

**Ownership and Authorship in Copyright Law**  
**(A Proposal to Re-Categorise Works and a Digital Implementation)**

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to the University of Exeter as a thesis for the degree of  
Doctor of Philosophy in Law

In February 2015

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## ***Abstract:***

The thesis argues that there is a pressure on the authorship concept since the emergence of collections of facts, anthologies, and adaptations of pre-existing works. These works were the reason that Judges offered various interpretations to authorship and originality, as some Judges lessened the requirement of originality to obtain copyrightability for these works and some raised it. This led to make the protection granted by copyright law to intellectual works vague and uncertain. This became apparent in conflicts in courts decisions on copyright subsistence in works. This subsequently led to confusion around the criteria of interpretation that should be adopted and the theory or justification that copyright law is founded upon.

The thesis argues that this vagueness and uncertainty is related not to the authorship concept but to the failure of law to adapt to two separate natures of works, one including authorial, mental and personal contribution and the other only including manually skilful contribution. Those two kinds cannot be subject to same principles or justifications of protection. The inexistence of such differentiation in doctrine, judiciary and legislation led to the distortion of authorship and originality concepts in the attempts to reduce their interpretation to suit those works that actually miss authorial contribution. Alternatively, whole attention was paid to granting ownership to right holders of these works, which led to the prevalence of the ownership concept as being a necessity for the marketability of cultural works over the authorship concept.

The thesis finds that this difference in nature can be uncovered by settling on a differentiation between two kinds of skills that are used in creating works: the mental skills, which are authorial skills, on the one side, and manual skills, which are the collecting, combining, performing or executing skills, on the other. Accordingly, this thesis proposes a categorisation of works, that of 'high, low and non-authorship' works, which relies on the nature of the works and elements of authorship in the work. The thesis finds that every category of works needs a separate criterion that can suit its nature and constituent authorship elements; also, the protection needs to be graded depending on the level of authorship in the work. This thesis suggests that such a legal proposition be implemented digitally in what it calls the 'Digital Cultural National Gate', which decides the category the work should belong to and the correspondent protection, and that through some questionnaires on the work the authorship elements can be recognised.



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## Chapter One: The Research Argument and Methodology

### 1.1 The Thesis Argument:

This thesis argues that intangible works are not necessarily intellectual works. The skills and capabilities used to create works vary between mental ones and manual ones. Some works require only mental effort, others only manual effort; others require both, as will be detailed in the next paragraphs. The thesis argues that authorship is, in general, a mental process that requires absorbing information and processing it in the mind and producing a product that conveys thoughts or sensations to the audience. This depends on Locke's 'mind processing' theory, since he requires that the author should do "thinking, doubting, believing, reasoning, knowing, willing"<sup>1</sup> in order for his work to be a work of intellect, otherwise, the use of only the senses will produce a work of a lesser grade,<sup>2</sup> like, the collections of facts even if it was claimed that the selection and arrangement is original.

This discussion of which works are reflective of mind, and which are a product of manual effort, is needed at a time when copyright law has been able to protect the tables of trains and the receipts of restaurants and give them the same protection that the 'Mona Lisa'<sup>3</sup> and 'Ulysses',<sup>4</sup> 'Odyssey'<sup>5</sup> or the 'Thinker' statue<sup>6</sup> can have. The distinction between personal and mental authorial contribution, on one side, and manual or mechanical efforts on the other, is thought by this thesis to need more focus in modern times. The inexistence of such distinction has led to the distortion of copyright law and its orthodox concepts of authorship and originality. As confirmed by the Court in *National Telegraph News Co. v. Western Union Telegraph*,<sup>7</sup> "[l]ittle by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, directories, and other works of similar character. Nothing, it would seem, evincing, in its makeup, that there has been

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<sup>1</sup> John Locke, *An Essay Concerning Human Understanding* (1700). p. 88

<sup>2</sup> *Ibid.* p. 89

<sup>3</sup> 'Mona Lisa' is a half-length portrait of a woman by the Italian artist Leonardo da Vinci.

<sup>4</sup> 'Ulysses' is a novel written by James Joyce and is considered one of the most important works of modernist literature, James Joyce, 'Ulysses. 1922', *Ed. Hans Walter Gabler. New York: Vintage*, (1986).

<sup>5</sup> An epic poem written by Homer.

<sup>6</sup> It is a bronze sculpture created by Auguste Rodin to represent philosophy.

<sup>7</sup> *National Telegraph News Co. V. Western Union Telegraph Co.*, 1902, 119 F. 294, Circuit Court of Appeals, Seventh Circuit.

underneath it, in some substantial way, the mind of a creator or originator, is now excluded.<sup>8</sup> [Underlining added]

The thesis argues that collecting and combining facts or precedent works, or changing the physical form of the work are non-authorship processes, as these works require manual work not mental work, they are created through following several steps that anybody without any capabilities can do, even machines or computers can do such types of work. This is why Laddie *et al.* have described directories thus: “no imagination is required to produce these and no skill beyond knowing how to read and write.”<sup>9</sup> The process of creating factual works is confined to collecting information in order to present them as a dispersed group of information to the audience, though this type of works is important to society, but the creators of factual works cannot be authors; they may be investors or workers in collection, or performers of executive steps, but not authors of creative works, as “[r]ecognizing them directly as ‘authors’ will strengthen their rights.”<sup>10</sup> And this causes distortion to authorship and copyright law in general as will be explained. Examples of those works are: maps, databases, train timetables, or matches, collections of pictures, etc.

Creating an intellectual work requires an effort of mind or intellect, wherein the work is considered a way of communication that is used by the author to convey his thoughts or sensations to the audience. Hegel calls the work of art -for instance- “the portrayal of thought in an external medium”.<sup>11</sup> Examples of authorship works are novels, musical works, artistic works, and dramatic works that convey to the audience thoughts or sensations that belong to the author. However, if the work reworks the thoughts and detailed ideas of an antecedent work, like adaptations of works, they should not be in the same ‘selection and arrangement’. The thesis argues that the ‘selection and arrangement’ of the raw material of authorship – the words, lines and common pieces of information - is the process that proves whether there is authorship in the work or not. The difference in ‘selection and arrangement’ between the created work and antecedent works is an evidence that the author is expressing his own thoughts and sensations.

Accordingly, it is contended that the factual works are ‘non-authorship’ or ‘utilitarian works’, and other works that have included mental processes are ‘authorship works’.

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<sup>8</sup> *Ibid.* at 297, as the Court held that ticker tapes listing telegraph transmissions of market quotations, sports scores, and race results are not copyrightable.

<sup>9</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, 2 vols. (Fourth edn., 1: LexisNexis, 2011). at 3.69.

<sup>10</sup> Kim Treiger-Bar-Am, 'Kant on Copyright: Rights of Transformative Authorship', *Cardozo Arts & Entertainment Law Journal*, 25 (2008). p. 1061.

<sup>11</sup> Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, trans. TM Knox (New York: Oxford University Press, 1952). p. 54

These should be separated into two groups and each group should have its own criteria for protection, justification for protection and specific level of protection. Furthermore, authorship works should be divided into high and low authorship works depending on the level of authorial contribution done and using the 'selection and arrangement' criterion. As Tarolli argued, "[t]he copyright system, which only protects works demonstrating a subjective authorial presence, or high amounts of creative authorship, neither consistently serves copyright's original purposes nor adequately protects many utilitarian works that facilitate the dissemination of valuable information. Rather than continuing to require utilitarian works to evidence authorial personality, copyright law would better fulfil its purposes with the adoption of a binary system of protection."<sup>12</sup> However, no-one has proposed such a distinction in copyright law in a comprehensive way.

The above argument is the ultimate aim of the discussion throughout this thesis. However, the initiator of this discussion is the desire to face the conflict in copyright decisions in the UK and the US judiciary regarding copyright subsistence in works, the interpretation of originality, and the justification of copyright law protection, especially regarding the collections of facts, "there is a split of authority among the United States courts of appeals as to the proper rationale for extending copyright protection to compilations".<sup>13</sup> Such conflict is caused by the desire to apply the copyright law's orthodox values of authorship and originality that are based on personality to works that are devoid of personal and mental authorship. Such conflict has continued for over three hundred years and has been aided by advocators of authorship, on one side, and advocators of 'the death of the author',<sup>14</sup> on the other. The thesis argues that it is the first group that will win at the end, depending on theoretical justification, and judicial and legal indicators.

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<sup>12</sup> Stephen P. Tarolli, 'Comment, the Future of Information Commerce under Contemporary Contract and Copyright Principles', *American University Law Review*, 1639 (1997).p. 1664

<sup>13</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', *Columbia Journal of Law & Social Problems*, 23 (1989). p. 348, Haungs explains further that "[o]ne line of cases, the 'originality standard' cases, bases copyright protection upon the compilation's originality in its selection and arrangement of material. A contrary line of authority, the 'industrious collection' standard cases, followed by the Seventh and Eighth Circuits, grounds protection for compilations in the compiler's 'industrious collection' - the labor or effort expended in creating the compilation." See, *ibid.* p. 348

<sup>14</sup> A doctrine initiated by Roland Barthes, in his work Roland Barthes, 'The Death of the Author', *Image, Music, Text* (Fontana Press, 1977)., and by Michel Foucault, 'What Is an Author?', in Donald F. Bouchard (ed.), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1980). and which has been inserted into law discussions, especially by Martha Woodmansee in her articles Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author'', *Eighteenth Century Studies*, (1984). And M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *Cardozo Arts & Entertainment. Law Journal*, 10 (1991)., and by P. Jaszi in his article, Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *ibid.* ( For more detailed discussion see Chapter 4. And the book, Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press Books, 1994).

It is argued that UK and US copyright laws are not consistent with the different natures of the works they protect. The originality criterion used to decide on the copyrightability of works is not suitable for application to all works that have different constituent elements; this expresses a deeper differentiation in the theories and concepts behind this criterion that cannot be applied to different natures.

Besides, Judges over-concentrate on originality to the detriment of authorship in order to reach a decision on ownership and the protection of copyright law. This thesis argues that the authorship concept has been disregarded in modern copyright law in the UK and the US in favour of focusing on the interpretation of the 'originality' condition as a threshold for copyright protection, not as a concept with a theoretical foundation and historical development that is linked to authorship. It is insisted upon in this thesis that originality concept should reflect the status of the authorial contribution. This manner reflects the desire to protect works by courts even to the detriment of the legal theory of copyright law. This has resulted in the elevation of the ownership doctrine and the marginalization of authorship, hence the thesis's title: 'Ownership and Authorship in Copyright Law'.<sup>15</sup>

It has been explored that at a specific historical stage, the courts have mixed two issues, first, between work that is an intellectual work and others that are just intangible but devoid of any intellect's effort; and, secondly between whether the aim of copyright law is to protect the products of mind or the products of effort and investment. The lack of rapid interaction by the law with the appearance of intangible but not intellectual works and separating them from other intellectual works has forced Judges to use the contemporary principles of copyright law, which is entangled with authorship doctrine,<sup>16</sup> to protect emerging non-intellectual works, and the equality between them through using a unified originality criterion. It is argued that this step was the reason for the distortion of the authorship doctrine and then the confusion within copyright law appeared in judicial decisions. This all helped to constitute the chaotic status of courts' decisions.<sup>17</sup> This thesis's study of authorship and originality is therefore crucial at this stage to help copyright law achieve some stability and certainty.

Such uncertainty is caused by non-discrimination between diverse intellectual works when interpreting the originality criterion that is required by copyright law. It is believed that the 'one size fits all' criteria is an out-dated one, as created works are varied in

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<sup>15</sup> The normal order of the two concepts in copyright law studies is authorship and then ownership, according to the rule that the ownership is approved to the person who gains the author title.

<sup>16</sup> Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, *supra* note 14, p. 2-3

<sup>17</sup> Explained in Chapter Two

nature and may not fit with orthodox literary, artistic, musical and dramatic works' categorisation, principally due to the lack of authorial contribution.

In order to guarantee the smooth application of the proposed theoretical distinction of works in practice the thesis proposes that this distinction be applied through an online platform titled 'Digital Cultural National Gate' (DCNG). According to the DCNG the author has to provide information through a questionnaire that enquires about the nature of his work and elements of authorship included if any. Using the proposed categorisation of works the author will be given a certificate that indicates the category his work belongs to and the level of protection it is qualified to. Furthermore, an appeals committee should be also existent in the copyright or intellectual property office in the country.

The DCNG keeps pace with the recent proposition by The Advisory Group appointed by The Civil Justice Council (CJC),<sup>18</sup> as it proposed an online courts system called 'Online Dispute Resolution' (ODR) for small litigations.<sup>19</sup> Through this system the case will pass through three tiers; the 'Online Evaluation', which will help users to "to evaluate their problems, that is, to categorize their difficulties."<sup>20</sup> There is then a second tier 'Online Facilitation' and a third called 'Online Judges', and in these last two tiers natural persons will intervene to help in settling cases. The proposed DCNG and the theoretical categorisation which it will apply can be considered an earlier step to the emergence of conflicts and resorting to the proposed ODR, but following its own digital nature. Yet, the DCNG is thought to be the development that not copyright law theoretically and practically only needs but also that comply with the digitalization in recent times of laws and judiciary.

This proposed categorisation and its digital implementation have several benefits. Firstly, Judges will have a classification system that relies on the elements that every work includes. The Judge's mission will be confined, although he will still have some discretion in the final judgment, in allocating the work to a suitable category according to its nature and authorship elements, and granting the corresponding protection of this category. Accordingly, the existence of such a system will help to reduce the conflict in copyright subsistence decisions to a large extent. Secondly, this proposition will preserve the authorship and originality values without collapsing with the commodification or marketability of cultural works, as the thesis proposes that non-

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<sup>18</sup> Online Dispute Resolution Advisory Group. Online Dispute Resolution for Low Value Civil Claims. February 2015. Civil Justice Council.

<sup>19</sup> Graham Ross, 'Odr Advisory Group in the Uk Recommends Online Court', last accessed 19 February 2015.

<sup>20</sup> Online Dispute Resolution Advisory Group. Online Dispute Resolution for Low Value Civil Claims. February 2015, p. 19

authorship works will obtain protection under a separate *sui generis* system that is devoid of authorship and originality concepts.

### **Position of Authorship in Copyright Law:**

The reason for such pressure on authorship is that it is the gateway that right-holders must pass through to reach ownership, according to the general rule in copyright law 'the author of a work shall be the first owner'<sup>21</sup>. Such a system has made authorship likely to be modelled, reformed, manipulated and eventually distorted by Judges, scholars and lawyers in order to reach the desired ownership, driven by the interests of the copyright-holders, and the desire to provide protection for their investments. Such distortion happens through repurposing authorship in works that lack any authorship process, or by using a pretext to prove, wrongly, the existence of this authorship in works that are already devoid of any authorial contribution.

It is suggested that copyright and authorship have mutual influences on each other; the justifications for copyright affect authorship. Likewise, authorship and originality interpretations by courts and scholars affect the scope of copyright, both in theory and in practice. Authorship is the "The most central, and certainly the most resonant, of the foundational concepts associated with Anglo-American copyright doctrine,"<sup>22</sup> and this centrality is "an uncritically accepted notion"<sup>23</sup>. Authorship can be defined as that structure that "generates products of special social value, entitling the practitioners (the authors) to unique rewards".<sup>24</sup>

### **1.2 Development of originality interpretation:**

This section will put an initial investigation of the justification of copyright protection that courts have taken in consideration in the UK and the US, starting from the early decisions and the development happened. As will be shown, copyright law principles have been followed in a straight way in earlier cases and what protected was the mental contribution by the author, however, this attitude has changed, and the pressure by factual works' right holders is the reason, as will be clarified below. This fact will be detailed and discussed in many places throughout this thesis.<sup>25</sup>

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<sup>21</sup> This was initially stated in the British Copyright Act 1911, "subject to the provisions of this act, the author of a work shall be the first owner of the copyright therein." See, 'An Act to Amend and Consolidate the Law Relating to Copyright', *Copyright Act, 1911* (Great Britain, 1911)., s. 5. (1)

<sup>22</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *Duke Law Journal*, (1991a). p. 455

<sup>23</sup> *Ibid.* p. 466

<sup>24</sup> *Ibid.* p. 466

<sup>25</sup> For detailed discussion on the differentiation between authorship and non-authorship works see chapter 6 and 7.

### **Before the statute of Anne:**

Before any copyright law courts protected works that depended on mental work. This was the case, for instance, under the Statute of 1662 concerning printing.<sup>26</sup> The Court of *The Company of Stationers v. Seymour*<sup>27</sup> mentioned some references that may be considered the origin of originality requirement in copyright law thereafter. The Court questioned what sort of books might be granted a licence for printing, “the question here is not, whether the King may, by law, grant the sole printing of all books; but of any, and of what sort of books?”<sup>28</sup> The idea that the subsequent works should not have the same contents as antecedent works, was stable at that time.<sup>29</sup> The Court also talked about the additions to a book which could not guarantee the granting of a license to print if they were ‘inconsiderable’, “[t]hose additions of prognostications and other things that are common in *almanacks*, do not alter the case; no more than if a man should claim a property in another man's copy, by reason of some inconsiderable additions of his own.”<sup>30</sup>

This case confirms that works protected before the Statute of Anne<sup>31</sup> had to be ‘works of mind’, and this is apparent through a glance at a statement by the Court in the same case: “men had some other way to publish their thoughts.”<sup>32</sup>[Underlining added]. So the stake was the ‘thought’ not ‘labour’ in creating and protecting works, as happened afterwards. This vision continued after the statute of Anne.

### **After the Statute of Anne:**

When the Statute of Anne was enacted and authorship recognised, the author’s position was reinforced, as the Courts continued to protect works that depended on the author’s mental contribution.

In the *Carnan v. Bowles* case<sup>33</sup>, for instance, it was apparent that the Court was adopting ‘mental effort’ as a condition for considering the work original, and originality was used as an explicit condition for copyrightability. This was evident from the court reliance on the argument of Locke, in his book ‘The essay on human understanding’ to justify that works that lack mental processes are less work, as their creators depend on outer senses not inner senses,<sup>34</sup> -“it is not an operation of the mind, like the Essay on

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<sup>26</sup> 'Licensing Act (Statute Concerning Printing)', 13 & 14 Car. 2, c. 33 (a) (England, 1662).

<sup>27</sup> *The Company of Stationers V. Seymour*, 1677, 29 CAR. 2,

<sup>28</sup> *Ibid.* at 257

<sup>29</sup> *Ibid.* at 257

<sup>30</sup> *Ibid.* at 258

<sup>31</sup> 'Statute of Anne', 8 Anne, c. 19 (England, 1710).

<sup>32</sup> *The Company of Stationers V. Seymour*, 29 CAR. 2, *supra* note 27, at 258

<sup>33</sup> *Carnan V. Bowles*, 1786, 1 Cox Eq. Cas. 283, Court of Chancery

<sup>34</sup> For a detailed discussion of Locke’s argument, see Chapter 6

Human Understanding; it lies *in medio*.”<sup>35</sup>- [Underlining added]. Lord Thurlow confirmed that the question of copyright of the book of roads depends “much upon the nature of them”,<sup>36</sup> and he finds that these works “every man with eyes can trace it; and the whole merit depends upon the accuracy of the observation: every description will therefore be in a great measure original. If this be so, every edition will be a new work.”<sup>37</sup> This statement contains a great deal of advancement in the analysis of the nature of works in terms of kind of contribution involved whether it is authorial contribution or not. Lord Thurlow’s argument in the eighteenth century presents a view that this thesis finds suitable to end the conflict in copyright subsistence decisions in the twenty-first century.

We should also note that the Court of Chancery’s concern was about the work itself (a map), not the preparatory steps, or the labour expended in creating the work.<sup>38</sup> Also it refused to consider the next work protectable as it included the same works as the first one and there was no authorial addition. “If the improvements are mere additions of what was imperfect, they are only part of the original work; if they are surveys of different roads, they constitute a new work.”<sup>39</sup> Not just that, but the Court approved the Master’s opinion that originality lies not in the map itself, but in the addition of the creator if he has provided an index or ‘ready method’ of finding a place in the map. “It is an extremely difficult thing to establish identity in a map, or a mere list of distances: but there may be originality in casting an index, or pointing out a ready method of finding a place in a map.”<sup>40</sup> [Underlining added]

It is worth noting that after a long period of confusion about originality in factual works, like maps, and resorting to skill and labour in the UK, the EC database directive<sup>41</sup> used the criterion applied in this case “a ready method of finding a place in a map”<sup>42</sup>. As the database directive required originality in a methodical means of arrangement: “‘database’ shall mean ... arranged in a systematic or methodical way”<sup>43</sup> regardless of

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<sup>35</sup> *Carnan V. Bowles*, 1 Cox Eq. Cas. 283, *supra* note 33, at 83

<sup>36</sup> *Ibid.* at 83

<sup>37</sup> *Ibid.* at 83

<sup>38</sup> *Ibid.* at 83

<sup>39</sup> *Ibid.* at 83

<sup>40</sup> *Ibid.* at 84 it is worth noting here how originality was used in the cases after the Statute of Anne, and is not a result of the romanticism doctrine, as argued, and this will be discussed later, see, Chapter Five

<sup>41</sup> 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', 96/9/EC (EU, 1996).

<sup>42</sup> *Carnan V. Bowles*, 1 Cox Eq. Cas. 283, *supra* note 33 at 84

<sup>43</sup> 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 41 Recital 21. See in interpreting the meaning of ‘systematic or methodical way’ Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 9, p. 1273 at 32.22 as Laddie et.al. argued that “what is required is that the collection should be contained in a fixed base and include technical means such as electronic, electromagnetic ... as an index ... to allow the retrieval of any independent material ... However,, physical storage in an organized way is not necessary.” See *Ibid* at

the arrangement of data in the database itself, as confirmed in the directive “it is not necessary for those materials to have been physically stored in an organized manner.”<sup>44</sup>

This thesis finds a reflectance of its argument in Lord Chancellor Thurlow’s statement that “the question will be, whether the author has exhibited any new and distinct idea in the exposition of them”.<sup>45</sup> The same argument was confirmed in the Cary v. Faden case,<sup>46</sup> wherein the subject matter was maps of ‘Great Britain’ and the Court of Chancery decided that the work can be original from the view of the plan and design used, without looking to the manual work the plaintiff has done, “the general plan or design of the Plaintiff’s work is not new or original.”<sup>47</sup>

However, in the Sayre v. Moore case<sup>48</sup>, we find that Lord Mansfield expected that a confusion might happen between the two justifications of copyright protection: the protection of ingenuity, on one hand, and the protection of investments and labour, on the other, as Lord Mansfield confirmed “[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 labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.”<sup>49</sup> However, according to his reference to the Carnan v. Bowles case Lord Mansfield refused to consider charts as works of authorship as “charts [...] not to be within the Statute [of Anne]”.<sup>50</sup> This behaviour although prevail authorship and mentality values over manual or superficial alterations, compilations of facts are important products for the public and should get some kind of protection, and that which this thesis’s proposition will do alongside prevailing authorship concept also.

### **The change to expense and labour as a criterion for protection:**

By the beginning of the 1800s many courts began to rely on the expenditure of labour and time by the creator to prove the copyrightability of the work, and they applied that

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32.22, Laddie et. al. cited Fixtures Marketing Ltd. V. Organismos Prognostikon Agonon Podosfairou (Opap), 2005, C-444/02 - E.C.D.R. 3, Court of Justice of the European Communities at. 30

<sup>44</sup> Recital 21 of the 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 41

<sup>45</sup> Carnan V. Bowles, 1 Cox Eq. Cas. 283, *supra* note 33, at 85

<sup>46</sup> Cary V. Faden, 1799, 5 Ves. Jr. 24, Court of Chancery

<sup>47</sup> *Ibid.* at 25

<sup>48</sup> Sayre V. Moore, 1785, 102 E.R. 139; 1 East's 361, Court of King's Bench

<sup>49</sup> Referred to in Bill Morrow, 'Originality: Primary, Initial, First', Alternative Law Journal, 20 (1995). p. 164 as a registration of this case was not found.

<sup>50</sup> Carnan V. Bowles, 1 Cox Eq. Cas. 283, *supra* note 33, at 84

to all works. For instance, in Matthewson v. Stockdale<sup>51</sup> it was stated -regarding a calendar and directory- that “if a man, ... has by considerable expence and labour procured with correctness all the names and appointments ..., he has a copyright in that individual work.”<sup>52</sup> [Underlining added]

Since this time, the terminology of labour, time and expense in creating works were used to justify the conferral of copyright protection to factual works, and the mental work or personal addition terminology was ignored. For instance, in Longman v. Winchester<sup>53</sup> it was stated that the defendant’s work included “great many additions and corrections,... various alterations of lines, and differences of names, ... [that] were made by the Defendants at great labour and expense”<sup>54</sup> and instead of relying on the originality of ‘mental effort’ the court used the expression “it is the fair fruit of original labour.”<sup>55</sup>[Underlining added]

Also, in Morris v. Ashbee<sup>56</sup> although the court briefly referred to that the work was “not an original design of Plaintiff,”<sup>57</sup> it stated that the labour and expense are the important elements,<sup>58</sup> and the term ‘original’ was not used again in the case. The Court confirmed that ‘independent labour and expense’ is sufficient to grant copyright protection: “no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road.”<sup>59</sup> [Underlining added]

This direction has continued until recently, e.g., in Ladbroke v. William Hill,<sup>60</sup> Lord Hodson cited, with approval, the statement of Sir Charles Hall, V.C., in the case of Hogg v. Scott,<sup>61</sup> when he confirmed “[t]he true principle in all these cases is, that the Defendant is not at liberty to use or avail himself of the labour which the Plaintiff has been at for the purpose of producing his work—that is, in fact, merely to take away the result of another man’s labour, or, in other words, his property.”<sup>62</sup> This focus on the person’s labour without investigating the mental contribution whether it was

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<sup>51</sup> Matthewson v. Stockdale, 1806, 12 Vesey Junior 270; 33 E.R. 103, Court of Chancery

<sup>52</sup> *Ibid.* at 105

<sup>53</sup> Longman v. Winchester, 1809, 16 Vesey Junior 269; 33 E.R. 987, Ct of Chancery

<sup>54</sup> *Ibid.* at 269.

<sup>55</sup> *Ibid.* at 272.

<sup>56</sup> Morris v. Ashbee, 1868, L.R. 7 Eq. 34, Giffard, V. C.

<sup>57</sup> *Ibid.* at 36.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* at 40.

<sup>60</sup> Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., 1964, 1 W.L.R. 273, House of Lords

<sup>61</sup> Hogg v. Scott, 1874, H. 207., L.R. 18 Eq. 444,

<sup>62</sup> *Ibid.* at 458 cited in Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., 1 W.L.R. 273, *supra* note 60, at 287

appropriated or not is what this thesis criticise and argues that it is the main reason for the conflict in cases, as will be clarified below.<sup>63</sup>

In Ravenscroft v. Herbert<sup>64</sup> Brightman J. cited with approval the Harman Pictures v. Osborne<sup>65</sup> case, which in turn cited Jarrold v. Houlston<sup>66</sup> for this statement: “another person may originate another work in the same general form, provided he does so from his own resources and makes the work he so originates a work of his own by his own labour and industry bestowed upon it.”<sup>67</sup> This again confirms the reliance of courts in 1800s and 1900s on the labour and industry in protecting intellectual works.

At the same time, in the US, earlier cases were influenced by the Statute of Anne and the theories of personality and mental authorship. Mental addition was something that was essential in order to grant copyright protection, though the condition differed afterwards as happened also in UK. For instance, in Baker v. Selden<sup>68</sup> the court stated: “[a]lthough great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way ... The title of the Act of Congress is, ‘for the encouragement of learning,’ and was not intended for the encouragement of mere industry, unconnected with learning and the sciences...”<sup>69</sup> [Underlining added] This shows that early copyright decisions in the UK and even in the US were adopting mental contribution and refusing labour and industry justifications in protecting works, but the situation changed after that due to the pressure of works of that industry nature.

This practice was confirmed also in the early US case of Trade-Mark Cases. v. Steffens<sup>70</sup> which stated that ‘originality’ is required and it is construed to mean mental and authorial contribution: “originality is required. And while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like.”<sup>71</sup> [Underlining added] However, cases in the 1900s in US reflects a tendency to adopt the ‘labour’ whether it is manual or mental in protecting works, as will be clarified in next paragraphs.

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<sup>63</sup> See below sections in this chapter, and see especially chapter 7 for the detailed differentiation between natures of works.

<sup>64</sup> Ravenscroft V. Herbert, 1980, R.P.C. 193, The High Court of Justice - Chancery Division

<sup>65</sup> Harman Pictures V. Osborne, 1967, 1 W.L.R. 723, Chancery Division

<sup>66</sup> Jarrold V. Houlston, 1857, 69 E.R. 1294,

<sup>67</sup> *Ibid.* at 708.

<sup>68</sup> Baker V. Selden, 1879, 101 U.S. 99, WL 16689, Supreme Court of the United States

<sup>69</sup> *Ibid.* at 105

<sup>70</sup> Trade-Mark Cases V. Steffens, 1879, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, Supreme Court of the United States

<sup>71</sup> *Ibid.* at 94

### **Mutual influence between the UK and the US case law and scholarship:**

Since the emergence of the first US Copyright Act the mutual influence between the UK and the US has been evident. Judge Miller in the *Burrow-Giles Lithographic Co. v. Sarony* case<sup>72</sup> confirmed that the framers of the US Constitution were affected by the Statute of Anne at the time of the enactment of the US Constitution, and that they “understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect, [that] existed in England at that time.”<sup>73</sup> [Underlining added].

It appears from the UK case of *Ravenscroft v. Herbert*<sup>74</sup> also the mutual influence between UK and the US courts, as Brightman J. cited the US *Oxford Book Co. v. College Entrance Book Co.* case<sup>75</sup>, in distinguishing between the copyrighted parts and the non-copyrighted parts in the debated work.<sup>76</sup> Even recently, the Eleventh Circuit of the US Court of Appeal in the case of *Suntrust bank v. Houghton Mifflin Co.*<sup>77</sup> has relied on the fact that Statute of Anne came to “encourage creativity and ensure that the public would have free access to information”<sup>78</sup> in order to support its argument. And it confirmed that “[c]ongress directly transferred the principles from the Statute of Anne into the copyright law of the United States in 1783 ... then in 1790, with the passage of the first American federal copyright statute”.<sup>79</sup>

Accordingly, this thesis tends to explain the situation of legislation and judiciary in the UK and the US in a parallel manner, and it will appear that both are taking the same approach in developing, and the thesis’s proposition is believed to be applied in both jurisdictions.

### **Confusion between personal justification and financial justification:**

It is argued that in the UK and the US the nature of factual works (Databases, maps, charts, etc.) which is different from other literary and artistic works led to conflicting interpretations of the originality requirement in case law, as will be elaborated in

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<sup>72</sup> *Burrow-Giles Lithographic Co. V. Sarony*, 1884, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, Supreme Court of the United States

<sup>73</sup> *Ibid.* at 281

<sup>74</sup> *Ravenscroft V. Herbert*, R.P.C. 193, *supra* note 64.

<sup>75</sup> *Oxford Book Co. V. College Entrance Book Co.*, 1938, 98 Fed. Rep. 688 Second circuit, United States Court of Appeal

<sup>76</sup> *Ibid.* at 691

<sup>77</sup> *Suntrust Bank V. Houghton Mifflin Company*, 2001, 268 F.3d 1257, United States Court of Appeals, Eleventh Circuit.

<sup>78</sup> *Ibid.* at 1260

<sup>79</sup> *Ibid.* at 1261

second Chapter. The common factor that causes this conflict is the confusion of courts between the personal and mental justifications that copyright law assumes on one side and the investment and labour justifications that factual works' nature assume on the other side.<sup>80</sup>

Judges always express their confusion about the nature of compilations of facts. As it is noticed that they argue that compilation works are neither literature nor art, and cannot be original, however, they grant them copyright protection under the pressure of the inexistence of other legislation that protects them; otherwise they will not be protected. For instance, Lord Evershed in *Ladbroke v. William Hill*<sup>81</sup> case confirmed: “[t]rue it is that no question of literary taste or quality is involved that would give to the coupon the award of literature as normally understood. But, having regard to the introduction of a compilation into the definition, that clearly cannot be a decisive factor, since otherwise such things as lists or catalogues could never have been held to have been properly subject to copyright.”<sup>82</sup> Accordingly, he used the ‘skill, labour and Judgement’ criteria to allow the protection of compilation works under copyright law. Ginsburg confirmed this thesis’s argument: “even when courts do in fact protect a compilation's commercial value, they express disconcertion at the incongruence between the result and standard copyright rationales.”<sup>83</sup>

Accordingly, the thesis criticises the inclusion of compilation works (in US law), or databases (in UK law), under the protection of Copyright Law, using the same criteria used for other literary and artistic works, due to the confusion around the nature of factual works. As this confusion, which will be detailed later,<sup>84</sup> has caused distortion of the authorship doctrine and originality in general, instead they should be separated under a *sui generis* system.

### **The situation in international provisions:**

The Berne Convention,<sup>85</sup> TRIPS agreement,<sup>86</sup> WIPO Copyright Treaty,<sup>87</sup> the Computer Software EC Directive,<sup>88</sup> EC Directive on Databases,<sup>89</sup> and the EU Directive on the

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<sup>80</sup> Due to determining the orientation of the law towards these kinds of works was wholly left to judges, so they relied on their own interpretation or understanding, or even on personal preference in choosing between both routes, whether preserving the authorship values and personalisation requirements and then raising the threshold of copyright protection, or in lessening or ignoring any orthodox values in copyright theory, or even through twisting them to adapt to the new works to allow for their protection.

<sup>81</sup> *Ladbroke (Football) Ltd. V. William Hill (Football) Ltd.*, 1 W.L.R. 273, *supra* note 60

<sup>82</sup> *Ibid.*, at 281

<sup>83</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *Columbia Law Review*, 90 (1990). p. 1869

<sup>84</sup> See chapter 7 at 7.3

<sup>85</sup> Art. 2 (5) of the 'Berne Convention', (Switzerland 1886 (Paris act 1971)).stated “Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such.”

Term of Protection<sup>90</sup>, have all assured the criterion of copyright protection as 'intellectual creation', and has specified or limited this criterion regarding collections or compilations of works or data to be applied to the 'selection and arrangement' of these works or data.

The EC Directive 96/9 on the Protection of Databases<sup>91</sup> provided for a dual system for protecting databases, the first through copyright law, and the second through a *sui generis* system. Under Chapter II, entitled 'Copyright', Art. 3 provided that "[i]n accordance with this directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection."<sup>92</sup> [Underlining added]

The parallel system of protection for databases is stated under Chapter III, which is entitled 'Sui Generis Right' as Art. 7 of the EC Directive states: "[m]ember States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."<sup>93</sup>

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<sup>86</sup> Art. 10 (2) of 'The Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips)', *O.J. 1994 L*. (1994). stated "Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, shall be protected as such. Such protection, which shall not extend to the data or material itself,"

<sup>87</sup> 'Wipo Copyright Treaty 1996', (Geneva, 1996). Art. 5 of the WIPO copyright treaty provides for "Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation."

<sup>88</sup> Art. 1 (3) provided that "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation." See, 'Directive of the European Parliament and of the Council on the Legal Protection of Computer Programs', *2009/24/EC* (European Union, 2009).

<sup>89</sup> Art. 3 (1) of 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 41, stated "In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection."

<sup>90</sup> 'Directive of the European Parliament and of the Council on the Term of Protection of Copyright and Certain Related Rights', *2006/116/EC* (European Union, 2006). See Recital 16 and Article. 6

<sup>91</sup> 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 41.

<sup>92</sup> Article 3, s(1), of *ibid*.

<sup>93</sup> *Ibid*. Art. 7. In addition, to confirm that this system is independent of copyright protection, Chapter III Art. 7 (4) of EU Directive 96/9 provided that, "The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights."

The UK CDPA did not include any mention of databases before the EC Directive on the Protection of Databases 96/9,<sup>94</sup> as they were included under the expression 'compilations' as one type of literary works that is protected by copyright law if they were original. The 'skill, labour and judgment' criterion was applied to all works, including compilation works. The thesis argues that this criterion was used to incorporate any kind of work under copyright law if there is skill of any kind, and labour -mental or manual- included, and judgment, which may be ignored. "[T]he skill and labour [that] have been key to the protection of these compilations as it is the standard by which originality has been Judged".<sup>95</sup>

Waelde confirmed how Judges could adapt this criterion to allow for the protection of any kind of works, regardless of their nature, "[a]t times, where it has been clear that one part of the process (such as an alphabetical arrangement) lacks in the requisite originality level for protection, greater emphasis will be placed on the labour and expense in gathering the information together. At other times, where the labour in creating or gathering information has been meagre, emphasis has been placed on the expression. The two are sometimes distinguished by terminology such as quantity or preexpressive labour (the creation and gathering) and the quality or expressive labour (the arrangement and presentation)."<sup>96</sup>

However, Chapter III of the EC Database Directive was implemented through Part III of the amendment to the UK CDPA in 1997, entitled 'The Copyright and Rights in Databases Regulations 1997',<sup>97</sup> which gave databases a *sui generis* right to protection, independent of the protection that may also be granted to databases under the regulations for copyright protection under CDPA. According to the new right, "[a] property right ("database right") subsists ... in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database."<sup>98</sup> It confirmed that this protection is not correlated or dependant on whether the work is protected under copyright law, "[f]or the purposes of paragraph (1) it is immaterial whether or not the database or any of its contents is a copyright work, within the meaning of Part I of the 1988 Act."<sup>99</sup>

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<sup>94</sup> *Ibid.*

<sup>95</sup> Charlotte Waelde, 'Database Copyright: The Story of Bhb', *Copyright Law: A Handbook of Contemporary Research* (2009), 109. p. 113

<sup>96</sup> *Ibid.* p. 114

<sup>97</sup> Part III (Regulations 12-25) of the Copyright and Rights in Databases Regulations 1997, SI 1997/3032, as free-standing legislation not incorporated into the Copyright, Designs and Patents Act 1988.

<sup>98</sup> Art. 13 (1) of 'The Copyright and Rights in Databases Regulations', (UK, 1997).

<sup>99</sup> Art. 13 (1) of *ibid.*

It is believed that this implementation included a paradox. As although the amendment was implemented in s. 3 (A) and included the same definition of databases as the EC directive and the same criteria used for protecting them under copyright law, which is that a “database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation.”<sup>100</sup> The amendment also added databases to literary works and the general requirement for originality according to Art. 3.1 (d), which gave a definition of ‘literary, dramatic and musical works’, and included ‘databases’ as an example of literary works. Consequently, the condition of originality that exists in Art. 1. 1 (a) applies to databases.<sup>101</sup> This method of integration led Laddie *et al.* to argue that UK CDPA differentiated between compilations and databases.<sup>102</sup>

Although databases were defined in the EC Databases Directive as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.”<sup>103</sup> The term ‘independent works’ is interpreted to refer to works that are “intended to be appreciated or useful in isolation”<sup>104</sup>, accordingly, this database’s definition is broad enough to include all compilation works of facts, and previous works or information, whether encyclopaedias, directories, anthologies or catalogues.<sup>105</sup>

However, cases after this 1997 amendment in the UK has kept the application of ‘skill, labour and judgment’ criterion on all works, including databases. For instance, in the *Cantor Fitzgerald International v. Tradition Ltd.* case<sup>106</sup>, Mr Justice Pumfrey confirmed that “[i]n my judgment, so far as English law is concerned the correct approach to substantiality is straightforward. It is the function of copyright to protect the relevant skill and labour expended by the author on the work.”<sup>107</sup> Not just that, but the mechanical labour was also approved by the Court as a possible requirement for the conferment of

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<sup>100</sup> S. 3 A (2) defined the meaning of database as: “a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation.”

<sup>101</sup> Which provided that: (1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work— (a) original literary, dramatic, musical or artistic works. ‘Copyright, Designs and Patents Act (CdpA)’, (UK, 1988).

<sup>102</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 9, p. 1276

<sup>103</sup> Art 1(2) of ‘Directive of the European Parliament and of the Council on the Legal Protection of Databases’, *supra* note 41.

<sup>104</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 9, at 32.19

<sup>105</sup> *Ibid.*, at 32.19

<sup>106</sup> *Cantor Fitzgerald International V. Tradition (U.K.) Ltd.*, 1999, R.P.C. 95 The High Court of Justice-Chancery Division

<sup>107</sup> *Ibid.* at 131

copyright protection to the work.<sup>108</sup> Also, in the *Newspaper Licensing Agency Ltd v. Meltwater Holding* case<sup>109</sup> the *Interlego A.G. v. Tyco Industries Inc.* case<sup>110</sup> was cited with approval, as the Court adopted the 'skill, labour and judgment' criteria, confirming that "[o]riginality involves the application of skill or labour in the creation of the work."<sup>111</sup>

In attempting to adapt the 'skill, labour and judgment' criterion to the requirements of the EU Directive the Court justified that "the test of quality has been re-stated but for present purposes not significantly altered by the Infopaq case ... I say that in the knowledge that the decision may sit awkwardly with some provisions of English law, that many questions remain unanswered by the CJEU and that the full implications of the decision have not yet been worked out."<sup>112</sup>

On the other hand, Waelde argued that the EU database directive adopted a civil law perspective, "[t]his standard for database copyright is one that is familiar from civilian legal systems, and is generally thought by most commentators to be higher than the traditional British tests of skill, labour and effort."<sup>113</sup> And that which this thesis understands and seeks to maintain.

It can be understood that the International provisions (BERNE, TRIPS, WIPO and EU directives) would like to avoid the conflict that occurred between national Judges in the interpretation of originality, and that is why they used a different terminology to settle the issue. As they adopted the 'intellectual creation' criterion as a high interpretation of the originality criteria that incorporate mental with personal authorship. The EU has supported this argument, for instance, it confirmed regarding photographic works that "[a] photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality."<sup>114</sup>  
[Underlining added]

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<sup>108</sup> As stated "So, it is possible that entirely mechanical labour may be saved by copying something produced by entirely mechanical labour, involving no skill. The only question is whether the entirely mechanical labour which went into the earlier work is relevant labour for the purpose of conferring originality in the copyright sense" see, *ibid.* at 133

<sup>109</sup> *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding Bv and Others*, 2012, EWHC 3099 (Ch), Bus. L.R. 53, Court of Appeal, UK

<sup>110</sup> *Interlego A.G. v. Tyco Industries Inc.*, 1989, A.C. 217; R.P.C. 343 Privy Council

<sup>111</sup> *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding Bv and Others*, EWHC 3099 (Ch), Bus. L.R. 53, *supra* note 109, at 62

<sup>112</sup> *Ibid.* at 72

<sup>113</sup> Charlotte Waelde, 'Database Copyright: The Story of Bbh', *supra* note 95, p. 125

<sup>114</sup> 'Directive of the European Parliament and of the Council on the Term of Protection of Copyright and Certain Related Rights', *supra* note 90, recital (16)

Laddie *et al.* touched this point, as after they discussed the '*travaux preparatoires*'<sup>115</sup> of the EU Directives of Databases, Computer Program and Term Protection, they concluded "[i]n summary, such indicators as there are in the *travaux preparatoires* relating to the three directives point towards the *intellectual creation* criterion for originality being higher and more fundamentally a different test to that which UK law traditionally applies."<sup>116</sup> [Underlining added]

It is worth noting that, in the EC Directive of Databases, the 'selection and arrangement' criterion was preserved as a condition of copyright protection, at the same time that Recital 21 of the Directive states that "it is not necessary for those materials to have been physically stored in an organized manner."<sup>117</sup> CJEU in the *Fixtures Marketing Ltd v. Organismos Prognostikon Agonon Podosfairou (OPAP)* case,<sup>118</sup> interpreted this provision stating that "[the] condition implies that the collection should be contained in a fixed base, of some sort, and includes technical means such as electronic, ... an index, a table of contents, ... to allow the retrieval of any independent material contained within it."<sup>119</sup> Accordingly, Laddie *et al.* confirmed that arranging works in "alphabetical or chronological order would be included"<sup>120</sup> within this definition, although Laddie *et al.* mentioned above that this criterion is higher than UK traditional criteria.<sup>121</sup>

This interpretation supports the thesis's argument that the arrangement of databases has become easy manual work that cannot prove any creativity in the work, accordingly, it cannot impart any originality or creativity to the work as a whole. The thesis contends that preserving the 'selection and arrangement' as a criterion of copyright in the EC directive and allowing the arrangement to be electronic, separate and not physical is a confession of the real purpose of the protection of databases. It is not the originality of the 'selection and arrangement' or creativity, but the protection of investments, even by employing copyright principles for this purpose.

The thesis also argues that the 'selection and arrangement' criterion adopted to ensure that there is an intellectual creation (or authorship) in compilations and databases is not

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<sup>115</sup> Preparatory proceedings of the directives which include the proposals by the member states, the opinion of the Economic and Social Committee, the European Parliament's opinion

<sup>116</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 9, at 32.28

<sup>117</sup> 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 41, Recital (21)

<sup>118</sup> *Fixtures Marketing Ltd. V. Organismos Prognostikon Agonon Podosfairou (Opap)*, C-444/02 - E.C.D.R. 3, *supra* note 43.

<sup>119</sup> *Ibid.* at 38

<sup>120</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 9, at 32.22

<sup>121</sup> *Ibid.* at 32.82.

suitable for application to these works, for many reasons. For instance, these works do not aim to provide creative content to the society, but they are useful in preserving information and presenting it, and whether they are presented in totality or in a selective way is something that differs according to the nature of the information and the requirements of the audience for this specific collection. This will be detailed later.<sup>122</sup> The thesis finds that it is not fair to give protection to a collection of selected specific works, and to deprive a collection that is considered to be comprehensive of protection. In both cases usefulness is achieved. And selection and arrangement is not suitable to the nature of compilations of facts.<sup>123</sup>

The criterion for selection and arrangement also has no scope for application when applied to works that lack authorship. As in this case stipulating the selection and arrangement is a stipulation of novelty not originality. The work reflects the personality of its author through the thoughts and sensations it bears, and regarding compilations of facts the thesis questions what sort of thought or sensations a 'specific selection or arrangement' of facts *per se* can bear. There is a confirmation of this argument in the German case *Pharma Intranet v. IMS Health GmbH*<sup>124</sup> cited in the *Football Dataco Ltd v. Britten Pools Ltd*<sup>125</sup> case as the Court stated "[a] selection or organisation that anyone would undertake in a particular manner does not constitute individual creation. If the selection or organisation is determined by the nature of the thing or is predetermined by purposefulness or logic, then there is no room for individual creative work..."<sup>126</sup>

### **1.3 The Thesis's Proposition:**

This thesis argues that the confusion around interpreting originality among Judges returns to the disregard of the authorship concept which originality had to be applied to, in other words, it is the authorship in the intangible work that originality had to measure to decide whether it can be qualified to be a 'work' or 'intellectual work' or not. Applying originality to intangible works without a guide led to varied interpretations of originality even within the same legal system, such as 'origination from the author', expenditure of 'skill, judgment and labour' in the work. Authorship is believed to be the major and prominent component of originality which is confirmed by the expression 'original work

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<sup>122</sup> See Chapter 7 at 7.4

<sup>123</sup> For detailed discussion on the nature of works see chapter 7 at 7.3

<sup>124</sup> *Pharma Intranet Information Ag V. Ims Health GmbH & Co. Ohg*, 2005, ECC 12, Oberlandesgericht (Court of Appeal)

<sup>125</sup> *Football Dataco Ltd V. Britten Pools Ltd*, 2010, R.P.C. 17, High Court of Justice (Chancery Division)

<sup>126</sup> *Pharma Intranet Information Ag V. Ims Health GmbH & Co. Ohg*, ECC 12, *supra* note 124.

of authorship<sup>127</sup> in US law and 'intellectual creation'<sup>128</sup> in UK law and international provisions.

The thesis mainly asserts that judges have dealt with originality as a rule that is devoid of a principle, and has been interpreted as an abstract terminology, although "no rule can exist without principle, and that legal decisions cannot be reached by simple and exclusive deduction."<sup>129</sup> This attitude is in fact what judges have practiced regarding interpretation of originality as they ignored its historical background and theoretical basis though the notion of originality entails in fact "a profound philosophical impact"<sup>130</sup>. So, the thesis's research in the history and theory behind originality is a kind of researching the foundations of the principles which is represented in authorship, that from it emanates the notions of the author, the work, the originality and creativity. That constitutes the third and second layers of the ontology of copyright law.<sup>131</sup>

Thus, it is authorship rather than originality is the core of copyright protection; copyright law is only related to personal and mental contribution, so the manual efforts used to create works are devoid of authorship and should be separated in a different system. Although this system is similar to that provided for in the Database Directive and approved by courts afterwards "[t]he purpose of copyright is to provide encouragement for creative endeavour, and differs in that respect from the *sui generis* right which is designed to encourage investment in particular types of data gathering."<sup>132</sup> There is no sufficient justification of this trend especially in the UK and the US where works were protected for the labour and investment, also the system provided in the Database Directive is not a comprehensive enough to include works of the same nature of database, which will still not prevent contradictions in copyright law. That is why this thesis is presenting a theoretical justification of the distinction between works, in a comprehensive way and through implementing technological means also that reduce the conflict of decisions to the minimum.

The thesis proposes a categorisation of works to two categories. The first are 'authorship works', which get full protection using the criteria that measure mental and personal contributions. The second are 'non-authorship' or 'utilitarian works' that gain less protection and use a criterion that depends only on measuring investment, labour

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<sup>127</sup> Which is required in §. 102 of the copyright act of 1976 as a description of works that can be copyrighted

<sup>128</sup> As required in s. 3A of the CDPA as a requirement for protecting databases.

<sup>129</sup> Guido Westkamp, 'Changing Mechanisms in Copyright's Ontology - Structure, Reasoning and the Fate of the Public Domain', in GUIDO WESTKAMP (ed.), *Emerging Issues in Intellectual Property-Trade, Technology and Market Freedom: Essays in Honour of Herchel Smith* (Edward Elgar, 2007), 54-72. p. 56

<sup>130</sup> *Ibid.* p. 57

<sup>131</sup> According to the multi-layer approach of copyright law ontology explained by Westkamp, see, *ibid.* p. 56

<sup>132</sup> *Football Dataco Ltd V. Britten Pools Ltd*, R.P.C. 17, *supra* note 125 at 542

and time expended. Also, authorship works is proposed to be separated into 'high' and 'low' authorship works depending on the selection and arrangement criterion. The adoption of a *sui generis* system for databases in the EU and UK CDPA is only a step towards reaching the thesis's argument of categorising works as authorship and non-authorship (utilitarian) works, with a clear application of different criteria and level of protection for each.

In reaching this proposition, authorship must be reinforced against some challenges that call for its abolition. That is why the thesis will discuss the calls for the 'death of the author',<sup>133</sup> and claims that the romantic author is against the incorporation of collective works under copyright law.<sup>134</sup> In these discussions or claims there are much confusion between the literary and legal concepts of authorship. The thesis argues that although copyright law borrows some terminology from literature, this does not mean that it has adopted the whole concept and it should develop with it step by step.<sup>135</sup>

The thesis emphasise that the author's individuality is the basis of copyright law, and authorship in general, and that does not mean adopting the ideas of genius and the romantic author that exist in literature. The individuality invoked by copyright law's authorship is shown in works through the existence of a mental and personal contribution by an author.<sup>136</sup> Regarding the death of the author doctrine, it is argued that this is a literary discussion that should be confined to this scope and cannot be applied in law.<sup>137</sup>

Having said that authorship in UK is going to, or has to, adopt the personality approach of the civil law system, it is worth referring here to the German case which Judge Floyd referred to in *Football Dataco Ltd v. Britten Pools Ltd*<sup>138</sup>, as he cited the German Court's confirmation that: "the individuality differentiates the work protected in copyright law from the unprotected mass of everyday things, from purely physical labour, routine performance,"<sup>139</sup> which supports this thesis's approach.

It seems that the US also had decided to take the personality approach, as in the last compendium of U.S. copyright office practices<sup>140</sup> it seems that the latter office decided to return to the 19<sup>th</sup> century interpretation of originality and cited the *Trade-Mark Cases*.

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<sup>133</sup> See Chapter 4 at 4.2

<sup>134</sup> See Chapter 5 at 5.4

<sup>135</sup> This will be the subject of two Chapters 4 & 5

<sup>136</sup> This is the subject of Chapter 5

<sup>137</sup> This is the subject of Chapter 4

<sup>138</sup> *Football Dataco Ltd V. Britten Pools Ltd*, R.P.C. 17, *supra* note 125.

<sup>139</sup> *Ibid.* at 544

<sup>140</sup> Compendium of U.S. Copyright Office Practices· 2014· Third

v. Steffens,<sup>141</sup> stating that “[t]he copyright law only protects ‘the fruits of intellectual labor’ that ‘are founded in the creative powers of the mind.” [Underlining added] The office also cited the Burrow-Giles Lithographic Co. v. Sarony case.<sup>142</sup> Accordingly, the office decided that “[b]ecause copyright law is limited to the ‘original intellectual conceptions of the author,’ the Office will refuse to register a claim if it determines that a human being did not create the work.” [Underlining added] However, US courts did not settle the issue in this clearance.

The thesis will examine the personality approach and the attempts to apply it in order to prohibit a return to confusion within copyright law. As, although that authorship and originality interpretations need to be maintained, doing this without establishing an outlet for the works with which their nature can cope will result in continuing the distortion of authorship and originality.

Additionally, applying the proposed categorisation will not be effective unless through using the technological facilities in classifying works using the proposed ‘Digital Cultural National Gate’ (DCNG). In addition, it is believed that if this categorisation is applied digitally authorship and originality concepts will be reinforced; the uncertainty regarding copyrightability of works will be reduced, and the conflict of cases will be less. Furthermore, the registration of literary, artistic, musical and dramatic works online will increase the ability of the proposed system to pick up infringement more easily over time. Also, as noted earlier<sup>143</sup> the proposed DCNG can assist the recently proposed ‘Online Dispute Resolution’ (ODR) through identifying the characteristics of the disputed work, elements of authorial contribution, the parts appropriated from antecedent works, and identifying the originality interpretation suitable to the nature of the work.

**The thesis’s argument, then, investigates the following questions:**

- Is there a conflict in judicial decisions? What are the reasons, and to what degree has that conflict been reached?
- Can authorship survive amid challenges against it? This includes two discussions.
  - o The death of the author.
  - o The romantic author.
- How does the nature of factual works differ from other intellectual works?

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<sup>141</sup> Trade-Mark Cases V. Steffens, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, *supra* note 70.

<sup>142</sup> Burrow-Giles Lithographic Co. V. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 72.

<sup>143</sup> See above p. 12

- Are personal and mental elements the only components or elements of authorship?
- How will the proposed categorisation of works work and how can this reduce conflict in decisions?
- Finally, how will the proposed 'Digital Cultural National Gate' participate in implementing theories of copyright on the practical daily transactions of authors and users? How will this affect the interpretation of originality or possible distortion of copyright principles?

### **1.3.1 How will Categorisation Look?**

As stated above the thesis argues that works should be divided into 'non-authorship' works category, and 'high authorship' works and 'low authorship' works.

With regard to 'high authorship' works, those are the works which include thoughts and sensations peculiar to the author that he wanted to convey to the audience, regardless of whether these thoughts are found in other work, or not. What matters here is whether the author has exercised mental work and established a peculiar structure in the work that can bear these thoughts to the audience. This structure is defined by the thesis as the 'selection and arrangement' of the 'raw materials of authorship' –words, lines, or any public domain elements- used in creating the work.

Low authorship works are those that depend heavily on previous works, wherein the author just changes the expressive and physical form of the work. Such as adaptations from novels to films, and the works where their elements are re-arranged from a prior work to convey thoughts or sensations, whether different or similar, like parody or musical arrangements. Here, the 'raw materials of authorship' the first author selected are still the same in the adapted work, but the author of the second work has reworked them or changed their appearance, although his intervention is not substantial, he has used mental efforts to do so. Accordingly, the adapted work is an authorship work, but still less than the level of the original work it relied upon, hence, it should be considered a low authorship work and the creator should gain authorisation from the original author, if it is still copyrighted, to make these changes.

Non-authorship or utilitarian works are the third category. These are works created using manual effort and skills only, and with the expenditure of time, investment, or with technical, mechanical and technological means. This category includes works that rely completely on facts or antecedent works to the degree these facts or works were not changed, whether by collecting them together or changing the physical form on which they are borne; an example of the first is the collection of facts, or a collection of

previous works, poems, musical notes, songs,<sup>144</sup> and an example of the second kind is a transfer from painting to sculpture,<sup>145</sup> painting to photography or the opposite.

It is worth mentioning some clarification examples here. For instance, a change from novel to film is to be considered an authorship work (though a low authorship work), however, the change from painting to sculpture is a non-authorship work. In the change from novel to film, the director and scriptwriter, although they follow the same steps as the novelist, they use their judgment to choose between several choices to offer the same expression or moves or circumstances with which to build a dramatic plot. However, the sculptor follows the same steps, lines and angles, and he attempts to abolish his personality or any tendency to change something, he tries to be faithful in copying. On the other hand, the director and scriptwriter cannot already find a direct line to follow, unless through the general plot, that is why their discretion bears more mental and personal characteristics than the creator of sculpture out of painting.

That is why the transfer from painting to sculpture can be, and has already been, replaced by machines, such as the 3D printers, due to the mechanical nature of this work. However, the transfer from novel to film cannot be done by a machine, due to the quantum of judgment, mental and personal work it involves, which is why it is considered an authorship work. The same justification is followed by the thesis to criticise the *Walter v. Lane*<sup>146</sup> case,<sup>147</sup> as the skill used is not mental skill, as anyone who can read and write can do it, and no personal trace can be found in the work produced, as the creator has no intent to do so. However, Laddie *et al.* argued that copyright protection can be granted to directories, although “no imagination is required to produce these and no skill beyond knowing how to read and write.”<sup>148</sup> [Underlining added] The same applies to verbatim reports, according to the belief of the thesis, as the author follows the original author’s steps and eliminates his will and abolishes any ideas that come to his mind so as to comply with the original author’s structure. According to Hegel and Locke, as will be detailed later,<sup>149</sup> this is against what ‘authorship’ presumes.

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<sup>144</sup> Though this was specifically excluded pursuant to Recital. 19 of the 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 41. The thesis finds that there is no difference between the collection of music, songs, photographs, poems, film clips etc.

<sup>145</sup> The thesis would like to draw attention to that if the sculptor drew a sample of his sculpture before making it then his sculpture can be considered a high authorship work, and his drawing is a separate work similar to the notes and drafts that precede the writing of a novel.

<sup>146</sup> *Walter V. Lane*, 1900, A.C. 539, House of Lords

<sup>147</sup> See Chapter 3 at 3.5

<sup>148</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 9. at 3.57.

<sup>149</sup> See Chapter 6 at 6.3 & 6.4

The thesis accordingly calls for the revival of the US ‘sweat of the brow’ doctrine regarding collections and compilation works and other non-authorship works. That approach was advocated by Judge Roney, in the *Miller v. Universal Studios* case,<sup>150</sup> who argued that “it may be better to recognize the directory cases as being in a category by themselves rather than to attempt to bring their result and rationale to bear on non-directory cases.”<sup>151</sup>

As Ginsburg contended, copyright law should protect low authorship works and should do so in low authorship terms.<sup>152</sup> She proposed a dual system for both high and low authorship works instead of “disguising” low authorship works as high ones.<sup>153</sup> This thesis advocates this system but, *a fortiori*, it proposes differentiation between works, depending on their inherent elements, into authorship and non-authorship works, and afterwards, separating authorship works into high and low authorship. Such a system will consider the special qualities and characteristics of every type of works, as factual works or compilation works are devoid of authorship and not just low in authorship.

Accordingly, the works of high originality should gain full copyright protection<sup>154</sup>, and this will give authors the utmost incentive to produce creative works,<sup>155</sup> as the reward for their creative efforts will be due more to being able to distinguish it from other less ‘authorship’ works. Also, the public will encourage such differentiation that will break down the current mix of creative and non-creative works.<sup>156</sup> The low authorship works will have lower protection in terms of copyright protection and exclusive rights. The third, ‘non-authorship works’, will gain the minimum amount of protection, prohibiting the full copying of works and preserving financial incentives for producers.<sup>157</sup> Besides, the criterion used to decide copyrightability of every category should be differentiated to suit the elements of the work it is going to measure.

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<sup>150</sup> *Gene Miller V. Universal City Studios, Inc., Et Al.*, 1981, 650 F.2d 1365, C.A.Fla., No. 78-3772., United States Court of Appeals, Fifth Circuit.

<sup>151</sup> *Ibid.* at 1370

<sup>152</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 83, p. 1916

<sup>153</sup> *Ibid.* p. 1916

<sup>154</sup> This is applied now, as the thesis argues that if current copyright protection is applied appropriately and respects the proposed dichotomous system, without excluding any of the copyright principles, then it will be enough to protect authors and incentivise them.

<sup>155</sup> Creativity is a term related to inventive creation and laborious mind efforts, and is adopted as a more specific term to mean more than originality.

<sup>156</sup> Further elaboration of the benefits of this distinguishing can be found in Chapter 5 at 5.3

<sup>157</sup> This classifying of concepts of authorship and grades of originality and creativity, and the tailored concepts of copyright for every category of works is explained in Chapter 5 at 5.3

Accordingly, the proposed categorisations of works will be as follows:

	High-authorship works	Low-authorship works	Non-authorship works
Subject of work	Thoughts and ideas belong to the author	-Main Thoughts and ideas do not belong to the author, only include change of the expressive form -Or thoughts are different but the elements of authorship are the same	-Collection of Facts and information, presented comprehensively or selectively -Or collection of previous works -Or change of the physical form
Characteristics	-Different selection -Different arrangement from antecedent works  <u>Examples:</u>  Novels, music, paintings, sculpture not derived from antecedent work.	-Same selection  -Same arrangement of the original work  -Different expressive form. <u>Examples:</u>  -Adaptations: novel to film  -Translation  -Abbreviation	Collection of facts, information or antecedent works. <u>Examples:</u>  -Databases (telephone directories, match tables)  -Compilation of previous works (legislations, poems) or anthologies  -Maps
	-Same selection -Different arrangement  <u>Examples:</u>  Books of different sciences, especially text books.	-Same selection -Different arrangement -Same expressive form  <u>Examples:</u>  Musical rearrangement, audio-visual (films and drama) rearrangement,	-Same selection -Same arrangement  -Same expressive form as the original work.  With change of physical form

		Parody, Appropriation.	<u>Examples:</u> Change from painting to sculpture,
Criteria	-Different selection, arrangement of elements of authorship -If similar selection and arrangement, prove independent creation	-Mental effort and Judgement in creating the work (not-following mathematical means). -License from the author of original work if work is copyrighted	-Proving the expenditure of labour, funds -Independent creation.
Suggested protection	The current copyright protection in exclusivity and term of protection.	Lower term of protection, i.e., 30 years after death. -Less exclusive rights	Lower term of protection i.e., (15 years) -Less exclusive rights

In terms of the factual application of such a proposition, this thesis proposes an amendment to be made of copyright laws in the UK and US to codify the proposed system.<sup>158</sup> It also proposes the adoption of the mentioned and further investigated philosophies and doctrines in this thesis by Judges in their interpretations of copyright law or in the application of an originality threshold to decide on the copyrightability of works. Also, the DCNG will contribute in the reduction of the conflict of decisions through a user-friendly platform that makes the copyright protection graded and straightforward.

#### 1.4 Methodology:

In dealing with the theoretical issues of copyright law and due to “*copyright [being] ... conceptual in nature*”<sup>159</sup> it is important to understand the concepts of authorship, originality, creativity, and ownership. This thesis finds that theoretical study is the basis

<sup>158</sup> For further detail on the amendment and its application, see Chapter 8 at 8.5 and 8.6

<sup>159</sup> Jean-Robert Tyran and Lars Feld, Why People Obey the Law: Experimental Evidence from the Provision of Public Goods, ideas.repec.org, Center for Economic Studies & Ifo Institute for Economic Research, 2002 p. 181

on which we can establish a relatively certain, stable and less vague system of protection, that all people seek –even those who support uncertainty.<sup>160</sup>

The thesis will pursue a theoretical and historical study to investigate the emergence of originality, the challenges it faces, and its conflicted interpretations. A critical and historical study of authorship will be followed when the death of the author doctrine is challenged. This issue is an important subject that should be challenged in every study that addresses authorship. It is also important to challenge the romantic author doctrine's pressure on authorship in copyright law, in order to purify authorship of any possible doubts about its validity in copyright law.

A theoretical study will then be pursued to support the reasons for which authorship should prevail in copyright law. Lastly, the thesis's proposition will be the subject of the last Chapter, when all the strands are brought together to support and justify the proposed categorisation of works and its digital implementation the DCNG.

#### **1.4.1 Theoretical and Historical Perspective:**

This theoretical study will concern the concepts of originality and authorship, as the thesis will investigate the history of originality, when originality emerged, and the development of the interpretation of originality.

There is a collision between the desire to satisfy the economic needs of right holders, and the need to preserve the concept of authorship.<sup>161</sup> If it is believed by a Judge that copyright justification is to enhance the production of works and encourage and protect investment, then the Court<sup>162</sup> will embrace low, or broader, criteria of copyrightability.<sup>163</sup> For the sake of rewarding efforts and funds expended on the production of works and to foster the economic incentivisation that pushes this intellectual production. By contrast, if the copyright justification is believed to be maintaining and rewarding creativity and ingenuity, the Judge<sup>164</sup> adopts high or strict criteria<sup>165</sup> in deciding the

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<sup>160</sup> Like Jerome Frank, See Chapter 2 at 2.6

<sup>161</sup> See copyright law justifications in Chapter 5 at 5.4

<sup>162</sup> E.g., *Hutchinson Telephone Co. V. Fronteer Directory Co. Of Minnesota, Inc.*, 1985, 770 F.2d 128, United States Court of Appeals, Eighth Circuit.; *Southern Bell Telephone and Telegraph Company V. Associated Telephone Directory Publishers; C.A.*, 1985, 756 F.2d 801, United States Court of Appeals, Eleventh Circuit.; *Leon V. Pacific Tel. & Tel. Co.*, 1937, 91 F.2d 484, Court of Appeals, Ninth Circuit.

<sup>163</sup> For an illustrative definition and examples of low criteria, or the wide interpretation of authorship and protection criteria, see Chapter 6 at 6.4

<sup>164</sup> E.g., *Feist Publications, Inc. V. Rural Telephone Service Co.*, 1991, 499 U.S. 340, 111 S.Ct. 1282, Supreme Court of the United States; *International News Service V. Associated Press*, 1918, 248 U.S. 215, 39 S.Ct. 68, Supreme Court of the United States; and there are those who have differentiated between fictional and non-fictional works in stipulating originality, like, *W. Eckes V. Card Prices Update*, 1984, 736 F.2d 859, United States Court of Appeals, Second Circuit.

<sup>165</sup> For an illustration of the high criteria of copyright protection, or the narrow interpretation of authorship principles and protection criteria, see Chapter 6 at 6.4

copyright subsistence of works, in order to reward creativity and originality and to maintain authorship principles and philosophies<sup>166</sup>.

The theoretical study of this thesis will also be made on the discussion of the 'death of the author' doctrine, the arguments of Barthes and Foucault will be challenged in both literary and legal contexts, and it will be shown how this argument cannot be applied in law, since this was not meant by their initiators. A study of 'romantic authorship', or romanticism, will be theoretically discussed and challenged in legal terms. To prove the validity of the thesis's claims, a historical investigation of authorship and literary property and of the originality stipulation in England and the US will be presented.

The next discussion will concern the question of why uncertainty is an undesirable feature in copyright law, and this will mainly entail challenging Frank and Holmes, as achieving a reasonable degree of stability and certainty will help authors and users to know the situation of their works and other works that have emerged. This will encourage them from the start to think about which elements their works should have to fulfil the originality requirement and to be considered under copyright law, and which parts or elements of works can be appropriated or reused, as will be elaborated in later chapters. On the other hand, stability will encourage investors to produce more works, as they will know from the start which kinds of works and which features will be protected, and which features will make the work un-copyrightable.

#### **1.4.2 Practical Perspective: Technological Implementation:**

This thesis argues that technology should be a tool in hands of law not the opposite, so technology can be used to enforce or enhance the application of copyright law not to be used in making a parallel system through the technological restrictions and digital rights management.<sup>167</sup>

Following from the above theoretical discussions, the implementation of the proposed categorisation system in the technological environment through a 'Digital Cultural National Gate' (DCNG) will help to efficiently categorize works depending on the proposed division of works and criteria to decide the level of protection that is deserved. This further step will help authors to have a clear idea on whether their works deserve protection and at which level they can be classified, even before completing their works. Users will benefit also through deciding the rights or exceptions they can gain for every work; even publishers and producers, as the proposed system provides protection for all works, but at different levels. Such a technological

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<sup>166</sup> Authorship philosophies or principles refer to the major principles constituting the main structure of the authorship concept, like originality and creativity.

<sup>167</sup> See Chapter 8 at 8.6

proposition, it is presumed, will combat the adverse effects of technology on copyright law and reinforce the position of the orthodox concepts of authorship and originality in practice.<sup>168</sup>

Accordingly, the technological proposition (DCNG) is a tool that employs the theoretical system in the digital world, by investigating works through the applicants themselves and under their responsibility. Such theoretical research and practical implementation can reinforce the position of copyright law before laws of contract, competition, and trade that have recently overshadowed copyright law, as Bently confirmed: “the failings of copyright have resulted in a strengthening of the actions which have been developed to fill the gap - which, in turn, make copyright law increasingly insignificant.”<sup>169</sup>

### 1.5 Terminology:

**Copyrightability:** this term is used to refer to copyright law’s main purpose which is protecting works through conferring protection to them. Namely, it means the copyright subsistence decisions. This is mostly used as a differentiation between the literary discourse of authorship, and the legal discourse that looks to copyright law as a means to regulate relations and to confer protection or exclusive rights.

**Factual works:** this term refers to all works based on facts, ideas, or pre-existing works, without addition from the creator. Those works are normally created through collecting, combining and arranging information or previous works, whether randomly or in a specific form. They are usually compared with authorship works that are based on the author’s mental work.

**Collective works and a collection of works:** the collective work is a work that is produced by several authors and it is not possible to specify the part that every author has created. The collection of works occurs when several contributions of several authors are gathered within one collection of separate works, and it is specified for every work that it was created by a specific author.<sup>170</sup>

### 1.6 Overview

This thesis comprises of eight chapters; the first is mainly focused –as we saw- on formulating its main argument through presenting the research problem<sup>171</sup>, and a brief presentation of the different natures of works, and the development of originality

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<sup>168</sup> See Chapter 8 at 8.6.4

<sup>169</sup> Lionel Bently, 'Copyright and the Death of the Author in Literature and Law', *The Modern Law Review*, 57/6 (1994). p. 976

<sup>170</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra note* 9, at 32.20

<sup>171</sup> See this Chapter at 1.1

interpretation that causes confusion in copyright law,<sup>172</sup> together with an introduction to the proposed solution<sup>173</sup> and how –in a brief reference- this solution will look or will work<sup>174</sup>.

**The second Chapter** will firstly be concerned with originality, as the main reason for the confusion around the copyrightability of works, so it will seek for the emergence of originality,<sup>175</sup> its definition,<sup>176</sup> and the development of originality in case law,<sup>177</sup> and how it has participated in conflicts in judicial decisions.<sup>178</sup>

Secondly, it will focus on answering the initial question - why is the thesis concerned with searching the conflict in copyrightability decisions, and if it is desirable to leave them in conflict, or whether this conflict is natural to the law. Here, this thesis challenges the arguments that advocate uncertainty in laws and answer the question: what are the reasons for which it advocates stability and certainty in laws.<sup>179</sup>

**The third Chapter** shows the varied interpretations of the originality requirement by courts in the UK and the US even those cases heard before the same court or regarding similar works. These interpretations varied between the ‘sweat of the brow’ doctrine and the ‘origination from the author’ in the US,<sup>180</sup> and the adoption of the minimal creativity interpretation -in the UK and the US-,<sup>181</sup> and ‘skill, labour and judgment’ in the UK.<sup>182</sup> These interpretations will be separated according to which elements of the work they are measuring, the author’s personality or labour and investment, so they can match the categorisation proposed between authorial works and utility works with the suitable interpretation.<sup>183</sup>

**The fourth Chapter** addresses the doctrine of the ‘death of the author’, which mainly emerged from Barthes and Foucault,<sup>184</sup> who claimed that the author should disappear in favour of language. The thesis replies to their claims by discussing the literary and legal side of their argument,<sup>185</sup> and concludes that a distinction between literary and

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<sup>172</sup> See this Chapter at 1.2

<sup>173</sup> See this Chapter at 1.3

<sup>174</sup> See this Chapter at 1.3.1

<sup>175</sup> See Chapter 2 at 2.2

<sup>176</sup> See Chapter 2 at 2.3

<sup>177</sup> See Chapter 2 at 2.4

<sup>178</sup> See Chapter 2 at 2.5

<sup>179</sup> See Chapter 2 at 2.6

<sup>180</sup> See Chapter 3 at 3.2

<sup>181</sup> See Chapter 3 at 3.10

<sup>182</sup> See Chapter 3 at 3.6

<sup>183</sup> See Chapter 3 at 3.7

<sup>184</sup> See Chapter 4 at 4.2

<sup>185</sup> See Chapter 4 at 4.4

legal authorship is required.<sup>186</sup> This discussion removes the doubts around the validity of the 'authorship' concept so as to still and revive it in copyright law before the increasing claims against it, as authorship is the main focus of the thesis. It must thus be defended before being used and built on in remainder of the thesis.

**The fifth Chapter** addresses claims that authorship depends on the romantic author concept. This is supported by Woodmansee and Jaszi, who confirmed that authorship in copyright law is not convenient for collaborative authorship and adaptations.<sup>187</sup> In the reply to these arguments, historical perspective will be followed to prove the old history of the author concept and of literary property, and even of originality in the UK before any laws of copyright,<sup>188</sup> as personal authorship was considered the main theme when discussing literary or artistic works. However, this does not include the meaning of romantic nor of the genius author that is revealed in literary discourse, as copyright law is concerned with authorship leading to copyrightability not literary discourse of romantic authorship, and in this way it understands authorship. Accordingly, this Chapter insists on the necessity of separating literary authorship from legal authorship, as they share the vocabulary but not the substance.<sup>189</sup>

**The sixth Chapter** addresses the authorship elements,<sup>190</sup> or what the elements that show that a given work is a product of an authorship process, and herein it will depend on the opinions of Hobbes, Locke, Hegel and Kant.<sup>191</sup> It finds that there are mental and personal features that works should show so as to be a work of intellect or authorship, and this will be relied upon in determining the natures of works and, accordingly, to categorise works into 'authorship' and 'devoid of authorship' works.

**The seventh Chapter** includes an application of the elements and factors of authorship, set in the previous Chapter, on factual works,<sup>192</sup> or imitations,<sup>193</sup> in order to reveal whether they include authorship or not. Also, 'selection and arrangement' as criterion for collections of facts will be challenged in this Chapter, especially regarding whether it can prove the existence of personal or mental authorship, or not.

**In the eighth Chapter**, the proposed system is described, according to a categorisation of works in terms of 'high, low and non-authorship'.<sup>194</sup> There is a

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<sup>186</sup> See Chapter 4 at 4.5

<sup>187</sup> See Chapter 5 at 5.4

<sup>188</sup> See Chapter 5 at 5.3

<sup>189</sup> See Chapter 5 at 5.6

<sup>190</sup> See Chapter 6 at 6.7

<sup>191</sup> See Chapter 6 at 6.2, 6.3, 6.4 & 6.5.

<sup>192</sup> See Chapter 7 at 7.3

<sup>193</sup> See Chapter 7 at 7.5

<sup>194</sup> See Chapter 8 at 8.4

corresponding division of originality interpretations in the three categories.<sup>195</sup> Every interpretation will have specific elements that fit with it and which can measure the elements in the corresponding category of works. Finally, the thesis proposes a technological implementation of the proposed system that can merge theoretical discussion in the online environment and contribute in lessening future distortions of originality and authorship. This will be through the proposed 'Digital Cultural National Gate'.<sup>196</sup>

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<sup>195</sup> See Chapter 8 at 8.4.1

<sup>196</sup> See Chapter 8 at 8.6



## **Chapter Two: Originality and the Conflict of Copyright Subsistence Decisions**

### **2.1 Introduction:**

This thesis is interested in investigating the developments in the authorship and ownership concepts that are shaping the modern copyright law, and it argues that the copyright criteria is the most important part of this investigation as, according to it, the definitions and borders of authorship, in the meaning of copyrightability, and of ownership are decided.

In order for copyright to fulfil its functions, namely to provide right holders with the protection they need for their works as the subjects of dealings, its protection should be selective. Providing protection to all works means protecting the work and its infringement, and this equates with the non-protection of any work. Such selectivity needs a criterion in order to action it. On the other hand, the existence of protection presumes an infringement of this protection by attempts to circumvent it. Accordingly, we need a criterion through which to decide whether the creator of the disputed work has infringed the copyright of antecedent works or not,<sup>1</sup> this criterion is 'originality'. Accordingly, this Chapter will discuss how the concept of originality emerged, what its interpretations are, and whether these interpretations are subject to any classification.

### **2.2 The Emergence of Originality:**

As discussed in the introduction in first chapter, the requirement of criteria for works, that they be a 'personal creation' and 'mental work', was required even before the Statute of Anne, for instance, in the *The Company of Stationers v. Seymour* case.<sup>2</sup> Herein, there will be more investigation on the emergence and definition of originality and the conflict in interpreting it in several cases in the UK and the US.

Historically, Woodmansee has confirmed that the principle of originality first appeared in Young's writing in 1759.<sup>3</sup> Young argued that the originality of the work, - he took

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<sup>1</sup> In the law's view, as an organizational tool for relations and transactions in society, the existence of the protection of a work requires distinguishing between protected and unprotected works, as conferring protection to all works will entail the protection of even infringing works, as they are intellectual works also. So the focus in the legal context should be on how to separate infringing work from other works in general. The separation between works needs a criterion or threshold to provide a means by which the Statute can first assess whether the work is in the beginning a literary or artistic work, or neither. Second: has it infringed other pre-existing works?

<sup>2</sup> *The Company of Stationers v. Seymour*, 1677, 29 CAR. 2,

<sup>3</sup> Edward Young and Samuel Richardson, *Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison* (Printed for A. Millar, 1759). On the other hand, if this argument brings to mind the Woodmansee reference to the Franciscan, St. Bonaventura, (1221-1274); this will be discussed in Chapter 5 at 5.3.1.

poems as an example- or its essential quality, emanates from the poet's own genius, and it is that which should be evaluated, rather than the "rules extrapolated from classical literature".<sup>4</sup> Woodmansee confirms that these ideas, after translation into German, were used by Goethe, Kant and Fichte to engage originality in the theory of arts.<sup>5</sup>

It seems that originality was not invented by legislation, but was one of the features of the 19<sup>th</sup> century to which artists resorted to distinguish themselves from the imitations and repetitions of that age, and it thus spread in society before being required by law. This is obvious in Eitner's explanation: "Claude was to Turner, Raphael to Ingres, Rubens to Delacroix far more than a brief stimulus or passing influence. Such dependence on tradition was not unprecedented in the history of art, but what distinguished the particular situation of 19<sup>th</sup> century art from that of earlier periods of eclecticism was the modern artist's claim to originality and individual freedom."<sup>6</sup> It seems that the emergence of originality participated in the progression of art and literature in the 19<sup>th</sup> century,<sup>7</sup> However, this does not mean that originality was born in this period, but there is other evidence that it had existed since the 15<sup>th</sup> century as a legal and literary concept, as will be shown in the next section.

Originality was required in the UK at an early stage in the Sculpture Copyright Act, 1814, which had established the requirement of being "new and original"<sup>8</sup> in any works to gain copyright protection. The same was followed in the Copyright of Designs Act, 1842.<sup>9</sup> However, the Fine Art Copyright Act of 1862<sup>10</sup> sufficed with the condition of being 'original'. Accordingly, it was considered that "the 1862 Act provided the first occasion on which the legislature introduced the requirement that works be "original"

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<sup>4</sup> Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author'', *Eighteenth Century Studies*, (1984). p. 430

<sup>5</sup> *Ibid.* p. 430

<sup>6</sup> Lorenz Eitner, *Neoclassicism and Romanticism, 1750-1850: Enlightenment* (1: Prentice Hall, 1970). p. 93

<sup>7</sup> Walter Darby Bannard, 'On Originality', *Arts Magazine*, September 1985 (1985). p. 132 as he confirmed "[t]his search for originality (that which had not been done or produced before) goes some way to explain the progression of artistic movements which started in the latter part of the 19<sup>th</sup> century and has continued to the present time. In the eyes of some it represents a 'ritual of novelty' where originality is not just desirable but obligatory."

<sup>8</sup> See s. 1 of 'Sculpture Copyright Act', (Britain, 1814). referred to in R. Bently & M. Kretschmer Deazley, 'Commentary On: Fine Art Copyright Act (1862)', *Primary sources on copyright (1450-1900)* (Arts and Humanities Research Council; UK: copy.law.cam.ac.uk, 2008).

<sup>9</sup> 'An Act to Consolidate and Amend the Laws Relating to the Copyright of Designs for Ornamenting Articles of Manufacture', (Britain, 1842)., 5 & 6 Vict., c.100. referred to in R. Bently & M. Kretschmer Deazley, 'Commentary On: Fine Art Copyright Act (1862)', *supra* note 8.

<sup>10</sup> 'Fine Arts Copyright Act', 25 & 26 Vict., c.68 (Britain, 1862).. Although Bentley confirms that the first copyright act that required originality is the 1911 Copyright Act, see L. Bently and B. Sherman, *Intellectual Property Law* (third edn.: Oxford University Press Oxford., 2009). p. 93, this thesis argues that it is the 1862 Act and supports this argument with the Graves Case, wherein the Queen's Bench Division confirmed "By 25 & 26 Vict. c. 68, §. 1, "the author of every original painting, drawing, and photograph, and his assigns," see, Graves' Case, 1869, L.R. 4 Q.B. 715, Queen's Bench Division at 715

as a threshold for copyright protection.”<sup>11</sup> Also, Lord Herschell argued in a Parliamentary Bill<sup>12</sup> proposition that “[c]opyright in respect of a newspaper shall apply only to such parts of the newspaper as are compositions of an original literary character, to original illustrations therein.”<sup>13</sup> [Underlining added]

In the US, Saunders claimed that originality was initiated depending on the term ‘authors’ mentioned in the US constitution, “[s]ince an author means beginner, first mover, creator, or originator, the Constitution necessarily requires originality, and if it is lacking, the work is not one of an author.”<sup>14</sup> As inferred by the Supreme Court in Burrow Giles, v. Sarony, where Judge Miller interpreted originality as ‘origination from the author’ and include ‘intellectual conception’ or mental work, as he argued that “[a]n author in that sense is ‘he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.’ ... so far as they are representatives of original intellectual conceptions of the author.”<sup>15</sup> [Underlining added]

It is thus evident that from the beginning of the 19<sup>th</sup> century ‘originality’ was a recognised criterion for copyright protection. Since then, originality has had a central position in copyright law, “[o]ne of the concepts central to copyright protection is that of originality”<sup>16</sup> or, as Suk stated, “originality is the touchstone of copyright law”<sup>17</sup> and proved to have a close relationship with the authorship doctrine for “[i]n general usage authorship has connotations of originality.”<sup>18</sup>

### 2.3 Definition of Originality

There is an ambiguity around ‘originality’, not just regarding its position in copyright law, or its application, but in its definition also, in the UK and the US statutes ‘originality’, as a copyright criterion, is not defined, as this mission was left to the courts to develop. However this mission proved to be impossible, Nietzsche argued, “[w]hat is originality? To see something that is yet without a name, that is yet impossible to designate, even

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<sup>11</sup> R. Bently & M. Kretschmer Deazley, 'Commentary On: Fine Art Copyright Act (1862)', *supra* note 8.

<sup>12</sup> Lord Herschell, 'Copyright in Books', in *Sessional Papers House of Lords* (ed.), (Vol. 3, Bill No. 21. Birrell, 1898). This bill has not been enacted into legislation.

<sup>13</sup> This was confirmed in a bill proposition that has not been enacted, see, *ibid.* section 11, p. 210.

<sup>14</sup> Elizabeth M Saunders, 'Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection', *Notre Dame L. Review*, 62 (1986). p. 766

<sup>15</sup> Burrow-Giles Lithographic Co. V. Sarony, 1884, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, Supreme Court of the United States at 58

<sup>16</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, 2 vols. (Fourth edn., 1: LexisNexis, 2011). at 3.57.

<sup>17</sup> Jeannie Suk, 'Originality', *Harvard Law Review*, 115 HVL.R (2002). p. 1988

<sup>18</sup> J.G.H. Griffin, 'The Need for a New Paradigm in Ip Law: A Focus on Authorship', *Information & Communications Technology Law*, 14/3 (2005). p. 269

though it stares you in the face.”<sup>19</sup> In terms of deciding its level or borders, it is argued that the evaluation of artistic value or the artistic merit of the work should be excluded. For that MacQueen confirms: “even the most mundane of works, rehearsing old ideas and information has copyright if expressed in the author’s own way.”<sup>20</sup> Laddie *et. al.* also argue that whatever the kind of work, literary, dramatic or artistic, it may enjoy protection, even though it is devoid of any aesthetic merit<sup>21</sup>.

It is worth referring, as well, to the lingual meaning of originality, as it refers to ‘The ability to think independently and creatively; or the quality of being novel or unusual’.<sup>22</sup> However, the ambiguity of the term ‘original’ is the main cause of the ambiguity around copyrightability that is embodied in the conflict of Courts’ decisions and, accordingly, in copyright law, “it is very difficult if not impossible to state with any precision what copyright law means when it demands that works be original”<sup>23</sup>

Bently suggests that originality’s main function is limiting the copyright protection term through preventing already protected works from gaining further protection or extending the term of that protection.<sup>24</sup> He finds that this function can be fulfilled by requiring that the work, in order to get copyright protection must not already exist. This is what is required from the entrepreneurial works to be protected, although originality is not required there, consequently ‘originality’ should have another meaning or should do something more, but “what this is, however, is unclear”.<sup>25</sup>

The originality stipulation or significance has floundered between two extremes. On the one hand, there are those who have considered originality the main threshold of copyright law, “the concept of originality which is the premise of copyright law”<sup>26</sup>, and that the extent of the copyrightability of works is dependent on the interpretation of this

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<sup>19</sup> Friedrich Nietzsche was a German philologist, philosopher, cultural critic, poet and composer, (1844-1900)

<sup>20</sup> H.L. MacQueen et al., *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, UK, 2011).Para 2.35

<sup>21</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra note* 16, at 3.28

<sup>22</sup> See, Oxford Dictionary, it is a synonym for, inventiveness, ingenuity, creativeness, creativity. See, 'Oxford Dictionaries', <<http://www.oxforddictionaries.com/definition/english/originality>>, last accessed 12/2013.. In the Cambridge Dictionary it means 'the quality of being special and interesting and not the same as anything or anyone else', see, 'Cambridge Dictionaries Online', <<http://dictionary.cambridge.org/dictionary/british/originality>>, last accessed 12/2013.

<sup>23</sup> L. Bently and B. Sherman, *Intellectual Property Law*, *supra note* 10, p. 93

<sup>24</sup> *Ibid.*p. 94

<sup>25</sup> *Ibid.*p. 94

<sup>26</sup> *Gene Miller V. Universal City Studios, Inc., Et Al.*, 1981, 650 F.2d 1365, C.A.Fla., No. 78-3772., United States Court of Appeals, Fifth Circuit. at 1368 also, Olson confirmed “originality has long and consistently been judicially required for protection.” See Dale P Olson, 'Copyright Originality', *Missouri Law Review*, 48 (1983). p. 31. In *Puddu v. Buonamici Statuary, Inc* it was stated that “the one indispensable element of authorship is originality.” See *Puddu V. Buonamici Statuary, Inc.*, 1971, 450 F.2d 401, United States Court of Appeals, Second Circuit at 402

term. Abrams, for instance, confirms its role in the authorship practice as copyrightability, “the question of originality, the threshold standard of qualification for copyright protection, is at the core of copyrightability.”<sup>27</sup> Besides, the US Congress confirms that originality was enacted to prohibit courts from protecting works that the constitution meant to unprotect, or unprotecting works that were meant to be protected.<sup>28</sup>

On the other hand, there are others who have denied the requirement or importance of originality at all, like Sherwin<sup>29</sup>, who argues that the creation of art in general is a process of building over preceding generations’ creations, and the work can be original only if the creator was hidden from all visual experiences.<sup>30</sup> He concludes that originality in art “does not exist”<sup>31</sup>, justifying this with a claim that how would painters learn to hold the paintbrush, and how would photographers know that cameras are used for taking photographs, unless they had experience from living and preceding artists, thus “nothing is original”.<sup>32</sup> So, he confirms that what the best artists can do is to “offer a unique adaptation of ideas that have been already explored”.<sup>33</sup> This thesis argues that Sherwin has interpreted originality in an extreme way that is equal to novelty, and that such a meaning is not actually applied in copyright law. Judge Learned Hand in *Sheldon v. Metro*,<sup>34</sup> confirmed this view: “copyrighted work, unlike patent, need not be new as well as original.”<sup>35</sup>

#### **2.4 The Development of Originality in Case Law:**

Though it is believed that originality appeared in case law in the middle of the nineteenth century, especially in the cases of *Lewis v. Fullarton*<sup>36</sup> and *Jarrold v. Houlston*,<sup>37</sup> this thesis argues that Lord Chancellor Hardwicke, in *Gyles v. Wilcox*,<sup>38</sup> initiated the requirement for a ‘criterion’ in order to obtain copyright protection under the

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<sup>27</sup> Howard B Abrams, 'Originality and Creativity in Copyright Law', *Law & Contemporary Problems Journal*, 55 (1992). p. 4

<sup>28</sup> House of Representatives, 'Rep No 1476, 94th Cong, 2d Sess 51', (1976). , and, Senate Report, 'Rep. No 473, 94th Cong, 1st Sess 50', (1975).

<sup>29</sup> Sherwin is an art critic, blogger, curator, artist and writer based near Chicago, Illinois. He has been published in Hi Fructose Magazine, Illinois Times, The Huffington Post, The Boston Globe, and Juxtapoz Magazine.

<sup>30</sup> Brian Sherwin, 'The Origins of Original Art: The Stepping Stone of Originality in Art', *Fine Art Views* <<http://faso.com/fineartviews/33317/the-origins-of-original-art-the-stepping-stone-of-originality-in-art>>, last accessed 07/12/2013.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Sheldon V. Metro-Goldwyn Pictures Corp.*, 1936, 81 F.2d 49, Circuit Court of Appeals, Second Circuit.

<sup>35</sup> *Ibid.* at 49

<sup>36</sup> *Lewis V. Fullarton* 1839, 48 E.R. 1080,

<sup>37</sup> *Jarrold V. Houlston*, 1857, 69 E.R. 1294,

<sup>38</sup> *Gyles V. Wilcox*, 1740, 27 E.R. 682, 368, Barnardiston Chancery

Statute of Anne.<sup>39</sup> That was when he said: “[w]hen Complaints have been made of a Book's being printed contrary to the Statute, the only Question has been, whether it is the same Book with the former?”<sup>40</sup> [Underlining added] Lord Chancellor Hardwicke considered this condition or requirement to be an interpretation of the “intention of the legislature”.<sup>41</sup> However, he did not use the term ‘original’, but his expression holds the substance of being original.

Although we showed in the introduction how mental creation was the basis of conferring protection to works, whether before or after the Statute of Anne, the case of Gyles v. Wilcox<sup>42</sup> in 1740 represented the confusion that ‘low authorship’ and ‘non-authorship’ works<sup>43</sup> may cause to the copyright criteria interpretation, even before giving it the name ‘originality’. As regards ‘abridgments’, a work that relies heavily on previous works, the Court used personal and usefulness justifications to confer protection to them. That was evident when Lord Chancellor Hardwicke stated, “abridgments may with great propriety be called a new book, because ... the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful.”<sup>44</sup> [Underlining added] Although the expressions ‘invention’, ‘learning’, and ‘judgment’ refer to the requirement of a high level of creation and authorship or to mental efforts, Lord Hardwicke approached copyright and patent through the word ‘invention’, as a description of both. On the other hand, the use of the expression ‘extremely useful’ raises the question about which philosophy the Court adopted in considering the work copyrightable: is it the high and original authorship, or the utility of the work?

Mr Justice Willes in Millar v. Taylor<sup>45</sup> stated at the beginning of this case that “[i]t is found ‘that the work is an original composition’ ...”<sup>46</sup> This might be the first mention of ‘originality’ terminology in the decisions of courts in the UK. He even confirmed afterwards that: “[c]ertain *bonâ fide* imitations, translations, and abridgments are different; and, in respect of the property, may be considered as new works; but colourable and fraudulent variations will not do.”<sup>47</sup> Herein, Mr Justice Willes required that works should not be a colourful variation of the antecedent work to obtain copyright

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<sup>39</sup> 'Statute of Anne', 8 Anne, c. 19 (England, 1710).

<sup>40</sup> Gyles v. Wilcox, 27 E.R. 682, 368, *supra* note 38, at 143

<sup>41</sup> *Ibid.* at 143

<sup>42</sup> *Ibid.* at 143. Accordingly, this thesis argues that such expressions refer to the requirement for creativity or a high level of originality, not a low level of originality, as detailed in Chapter 4 at 4.4

<sup>43</sup> See, for clarification, Chapter 1 at 1.1

<sup>44</sup> Gyles v. Wilcox, 27 E.R. 682, 368, *supra* note 38, at 143

<sup>45</sup> Millar v. Taylor, 1769, 4 Burrow 2303, Court of King's Bench

<sup>46</sup> *Ibid.* at 206

<sup>47</sup> *Ibid.* at 206

protection; this reflects a kind of high originality interpretation and special treatment for translation and abridgment.

Likewise, in *Millar v. Taylor*,<sup>48</sup> Mr Justice Yates equated patent and copyright in requiring originality for both and calling them inventions, “[b]oth original inventions stand upon the same footing, in point of property; whether the case be mechanical, or literary; whether it be an epic poem, or an orrery. The inventor of the one, as well as the author of the other, has a right to determine ‘whether the world shall see it or not.’”<sup>49</sup> The main focus of the statement is the exclusive rights of authors and inventors, however the expression ‘original inventions’ was meant to be applied to both inventions and literary works.

It is worth noting, and of special significance for this thesis’s argument, the reference by Mr Justice Yates to the mind faculties of the author that are manifest in the work. This was stated when he talked first about “Mr. Harrison’s time-piece; which is said to have cost him twenty years application”<sup>50</sup> and afterwards, he equated this invention with the writing of the ‘Seasons’, as both used ‘all faculties of the mind’, as he commented, “Mr. Harrison (whom I mentioned before) employed at least as much time and labour and study upon his time-keeper as Mr Thomson could do in writing his Seasons for, in planning that machine, all the faculties of the mind must be fully exerted. As far as value is a mark of property, Mr Harrison’s time-piece is, surely, as valuable in itself, as Mr Thomson’s Seasons.”<sup>51</sup> [Underlining added] Mr Justice Aston in the same case added that “[t]he present claim is founded upon the original right to this work, as being the mental labour of the author; and that the effect and produce of the labour is his. It is a personal, incorporeal property.”<sup>52</sup> [Underlining added]

Mr Justice Aston added another dimension when he considered that the thoughts and sensations in books are the main determinant of its copyrightability. This was in his comparison between invention and copyright and gave more protection and monopolisation to copyright, and he justified this by arguing that, “the difference consists in this, that the property of the maker of a mechanical engine is confined to that individual thing which he has made; that the machine made in imitation or resemblance of it, is a different work in substance, materials, labour and expense, in which the maker of the original machine cannot claim any property; for it is not his, but only a resemblance of his, whereas the reprinted book is the very same substance; because its doctrine and sentiments are its essential and substantial part; and the

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* at 247

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* at 247

<sup>52</sup> *Ibid.* at 221

printing of it is a mere mechanical act, and the method only of publishing and promulgating the contents of the book. The composition therefore is the substance: the paper, ink, type, only the incidents or vehicle.”<sup>53</sup> [Underlining added] In brief he confirmed “[t]he imitated machine, therefore, is a new and a different work: the literary composition, printed on another man's paper, is still the same.”<sup>54</sup>

This proves not just that the copyright of the author in his work is more inherent than is that of the invention in this age, but also – which is of special importance to this thesis's argument - the literary work's manifestation of 'doctrine and sentiments' are the characteristics of literary works in that age. Although Mr Justice Aston was talking about the reproduction of the book, this statement says that in imitation, the existence of sentiments and its doctrine is an inhibitor to considering the work as original work, accordingly, some alteration in the sensations expressed or the doctrine followed in expressing them should be present in order to consider the work original.

These arguments prove the high level of originality required in cases that followed the Statute of Anne to approve the conferral of copyright , as the origination of the work by the author or not copying from previous work were insufficient, but it is the mental effort and the intellectual originality that can make the work copyrightable. Also, in *Millar v. Taylor* the distinction was apparent between whether the work bears the thoughts of its author or the thoughts of another person and the author just performs 'improvements' for “the improvement is the title to the merit of the invention: but the original thought and first attempt belongs to another person, and probably would never have occurred to the improver.”<sup>55</sup> However, when the matter is related to factual works, confusion starts to emerge, for instance, in the *Morris v. Ashbee* Case<sup>56</sup>, although the Court explicitly confirmed that 'originality' cannot be found in just the arrangement of facts, “[t]here can be no copyright in the mere arrangement and plan of the Plaintiff's work, which is not original in this respect.”<sup>57</sup> [Underlining added] The Court allowed for protection of directories.<sup>58</sup>

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<sup>53</sup> *Ibid.* at 227

<sup>54</sup> *Ibid.* at 227

<sup>55</sup> *Ibid.* at 263

<sup>56</sup> *Morris V. Ashbee*, 1868, L.R. 7 Eq. 34, Giffard, V. C.

<sup>57</sup> *Ibid.* at 37

<sup>58</sup> *Ibid.*

## Cases after the Statute of 1911:

The Copyright Act of 1911<sup>59</sup> explicitly stated the condition of 'originality' in s.1 (1) which provided that "subject to the provisions of this act, copyright shall subsist ... in every original literary, dramatic, musical and artistic work."<sup>60</sup>

This thesis contends that after this express requirement of 'originality', courts began to question whether a work is original or not and ignored asking whether the work is *prima facie* a literary work or not, whether there is an authorship and authorial contribution? The debate around the interpretation of originality began by Judge Peterson in University of London v. University Tutorial<sup>61</sup>, when he stated "the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author."<sup>62</sup> Judge Peterson here changed the meaning of originality in its historical context, as stated in the above cases (i.e. Millar v. Taylor<sup>63</sup> and Gyles v. Wilcox<sup>64</sup>). Instead of requiring a degree of difference in the work, or something that reflects the author's personality and which appears in his ideas and sensations, he interpreted it to mean 'non-copying' from another work. This thesis asserts that this is the main step taken on the way to distorting the originality requirement and authorship concept in modern copyright law in the UK.

The scepticism on the copyrightability of works with no clear authorial contribution and the desire to protect works with any justification was obvious also in Judge Peterson's<sup>65</sup> statement "[i]f an author, for purposes of copyright, must not draw on the stock of knowledge which is common to himself and others who are students of the same branch of learning, only those historians who discovered fresh historical facts could acquire copyright for their works."<sup>66</sup> [Underling added] It is argued that Judge Peterson was confused regarding the copyrightability of facts, which is apparent from the contradiction between the latter statement and his belief that the author should be a genius -which is understood from the latter underlining statement. This is the reason for the low level of originality that he adopted. In older cases discussed above, whether the subject matter was abridgments (in Gyles v. Wilcox and Millar v. Taylor) translations (Millar v. Taylor), directories (Morris v. Ashbee), or maps (Carnan v. Bowles), it was

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<sup>59</sup> 'An Act to Amend and Consolidate the Law Relating to Copyright', *Copyright Act, 1911* (Great Britain, 1911).

<sup>60</sup> *Ibid.* §.1 (1)

<sup>61</sup> University of London Press V. University Tutorial Press, 1916, 2 Ch. 601, Chancery Division

<sup>62</sup> *Ibid.* at 609

<sup>63</sup> Millar V. Taylor, 4 Burrow 2303, *supra* note 45.

<sup>64</sup> Gyles V. Wilcox, 27 E.R. 682, 368, *supra* note 38.

<sup>65</sup> University of London Press V. University Tutorial Press, 2 Ch. 601, *supra* note 61.

<sup>66</sup> *Ibid.* at 609

never discussed whether the author should rely on facts in common knowledge, or not, because this is out of the discussion, as facts can never get protection or justify protection

This approach by Judge Peterson paved the way for every work to gain copyright protection, regardless of any conditions, especially under his renowned statement “what is worth copying is *prima facie* worth protecting.”<sup>67</sup>

### **In the US:**

Courts in the US showed conflicting interpretations regarding the level of criteria that should be adopted in deciding the protection of intellectual works. For instance, in the 1879 case of Trade-Mark Cases. v. Steffens<sup>68</sup> the Court assessed whether trademarks could be protected under copyright law or not. It found that the objections to this step are strong since copyright law protects only literary works that are works of mind and shows creativity, “while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like.”<sup>69</sup> [Underlining added] This shows how the understanding of copyright protection to literary works has presumed the intervention of mental effort and personal authorship in the creation of these works.

This was confirmed also in Burrow-Giles Lithographic Co. v. Sarony<sup>70</sup> when, although the debated work was a photograph, and despite the scepticism about the mechanical process of producing them, Judge Miller argued that in any work the author should prove the existence of the “originality, of intellectual production, of thought, and conception on the part of the author.”<sup>71</sup> Notice here how the originality criterion has been entrenched in the US doctrine since the Copyright Act, and how from the outset it was attached to values of personality and mental effort.

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<sup>67</sup> *Ibid.* at 609, this thesis questions the situation of Judge Peterson’s refusal to consider the work of defendants as original work, although they added their own answers and criticism to the question of the plaintiffs, and the mention of the questions was not the essential work. The question is raised by this thesis because Judge Peterson earlier argued that it suffices that the expression belongs to the author, and is not copied and that “what is worth copying is *prima facie* worth protecting” and the defendants’ work was undoubtedly worth copying. This thesis argues that Judge Peterson sufficed by expressing his personal objection to conferring protection to the defendants’ work, although he confirmed that “[b]oth publications are intended for educational purposes and for the use of students,” *ibid.* at 609.

<sup>68</sup> Trade-Mark Cases V. Steffens, 1879, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, Supreme Court of the United States

<sup>69</sup> *Ibid.* at 94

<sup>70</sup> Burrow-Giles Lithographic Co. V. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 15.

<sup>71</sup> *Ibid.* at 282

However, when the subject of the case is a low or a non-authorship work<sup>72</sup> (database, compilations, abridgments, etc.) the confusion began to appear. For instance, just three years after the last case, in the case of List Pub. Co. v. Keller,<sup>73</sup> although Judge Wallace argued, that the work was original due to the selection and judgment - “[t]hey are original to the extent that the selection is original. Their commercial value depends upon the judgment and knowledge of the author ...”<sup>74</sup> However, he finds that the nature of these works requires a protection for more than just the selection, because “the compiler of such a directory uses a previous directory of the same character, to save himself the trouble of making an independent selection”<sup>75</sup> which make the copyright protection to these works useless.

Then the interest of the judge in this case was transferred to a deeper stage and looks beyond the work itself and its characteristics to the process of creating the work, and the subject matter is transferred from the original work to the original labour used to create the work. “The question in the case is whether the defendant, in compiling his directory, has done so by his own original labor, or whether, in order to spare himself time and expense ...”<sup>76</sup> as the next compiler “has no right to take ... the results of the labor and expense”<sup>77</sup> of the original author. Also, in Batlin v. Snyder<sup>78</sup> the Court ruled that ‘non-copying’ from other works sufficed to confer copyright protection.<sup>79</sup>

These cases show how factual works, or in fact the decisions of the Judges dealing with factual works, were the reason for the confusion that has continued until today regarding the interpretation of originality. In the US, the development that followed the List Pub. Co. v. Keller<sup>80</sup> case was the adoption of the ‘sweat of the brow’ doctrine, and continued until cases like Feist v. Rural<sup>81</sup> that attempted to return to the first cases and retrieve the origins and theoretically orthodox principles of copyright law that were

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<sup>72</sup> For the definition of low and non- authorship works see Chapter 1 at 1.3

<sup>73</sup> List Pub. Co. V. Keller, 1887, 30 F. 772, Circuit Court, S.D. New York.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> L. Batlin & Son, Inc., V. Jeffrey Snyder and Etna Products Co., 1976, 536 F.2d 486, United States Court of Appeals, Second Circuit.

<sup>79</sup> *Ibid.* at 491. As it stated “[o]riginality, as copyright prerequisite, means that work owes its creation to its author, and this in turn means that work must not consist of actual copying”.

<sup>80</sup> List Pub. Co. V. Keller, 30 F. 772, *supra* note 73

<sup>81</sup> See, Feist Publications, Inc. V. Rural Telephone Service Co., 1991, 499 U.S. 340, 111 S.Ct. 1282, Supreme Court of the United States

apparent in Trade-Mark Cases. v. Steffens<sup>82</sup>, and Burrow-Giles Lithographic Co. v. Sarony.<sup>83</sup>

## 2.5 Conflict in Decisions on Copyright Subsistence:

In this section the thesis will present some examples of the conflict of decisions that result from the different interpretations that Judges give to originality, although the interpretations of originality will be detailed in the next Chapter.

An important case is the US case of Bridgeman v. Corel<sup>84</sup>, that had an impact on UK law also, as Judge Kaplan confirmed that the photographic transparencies of other works of arts in the public domain, created by 'Bridgeman' and sold on CDs, are not eligible for copyright protection, due to a lack of sufficient originality<sup>85</sup>. The Judge here interpreted originality as requiring the 'independent creation' of the author, besides he required a 'distinguishable variation' of the work from pre-existing works<sup>86</sup>. Judge Kaplan confirmed that this lack of originality is recognised both in the UK and US laws, as he stated, "Bridgeman's images lack sufficient originality to be copyrightable under the UK... the court would reach the same result under United States law"<sup>87</sup>. [Underlining added] Even after reargument and reconsideration of the case by the plaintiff, Judge Kaplan confirmed this result<sup>88</sup>.

On the other hand, we find another court has made a completely different decision in a case with facts close to those in the above case. In the case of Alfred Bell v. Catalda<sup>89</sup> Judge Smith explained that the plaintiff 'Bell' had aimed to produce mezzotint engravings that 'faithfully' reproduced paintings in the public domain, so that "the basic idea, arrangement, and color scheme of each painting are those of the original artist."<sup>90</sup> He outlined that there was a 'long' and 'tedious' process in making these reproductions.<sup>91</sup> In addition, Judge Smith confirms that "[t]he engraver is not trying to

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<sup>82</sup> Trade-Mark Cases V. Steffens, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, *supra* note 68.

<sup>83</sup> Burrow-Giles Lithographic Co. V. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 15.

<sup>84</sup> For Trial Court see, Bridgeman Art Library, Ltd. V. Corel Corp., 1999, 25 F. Supp. 2d 421, United States District Court, S.D. New York.; and for the reconsideration of the case see, The Bridgeman Art Library, Ltd. V. Corel Corporation, Et Ano., 1999, 36 F.Supp.2d 191 United States District Court, S.D. New York.

<sup>85</sup> Bridgeman Art Library, Ltd. V. Corel Corp., 25 F. Supp. 2d 421, *supra* note 84, at 427

<sup>86</sup> *Ibid.* at 427

<sup>87</sup> *Ibid.* at 427

<sup>88</sup> The Bridgeman Art Library, Ltd. V. Corel Corporation, Et Ano., 36 F.Supp.2d 191 *supra* note 84.

<sup>89</sup> For Trial Court see, the Interlocutory Judgment Alfred Bell & Co. V. Catalda Fine Arts, 1947, 74 F.Supp. 973, District Court, S.D. New York.; and Alfred Bell & Co. V. Catalda Fine Arts, 1949, 86 F.Supp. 399, United States District Court, S.D. New York.; for Appellate Court see, Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et AL., 1951, 90 U.S.P.Q. 153, 191 F.2d 99, United States Court of Appeals, Second Circuit.

<sup>90</sup> Alfred Bell & Co. V. Catalda Fine Arts, 74 F.Supp. 973, *supra* note 89, at 975

<sup>91</sup> *Ibid.* at 975. As it stated "It is a tedious process requiring skill and patience and is, therefore, rather expensive compared with modern color photographic processes. The artists employed to produce these

alter or improve on the old master. He is trying to express in another medium what the original artist expressed in oils on canvas.”<sup>92</sup> However, he decided that the treatment of the same work in another medium is original. <sup>93</sup> The thesis argues that this decision is defective.

It may be argued that Judge Smith’s decision was affected by the long and tedious process of making these reproductions, which cannot be applied in photography, so it may be thought that the *Alfred Bell v. Catalda*<sup>94</sup> and *Bridgeman v. Corel*<sup>95</sup> cases are not in conflict. Surprisingly, in the *Alfred Bell* Case, Judge Smith exposed to the analysis of the photography made of these engravings, and he contended that they were original works and deserved copyright protection, even if they were reproducing works in the public domain.<sup>96</sup> This result was also confirmed by Judge Frank in the Court of Appeal Second Circuit, where he compared the ‘novelty’ required in patent law and the condition that the work should ‘owe its origin to the author’, which he argued to be the only threshold for conferring copyright protection.<sup>97</sup> Consequently, he conferred copyright protection for the engravings because they belonged to their creators.

The collision is thus evident between Judge Kaplan in *Bridgeman v. Corel* ,<sup>98</sup> who refused to confer copyright protection for the photography of old paintings, and Judges Smith and Frank, in the case of *Alfred Bell v. Catalda*,<sup>99</sup> who conferred copyright protection for similar works (engravings reproducing paintings) and even the same work (photography of engravings). The analysis of these two decisions will assume one of two approaches. The first approach is that we have to research the artistic value of the debated photographic works to decide which case is protected and which prohibited or not encouraged within copyright law doctrine, and this is largely unfavourable according to copyright law principles. As Mr Justice Holmes confirms “it would be a dangerous undertaking for persons trained only in law to constitute themselves final Judges of the worth of pictorial illustrations.”<sup>100</sup> The second approach

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mezzotint engravings in suit attempted faithfully to reproduce paintings in the mezzotint medium so that the basic idea, arrangement, and color scheme of each painting are those of the original artist.”

<sup>92</sup> *Ibid.* at 976

<sup>93</sup> *Ibid.* 89 at 976 he added also, “it is a distinguishable effect which can itself be copied by photography. The engraver’s contribution to the world’s art is indeed modest, but it is his own and should be protected.” see, *ibid.* 89 at 976

<sup>94</sup> *Ibid.* 89

<sup>95</sup> *Bridgeman Art Library, Ltd. V. Corel Corp.*, 25 F. Supp. 2d 421, *supra* note 84.

<sup>96</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et AL*, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 89, at 977, but in this case, of course, photographs were made of protected copyrighted works, as both courts decided.

<sup>97</sup> *Ibid.* at 102

<sup>98</sup> *Bridgeman Art Library, Ltd. V. Corel Corp.*, 25 F. Supp. 2d 421, *supra* note 84.

<sup>99</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et AL*, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 89.

<sup>100</sup> *Bleistein V. Donaldson Lithographing Co.*, 1903, 188 U.S. 239, 23 S.Ct. 298, Supreme Court of the United States at 251.

is to confess the existence of conflict in decisions in conferring copyright law protection, and the need to find a solution that can achieve some stability and certainty, and that what this thesis aims for.<sup>101</sup>

Another example of the conflict between judicial decisions is related to originality and the fact/expression dichotomy.<sup>102</sup> In the case of *Miller v. Universal Studios*,<sup>103</sup> the plaintiff Gene Miller wrote a book called '83 Hours Till Dawn' about an actual kidnapping incident, and he engaged in research and interviews and used the style and techniques of exciting writing about historical events in the context normally used for crime novels.<sup>104</sup> Universal Studios (the defendant) relied on his book in producing film called 'The Longest Night'. Judge Roettger, of the District Court, found that there was proven access by the defendant to the work of the plaintiff, with evidence that even mistakes made by Miller were copied into the film,<sup>105</sup> and proved substantial similarity through the expert witness and a jury verdict,<sup>106</sup> although, there was an evidence that the scriptwriter was told that the use of Miller book is 'verboden'.<sup>107</sup>

Depending on the US (and partly in the UK) rule that if there is no direct evidence of copying it is proper to rely on two factors. Proving access to the copyrighted work, and the substantial similarity between the two works,<sup>108</sup> Judge Roettger decided that there was an infringement by the defendant of the plaintiff's work. Judge Roettger deemed this approach more suitable to the spirit of copyright law: "[i]n the age of television 'docudrama' to hold other than research is copyrightable is to violate the spirit of the copyright law and to provide to those persons and corporations lacking in requisite diligence and ingenuity a license to steal."<sup>109</sup>

However, Judge Roney of the Appellate Court argued that there was a statement that deemed the District Court decision reversible, which is the instruction to the jury that 'research is copyrightable'. And that was the substantial question Judge Roney tried to answer: is research copyrightable? Depending on his own investigation he decided to

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<sup>101</sup> See next paragraphs for more details about this conflict.

<sup>102</sup>It means, in brief, that facts are not copyrightable, but the expression of the facts or the mould that facts are put in is copyrightable, see Chapter 6 at 6.9

<sup>103</sup> For the Trial Court, *Miller V. Universal City Studios, Inc.*, 1978, 460 F.Supp. 984, United States District Court, S. D. Florida; and the Appellate Court, *Gene Miller V. Universal City Studios, Inc., Et AL*, 650 F.2d 1365, C.A.Fla., No. 78-3772., *supra* note 26.

<sup>104</sup> *Miller V. Universal City Studios, Inc.*, 460 F.Supp. 984, *supra* note 103, at 984

<sup>105</sup> *Ibid.* at 985

<sup>106</sup> *Ibid.* at 986-88

<sup>107</sup> *Ibid.* at 986

<sup>108</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (M. Bender, 1990). at s 13.01(B)

<sup>109</sup> *Miller V. Universal City Studios, Inc.*, 460 F.Supp. 984, *supra* note 103, at 988

reverse and remand the case. Judge Roney cited *Rosemont v. Random House*<sup>110</sup> and *Hoehling v. Universal City Studios*<sup>111</sup> as supportive cases to his argument.<sup>112</sup> While Circuit Judge Moore of the *Rosemont* case rejected the protection of research and any efforts to prepare the work, and even the independent research doctrine, as a threshold for copyrightability.<sup>113</sup> The Court in *Hoehling v. Universal City Studios* gave the argument briefly in one statement: “the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis.”<sup>114</sup> Judge Roney considered this approach beneficial for copyright law policy as he confirmed “[i]t provides a means of balancing the public's interest in stimulating creative activity, as embodied in the Copyright Clause, against the public's need for unrestrained access to information.”<sup>115</sup> This thesis attempts to support this approach for the same reason: ‘stimulating creativity’.

On the other hand, the cases *Toksvig v. Bruce*<sup>116</sup> and *Rosemont v. Random House*<sup>117</sup> have debated the copyrightability of ‘research’ performed in the process to reach facts used for creating works. In the former case, independent work was considered an important element in conferring copyright protection to works; consequently, the defendant could get the same information (passages from biographical work that was extracted from Danish resources) by going through to the original resources.<sup>118</sup> Here, the touchstone is “whether she [the defendant] in fact had done her own independent research”.<sup>119</sup> On the other hand, the latter case rejected the dependence on ‘independent research’ and tended towards banning the protection of facts and ideas at all, as it considered that the fair use doctrine was intended to save time and effort for subsequent authors<sup>120</sup>. It confirmed: “[i]t is just such wasted effort that the proscription

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<sup>110</sup> *Rosemont Enterprises, Inc. V. Random House, Inc.*, 1966a, 366 F.2d 303, United States Court of Appeals Second Circuit

<sup>111</sup> *Hoehling V. Universal City Studios*, 1980, 618 F.2d 972, United States Court of Appeals, Second Circuit

<sup>112</sup> As he stated “We find the approach taken by the Second Circuit in *Hoehling* and *Rosemont* to be more consistent with the purpose and intended scope of protection under the copyright law than that implied by *Toksvig*.” See, *Gene Miller V. Universal City Studios, Inc., Et AL*, 650 F.2d 1365, C.A.Fla., No. 78-3772., *supra* note 26, at 1371.

<sup>113</sup> See, *Rosemont Enterprises, Inc. V. Random House, Inc.*, 366 F.2d 303, *supra* note 110, at 310

<sup>114</sup> *Hoehling V. Universal City Studios*, 618 F.2d 972, *supra* note 111, at 974

<sup>115</sup> *Gene Miller V. Universal City Studios, Inc., Et AL*, 650 F.2d 1365, C.A.Fla., No. 78-3772., *supra* note 26, at 1371

<sup>116</sup> *Toksvig V. Bruce Pub. Co.*, 1950, 181 F.2d 664, United States Court of Appeals Seventh Circuit

<sup>117</sup> For Trial Court see, *Rosemont Enterprises, Inc. V. Random House, Inc.*, 1966j, 256 F.Supp. 55, United States District Court S.D. New York. For Appellate Court see, *Rosemont Enterprises, Inc. V. Random House, Inc.*, 366 F.2d 303, *supra* note 110.

<sup>118</sup> *Toksvig V. Bruce Pub. Co.*, 181 F.2d 664, *supra* note 116, at 666

<sup>119</sup> *Ibid.* at 667.

<sup>120</sup> *Rosemont Enterprises, Inc. V. Random House, Inc.*, 256 F.Supp. 55, *supra* note 117, at 258

against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent.”<sup>121</sup>

In addition, the Toksvig Court confirmed that using a precedent biography’s translation in a foreign language to make a new biography is not fair use, as it saved two thirds of the time that was required to create the pre-existent biography, consequently, this was deemed as infringement.<sup>122</sup> On the contrary, in Rosemont case the Court argued that the author is not precluded from saving “time and effort by referring to and relying upon prior published material”.<sup>123</sup> Subsequently, the Court of the latter case confirmed that the narration of historical events, although its form of expression is copyrighted, it cannot be monopolised,<sup>124</sup> even it argued that there is no infringement of copyright law in the biographies that rely heavily on precedent articles or magazine reports.<sup>125</sup> Additionally, the Rosemont Court confirmed that the people who enter the public arena should ease their privacy right for the sake of the public right to get information about public figures.<sup>126</sup> Note here the contrast in the interpretation of copyright principles adopted in every case, the Toksvig Court believed that copyright law prohibited the saving of time and effort by the next creators, however, the Rosemont Court believed the opposite, as it argued that copyright law does not forbid the saving of time and effort, and the fair use doctrine is designed to achieve this purpose.

Regarding the fair use claim by the defendant in both cases, the Rosemont Court called for the need in giving priority to the public interest in the development of art over the copyright holder’s interest in financial return.<sup>127</sup> It confirmed that quoting directly from precedent biographies is permitted as it encourages the “development and distribution of historical and biographical works.”<sup>128</sup> The Toksvig Court, on the other hand, claims that it is not a matter of whether the defendant has obtained the information from the same resources, but it is rather whether he has done his own independent research which confers originality to the work, or whether he has just made unfair use of others’ works.<sup>129</sup> This reflects a huge gap of understanding in interpreting the originality criteria in copyright law and what the justification of protection granted is, and whether it is realised in their respective cases, or not.

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<sup>121</sup> Rosemont Enterprises, Inc. V. Random House, Inc., 366 F.2d 303, *supra* note 110, at 303.

<sup>122</sup> Toksvig V. Bruce Pub. Co., 181 F.2d 664, *supra* note 116, at 664.

<sup>123</sup> Rosemont Enterprises, Inc. V. Random House, Inc., 366 F.2d 303, *supra* note 110, at 303.

<sup>124</sup> *Ibid.* at 303, 306.

<sup>125</sup> *Ibid.* at 303, 306.

<sup>126</sup> *Ibid.* at 303.

<sup>127</sup> *Ibid.* at 307.

<sup>128</sup> *Ibid.* at 303.

<sup>129</sup> Toksvig V. Bruce Pub. Co., 181 F.2d 664, *supra* note 116, at 665.

Another important factor on which both courts disagreed over is the role of financial return in deciding infringement; the Toksvig Court argued that although the appropriation did not prejudice the sale of the plaintiff's work, it held that there was an infringement of copyright law even if there was no financial loss.<sup>130</sup> On the other hand, the Rosemont Court decided that due to there being no actual damage suffered by the claimant, and that because there was no competition between the two works, so the preliminary injunction was not justified and the infringement claim could not be backed.<sup>131</sup>

Finally, it is worth referring to two cases under the same law, the Copyright Act of 1976, which adopted contradicting views regarding the interpretation of originality. In the Schroeder v. William Morrow<sup>132</sup> case in 1977 the judge adopted the 'sweat of the brow' doctrine when he stated "only 'industrious collection',... is required."<sup>133</sup> However, in the Rockford Map Publishers v. Directory Service<sup>134</sup> case in 1985 the seventh court confirmed on the abandonment of the 'sweat of the brow' doctrine when stated that "[t]he copyright laws protect the work, not the amount of effort expended."<sup>135</sup> Also it explained "[i]n each case the copyright depended on the fact that the compiler made a contribution-a new arrangement or presentation of facts-and not on the amount of time the work consumed."<sup>136</sup> This represents the conflict of courts' interpretations of copyright law principles and justifications.

It is worth referring here to a more evident example of misinterpretation of legislation texts for the sake of benefitting specific parties in cases. This is regarding the interpretation of the DMCA.<sup>137</sup> As plaintiffs depend on this Act to intimidate their competitors from circumventing the technological protection measures (TPMs) they used to protect their works, even if they benefited from fair use permission according to the DMCA itself.<sup>138</sup> For instance, although the DMCA has stressed the respect for the fair use doctrine, as it provided that: "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use,"<sup>139</sup> we

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<sup>130</sup> *Ibid.* at 665.

<sup>131</sup> Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, *supra* note 110, at 303.

<sup>132</sup> Schroeder v. William Morrow & Co., 1977, 566 F.2d 3, United States Court of Appeals, Seventh Circuit.

<sup>133</sup> *Ibid.* at 5

<sup>134</sup> Rockford Map Publishers, Inc. v. Directory Service Co. Of Colorado, Inc., 1985, 768 F.2d 145, United States Court of Appeals, Seventh Circuit.

<sup>135</sup> *Ibid.* at 148

<sup>136</sup> *Ibid.* at 149

<sup>137</sup> 'The Digital Millennium Copyright Act', (U.S., 1998).

<sup>138</sup> See, Jacques Dewerra, 'The Legal System of Technological Protection Measures under the Wipo Treaties, the Digital Millennium Copyright Act, the European Union Directives and Other National Laws (Japan, Australia)', *Alai Congress: Adjuncts and Alternatives To Copyright* (2001). Para. IV (a); and Pamela Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised', *Berkeley Technology Law Journal*, 14 (1999). p. 519

<sup>139</sup> S 1201 (c), of 'The Digital Millennium Copyright Act', *supra* note 137.

find Judge Newman in the *Universal City Studios v. Corley*<sup>140</sup> case confirming that Congress intentionally declined to incorporate the fair use defence into anti-circumvention violations,<sup>141</sup> and his reply to the appellants' argument, that the law allowed the circumvention when the conditions of fair use are available, was that "[t]he Appellants' much more expansive interpretation of subsection 1201(c)(1) is not only outside the range of plausible readings of the provision, but is also clearly refuted by the statute's legislative history."<sup>142</sup>

This case led to the belief that the practical implementation of laws is accompanied by misinterpretation in order to favour the right holders' financial interests over the users' or competitors' fair rights. The same attitude is reflected in the case of *Universal City Studios v. Reimerdes*<sup>143</sup>, when Judge Kaplan argued that "nothing in DMCA suggested that the fair use defense was available"<sup>144</sup> he added that "[i]f Congress had meant the fair use defense to apply to such actions, it would have said so."<sup>145</sup> As a result, he conditioned authorised access in order to allow fair use,<sup>146</sup> which, in fact, empties the fair use doctrine of its substance.

## **2.6 Conclusion: The Need for a Stable Copyright Subsistence System**

Landes and Posner believe that the condition of originality in copyright law, and even novelty in patent law, are not mechanical or stable criteria that will settle the matter of protection in a strict manner, for authors and publishers cannot be sure in advance of litigation whether their work is protected or not.<sup>147</sup> Ginsburg stressed also, "Within a single jurisdiction, the requisite level of originality may vary with the nature of the work".<sup>148</sup> Although this argument reflects an actual experience of what can be seen in copyright decisions, this thesis argues that this dilemma should be resolved, and the solution lies in the last expression of Ginsburg "the nature of the work".<sup>149</sup> This thesis finds that this 'nature' is the reason for the uncertainty, and it is the solution also, as the nature of works can categorise them and accordingly establish copyright criteria that can suit every category.<sup>150</sup>

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<sup>140</sup> *Universal City Studios V. Corley*, 2001, 273 F.3d 429, United States Court of Appeals, Second Circuit.

<sup>141</sup> *Ibid.* at 444.

<sup>142</sup> *Ibid.* at 443.

<sup>143</sup> *Universal City Studios, Inc. V. Reimerdes*, 2000, 111 F.Supp.2d 294, United States District Court, S.D. New York.

<sup>144</sup> *Ibid.* at 294.

<sup>145</sup> *Ibid.* at 322.

<sup>146</sup> *Ibid.* at 323.

<sup>147</sup> William M Landes and Richard A Posner, 'Economic Analysis of Copyright Law, An', *Journal of Legal Studies*, 18 (1989). p. 350

<sup>148</sup> Jane C. Ginsburg, 'The Concept of Authorship in Comparative Copyright Law', *DePaul Law Review*, 52 (2002). p. 1078

<sup>149</sup> *Ibid.* p. 1078

<sup>150</sup> As will be explained in Chapter 6.

The hesitant and uncertain status of copyright protection has influenced ‘predictability’, which is the main factor in modern legal rules. The 1996 Green Paper of the EU Commission on copyright<sup>151</sup> mentioned that “[e]ffective exploitation of works and other related matter across the EU therefore requires clear predictability for right holders and users on what exactly is protected, ... [as] [t]he present situation is characterised by legal uncertainty.”<sup>152</sup> [Underlining added] It is evident from this statement that, firstly, there is a confession of the existence of uncertainty in copyright subsistence decisions. Secondly, that this uncertainty is an undesired status for users and right holders on which works are protected, and that there is also a need for a legal certainty.

The need for a stable and predictable life that Maslow's hierarchy<sup>153</sup> included undoubtedly comprises stability in the judicial system, so that authors, users and producers can have a predictable industry and practice.<sup>154</sup> This is something that the nature of humanity calls for after fulfilling survival needs (food, clothing, and shelter), as stability is a major element in the safety that humans need because “apparently growth forward customarily takes place in little steps, and each step forward is made possible by the feeling of being safe ... assured safety permits higher needs and impulses to emerge and to grow towards mastery.”<sup>155</sup>

This thesis will not delve into theoretical discussions about whether the law should exist and reflect legal concepts of positivism,<sup>156</sup> natural law,<sup>157</sup> or realism,<sup>158</sup> as such

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<sup>151</sup> Commission Of The European Communities, 'Follow-up to the Green Paper on Copyright and Related Rights in the Information Society ', *Communication From The Commission* (Brussels, 1996 ).

<sup>152</sup> *Ibid.* The full context is “The exclusive right of reproduction is one of the core rights of intellectual property ("copyright"). Effective exploitation of works and other related matter across the EU therefore requires clear predictability for right holders and users on what exactly is protected as well as an equivalent level of protection across the EU with respect to this important right. The present situation is characterised by legal uncertainty”

<sup>153</sup> See, Abraham H. Maslow, *Toward a Psychology of Being* (3rd edn.; New York: John Wiley & Sons, 1998). at 2.4

<sup>154</sup> *Ibid.* at 2.4.

<sup>155</sup> *Ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> Positivism is a theoretical philosophy that accordingly enacted laws not morals are the source of regulation. Its major advocates are Bentham, Hart, Austin and Kelsen. See, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1781).; Jeremy Bentham, *A Manual of Political Economy* (GP Putnam, 1839).; Herbert Lionel Adolphus Hart and Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford University Press, 2012). and John Austin, ... *Lectures on Jurisprudence: Or, the Philosophy of Positive Law* (J. Murray, 1875).

<sup>157</sup> Natural law, moral law or metaphysics are expressing one philosophical doctrine that refers to that regulation of society should be governed by reason and ethics rather than enacted rules enacted by authorities. Its main advocates are John Locke, Jean Jacques Rousseau, Lon Fuller, and John Finnis. See, John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011).and Lon L Fuller, *The Morality of Law* (152: Yale University Press, 1969).

<sup>158</sup> Realism is a philosophy that accordingly the actual application or operation of law on grounds is what should be considered not the laws previously enacted. Its major advocates are Jerome Frank and Holmes. See, Jerome Frank, *Law and the Modern Mind* (6th edn.; London: Stevens & Sons Limited, 1930). and Oliver Wendell Holmes Jr, *The Path of the Law* (2009 edn.: The Floating Press, 1897).

discussion emerges a kind of endless confusion, reflected in the understandings of scholars of these theories. Some find that although “realism represents an assault on positivism”<sup>159</sup> they treat the law ‘as it is’, which turns them into ‘positivists’, “realists are -paradoxically- considered positivists”<sup>160</sup> even Alan Hunt describes realists as ‘a rather simplistic positivism’<sup>161</sup>, and Wacks confirms “the realists ... their implicit conceptual loyalties were distinctly positivist.”<sup>162</sup> Altman described that realists in defending their argument of the operation of the judiciary they presuppose a theory of law which is a kind of positivism.<sup>163</sup> Furthermore, realists seek various scientific approaches in proving their perspective including sociology and psychology,<sup>164</sup> which inspired Llewellyn to argue that realism “is not a philosophy-it is a technology”.<sup>165</sup>

The question that needs to be answered here is: is the thesis’s argument, to find a solution to the conflict of juridical decisions, meaningful and needed? The answer to this question lies in supporting the concepts of certainty and stability of laws which are strongly opposed by realism theorists, Frank and Holmes’ thoughts may thus be those most related to this answer. Although certainty can be sought, Schulz argues that we first have to decide which meaning we refer to, as in one sense it can mean “the certainty that right will prevail in its struggle with wrong”<sup>166</sup>, in another sense, “certainty as to what is the law, its recognizable character and the predictability of the legal consequences [is] entailed by a particular set of facts”.<sup>167</sup> However, Frank had a renowned argument in this regard, as he finds that searching for certainty in law is like a child searching for emotional satiability by “hankering for the strict rules of the father”,<sup>168</sup> eventually, Frank confirmed that the possibility that law can be “stationary and certain” is an “illusion or myth.”<sup>169</sup>

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<sup>159</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press, 2012). p. 146.

<sup>160</sup> *Ibid.* p. 146.

<sup>161</sup> Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1994). cited in Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, *supra* note 159, p. 146.

<sup>162</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, *supra* note 159, p. 147.

<sup>163</sup> Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin', *Philosophy & public affairs*, (1986)..

<sup>164</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, *supra* note 159, p. 146.

<sup>165</sup> Karl N Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1: Transaction publishers, 2011). However, Leiter argues that realism and positivism are compatible at the philosophical or conceptual level, and realism needs positivism, but at the empirical level they disagree, and he even argues that no one legal philosopher “has actually provided a real argument against the Realist view.” See, Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered', *Ethics*, 111/2 (2001). p. 280.

<sup>166</sup> Fritz Schulz and Marguerite Wolff, *Principles of Roman Law* (Clarendon Press, 1936). p. 258.

<sup>167</sup> *Ibid.* p. 258.

<sup>168</sup> Jerome Frank, *Law and the Modern Mind*, *supra* note 158, p. 263.

<sup>169</sup> *Ibid.* p. 16.

Frank believed that the search for certainty in legal rules and application of law is a childish attitude “[t]he genealogy of legal myth-making may be traced as follows: childish dread of uncertainty and unwillingness to face legal realities produce a basic legal myth that law is completely settled and defined.”<sup>170</sup> He describes the insistence on this childish attitude as, “fatuous insistence on illusory certainty, continuity and uniformity; wishful intellection which ignores, or tries to obliterate from cognizance, unpleasant circumstances- these are the marks of childish thought and often affect legal thinking.”<sup>171</sup>

Although certainty is impossible to achieve in a perfect way, it is desirable and can be proportionally achieved, even Frank, although he confirms the uncertainty that the law has, considers this neither an inherent nor a desirable character, “it is simply not true that most of the ‘realists’ (and the writer in particular), to any greater extent than many of the ‘non-realists’ above cited, have expressed or implied a belief that imprecision in the legal rules is desirable.”<sup>172</sup> What he meant is that the definition of the law as just being rules is considered a tightening of the scope of the real status of applicable law. He argues that “[t]he sceptics insist that legal rules exist and must be studied. But they say that knowledge of the rules is but a small part of what lawyers and Judges use in their work and that a definition of law as rules does an injury to clear thinking about law.”<sup>173</sup> As he believes that the law, in fact, consists of decisions not rules and the judge is the person who makes the law.<sup>174</sup>

All Frank’s thoughts in this regard can be summarized not in the uncertainty or probability of the law, but in the definition of the law and the role of rules in its making, “[t]hat process of judging (which is law) is not to be confined within the compass of mere rules. The rules play only a subordinate role.”<sup>175</sup> This was clear also in his focus on the law as being central to the work of the lawyer, and his refusal to define this focal point as consisting of legal rules, otherwise he finds that abolishing the word ‘law’ may be a solution.

It is worth maintaining here that, firstly, Frank’s doctrine cannot be applied to all law rules, as uncertainty is harmful to many areas which these rules regulate. For instance,

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<sup>170</sup> Jerome Frank, *If Men Were Angels: Some Aspects of Government in a Democracy* (Harper & Brothers, 1942). p. 304.

<sup>171</sup> Jerome Frank, *Law and the Modern Mind*, *supra* note 158, p. 82.

<sup>172</sup> Jerome Frank, *If Men Were Angels: Some Aspects of Government in a Democracy*, *supra* note 170, p. 304.

<sup>173</sup> Jerome Frank, 'Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings', *University of Pennsylvania Law Review and American Law Register*, (1931). p. 45.

<sup>174</sup> Jerome Frank, *Law and the Modern Mind*, *supra* note 158, p. 127.

<sup>175</sup> *Ibid.* p. 274.

Fligstein confirms that “unstable market relations threaten the survival of all firms. Governments intervene to produce rules to promote stability.”<sup>176</sup> Secondly, the philosophy of Frank, from the point of view that laws cannot be eternally certain and accepted, is correct for any human act, even facts and discoveries still have some percentage of uncertainty. That is what Brierly confirmed when he stated that even if legal rules were enacted in a determined and stable way, the facts to which these rules are applied can never be expressly determined and are always rare, obscure or disputed. “Certainty is an ideal that law must never cease to aim at, but it is also one that it can never realize at all completely; for the main cause of uncertainty in any kind of law is the uncertainty of the facts to which it has to be applied. ... It is this intractability of facts that prevents the practice of law from ever becoming a science; it is and always will be an art.”<sup>177</sup>

It is believed that Frank’s appeal to abolish the need for stability is impractical, as the existence of law itself is a kind of father-power that enforces all individuals to respect his (its) rules, and the government is the executive body of that law or party that can be resorted to when some individuals in society have a conflict, this situation will remain so, as long as there are interrelations and consequent conflicts between individuals. “When stable markets become destabilized, it is natural for firms to appeal to government for help.”<sup>178</sup> This intervention is always recognised through the laws that maintain this stability: “if producing stability in multiple markets requires rules, then governments are deeply implicated in defining the various social structures that stabilize markets.”<sup>179</sup> This thesis considers that such an appeal for certainty –even relatively- is inherent to the nature of humans and their social relations. As market stability relies on mores and legislative rules in order to maintain a degree of stability, even if it is minor, “[t]o get such stability, people need either long experiences with one another, such that they settle into habitual patterns, or more formal rules to govern novel interactions”.<sup>180</sup>

In the *Infopaq v. Danske* Case,<sup>181</sup> the CJEU depended on ‘legal certainty’ in several places to justify its decision, this is apparent in its contention that “[l]egal certainty for right holders further requires ...”<sup>182</sup> and in elsewhere, “... thereof must also be

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<sup>176</sup> Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton University Press, 2001). p. 19.

<sup>177</sup> James Leslie Brierly, *The Outlook for International Law* (Clarendon Press, 1944). p. 16.

<sup>178</sup> Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies*, *supra* note 176, p. 19.

<sup>179</sup> *Ibid.* p. 19.

<sup>180</sup> *Ibid.* p. 27.

<sup>181</sup> *Infopaq International a/S V. Danske Dagblades Forening*, 2009, E.C.D.R. 16, C-5/08, Court of Justice of the European Communities (Fourth Chamber).

<sup>182</sup> *Ibid.* at 274.

interpreted in the light of the need for legal certainty for authors with regard to the protection of their works.”<sup>183</sup>

It is worth noting that the situation of uncertainty and confusion in copyright law has urged the EU legislators to affirm the need for stability in national laws, as this is important for the economic flourishing of the EU. This is supposed to be the reason that the EU adopted a unified criterion for copyright, namely, ‘intellectual creation’, in all its directives.<sup>184</sup> Directive 2001/29 states, in Recital 4 of the preamble, that, “[a] harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure ...”<sup>185</sup> [Underlining added] This confirms how the EU has considered legal certainty to be beneficial to increasing investments in creativity and innovation which is against the beliefs of Frank. Directive 2001/29 further described how technologies can help to increase ‘uncertainties in protection’ and how this can affect the economy of cultural works.<sup>186</sup> The need to banish the confusion around copyright subsistence in the individual countries is thus preamble before the pursuit to achieve the harmonisation between the EU members. That is why the EU stated: “[t]his Directive should define the scope of the acts covered by the reproduction rights. ... A broad definition of these acts is needed to ensure legal certainty within the internal market.”<sup>187</sup> [Underlining added]

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<sup>183</sup> *Ibid.*

<sup>184</sup> See text under title ‘The Situation in International Provisions’ under section 1.2 Development of Originality Interpretation.

<sup>185</sup> See recital (4) of ‘Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’, 2001/29/EC (EU, 2001).

<sup>186</sup> Since in Recital 6 of the preamble 2001/29 stated: “(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.”

<sup>187</sup> Recital 21 of the preamble of the EU directive 2001/29.



## **Chapter Three: Originality Interpretations in the UK and the US: Interpretations Measure Different Features in Works Whether High or Low authorship**

### **3.1 Introduction:**

In this chapter this thesis will expose the different interpretations of originality suggested by courts in the UK and the US in order to confer copyright protection for cultural works. In this Chapter we will show how this criterion was not agreed upon, sometimes the Judges resorted to low requirements, like ‘sweat of the brow’, ‘originating from the author’, or ‘non-copying’, and at other times they raise the requirement to ‘personal input’ or ‘creativity’, regardless of what the legislation states about and even whether it requires originality or not.<sup>1</sup>

Due to “[o]riginality remain[ing] the *sine qua non* of copyright”<sup>2</sup> and authorship, it is necessary to investigate it especially for this research’s argument, namely focusing on authorship and categorisation of works. This cannot be done except by discussing the interpretations of originality given by Judges in the UK and the US. These interpretations need to be categorised so as to suit the proposed categorisation of works. Subsequently, each of these interpretations will be applied to a corresponding category of works, so works within each category can be subjected to a specific interpretation that is suitable to their nature, and abolishing the ‘one size fits all’ criteria that caused conflicting decisions.

### **3.2 The US ‘Sweat of the Brow’ Doctrine**

This section will expose the emergence and development of the ‘sweat of the brow’ doctrine in the US until it was challenged, and how this criterion caused confusion to the originality criteria. Following this discussion, the thesis will conclude that ‘sweat of the brow’ was resorted to in order to protect facts from being copied against the copyright orthodox rule of not protecting facts. Yet, the ‘sweat of the brow’ cannot be generalised to all copyright works, as a result of the conceptual and logical conflict it causes when applied to them. However, it may be only suitable to certain works such as non-authorship works.<sup>3</sup>

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<sup>1</sup> S. Von Lewinski, *International Copyright Law and Policy* (Oxford University Press, 2008). p. 45.

<sup>2</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 1991, 499 U.S. 340, 111 S.Ct. 1282, Supreme Court of the United States at 348.

<sup>3</sup> See chapter 8 at 8.4.2 for an explanation of the adoption of this criterion regarding non-authorship works.

In general, it seems that the originality criterion, since it emerged in the US, has been subject to several fluctuations, sometimes going higher into personal requirements - even before the 1976 Act- and in other times going lower, so that the 'sweat of the brow', or even 'originating from the author' suffices – even after the 1976 Copyright Act.

Under the 'sweat of the brow' criterion, it is sufficient that any manual effort done to create the work to obtain copyright protection.<sup>4</sup> The courts' tendency to use the 'sweat of the brow' was largely driven by the need to reward or compensate investors in compilation works, and at the same time to guarantee their production as they are works that are useful for society.<sup>5</sup>

In the US, before the 1909 Copyright Act, factual works had strong protection, as cases adopted the 'sweat of the brow' doctrine to protect all works. Most courts prohibited the copying of facts contained in any precedent factual works due to the efforts and funds expended in their creation –or collection- and that any work should be independently created in order to get copyright protection. For instance, in *List Pub co. v. Keller*,<sup>6</sup> Judge Wallace argued that directories are an explicit example of copyrighted works and it is against the law to copy any portion of the texts or facts included.<sup>7</sup> If the subsequent compilers want to include any of the precompiled facts, they have to collect them themselves.<sup>8</sup> Judge Wallace confirmed that the compiler should show a degree of 'independent creation' or his 'original labor' so as to invalidate any infringement concerns, as Judge Wallace asked: "[t]he question in the case is whether the defendant, in compiling his directory, has done so by his own original labor, or whether, in order to spare himself time and expense he has copied the names and addresses...".<sup>9</sup> [Underlining added]

The only facility the Court allowed for the subsequent creator is for him to check his work, "he may use the first compiler's book for the purpose of verifying the orthography of the names, or the correctness of the addresses, of the persons selected."<sup>10</sup> It is noted here that the word 'original' has the meaning: 'originating from the author', which used by the court to refer to the said 'original labour', and that is equal to the 'independent creation' also, all have the same substance of 'sweat of the brow' and the

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<sup>4</sup> Howard B Abrams, 'Originality and Creativity in Copyright Law', *Law & Contemporary Problems Journal*, 55 (1992). p. 8.

<sup>5</sup> Sherrie Callis, 'Copyright Protection in Factual Compilations: Feist Publications V. Rural Telephone Service Company Altruism Expressed in Copyright Law', *Golden Gate University Law Review*, 22 (1992). p.532

<sup>6</sup> *List Pub. Co. V. Keller*, 1887, 30 F. 772, Circuit Court, S.D. New York.

<sup>7</sup> *Ibid.* at 773.

<sup>8</sup> *Ibid.* at 773.

<sup>9</sup> See, *ibid.* at 772.

<sup>10</sup> *Ibid.*

same intention in protecting the labour or effort's product not mental works, as will be clarified in next examples.

The 'sweat of the brow' doctrine was confirmed also in the case of Morris v. Ashbee,<sup>11</sup> when it was argued, "no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road."<sup>12</sup> [Underlining added] In these cases, it is evident that saving time, effort, or expense was unlawful, and the 'independent creation' of the work that proves the 'originating of the work from the author' is the criterion required to prove the existence of copyright protection.

After the US Copyright Act 1909, Judge Learned Hand, in Jeweler v. Keystone,<sup>13</sup> continued the same approach through confirming, "[a]ll are free to repeat those facts, just because they are facts."<sup>14</sup> However, at the same time, the compiler of facts should show his own 'independent work' through collecting facts by himself, and the only thing he can do with the precedent factual work is to 'check back' his compilation with such precedent works.<sup>15</sup> So, here, facts are not protected *per se*,<sup>16</sup> but the effort expended to find or discover them is, so independent work by subsequent authors was required in order to include these facts.

In Southwestern Bell v. Nationwide Independent Directory,<sup>17</sup> the District Court of Arkansas confirmed that the man who goes through the street and collects the names and numbers of inhabitants acquires copyright on his material, and he can be named as 'the author' of these materials, accordingly, any copying by anybody of any portion of the material collected in order to prepare a separate directory, is an infringement of his copyright<sup>18</sup>. Moreover, it confirmed that such a decision is regardless of whether such material shows literary skill, originality or just industrious collection.<sup>19</sup> Before and after the US Copyright Act of 1909 the manual efforts and labour of the author was thus what confers originality to the work, and any role of thoughts, sensations or additions to culture were ignored.

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<sup>11</sup> Morris v. Ashbee, 1868, L.R. 7 Eq. 34, Giffard, V. C..

<sup>12</sup> *Ibid.* at 40

<sup>13</sup> Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 1921, 274 F. 932, District Court, S.D. New York.

<sup>14</sup> *Ibid.* at 935.

<sup>15</sup> *Ibid.* at 934.

<sup>16</sup> This means that there is no monopoly on the facts, as it is possible that anybody else can repeat these facts, but only if he did his own independent research or discovery. So the patent law rules are not applied here.

<sup>17</sup> Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc., 1974, 371 F.Supp. 900, United States District Court, W.D. Arkansas, Hot Springs Division.

<sup>18</sup> *Ibid.* at 903-904.

<sup>19</sup> *Ibid.* at 905.

In other example, the Court in International News Service v. Associated Press<sup>20</sup> decided that intellectual works could not be protected unless they were independently created and not just dependent on appropriations. This was its interpretation of originality. In addition, the Court stressed that the protection of works is guaranteed when there are funds and efforts expended in their creation.<sup>21</sup> Accordingly, 'independent creation' was the emblem of copyrightability in US before the 1976 Copyright Act, and it was used interchangeably with 'sweat of the brow' and 'origination from the author'.

Under the Copyright Act 1976, although §. 102(1) stated: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression,"<sup>22</sup> [Underlining added]. However, the threshold of the protection of 'sweat of the brow' continued to be adopted.

An example is in Hutchinson Telephone Co. v. Fronteer Directory Co.,<sup>23</sup> where the Court argued that Hutchinson's Directory, which included its customer listing, is "an original work of authorship and therefore is copyrightable under the provisions of 17 USC. § 102."<sup>24</sup> Because it "alone solicited, gathered, filed, sorted, and maintained the information on which the directory is based"<sup>25</sup> [Underlining added] and it is irrelevant whether Hutchinson Co. got its information through requiring subscribers to supply him with the required information, or even if this was a State's requirement.<sup>26</sup> It is worth noting here that there is a conflict between this case and Feist v. Rural<sup>27</sup> six years later, which confirmed that the State authorities' requirement of the collection of specific data make the work unoriginal.

So, the whole focus of the Court was on the 'labour and efforts' expended by the author. As it confirmed, "[t]he proper focus is ... whether the directory itself is derived from information compiled and generated by Hutchinson's efforts."<sup>28</sup> [Underlining added] No creative or personal input was thus required by the Court to fulfil the originality requirement. The effort and labour, or the 'sweat of the brow' doctrine, sufficed for the Court.

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<sup>20</sup> International News Service V. Associated Press, 1918, 248 U.S. 215, 39 S.Ct. 68, Supreme Court of the United States

<sup>21</sup> *Ibid.* , pp. 243-245.

<sup>22</sup> 'Copyright Act of the United States', *Ch8-10; 12-17 of Title 17 of the US code* (US, 1976)..

<sup>23</sup> Hutchinson Telephone Co. V. Fronteer Directory Co. Of Minnesota, Inc., 1985, 770 F.2d 128, United States Court of Appeals, Eighth Circuit. at 132.

<sup>24</sup> *Ibid.* at 132.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Feist Publications, Inc. V. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

<sup>28</sup> Hutchinson Telephone Co. V. Fronteer Directory Co. Of Minnesota, Inc., 770 F.2d 128, *supra* note 23, at 132.

The ND Illinois District Court in Illinois Bell v. Haines<sup>29</sup> twelve years after the 1976 Act, confirmed the old approach that facts cannot be copied, and ‘industrious collection’<sup>30</sup> should be practised by the subsequent compilers. Even the Court of Appeal confirmed the District Court’s argument in this regard and required that the compiler should not get the facts by copying from the existing copyrighted factual work, as the facts *per se*, and the effort and research expended in their discovery, are protected.<sup>31</sup>

The Seventh Circuit Court, in Illinois Bell v. Haines,<sup>32</sup> refused to base the infringement on the substantial copying, and argued that ‘any copying’ of the facts from the factual copyrighted work constitutes an infringement of copyright, as it stressed that the defendant’s argument that substantial similarity “constitutes an infringing use. This is not the law.”<sup>33</sup>[Underlining added]

The same approach was adopted by the Seventh Circuit Court in Schroeder v. William Morrow<sup>34</sup> also after the US Copyright Act 1976, wherein the Court of Appeal confirmed: “only ‘industrious collection,’ not originality in the sense of novelty, is required.”<sup>35</sup> This argument by the Court in Schroeder shows how the misunderstanding of originality contributed to the adoption of the ‘sweat of the brow’ doctrine. Likewise, the same approach was adopted by the Court in Rockford Map v. Directory Service,<sup>36</sup> which confirmed the independent creation requirement for conferring protection to factual works.<sup>37</sup>

The above mentioned cases ignored also § 102(b) of the US 1976 Copyright Act, which provides that: “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work”.<sup>38</sup> Facts, whether discoveries, concepts or principles were explicitly excluded from protection. The House of Representatives’ report confirmed this meaning and in 1976 it expressly interpreted it as meaning that no

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<sup>29</sup> Illinois Bell Telephone Co. V. Haines and Co., Inc., 1988, 683 F.Supp. 1204, United States District Court, N.D. Illinois, Eastern Division.

<sup>30</sup> *Ibid.* at 1208.

<sup>31</sup> Illinois Bell Telephone Co. V. Haines and Co., Inc., 1990, 905 F.2d 1081, United States Court of Appeals, Seventh Circuit. at 1209.

<sup>32</sup> Illinois Bell Telephone Co. V. Haines and Co., Inc., 683 F.Supp. 1204, *supra* note 29.

<sup>33</sup> Illinois Bell Telephone Co. V. Haines and Co., Inc., 905 F.2d 1081, *supra* note 31, at 1086.

<sup>34</sup> Schroeder V. William Morrow & Co., 1977, 566 F.2d 3, United States Court of Appeals, Seventh Circuit.

<sup>35</sup> *Ibid.* at 5, the Court, in this argument, cited two cases decided by the Court of Appeal in 1937, 1992; Leon V. Pacific Tel. & Tel. Co., 1937, 91 F.2d 484, Court of Appeals, Ninth Circuit And Jeweler’s Circular Pub. Co. V. Keystone Pub. Co., 1922, 281 F. 83, Circuit Court of Appeals, Second Circuit.

<sup>36</sup> Rockford Map Publishers, Inc. V. Directory Service Co. Of Colorado, Inc., 1985, 768 F.2d 145, United States Court of Appeals, Seventh Circuit.

<sup>37</sup> *Ibid.* at 149.

<sup>38</sup> ‘Copyright Act of the United States’, *supra* note 22, of 1976.

protection can be conferred to facts or ideas, when it stated, “[c]opyright does not preclude others from using the ideas or information revealed by the author's work.”<sup>39</sup>[Underlining added] However, as, there are still judicial decisions that protect this information and preclude its copying.

These cases were referred to here to show the reader how the courts interpreted the originality requirement as, at the time, these courts required a low level of effort to make the work eligible for copyright protection, others raised this requirement, as will be shown in the next sections, not just after the Statute of 1976, but even before it.<sup>40</sup> Every interpretation is preferred to put into a separate group to show the different interpretations given to originality. This categorisation of the interpretations given to originality will be relied upon in the thesis's proposition, as these interpretations will be divided to suit a correspondent categorisation of works, proposed in later Chapters.

It is thus evident that before *Feist* case there was a long tradition that most US Courts would grant copyright coverage to informational works by taking into account ‘the sweat of the brow’ doctrine, or, in other words, by considering ‘efforts’, ‘independent research’ or ‘collection of facts’ as original work that deserves copyright protection. In doing so, they credited and approved the originality of the works’ industriousness and the investment of resources in a variety of works “from directories and mailing lists to computerized databases.”<sup>41</sup>

### 3.3 Refusing the ‘Sweat of The Brow’ Doctrine

In 1902, the US Seventh Circuit Court, in *National Telegraph v. Western Union Telegraph*,<sup>42</sup> anticipated the need to raise the originality requirement, a step that happened 90 years later in the *Feist v. Rural* decision,<sup>43</sup> as it refused to confer copyright protection for informational or factual works (e.g., compilations, directories and maps). The Court refused to rely on the expenditure of effort and money - the ‘sweat of the brow’ doctrine - as a criterion used when deciding the copyrightability of the works in dispute and they anticipated the adverse implications of the implementation of this doctrine in an excellent statement. The Seventh Circuit stated, “[l]ittle by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, directories, and other works of

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<sup>39</sup> House of Representatives, 'House Report No. 94-1476', ( 2d Sess 94th Cong, 1976). p. 56.

<sup>40</sup> See this Chapter at 3.3

<sup>41</sup> Jane C Ginsburg, 'No Sweat Copyright and Other Protection of Works of Information after Feist V. Rural Telephone', *Columbia Law Review*, 92 (1992).p.339.

<sup>42</sup> *National Telegraph News Co. V. Western Union Telegraph Co.*, 1902, 119 F. 294, Circuit Court of Appeals, Seventh Circuit.

<sup>43</sup> See, *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

similar character. Nothing, it would seem, evincing, in its makeup, that there has been underneath it, in some substantial way, the mind of a creator or originator, is now excluded.<sup>44</sup> [Underlining added]

This extraordinary statement by the Seventh Circuit needs a little thought. The Seventh Circuit in 1902<sup>45</sup> had referred to this thesis's differentiation between works and had anticipated the current fears facing copyright law, which is discussed in this research,<sup>46</sup> as follows. Firstly, it talked about the category of works that have been interpolated or inserted into copyright and their creators who had wrongly been given the description 'author', and it called these works the 'literature of commerce'. Which are called here 'non-authorship works' or 'utilitarian works'. This is supported as well through the term 'commerce' that indicates the nature of these works, which differs from other works that lack this characteristic but that are concerned with personal contribution and mental work.

Secondly, it anticipated how most works have gradually been enclosed under copyright protection, and the 'making up' process which will make the adverse effects unnoticeable at the beginning, through describing the non-intellectual efforts as authorship and the produced works as original, although there is no authorship at all, and that will contribute in marginalising intellectual efforts. This describes exactly what the thesis inferred, when courts describe the selection and arrangement of facts as an original contribution, it is argued that this will eventually lead to that everything being considered original, and will lead to the emptying of the meaning from this criterion, or any need for it. That is why we need the authorship and author doctrine. This result was described by the Court as "the mind of a creator or originator, is now excluded",<sup>47</sup> and this is what happened under the 'death of the author' doctrine.

Although it is commonly known that *Feist v. Rural*<sup>48</sup> is the case that refuted the long history of the 'sweat of the brow' doctrine, and its influence is not denied, there was a case in 1986 that established good case law in refuting this doctrine, and which criticized the philosophy of protecting efforts and funds and highlighted the drawbacks to which this can lead. This is the US case *Financial Information(FII) v. Moody*<sup>49</sup>. In this case, the employees and researchers of *FII* have carried out a time and effort

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<sup>44</sup> *National Telegraph News Co. V. Western Union Telegraph Co.*, 119 F. 294, *supra* note 42, at 297, as the Court held that ticker tapes listing telegraph transmissions of market quotations, sports scores, and race results are not copyrightable.

<sup>45</sup> In *ibid*.

<sup>46</sup> See Chapter 1 at 1.1

<sup>47</sup> *National Telegraph News Co. V. Western Union Telegraph Co.*, 119 F. 294, *supra* note 42, at 297.

<sup>48</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

<sup>49</sup> *Financial Information, Inc. V. Moody's Investors Service, Inc.*, 1986, 808 F.2d 204, United States Court of Appeals, Second Circuit. at 207.

consuming job and spent huge sums on the collection of information relating to municipal redemption bonds. They extracted the information and advertisements relating to the redemption of bonds on a specifically municipal level from various publications, and put them in a special format, since such information was very important to interested individuals. The District Court found the compilation was copyrightable because of the considerable effort and funds expended to extract information from a wide variety of scattered sources.<sup>50</sup> However, on remand, the Second Circuit Court reversed the District Court's decision,<sup>51</sup> afterwards, the District Court found that the compilation was not copyrightable and Judge Carter concluded, "FII's researchers perform a simple clerical task.... [and] there is no room for selection or choices or judgment"<sup>52</sup>, and this was confirmed by the Second Circuit Court .<sup>53</sup>

This thesis insists on an important argument, which constitutes the basis of its proposition, that the 'sweat of the brow' doctrine that is used as a criterion to protect works is refused initially because it measures the efforts exerted in the process of creating the work. It does not measure anything in the work itself, which gets the copyright protection. What should be measured is the subject matter of the protection, not the efforts expended in the process of collecting and gathering. So, we can conclude that the 'sweat of the brow' doctrine ignores the qualities and traits of the work itself.<sup>54</sup>

This argument found its echo in the Second Circuit decision in *FII v. Moody*,<sup>55</sup> which confirmed that "[t]he statute thus requires that copyrightability not be determined by the amount of effort the author expends, but rather by the nature of the final result."<sup>56</sup> [Underlining added] Besides, it confirms that relying on the 'sweat of the brow doctrine' will put vast amounts of facts and research material outside the public domain. "To grant copyright protection based merely on the 'sweat of the author's brow' would risk putting large areas of factual research material off limits and threaten the public's unrestrained access to information,"<sup>57</sup> as, "copyright law should protect only the expression of facts, not the facts themselves".<sup>58</sup> [Underlining added]

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<sup>50</sup> *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 1983, 599 F.Supp. 994 United States District Court, S.D. New York..

<sup>51</sup> *Financial Information, Inc. v. Moody's Investors Service*, 1984, 751 F.2d 501, United States Court of Appeals, Second Circuit.

<sup>52</sup> *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 808 F.2d 204, *supra* note 49.

<sup>53</sup> *Ibid.* at 207.

<sup>54</sup> For further discussion see Chapter 6 at 6.6.

<sup>55</sup> *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 808 F.2d 204, *supra* note 49.

<sup>56</sup> *Ibid.* at 207.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

### 3.4 Selection and Arrangement Criterion:

The thesis argues that ‘selection and arrangement’ is the criterion to which courts have resorted to escape from the ‘sweat of the brow’ doctrine. According to this criterion courts required that compilations of facts show original or creative selection or arrangement, in an attempt to attach personality to the bare facts and to justify the application of authorship and originality concepts to these devoid of authorship compilations. Although the *Feist v. Rural* case is the most known case in establishing the selection and arrangement criterion in compilations of facts in the US case law, this interpretation was existent a century before. As in 1896 the court of *Simms v. Stanton*<sup>59</sup> case quoted with advocacy Drone’s argument that subsequent compiler can take common material in previous works and arrange them differently, as copyright protects only the arrangement not the underline common material.<sup>60</sup>

Also in the 20<sup>th</sup> century before the *Feist* case the selection and arrangement criterion was applied several times,<sup>61</sup> for instance, in the *Eckes v. Card Prices*<sup>62</sup> case the Second Circuit stated that the sweat of the brow of the compiler cannot confer copyright protection unless there is ‘wholesale appropriation’.<sup>63</sup> The court thought that the subjective selection and arrangement of facts is the criterion that should be used, and it cited Nimmer: “‘originality involved in the selection and/or arrangement of such facts’ protected literary work”.<sup>64</sup> [Italic in original, Underlining added]

Although Judge Feinberg of *Eckes v. Card Prices*<sup>65</sup> raised the level of copyright criteria, even the Court in *FII v. Moody*<sup>66</sup> recognised his decision as a “reluctance to grant copyright protection to works of non-fiction”.<sup>67</sup> Judge Feinberg conferred copyright

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<sup>59</sup> *Simms V. Stanton*, 1896, 75 F.6, C.C.N.D. Cal.

<sup>60</sup> As Drone stated that “There is no recognized principle which will prevent a subsequent compiler from copying common materials from an existing compilation, and arranging and combining them in a new form, or using them for a different purpose. It is true that in this case he avails himself to some extent of the labor and research of his predecessor, instead of obtaining the material from the original sources. But the first compiler has no exclusive property in that of which he is not the author, and which may be used by any one. His copyright protects only his own arrangement of the materials which he has selected.” See, Eaton Sylvester Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States: Embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions* (Little, Brown, 1879). p. 424 quoted in *Simms V. Stanton*, 75 F.6, *supra* note 59, at 13

<sup>61</sup> ‘Selection and arrangement’ was mentioned first in art 2(3) of the Berne convention (Brussels Act 1948) which became art 2(5) according to the Stockholm and Paris Acts.

<sup>62</sup> *W. Eckes V. Card Prices Update*, 1984, 736 F.2d 859, United States Court of Appeals, Second Circuit.

<sup>63</sup> *Ibid.* at 862

<sup>64</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (M. Bender, 1990). Cited in *W. Eckes V. Card Prices Update*, 736 F.2d 859, *supra* note 62.

<sup>65</sup> *W. Eckes V. Card Prices Update*, 736 F.2d 859, *supra* note 62.

<sup>66</sup> *Financial Information, Inc. V. Moody's Investors Service, Inc.*, 808 F.2d 204, *supra* note 49.

<sup>67</sup> *Ibid.* at 207.

protection to Eckes' guide depending on the selection, creativity, and Judgment he found in the choosing of 5,000 premium baseball cards among the total number of 18,000 cards.<sup>68</sup> As he stated "[we] have no doubt that appellants exercised selection, creativity and judgment in choosing among the 18,000 or so different baseball cards in order to determine which were the 5,000 premium cards."<sup>69</sup> In an exaggerated manner, Judge Feinberg <sup>70</sup> described the selection and arrangement done by the claimant as creative acts that deserve copyright protection, as it confirmed that "[a]lthough copyright law and compilations are uneasy bedfellows, subjective selection and arrangement of information can merit protection, and in view of the selection, creativity and judgment exercised by copyright holders ... [their acts] merited protection under the copyright laws."<sup>71</sup> [Underlining added]

Although 'selection and arrangement' was used after the Copyright Act 1976 as an interpretation of originality –stated in the act-, the inner intention of judges stayed the protection of industry and labour. For instance in West Publishing Company v. Mead Data <sup>72</sup> the Eight Circuit found that the arrangement done by West of the 'Appeal Courts decisions' within each volume is original due to there is considerable labor, talent, and judgment expended in the arrangement. Although the expressions 'talent', 'judgment', 'arrangement' used, the arrangement was in a numerical order, which does not reflect any intellectual effort. Haungs commented on this case that: "if an obvious arrangement in numerical order is a sufficient criterion of originality for copyright protection, then virtually any arrangement of factual material will satisfy the requirement of originality. The result is the same as if labor alone were the decisive factor."<sup>73</sup> [Italic in original, Underlining added] What confirms this conclusion is that the Eighth Circuit justified its decisions by arguing that the access of Lexis users to the West's data will give them "a large part of what West has spent so much labor and industry in compiling, and would *pro tanto* reduce any one's need to buy west's books"<sup>74</sup>

### 3.4.1 The *Feist v. Rural* Decision:

As long as this thesis is concerned with authorship and its correlated principle of originality then the *Feist v. Rural*<sup>75</sup> decision needs a specific focus as "[t]he most significant development in the US copyright case law concerning the originality

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<sup>68</sup> *W. Eckes V. Card Prices Update*, 736 F.2d 859, *supra* note 62, at 863.

<sup>69</sup> *Ibid.* at 863.

<sup>70</sup> *Ibid.*

<sup>71</sup> *W. Eckes V. Card Prices Update*, 736 F.2d 859, *supra* note 62, at 859.

<sup>72</sup> *West Publishing Company V. Mead Data Central, Inc.*, 1986, 799 F.2d 1219, United States Court of Appeals, Eighth Circuit

<sup>73</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', *Columbia Journal of Law & Social Problems*, 23 (1989). p. 353

<sup>74</sup> *West Publishing Company V. Mead Data Central, Inc.*, 799 F.2d 1219, *supra* note 72.

<sup>75</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

standard is unquestionably the U.S. Supreme Court decision, *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>76</sup>

The discussion of this decision aims to analyse the most renowned attempt in modern copyright law to resurrect authorship theories of individualism and personality. In this case, it is evident that Mrs Justice O'Connor believed in personality theory as the real justification for copyright law protection and property, as she wanted to reflect them on authorship through the interpretation conferred to the originality criteria. However, the application of her thoughts on compilation works has led to a vacillating decision whose conception is different from its implementation.

### **Why the *Feist* case is important case law in the requirement of originality?**

The importance the *Feist* case lies in the timing of the decision, as the Court's insistence on applying the originality requirement in its strict meaning<sup>77</sup> and refuting the long established doctrine of the 'sweat of the brow', was an unpredicted decision if compared to the contemporary judiciary and jurisprudence. The significance of this case does not lie in its requirement for 'originality', as that was stated in the Copyright Act of 1976, but the surprising claim this Court made is its contention that originality was required by the US Constitution also, and that the Constitution meant that originality referred to creativity, although the Constitution included no reference to this condition. This argument relied upon the analysis of the specific terms used by the Constitution and that opened the door for theoretical discussion on the significance of the principles and theories behind terms used in legislation, which this thesis also supports.

Although the US Copyright Act of 1976<sup>78</sup> had already stipulated originality in §.102 in all 'works of authorship', and again confirmed the requisite of originality regarding compilations in §.103, the Courts continued<sup>79</sup> to grant copyright protection to compilations and factual works depending on the 'sweat of the brow' doctrine. This attitude was driven by the belief that originality is conferred to a work when there are extensive efforts expended in its creation. What supported this belief under the 1976 Copyright Act is the legislative history of §.102 (a) of the Copyright Act, which stated: "[t]he phrase 'original works of authorship,' which is purposely left undefined, is

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<sup>76</sup> P. Samuelson, 'The Originality Standard for Literary Works under Us Copyright Law', *American Journal of Comparative Law Supp.*, 42 (1994). p. 394

<sup>77</sup> As we argued before and will later elaborate, originality has many meanings, ranging from low interpretations (like, sweat of the brow, or originating from the author) to high or strict interpretations (like, creativity) and that latter interpretation which was adopted by the *Feist* Court, although it emptied it of content, as will be shown later.

<sup>78</sup> 'Copyright Act of the United States', *supra* note 22, of 1976.

<sup>79</sup> As explained under title 2.3.1.

intended to incorporate without change the standard of originality established by the courts under the present copyright statute”.<sup>80</sup> Reytblat stated that “such a uniform standard [originality] did not exist. Instead, originality jurisprudence was splintered, with "originality" often representing two distinct concepts.”<sup>81</sup>

The District Court of *Rural v. Feist*<sup>82</sup> confirmed this fact: “[t]he issue of whether telephone directories are copyrightable is well-settled. Courts have consistently held that telephone directories are copyrightable.”<sup>83</sup> The District Court mentioned several decisions confirming this meaning, both before and after the Copyright Act 1976, such as, *Hutchinson Telephone Co. v. Fronteer Directory Co.*(1985, Eighth Circuit)<sup>84</sup>, *Southern Bell Telephone v. Associated Telephone Directory* (1985, Eleventh Circuit)<sup>85</sup>, and *Leon v. Pacific Telephone* (1937)<sup>86</sup>. Although the Tenth Circuit of Appeal has confirmed this decision,<sup>87</sup>the Supreme Court has made an unpredicted step and reversed the District and Appeal Courts’ decisions.<sup>88</sup>

The Supreme Court did not even look at, or investigate, how much effort or funds were expended in the creation process, like other previous courts, as the real belief of the Supreme Court was that it was the author’s ‘original creation’,<sup>89</sup> not his manual labour, which ought to be protected. It confirmed, “the primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts”.<sup>90</sup> That is why the Court ruled that a modicum of creative expression must be shown, even if there were a great deal of labour exerted in the making of the work.<sup>91</sup> Although the principle of ‘sweat of the brow’ was widely accepted, the *Feist’s* Supreme Court abolished it and used ‘creativity’ as an alternative criterion that should be adopted. The Supreme Court confirmed that effort is no longer a good criterion for deciding copyright protection,<sup>92</sup> and adopted ‘the selection and arrangement of the factual material’ if it

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<sup>80</sup> House of Representatives, 'House Report No. 94-1476', *supra* note 39, at 51.

<sup>81</sup> Julia Reytblat, 'Is Originality in Copyright Law a Question of Law or a Question of Fact: The Fact Solution', *Cardozo Arts & Ent. LJ*, 17 (1999). p. 183.

<sup>82</sup> *Rural Telephone Service Co., Inc. V. Feist Publications, Inc.*, 1987, 663 F.Supp. 214, United States District Court, D. Kansas, *ibid*.

<sup>83</sup> *Ibid.* at 218.

<sup>84</sup> *Hutchinson Telephone Co. V. Fronteer Directory Co. Of Minnesota, Inc.*, 770 F.2d 128, *supra* note 23, at 132.

<sup>85</sup> *Southern Bell Telephone and Telegraph Company V. Associated Telephone Directory Publishers; C.A.*, 1985, 756 F.2d 801, United States Court of Appeals, Eleventh Circuit..

<sup>86</sup> *Leon V. Pacific Tel. & Tel. Co.*, 91 F.2d 484, *supra* note 35.

<sup>87</sup> *Rural Telephone Service Co., Inc. V. Feist Publications, Inc.*, 1990, 916 F.2d 718 United States Court of Appeals, Tenth Circuit. It confirmed the decision without opinion.

<sup>88</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

<sup>89</sup> Here, the Court intends to mean creative input or creation.

<sup>90</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 349.

<sup>91</sup> *Ibid.*1, at 341/ 1286.

<sup>92</sup> *Ibid.* at 364.

were creative<sup>93</sup> as the criteria to be used to fulfil the originality condition in compilation works.

The *Feist's* Supreme Court concluded that the real intention of copyright law and the US Constitution was to refuse protection to works depending on the 'sweat of the brow' doctrine.<sup>94</sup> The Supreme Court confirmed that the US Copyright Act's<sup>95</sup> definition of compilation<sup>96</sup> required selection and arrangement and thus confirmed that this is an affirmation that the law required originality in the meaning of creative input and not just the 'sweat of the brow'.<sup>97</sup> In addition, the court investigated the protection of facts in the US Copyright Act, and found that neither the Copyright Act nor its legislative history confer any protection to facts *per se*.<sup>98</sup> The *Feist* court cited Nimmer's opinion in rejecting the dependence on the 'sweat of the brow' interpretation: "[a] copyright in a directory, however, is properly viewed as resting on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information."<sup>99</sup>

The *Feist's* Court also referred to 'census data' as an illustration that the efforts exerted in the collection process of data do not qualify for copyright protection due to the lack of creativity.<sup>100</sup> Accordingly, despite the huge efforts and extensive expenditure of funds required for the collection and arrangement process of census data, it does not fulfil the originality requirement.<sup>101</sup>

The *Feist's* Judge, Mrs Justice O'Connor, confirmed blatantly for the first time in US copyright case law that the Constitution is the source of mandating originality on all works in order to be copyrighted, as she confirmed, "[a]rticle 1, § 8, cl. 8, of the Constitution mandates originality as a prerequisite for copyright protection."<sup>102</sup> [Underlining added] In another place, she stated: "Originality, for copyright purposes, is

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<sup>93</sup> *Ibid.* at 360.

<sup>94</sup> *Ibid.* at 348.

<sup>95</sup> 'Copyright Act of the United States', *supra* note 22, of 1976.

<sup>96</sup> Which is "a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works." See, §. 101 of the US copyright act 1976.

<sup>97</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 1294.

<sup>98</sup> *Ibid.*

<sup>99</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, *supra* note 64, at §.3.04. cited in *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2 at 360.

<sup>100</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 347.

<sup>101</sup> *Ibid.* at 347.

<sup>102</sup> *Ibid.* at 340/1285.

constitutionally mandated for all works.”<sup>103</sup> [Underlining added] However, she relied on precedent cases to support this argument, as shown below.

The Feist Supreme Court confirmed that most courts that conferred copyright protection to white pages were relying on the ‘sweat of the brow’ doctrine, not on originality, and cited Leon v. Pacific Telephone<sup>104</sup> and Jeweler v. Keystone.<sup>105</sup> For instance, it was decided in the last case that “[t]he right to copyright a book ... does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection.”<sup>106</sup> So the ‘industrious collection’ not originality, creativity or any mental effort, was the criterion for conferring copyright protection according to the Second and Ninth Circuit Courts.

The Supreme Court clarified that such a conclusion is based on the previous interpretations of the constitutional clause in Art. 1 §.8, at Trade-Mark cases v. Steffens<sup>107</sup> and Burrow-Giles v. Sarony.<sup>108</sup> As the Supreme Court confirmed; “[t]he originality requirement articulated in The Trade-Mark cases and Burrow-Giles remains the touchstone of copyright protection today.”<sup>109</sup> [Underlining added] Regarding the requirement of originality, in general, the Court of Trade-Mark Cases confirmed that originality was required for the conferring of copyright protection, as it stated, “If we should endeavour to classify it under the heading of writings of authors,... originality is required”.<sup>110</sup> Likewise, the Burrow-Giles Case was used by the Feist Court to justify that the originality requirement comes from an interpretation of the US Constitution, not that only, but also that the originality of the intellectual conceptions is the stake and not manual labour. In Burrow-Giles, although there was a debate around the copyrightability of photographs under the US Constitution and the Statutes of 1790 and 1802, the Court affirmed their protection. In doing so, the Court referred to originality as a pre-condition for the protection of any work, including photographs, as it stated, “[w]e entertain no doubt that the Constitution is broad enough to cover an act authorizing

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<sup>103</sup> *Ibid.*

<sup>104</sup> Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484, *supra* note 35.

<sup>105</sup> Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 F. 83, *supra* note 35.

<sup>106</sup> *Ibid.* at 88.

<sup>107</sup> Trade-Mark Cases v. Steffens, 1879, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, Supreme Court of the United States.

<sup>108</sup> Burrow-Giles Lithographic Co. v. Sarony, 1884, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, Supreme Court of the United States.

<sup>109</sup> Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 347.

<sup>110</sup> Trade-Mark Cases v. Steffens, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, *supra* note 107, at 94.

copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.<sup>111</sup> [Underlining added]

In addition, Judge O'Connor confirmed that the Constitution requires creativity as well, as, she argued: "[t]he Constitution mandates some minimal degree of creativity."<sup>112</sup> In confirming this, the *Feist* Court cited The *Trade-Mark Cases* case, wherein it was mentioned, "... originality is required. While the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor."<sup>113</sup> [Underlining added] Here, the *Trade-Mark Cases* Court was explicit in concentrating on 'intellectual labor'<sup>114</sup> and differentiating between mental and manual efforts, and confirming that the first is that copyright law meant, and that which this thesis argues also.

The same argument was confirmed by the Supreme Court in *Goldstein v. California*,<sup>115</sup> wording it as follows: "although the word 'writings' might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."<sup>116</sup> [Underlining added]

The *Feist* Court relied also on the opinions of scholars in justifying this argument, as it cited Patterson's statement: "[t]he originality requirement is constitutionally mandated for all works."<sup>117</sup> Nimmer also stated: "originality is a statutory as well as a constitutional requirement",<sup>118</sup> and confirmed that, "a modicum of intellectual labor ... clearly constitutes an essential constitutional element".<sup>119</sup>

### **The *Feist* case's role in reviving personal authorship:**

The general principles acknowledged in this case are considered to be a revival of the individualism and personality approach to the authorship doctrine and in deciding copyrightability, and the superiority of the author.

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<sup>111</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 108, at 58.

<sup>112</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 341/ 1286.

<sup>113</sup> *Trade-Mark Cases v. Steffens*, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, *supra* note 107, at 93, 94.

<sup>114</sup> *Ibid.* at 94.

<sup>115</sup> *Goldstein v. California*, 1973, 412 U.S. 546, 93 S.Ct. 2303, Supreme Court of the United States

<sup>116</sup> *Ibid.* at 561.

<sup>117</sup> L. Ray Patterson and Craig Joyce, 'Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations', *UCLA Law Review*, 36 (1988). p. 763, fn. 155.

<sup>118</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, *supra* note 64.

<sup>119</sup> *Ibid.*

On the implementation of the Feist Court's decision on compilations, it is evident that the Supreme Court is seeking to protect just the creative ways of making compilations while excluding any evaluation of the labour or effort expended in the creation process: "copyright rewards originality, not effort"<sup>120</sup> [Underlining added], likewise it stated: "[t]he Constitution mandates some minimal degree of creativity."<sup>121</sup>

There is also a US Court of Appeals, Seventh Circuit case, Baltimore v. Major League Baseball<sup>122</sup> in 1986 before the Feist<sup>123</sup> Case, wherein the Court argued that creativity is the requirement for copyrightability, as it stated: "[i]n order for work to meet the requirement of originality in order to be copyrightable, work must possess independent origin and minimal amount of creativity;"<sup>124</sup> [Underlining added]

The Feist Court, in sweeping words, has announced that any plaintiff should show "intellectual production, of thought and conception".<sup>125</sup> [Underlining added] Accordingly, manual effort alone is not enough to prove the existence of originality.<sup>126</sup> The Trade-Marks Cases Court<sup>127</sup> referred to by the Feist Supreme Court confirmed the same meaning.<sup>128</sup> These announcements by the Feist and Trade-Marks Courts that stress the protection of intellectual thought and the creative power of the mind of the author is supportive to this thesis's call for dominating personality approaches and individualism in authorship. This is especially so under the Feist Court's assertion that the utility of the work should be overlooked as a criterion, as O'Connor confirmed "Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original."<sup>129</sup>

Tarolli reflected on the Feist case: "the court clearly endorsed conditioning copyright protection on the presence of subjective input by the author and explicitly rejected the notion that copyright law rewards the industriousness of authors. Its holding endorsed a unitary, high authorship interpretation of the scope of copyright."<sup>130</sup>

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<sup>120</sup> Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, p.341.

<sup>121</sup> *Ibid.* at 341/ 1286.

<sup>122</sup> Baltimore Orioles, Inc., Et Al., v. Major League Baseball Players, 1986, 805 F.2d 663, United States Court of Appeals, Seventh Circuit.

<sup>123</sup> Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

<sup>124</sup> Baltimore Orioles, Inc., Et Al., v. Major League Baseball Players, 805 F.2d 663, *supra* note 122, at 663.

<sup>125</sup> Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 347.

<sup>126</sup> *Ibid.* at 364.

<sup>127</sup> Trade-Mark Cases v. Steffens, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, *supra* note 107.

<sup>128</sup> *Ibid.* at 93, 94.

<sup>129</sup> Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 363.

<sup>130</sup> Stephen P. Tarolli, 'Comment, the Future of Information Commerce under Contemporary Contract and Copyright Principles', American University Law Review, 1639 (1997).. p. 1651.

### 3.4.2 Criticism of the *Feist* Decision

There are three main criticisms of the policy adopted by the *Feist* Court. All are related to the employing of the 'selection and arrangement' criterion by this court. First, the industrious nature of these works make the variation of the selection and arrangement of these works impossible, as the adopted way to organize facts in a specific discipline cannot vary infinitely. So this will create some kind of monopoly for the first to adopt a beneficial and distinctive kind of organization, and if there is only some difference it cannot be creative, and this will maintain the doctrine of 'pretexts', as described by Ginsburg.<sup>131</sup>

Second, the usefulness of these works depends on the stabilization of the organization and arrangement used, in order to encourage users to utilise such works, regardless of the maker, so, again, the fear of monopoly is still existent. Thirdly, the selection requirement is criticized as it stipulates that works should not be comprehensive of all the related information to be protected by copyright law, although users might prefer comprehensive works, especially if the matter is related to all of the facts or data that are related to a specific category of interest. As the user will be deprived always of these types of works, and compilers have to intentionally overlook some sectors or fields to fulfil the selectivity condition. "This selection may create a difficult problem for suppliers of data, particularly in the form of electronic databases, because their commercial value may depend upon their completeness, even though they may lose copyright protection precisely by being complete."<sup>132</sup>

From another perspective, the constitutionality of the originality requirement has been criticized by Heald, who argued that this might frustrate the goals of the intellectual property clause in the Constitution.<sup>133</sup> He questioned the reliance on the constitutional grounds, though there are "several unconstitutional grounds [that] are readily available."<sup>134</sup> Heald offered several statutory alternatives the Court could have used for denying the infringement of *Rural's* copyright, rather than considering originality as a constitutional requirement. Heald argues that the Court could have relied on the copyright law in requiring originality, and arguing that *Rural's* white pages were not 'original works of authorship'.<sup>135</sup>

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<sup>131</sup> As she argued that the "[p]ersonality-based characterizations of many low authorship informational works seem contrived" see, Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *Columbia Law Review*, 90 (1990)., p. 1869.

<sup>132</sup> Howard B Abrams, 'Originality and Creativity in Copyright Law', *supra* note 4 p. 19

<sup>133</sup> Paul J. Heald, 'The Vices of Originality', *Supreme Court Review*, (1991). p.144.

<sup>134</sup> *Ibid.* p. 146.

<sup>135</sup> *Ibid.* p 146.

The mere problem of relying on the Constitution in requiring originality would result in one of two options - amending the Constitution to include compilations within the copyright law's scope, or ignoring the Feist decision. It is argued that the latter situation is the one that prevailed thereafter; the same fear was expressed by Ginsburg, who argued that Feist developed inconsistency.<sup>136</sup> As the invocation of the Constitution, although it may reduce the debate around the availability and scope of copyright protection regarding original works of authorship, it will enhance uncertainty regarding the authority of congress to codify or enact legislations that limit the protection for these works,<sup>137</sup> for other reasons, e.g., fair dealing.

Hughes also claims that the Feist Court mixed the meanings of originality, creativity and personal expression. As he stated expressly that the three ideas are "so thoroughly alloyed in American case law that there may be no principled way to disentangle them."<sup>138</sup> Gervais found that being used to interpreting originality as meaning that it 'originated from the author' has emptied originality of its core meaning,<sup>139</sup> and he cited the case of Burrow-Giles v. Sarony<sup>140</sup> as an advocate for the necessity to reflect the meaning of originality that is raised over just origination, which is creativity, and this is what this thesis advocates and tries to enhance.

### **The Feist decision has reduced the criterion not raised it:**

Although the Feist Court required originality and creativity, it limited their application to the different 'selection or arrangement' of facts, which is not considered by this thesis to be a sufficient evidence of mental labor.<sup>141</sup> Even the Feist court supported this by arguing that compilations can easily be protected through this criterion - as if the Court wanted to send a message that it did not want to dramatically change the contemporary practice in protecting compilations. Rahmatian confirmed this final result as he argued that Feist is: "a case which abandoned the simple 'sweat of the brow' approach but did otherwise not constitute a paradigm shift in US copyright law."<sup>142</sup>

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<sup>136</sup> Jane C Ginsburg, 'No Sweat Copyright and Other Protection of Works of Information after Feist V. Rural Telephone', *supra* note 41. p. 339.

<sup>137</sup> *Ibid.* 41. p. 339.

<sup>138</sup> Justin Hughes, 'The Personality Interest of Artists and Inventors in Intellectual Property', Cardozo Arts & Entertainment. Law Journal, 16 (1998). p. 89.

<sup>139</sup> Daniel J Gervais, 'Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law', Journal of Copyright Society of the USA, 49 (2002). p. 961.

<sup>140</sup> Burrow-Giles Lithographic Co. V. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 108.

<sup>141</sup> See Chapter 7 at 7.3.

<sup>142</sup> Andreas Rahmatian, 'Originality in Uk Copyright Law: The Old "Skill and Labour" Doctrine under Pressure', IIC-International Review of Intellectual Property and Competition Law, 44/1 (2013). p. 30.

The *Feist* Court confirmed that originality is ‘not a stringent criterion’,<sup>143</sup> and considered that ‘selection and arrangement’ is sufficient to fulfil the conditions of originality and creativity. Although this might have been intended not to frighten the current copyright owners of compilation works, this statement was the substantial reason for the later diminishing of the *Feist* decision’s significance.

It is even maintained that the protection granted by copyright law under the ‘selection and arrangement’ of the *Feist* decision was lowered, not raised. Although the *Feist* Court conceived that its criteria would raise the criteria of protection and “compilations will pass this test, but not all will”,<sup>144</sup> which may imply the raising of copyright criteria, what happened is that the criterion has been lowered. As, despite courts were protecting the efforts exerted in collecting facts, now they are just requiring that these facts be arranged differently, and they should not look to the labour or efforts used in collecting the facts or from where these facts came. It suffices that their shape and arrangement is different from existing compilations, even if the work extracted all its facts from previous works.<sup>145</sup>

### **Sacrificing copyright’s fundamentals:**

The selection and arrangement of the elements in a painting, for instance, is meant to convey a message to the audience, and the selection and arrangement of events and characters in a novel aim to convey a situation or specific thoughts to the readers. ‘Selection and arrangement’, here, is used as a means to manifest thoughts through transferring abstract meaningless symbols to a conceivable body of literature or art so that they have meaning or reflect emotions in the viewer’s and the reader’s mind, and this is argued to be the general rule applied to all literary, artistic, musical and dramatic works.

Unfortunately, this philosophy was changed for the sake of protecting the investment of producers of compilations of facts, to mean that the selection of any facts and arranging them in a way not similar to a previous one fulfils the originality condition, regardless of why this specific selection or arrangement was chosen and at what it aims regarding the subject matter of the work, which is the facts. This is why this thesis believes that the ‘selection and arrangement’ criteria adopted by *Eckes v. Card*

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<sup>143</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 362.

<sup>144</sup> *Ibid.* at 358.

<sup>145</sup> Further explanation can be found in Chapter 4 at 4.2.1.

*Prices*<sup>146</sup> and afterwards by *Feist v. Rural*,<sup>147</sup> is a kind of compromise of creativity and originality, which is believed to be the basis of copyright law protection.

The actual criteria that are meant behind stipulating the ‘original selection and arrangement’ in factual works is actually the ‘novel’ selection and arrangement. This is because it looks to whether they have been arranged in a new form that has not been repeated from a previous work to fulfil the originality criteria. Though originality has no determined meaning, at least ‘novelty’ is the first meaning to be excluded from the suggested interpretations of originality.

### **How the ‘selection and arrangement’ in *Feist* led to confusion:**

When the *Feist* Supreme Court tried to apply this ‘high’ interpretation of originality –a minimal degree of creativity- to compilation works, it seems that this did not fit the contents of the work – facts and information - so the Court thought it sufficient to apply them on the selection and arrangement of these facts. This is apparent from its statement: “[o]riginality requirement for compilations of Facts ... requires only that the author make selection and arrangement independently and display some minimal level of creativity”.<sup>148</sup> And the statement: “originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way.”<sup>149</sup> And also when it cited Nimmer’s argument: “[t]o 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.”<sup>150</sup>

It is argued that applying a high and personal criterion on the ‘format of works’ or the ‘external shape not contents’ has led to arbitrary judgments about which formats are creative. Alphabetical order was the first victim of this new system, as the Supreme Court declared its refusal of the alphabetical order followed in such works, and opposed considering it an original work. It explained: “copyright rewards originality, not effort... and holding that telephone database arranged alphabetically is not sufficiently original to qualify for copyright protection.”<sup>151</sup> The reason it set for this was that “[i]t is an age-old practice, firmly rooted in tradition and so commonplace that it has come to

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<sup>146</sup> *W. Eckes V. Card Prices Update*, 736 F.2d 859, *supra* note 62.

<sup>147</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

<sup>148</sup> *Ibid.* at 340

<sup>149</sup> *Ibid.* at 362.

<sup>150</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, *supra* note 64. §1.08 [c] [1] cited in *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 345.

<sup>151</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

be expected as a matter of course.”<sup>152</sup> Heald confirmed that this argument makes many publications of white pages, both prior to and after this decision, not copyrightable, as most follow this mode of arrangement, unless a constitutional amendment be made, to exclude them from this condition.<sup>153</sup>

Although the same criterion, namely ‘selection and arrangement’, has been required in the UK through the implementation of the EC directive on databases,<sup>154</sup> which included this criterion regarding databases, we find a different interpretation, by Laddie *et al.* of the Directive, as they found that alphabetical order can be original under ‘selection and arrangement’, as explained above.<sup>155</sup>

The vagueness of the originality of such selection and arrangement appeared in the *ProCD* case,<sup>156</sup> as the court adopted the *Feist*<sup>157</sup> requirement for ‘personal authorship’ in order to confer copyright protection to authorial works, and excluded works of information, such as *ProCD*’s database, from copyright protection, although Judge Easterbrook confirmed that “it [the database] is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in *Feist Publications, Inc. v. Rural Telephone Service Co.*”<sup>158</sup> This confusion confirms this research’s argument that factual works cannot cope with any requirements for intellectual work or mental and personal authorship, because their nature is totally different, and they should be governed by a different system.

### 3.5 The thesis’s reflection on *Walter v. Lane*:

Although it was occasionally argued that *Walter v. Lane*<sup>159</sup> case is a ‘good law’<sup>160</sup> for the originality and authorship topics, this thesis argues that this case has caused

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<sup>152</sup> *Ibid.* at 361.

<sup>153</sup> Paul J. Heald, ‘The Vices of Originality’, *supra* note 133, p. 144.

<sup>154</sup> ‘Directive of the European Parliament and of the Council on the Legal Protection of Databases’, 96/9/EC (EU, 1996)..

<sup>155</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, 2 vols. (Fourth edn., 1: LexisNexis, 2011). at 32.22 . See more in Chapter 1 at 1.2 and a detailed discussion of the selection and arrangement criterion in Chapter 7 at 7.4.

<sup>156</sup> *Procd, Incorporated V. Matthew Zeidenberg and Silken Mountain Web Services, Inc.*, 1996, 86 F.3d 1447, United States Court of Appeals, Seventh Circuit..

<sup>157</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

<sup>158</sup> *Procd, Incorporated V. Matthew Zeidenberg and Silken Mountain Web Services, Inc.*, 86 F.3d 1447, *supra* note 156, at 1449.

<sup>159</sup> *Walter V. Lane*, 1900, A.C. 539, House of Lords

<sup>160</sup> Laddie *et el.* confirmed that it is “highly probable [that] *Walter v. Lane* is still good law”, see, Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 155, Para. 3.52, and this was cited in *Lionel Sawkins V. Hyperion Records Ltd.*, 2005, EWHC 1530 (Ch); E.C.D.R. 10; R.P.C. 32 High Court of Justice (Chancery Division), at 3298; and it was argued to be “undeniably good law” by *Express Newspapers Plc. V. News*, 1990, 1.W.L.R.1320, FSR 359, Chancery Division at 1326

distortion to copyright law doctrine and principles in the UK, and even caused confusion on the meaning of terms like ‘author’ or ‘authorship’, and, surprisingly, after the enactment of the originality requirement, courts referred to Walter v. Lane to prove the low level of composition copyright can protect.<sup>161</sup> This spurred the author of this research to analyse this case and challenge the arguments of the Lords therein. It was found that Lords’ arguments are questionable, except of one lord, and that originality is inherent to personality and mental authorship.

The discussion of this case after the discussion of Feist v. Rural has two aims, first, to show how both cases got a renowned influence on the judiciary and jurisprudence of the UK and US, but with investigating judges’ arguments they appear questionable. Secondly, to show that the influence of non-authorship works on the interpretation of originality appears even if the court believes in high standard of originality, as Feist case, or do not believe in it, as Walter v. Lane. Which ultimately supports this thesis’s call for the need for separating them under different system, thus they can be protected but do not affect the interpretation of copyright law concepts.

In this case, reporters at *The Times* Newspaper had written down in shorthand the speeches of the Earl of Rosebery which were delivered to a public audience between 1896 and 1898, and revised and punctuated it to be prepared for publication as a verbatim delivery of Lord Rosebery, as the Court confirmed, “the reports were published in *The Times*, the speeches being given verbatim as delivered by Lord Rosebery.”<sup>162</sup> [Underlining added] Those reports, according to the contract between reporters and *The Times* Newspaper, are considered the newspaper’s property. In 1899, the respondent published a book entitled ‘*Appreciations and Addresses: Lord Rosebery*’, and it included reports from *The Times* of the mentioned Lord, and it was admitted that these reports were taken substantially verbatim from *The Times* reports.<sup>163</sup>

To clarify the subject of this case, two points should be clarified in the beginning. Firstly, it may be thought that the report copied by the defendant included a verbatim report of the speech and the notes or comments of the reporter, but Lord Robertson confirms “those notes are not taken from *The Times*. All that is taken from *The Times* consists of the words spoken by Lord Rosebery, without addition or subtraction.”<sup>164</sup> Secondly, it may be thought that such a job that would consist of quickly writing down

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<sup>161</sup> As Walter v. Lane was relied upon in cases like Lionel Sawkins V. Hyperion Records Ltd., EWHC 1530 (Ch); E.C.D.R. 10; R.P.C. 32 *supra* note 160, and Express Newspapers Plc. V. News, 1.W.L.R.1320, FSR 359, *supra* note 160.

<sup>162</sup> Walter V. Lane, A.C. 539, *supra* note 159, at 539.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

the speech of the speaker which at that time was a difficult job and was appreciated since sound recorders were not yet invented. Had they then been available, they perhaps would not have given protection to those who write down speeches, as it can be done by machines without any effort or skill. However, the defendant confirmed the existence of recording machines at this age, when he asked “[i]f the verbatim reporter is the author, who is the author when a speech is spoken into a phonograph, reproduced out of it and printed? Is the phonograph itself the author, or is the inventor of the phonograph? And who is entitled to the copyright? Which is the more meritorious, the more worthy of protection—the fallible man, or the unerring machine?”<sup>165</sup> [Underlining added] Which the thesis finds as good questions, however, not one of the Lords has challenged such an argument, except -briefly- Lord Robertson. What the House of Lords wanted to prove in this case is that verbatim reporters are authors.

This case is not the first to acknowledge that imitation or repeating the same work might be an original work of authorship, as in the Graves case, Judge Blackburn held that photographs of pictures are original works, “[a]ll photographs are copies of some object, such as a painting or a Statute. And it seems to me that a photograph taken from a picture is an original photograph.”<sup>166</sup> In this case the ‘Queen's Bench Division’ Court considered a photograph of an antecedent picture or engraving an original work, although the Fine Art Copyright Act 1862<sup>167</sup> required originality for the work to be copyrighted, and Judge Blackburn argued “[i]t has been argued that the word “original” is to be taken as applying to the word photograph. The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph.”<sup>168</sup> This argument shed light on how originality is so vague concept and that returns to the separation happened between originality and its historical development and theoretical origin which is authorship. Judges will not be able to reach a proper interpretation of such an abstract word without including the associated concepts. That is why this research is focusing on retrieving the relation between authorship and originality, and this includes challenging cases that enforced this separation like Walter v. Lane which strangely considered a good law in originality concept.

The House of Lords in Walter v. lane case considered verbatim reporters as authors and justified this with claims that their work requires effort, and special skills. As Lord Davey stated, “[t]he materials for his composition were his notes, which were his own

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<sup>165</sup> *Ibid.* at 543-544.

<sup>166</sup> *Graves' Case*, 1869, L.R. 4 Q.B. 715, Queen's Bench Division at 723.

<sup>167</sup> 'Fine Arts Copyright Act', 25 & 26 *Vict.*, c.68 (Britain, 1862)..

<sup>168</sup> *Graves' Case*, L.R. 4 Q.B. 715, *supra* note 166, at 723.

property, aided to some extent by his memory and trained judgment.”<sup>169</sup> Lord Earl of Halsbury L.C. added another justification, which is that the work of reporters should be valued due to their reserving culture and information for future generations “[reporters] preserve the memory of spoken words, which are assumed to be of value to the public.”<sup>170</sup>

Although the Lords, in Walter v. Lane,<sup>171</sup> confirmed that the person who writes from dictation cannot be an author, but a “mere agent or clerk of the person dictating, and requires to possess no art beyond that of knowing how to write,”<sup>172</sup> this thesis finds that the same efforts claimed to be exerted by the verbatim reporter and the circumstance to which he is exposed can be witnessed by the person to whom words are dictated. Lord James of Hereford set an argument is seen by this thesis to be improper, as he finds that the reporter is different because he does his job in difficult circumstances, or he may has advantageous conditions that only available to him, as he argued “[t]o follow so as to take down the words of an ordinary speaker, and certainly of a rapid speaker, is an art requiring considerable training, and does not come within the knowledge of ordinary persons.”<sup>173</sup> Also he assumed a situation of “if a reporter attended a meeting of Anarchists intended to be secret and made their speeches public, or if in former times a man had secreted himself in one of the Houses of Parliament and taken down the words of different speakers, may it not be contended that the reporter was doing something more than merely transcribing?”<sup>174</sup> However, with the recognition of the circumstances that reporter may do his job in, this is out of the subject matter of copyright law that cares about the work itself not the circumstances surrounded its making.

The difficult or advantageous circumstances reporters may experience can be passed through by any other workers or craftsmen, but the question of copyright is about authorship and creation, not about the hazards experienced within the process of recording of somebody else’s words. That is why the writer of this research poses the question, what if the person who is dictating somebody else was very quick, or talking

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<sup>169</sup> Walter V. Lane, A.C. 539, *supra* note 159, at 551

<sup>170</sup> *Ibid.* at 549

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.* at 554

<sup>173</sup> *Ibid.* at 354

<sup>174</sup> *Ibid.* at 555 Lord James of Hereford in other place argued “[s]upposing a speech were delivered in a language little used, such as Persian or Turkish, only a reporter acquainted with such a language would be able to report it. Does the work resulting from such special knowledge mean nothing? The proprietor of a journal may have paid highly for obtaining a special report of this almost unreportable speech. May he not make a claim for protection against a rival journalist who seeks to make equal use of the report thus obtained?” [Underlining added] *ibid.* at 555 see also Lord Brampton who confirmed that making creation of such verbatim reports “It is obvious that the preparation of them involved considerable intellectual skill and brain labour beyond the mere mechanical operation of writing.” See, *ibid.* at 556

in a foreign and rare language, or in a busy and noisy place, or if the person dictating does not take care of the logical order of discourse, and the person to whom words are dictated had to exert efforts in editing and revising the speech linguistically and logically, would he considered author. However, this latter argument was refused to be considered in this case, although the subject of the both persons, the reporter and the person who writes from dictation, are the same which is the exact words of somebody else. For instance, Lord Brampton commented briefly “[o]f course, a person who merely writes an article from the dictation and as the servant of another can claim no property in what he so writes, for that writing belongs to his employer; but that is not this case.”<sup>175</sup> He did not explain what that difference is.

Also it can be asked: what if the reporter did not perfectly write what the speaker said, and Lord Rosebery was misunderstood by the public? And suppose that Lord Rosebery will sue *The Times*. What is the title of Lord Rosebery in this case? In addition, if readers wanted to refer to his speech they should refer to whom as the author: Lord Rosebery or the reporter, and, if the latter, which one of the reporters of the many journals that reported him? In addition, what if he had prepared what he was delivering in writing, or what if he were already reading from a written paper, an assumption that was not mentioned in the case. Lord Rosebery has been considered in this case as a source of creation like the nature that works can be appropriated from,<sup>176</sup> like painting of landscape or imitating birds sounds, and, if yes, can the nature claim damages for wrong representation, or is he the real author, in fact?

If it may be argued that Lord Halsbury L.C. has discussed the confusion may happen in this case, which may be considered as a reply to the thesis’s doubts, which is: “some confusion has been created between two very different things. One, the proprietary right of every man in his own literary composition; and the other the copyright,”<sup>177</sup> or that appears in the plaintiff’s argument: “[t]he Court of Appeal confuses authorship of the speech with authorship of the report”<sup>178</sup>. The thesis argues that there is no difference between the work and its fixation, both are one thing. The thoughts if not fixed have no author, and when fixed the material itself is invaluable, but it is the thoughts and expression that are included that get all the rights and exclusivity. The House of Lords had to decide if Lord Rosebery were not author of his speech because – for instance - he did not record it in a tangible form; or that he is an author and the reporters not. But claiming that there are separate authorships in the speech and the

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<sup>175</sup> *Ibid.* at 558.

<sup>176</sup> This presumption is inferred depending on the arguments of Locke as will be explained in Chapter 6 at 6.3.

<sup>177</sup> *Walter V. Lane*, A.C. 539, *supra* note 159, at 547.

<sup>178</sup> *Ibid.* at 541.

tangible form together is inconceivable. Moreover, it should be asked what if both assigned their works to a publisher; will both publish the same work?

Although the topic of Lord Rosebery's authorship is of vital importance to this case, Lord Halsbury<sup>179</sup> argued that discussing whether the speaker owns his speech or not is a question the House of Lords has no concern in.<sup>180</sup> However, this question is an essential one, as, according to it, the copyright for verbatim reports will be decided. Lord Earl of Halsbury justified this because "Lord Rosebery is not here complaining of the publication of it, nor claiming any proprietary right in the speeches as delivered."<sup>181</sup> This means that, in other cases, if the speaker alleges he wants to restrict publication of his words, then he becomes an author and verbatim reporters will not. This thesis claims that this is not a law, because allocating authorship should have specific rules that do not depend on the request of the persons concerned. This angle of discussion supports the research's argument that *Walter v. Lane* is not actually a good law. Ironically, Lord Davey confirmed this argument although this was not applied in his case, "[i]n my opinion the question must be decided on general considerations, and not on any grounds which are personal either to the orator or to the reporter",<sup>182</sup>

On the other hand, this research's argument has been supported in theory and in application by Lord Robertson when he negates any relationship between Lord Rosebery's personal attitude and the decisions that should be related to legal concepts, regardless of individuals' legal attitude: "[t]he fact that the man who speaks in public is not a competitor with the reporter for copyright has not the slightest effect in altering the intellectual relation of the reporter to the words of the speech, nor does it render less inappropriate the result of holding the statute to confer on the stenographer a reward which has no relation whatever to his art."<sup>183</sup> Further discussion of Lord Robertson's argument will be explained in next paragraphs.

This thesis argues that Lord Halsbury is not convinced of the conferral of copyright to authors, instead he sees that producers or publishers should have the copyright, and he repeats again the questions that arose after the Statute of Anne in 1710.<sup>184</sup> This was evident from his explicit hostility against attributing the term 'author' to the creator of the work. "As I have pointed out, the judgment of the Court of Appeal rests solely on the use of the word 'author', and I cannot help thinking that some confusion has been

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<sup>179</sup> Hardinge Stanley Giffard, 1st Earl of Halsbury.

<sup>180</sup> As he argued "[w]hether the speech was delivered so as to give it to all the world and to prevent the original author of it from restricting its publication is a question with which your Lordships have here no concern." See *Walter v. Lane*, A.C. 539, *supra* note 159, at 547.

<sup>181</sup> *Ibid.*159, at 547.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*159.

<sup>184</sup> 'Statute of Anne', 8 Anne, c. 19 (England, 1710).

created between two very different things: one, the proprietary right of every man in his own literary composition; and the other the copyright, that is to say, the exclusive privilege of making copies created by the statute.”<sup>185</sup> Note here he did not talk about authorship. In fact, both the exclusive privilege of making copies and property rights should be attributed to the author, but he avoids this fact. He further prevails his intention to avoid using the word ‘author’, “[t]he question here is solely whether this book (to use the language of the Statute), printed and published and existing as a book for the first time, can be copied by someone else than the producers of it (I avoid the use of the word “author”), by those who have not produced it themselves”<sup>186</sup> [Underlining added]

Lord Halsbury’s concentration on the producer’s right made him equate patent and copyright, as he confirmed that the ‘first’ producer of the work is the proprietor of that copyright, “as I have endeavoured to point out, neither the one nor the other are conditions precedent to the right created by the statute. That right, in my view, is given by the statute to the first producer of a book”.<sup>187</sup> [Underlining added]. It is believed in this research that abolishing the doctrine of the author and authorship is the reason for ending up to this understanding. Such understanding destroys all stabilised principles in copyright law that confirm that nothing is important about the first author or first publisher, which Lord Halsbury himself confirmed afterwards, when he stated “[s]uppose a favourite view—a dozen artists take, each independently, his own representation of it. Is there any reason why each should not have his own copyright?”<sup>188</sup>

Lord Brampton also negated the idea that the author alone has the right to publish his work, as when the Court of Appeal argued that in order for the first publisher to get copyright on the work he has to get an authorisation from the author,<sup>189</sup> Lord Brampton states “I can find nothing in the Act which compels me to assent to this view.”<sup>190</sup> The thesis asks, should this not have been stabilised since 1710?<sup>191</sup> Since it was mentioned in the Statute of Anne that the author, or purchasers thereof, are the only persons who

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<sup>185</sup> *Walter V. Lane*, A.C. 539, *supra* note 159, at 547.

<sup>186</sup> *Ibid.* at 547.

<sup>187</sup> *Ibid.* at 549’

<sup>188</sup> *Ibid.*

<sup>189</sup> What is stated exactly is: “in order that the first publisher of any composition may acquire the copyright in it he must be the author of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript, or in some other way.” See, *Walter V. Lane*, 1899, W. 2282, 2 Ch. 749, Court of Appeal, Chancery Division at 771.

<sup>190</sup> *Walter V. Lane*, A.C. 539, *supra* note 159.

<sup>191</sup> The enactment date of the Statute of Anne.

have the right to print (or publish) the work.<sup>192</sup> And publishers, or any other person, accordingly, should get authorisation from authors in order to print or publish their works.

This preference for producers – by Lords Brampton and the Earl of Halsbury - if linked with the argument of Lord James of Hereford, mentioned above, wherein he stated “[t]he proprietor of a journal may have paid highly for obtaining a special report of this almost unreportable speech. May he not make a claim for protection against a rival journalist who seeks to make equal use of the report thus obtained?”<sup>193</sup> [Underlining added]. If this can prevail, what actually is the secret justification of the decision in *Walter v. Lane*?<sup>194</sup> The House of Lords, in this case, avoided explicitly arguing that this justified protection aims to protect *The Times*' investments and their expenditure of money. This research asserts that if a division were made between works that should be protected for compensating and protecting producers, and other works that are protected for inner features of the work, the current confusion and distortion would be less.

Instead, the House of Lords tried to prove that verbatim reporters are authors - although at the same time Lord Halsbury wanted to exclude the principle of the 'author' from discussions at all - by claiming that the compilers of addresses and importers of inventions are protected and it added to them reporters, which reflects the conflicted views that this case included. This appears in the appellants' argument that even if a 'phonograph' were used to record the sound of the speaker, the reporter would be the author. As Lord Peterson commented, “[t]he appellants think that if the owner of a phonograph publishes the speech as taken down by the phonograph he is the author of the report and entitled to copyright. I should have thought (and think) this a *reductio ad absurdum* of the whole argument of the appellants.”<sup>195</sup> One should take into consideration that this presumption, although argued by the respondent, was not challenged by any other Lords.

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<sup>192</sup> As mentioned in s. 1 of the 'Statute of Anne', *supra* note 184 that: “the author of any book ... shall have the sole right. and liberty of printing such book and books” and it also described that the infringer of that right is called the offender and the work made should be forfeited “and that if any other bookseller, printer, or other person whatsoever ... shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first be had and obtained in writing, ... then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books.”

<sup>193</sup> *Walter v. Lane*, A.C. 539, *supra* note 159, at 555. See also, Lord Brampton who confirmed that in the creation of such verbatim reports “It is obvious that the preparation of them involved considerable intellectual skill and brain labour beyond the mere mechanical operation of writing.” See, *ibid.* at 556.

<sup>194</sup> A statement by Lord Robertson may bear some meaning also, “Nor do I consider it legitimate to justify a novel application of the Copyright Act by treating its most extreme applications as if they represented its normal scope.” See, *ibid.* at 561.

<sup>195</sup> *ibid.*

It is important too to draw attention to Lord Halsbury's argument that "[e]ach reporter is entitled to report, and each undoubtedly would have a copyright in his own published report."<sup>196</sup> He equated their position with that of the artists and photographers who can register the same view but every one of them can get separate copyright protection, and confirms "[t]here is of course no copyright in the view itself, but in the supposed picture or photograph there is."<sup>197</sup> It is believed here that this argument includes a fallacy, as he supposes that the speech is a source of creation, like nature, although it is a finalised version of human creation, wherein Lord Rosebery appropriated ideas and thoughts from the public and arranged them, adding his own thoughts, and using specific words, he chose to express those whole thoughts in order. In fact, what was done was just the copying or reproduction of this process, without interference.

Lord Brampton, in his support of the reporter's authorship, argues that we should look to the book itself, not to where the inside came from: "I should think the merits of the book ought to be determined, having regard to the contents of the book itself, without inquiry as to whether any of the component parts of it emanated from the brain of some person other than the author of the book."<sup>198</sup> [Underlining added]. This evidently ignores that what is inside is not just the ideas of somebody else, but his expression also. This claim would be more accurate if there were just ideas or thoughts that were appropriated in the author's work from another work. However, registering the same thoughts, and detailed ideas in the same arrangement and words, nothing can describe this process but 'copying' or 'dictation'. Otherwise students could claim to be authors of every lecture they transcribe from their teacher, depending only on the fact that they exerted efforts in writing and adding punctuation.

In fact this has been proved to be impossible in several cases before Walter v. Lane, for instance, Lord Chancellor Eldon in Abernethy v. Hutchinson<sup>199</sup> confirmed that "A person who attends oral lectures is not justified in publishing them for profit."<sup>200</sup> He viewed the case from two sides, from the side of property or contract, whether express or implied, and the side of trust. Although Lord Eldon confirmed that the invasion of written work should be decided depending on comparing the composition with the piracy, and the information that was orally delivered. However, "although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they ... could not publish for

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<sup>196</sup> *Ibid.* at 549.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.* at 558.

<sup>199</sup> Abernethy v. Hutchinson, 1825, 1 H. & TW. 28, Court of Chancery

<sup>200</sup> *Ibid.* at 28

profit that which they had not obtained the right of selling”,<sup>201</sup> as this is justified to be breach of trust. From the contract side, although “there was not sufficient to establish an implied contract as between the Plaintiff and the Defendants ... the Defendants shall not publish.”<sup>202</sup>

The debate was raised about whether the pupils are public audience or not and how this affects the case, as in Nicols v. Pitman<sup>203</sup> case it was decided that if the audience were public so there is no protection to the author’s orals presentation. In other case, Greig v. University of Glasgow,<sup>204</sup> it was argued that the class anyway like the public audience because the teacher has no right to select the students who attend his lectures, besides other parties of the public can join the lecture. The most important factor that which the latter case also referred to is that if the students were allowed to publish the lectures of their students the professor would not be able to publish the result of his own work.<sup>205</sup>

In general terms, it was decided in Macklin v. Richardson<sup>206</sup> case that although the author of theatrical farces never printed or published them, “the representation of the farce, in this case, upon the theatre, was no gift to the public, nor entitled the defendants to print and publish it. That it was an invasion of the plaintiff’s right and property, who might chuse whether it should be printed and published or not.”<sup>207</sup>

The thesis strongly agrees with the claim of Mr Abernethy in Abernethy v. Hutchinson<sup>208</sup> that although he may got notes for his oral lectures, but “he had given his lectures, as most lecturers did, orally, and not from a written composition.”<sup>209</sup> Accordingly, “they would and must necessarily vary” from his notes, but the defendants’ publication called ‘*the Lancet*’ “written in as succinct a manner as possible, with a view to exhibit the arrangement he had formed, and the facts which he had collected, together with his opinions relative to certain subjects of surgery ... [which] ... cost him much time and study for a long series of years.”<sup>210</sup> This arrangement is the only expressive factor of the author’s personality and cannot be appropriated without his consent and this which had to be applied in Walter v. Lane.

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<sup>201</sup> *Ibid.* at 40

<sup>202</sup> *Ibid.* at 40

<sup>203</sup> Nicols V. Pitman, 1884, 26 Ch. D. 374, Chancery Division

<sup>204</sup> Greig V. The University of Edinburgh, 1868, L.R. 1 Sc. 348, House of Lords

<sup>205</sup> *Ibid.*

<sup>206</sup> Macklin V. Richardson, 1770, 2 Ambler, 694, Court of Chancery

<sup>207</sup> *Ibid.*

<sup>208</sup> Abernethy V. Hutchinson, 1 H. & TW. 28, *supra* note 199

<sup>209</sup> *Ibid.* 199, at 34

<sup>210</sup> *Ibid.* at 35

### Lord Robertson's Argument:

In the opposite direction to Lords' arguments in this case, one of the Lords participating in *Walter v. Lane*<sup>211</sup> had an opinion that simply reflects this thesis's argument.<sup>212</sup> If there is a 'good law' in *Walter v. Lane*<sup>213</sup> this will be in the argument of Lord Robertson, who agreed with the Court of Appeal in confirming that the verbatim reports which were taken included no "addition or subtraction"<sup>214</sup> as what is copied is the speech, not the reporter's notes. Lord Robertson stressed this nature: "[t]he case before your Lordships is a case of shorthand reporting, pure and simple."<sup>215</sup> [Underlining added].

Lord Robertson's argument is based on the recognition of the 'author' and 'authorship' concepts for "in the widest sense of the term "author," we are in the region of authorship."<sup>216</sup> And not merely their existence in law, but in understanding 'authorship' as a composition or creation; not as a word free from any meaning as Lord Halsbury thought. Lord Halsbury had argued that it was possible to use the word 'author' to describe the person who presents a work to the public, regardless of any features in that person or the work he presents.<sup>217</sup> Lord Robertson's understanding led him to find that there was no trace of composition in those reports: "there is no manner of composition..., even in the sense of arrangement, by a shorthand reporter."<sup>218</sup> The thesis and Lord Robertson understand this absence of authorship to be attributed to the lack of thoughts in this work. This was evident in his statement: "[i]n fact, the merit of the reports now before your Lordships is that they present the speaker's thoughts untingered by the slightest trace or colour of the reporter's mind."<sup>219</sup> [Underlining added.]

Regarding the debate about whether originality is required or not, led by Lord Halsbury,<sup>220</sup> Lord Robertson takes the same direction that this thesis took, that such originality requires a pre-requisite for its application, which is authorship, and the first question should be whether there is authorship or not.<sup>221</sup> This research finds that as long as the term 'author' was enacted and is insisted on by legislators of copyright, at least in the UK and the US, so it is the 'mental creation' that should be searched for in the first place, not the vague expression 'originality'. Lord Robertson adopted this view

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<sup>211</sup> *Walter V. Lane*, A.C. 539, *supra* note 159.

<sup>212</sup> This was not discovered until after this argument was formed.

<sup>213</sup> See this Chapter note 160

<sup>214</sup> *Walter V. Lane*, A.C. 539, *supra* note 159, at 559.

<sup>215</sup> *Ibid.* at 560.

<sup>216</sup> *Ibid.* at 561.

<sup>217</sup> See above p. 89

<sup>218</sup> *Walter V. Lane*, A.C. 539, *supra* note 159, at 561.

<sup>219</sup> *Ibid.*

<sup>220</sup> See above p. 89

<sup>221</sup> *Walter V. Lane*, A.C. 539, *supra* note 159, at 562

also, “[t]he word ‘author,’ occurring as it does, not in the preamble, but in the enacting section, seems to me to present a criterion consistent with the widest application of the Act to all who can claim as embodying their own thought, whether humble or lofty, the letterpress of which they assert the authorship.”<sup>222</sup> [Underlining added].

So, Lord Robertson’s argument supports this thesis’s argument, that choosing the word ‘author’ is a meaningful signal to the intention of the legislator, as it calls for the application of ‘authorship’ which means the creation or the composition that conveys thoughts and ideas and which qualifies a person to be an author. Even if there were no originality requirement in the Copyright Act 1842, as Lord Halsbury asserted, “the statute seems to me to require neither, nor originality either in thought or in language”,<sup>223</sup> however, there should be an authorship or creation embodied in the work, as clarified above.

If Lord Robertson’s argument had been maintained, the proposed categorisation would have been settled since then, and we would theoretically not see conflict in decisions and in deciding on copyrightability that we see today. In addition, Lord Robertson, after he exposed the composition of tables and catalogues that conferred protection, argues that there is some composition in these kinds of works, although they are “not great things, there has been structure and arrangement on the part of the maker.”<sup>224</sup> And he considers them trivial works “very pedestrian efforts of the mind.”<sup>225</sup> [Underlining added]. According to this argument, Lord Robertson considers compilation works to be low authorship works, or trivial works as they only include arrangement. He confirmed that although this is not the authorship expected from an author, it can get some protection.

Additionally, in comparing tables or catalogues and verbatim reports, he argued: “I think that the recording by stenography the words of another is in a different region from the making up of a time-table. I do not say it is lower or higher, but on a different plane, because there is no construction.”<sup>226</sup> [Underlining added] He argues, interestingly, that verbatim reports should be separated into a different category because their nature is different. This is what this thesis calls for and that is why it has proposed to separate them into a different category, to be called ‘non-authorship’ works. Even Lord Robertson described them as having “no construction”.<sup>227</sup> This thesis

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<sup>222</sup> *Ibid.* 159, at 562

<sup>223</sup> *Ibid.* at 548 the thesis attracts attention that Deazley above confirmed that the criteria ‘new and original’ was existent in the 1842 copyright act. See chapter 2 at 2.3

<sup>224</sup> *Ibid.* at 561

<sup>225</sup> *Ibid.* at 561

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.* at 561

also makes this proposal, and separating these works that have different nature requires the application of different criterion that suit their nature, and different level of protection.<sup>228</sup>

As a conclusion to the discussion of the Lords' arguments in Walter v. Lane,<sup>229</sup> It can be said that this case constituted a shocking move to the legal and judicial fields, and due to the Lords' constitutional position, their decision was taken seriously into consideration. However, this decision was mistaken and led to disastrous results.<sup>230</sup> Only one of the five Lords, namely Lord Robertson, gave the most appropriate answer in relation to the orthodox concepts of copyright law. Although his view did not win at that time, this thesis hopes that his view can prevail after more than a century.

### **The Consequences of the Walter v. Lane Case:**

Walter v. Lane has been used to justify the conferral of copyright protection to works that actually do not include any creation but only skill and labour in the production process. That is why this thesis argues that Walter v. Lane is not a good law but it's a bad law due to the deliberate disregard of authorship concept and the confusion occurred in copyright law theoretically and practically. For instance, Garnett and Davies relied on Walter v. Lane to argue: "the work of transcribing a piece of music into notation will usually be enough to make the new work original, even though the transcriber may not have created new sounds, the work will usually be original."<sup>231</sup> This argument is a justification for ending any creativity and allowing infringement of works or actually emptying of the substance from copyright law protection, due to the doctrine of Walter v. Lane.

Even Garnett and Davies considered the change of medium or form can qualify for copyright, "changing the expression of a work from one medium to another will entitle the new work to copyright,"<sup>232</sup> as they relied on that skill and labour expended on the creation of the work can solely gains originality and is vested with copyright protection. Subsequently, an engraving, even if a close copy of an existing work, such as a painting or drawing, will be considered original.

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<sup>228</sup> As detailed in Chapter 8

<sup>229</sup> Walter V. Lane, A.C. 539, *supra* note 159.

<sup>230</sup> Which started from the conflict of, and in, decisions and ended by calling for the death of the author.

<sup>231</sup> K.M. Garnett and G. Davies, *Copinger and Skone James on Copyright* (16th edn., 1: Sweet & Maxwell, 2009). at 3-139, note (10).

<sup>232</sup> *Ibid.*3-137.

Lord Oliver in *Interlego AG v. Tyco*<sup>233</sup> also said: “if somebody produces a good copy by painting, or produces an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an original work, because there is no originality.”<sup>234</sup> Garnett and Davies commented on Lord Oliver’s speech by stating that this is inconsistent with *Walter v. Lane*.

### 3.6 Skill, Labour and Judgement

The US interpretation of originality -‘sweat of the brow’- was prevalent for a long time and it diminished afterwards in favour of the selection and arrangement criterion, as explained above. In the UK, the ‘skill, labour and judgment’ was also a prevailing interpretation, yet recently there are pressures to abandon it in favour of a more personal interpretation, namely, ‘intellectual creation’, as will be clarified.

Originality was required in the UK as the main criterion for deciding on the copyrightability of intellectual works, as the first section of CDPA provided: “(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—(a) original literary, dramatic, musical or artistic works”. It was agreed by judiciary<sup>235</sup> and jurisprudence<sup>236</sup> in the UK that originality should be interpreted to mean the ‘skill, labour and judgment’ expended by the author in creating his work. Vitoria confirmed “[a]n original dramatic work is in general the product of the mind of a human author, arrived at by the exercise of substantial independent skill, creative labour or Judgement ...”<sup>237</sup>

It was confirmed in the case of *Ladbroke v. William Hill*<sup>238</sup> in the Court’s comment on the work done by the respondent ‘William Hill’ that “[i]t is not disputed that a vast amount of skill, judgment, experience and work has gone into building up the respondents' coupon.”<sup>239</sup> Lord Reid in confirming this criterion has argued that: “it has often been recognised that if sufficient skill and judgment have been exercised in

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<sup>233</sup> *Interlego A.G. v. Tyco Industries Inc.*, 1989, A.C. 217; R.P.C. 343 Privy Council.

<sup>234</sup> *Ibid.* at 371.

<sup>235</sup> See, *University of London Press v. University Tutorial Press*, 1916, 2 Ch. 601, Chancery Division; *Lionel Sawkins v. Hyperion Records Ltd.*, EWHC 1530 (Ch); E.C.D.R. 10; R.P.C. 32 *supra* note 160; *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, 1964, 1 W.L.R. 273, House of Lords.

<sup>236</sup> See, Rahmatian “The unanimous opinion was that in the UK a work is “original” ... if it is the result of its author’s own skill, labour, judgment and effort.” Andreas Rahmatian, 'Originality in Uk Copyright Law: The Old “Skill and Labour” Doctrine under Pressure', *supra* note 142, p. 5; see also Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 155, at 3.44.

<sup>237</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 155, at 3.44.

<sup>238</sup> *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, 1 W.L.R. 273, *supra* note 235.

<sup>239</sup> *Ibid.* at 275.

devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright.”<sup>240</sup>

Also, in Waterlow Directories Ltd. v. Reed Information Services Mr Justice Aldous decided that “no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road.”<sup>241</sup>

Also in Baigent v. Random House Group<sup>242</sup> it was argued that the authors of the Holy Blood and the Holy Grail (HBHG) cannot obtain copyright protection because the work “was not the product of the application of skill and labour by the authors”.<sup>243</sup> It is worth noting that this criterion was adopted in the US also, as in the Bridgeman Art Library, Ltd. v. Corel Corp case,<sup>244</sup> it was argued by Judge Kaplan that “[o]riginality presupposes the exercise of substantial independent skill, labour, judgment.”<sup>245</sup> [Underlining added]

### **3.6.1 Criticism of the ‘Skill, Labour and Judgment’ Criterion:**

This interpretation or criterion is criticised from several perspectives. First, it resembles the precedent US criterion ‘sweat of the brow’; second, it measures the creation process and preparatory steps, not the characteristics or contents of the work itself; third, the uncertainty surrounding its application.

#### **-1- Resemblance between the UK’s ‘Skill and Labour’ and the US’s ‘Sweat of the Brow’**

In courts whether, in the UK or US, it seems that the ‘skill and labour’ criterion was translated into the ‘sweat of the brow’, both seek to protect any works created using individual efforts or capitals that confer market value to the work, not the personal and mental characteristics. Scassa confirmed this view, as she stated that skill and labour is “a standard for originality that can easily be interpreted so as to offer copyright protection to facts.”<sup>246</sup>

In Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. the House of Lords gave more detail to the ‘skill, labour and judgment’ to ease its application through adding equal

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<sup>240</sup> *Ibid.* at 277.

<sup>241</sup> Waterlow Directories Ltd. V. Reed Information Services Ltd., 1993, E.C.C. 174, The English High Court, Chancery Division at 180.

<sup>242</sup> Baigent V. Random House Group, 2007, EWCA Civ The Court of Appeal

<sup>243</sup> *Ibid.* at 284.

<sup>244</sup> Bridgeman Art Library, Ltd. V. Corel Corp., 1999, 25 F. Supp. 2d 421, United States District Court, S.D. New York.

<sup>245</sup> *Ibid.* at 198.

<sup>246</sup> Teresa Scassa, 'Original Facts: Skill, Judgment, and the Public Domain', McGill LJ, 51 (2005). p. 3.

expression to the used terminology, as the House of Lords stated: “the appropriate odds ... is something which only great skill, industry and experience will discover.”<sup>247</sup> They also confirmed that “[i]t is common ground that the preparation of a coupon with bets of this sort requires a great deal of industry and skill.”<sup>248</sup> [Underlining added]. Laddie *et al.* have combined stipulation that the work was not copied from pre-existing works and the embodying of a substantial amount of skill, knowledge, labour and Judgement.<sup>249</sup>

‘Skill, labour and judgment’ can be used to justify the protection of copyright to any work, regardless of the mental contribution, including to compilation works and databases. This view was confirmed by Ginsburg who sees that the ‘the volatility of originality’ has offered alternative interpretations for it, and that the ‘skill and labour’ standard adopted in commonwealth countries is “formerly known in the United States as the ‘sweat copyright’.”<sup>250</sup> Rahmatian argues the same, although he finds that the US ‘sweat of the brow’ is focused on labour and is too narrow.<sup>251</sup> Besides, he confirms that “the UK originality concept [skill, labour and judgment] ... [has] intrinsic inconsistencies.”<sup>252</sup>

This view was advocated by Lord Oliver in *Interlego AG v. Tyco*<sup>253</sup> who argued that skill and labour are not justifiable conditions that indicate the originality of the work. “Take the simplest case of artistic copyright, a painting or photograph. It takes great skill, judgment and labour to produce a good copy by painting, or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an ‘original’ artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality.”<sup>254</sup> [Underlining added] It is worth mentioning that Judge Kaplan, in

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<sup>247</sup> *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, 1 W.L.R. 273, *supra* note 235, at 280.

<sup>248</sup> *Ibid.* at 280.

<sup>249</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 155, 3.57. The UK IP office also has required two conditions, independent creation and skill and labour, however, it considered the existence of investment is sufficient to confer protection, which is a recognition of the ‘sweat of the brow doctrine’, as it was stated: “The term ‘original’ also involves a test of substantiality - literary, dramatic, musical and artistic works will not be original if there has not been sufficient skill and labour expended in their creation. But, sometimes significant investment of resources without significant intellectual input can still count as sufficient skill and labour.” [Underlining added] See Intellectual Property Office, ‘Original Works’, *Copyright applies to* <<http://www.ipso.gov.uk/types/copy/c-applies/c-original.htm>>, last accessed 18/03/2012.

<sup>250</sup> Jane C. Ginsburg, ‘The Concept of Authorship in Comparative Copyright Law’, *DePaul Law Review*, 52 (2002), p. 1082.

<sup>251</sup> Andreas Rahmatian, ‘Originality in Uk Copyright Law: The Old “Skill and Labour” Doctrine under Pressure’, *supra* note 142, p. 5 note. 3

<sup>252</sup> *Ibid.* p. 6.

<sup>253</sup> *Interlego A.G. v. Tyco Industries Inc.*, A.C. 217; R.P.C. 343 *supra* note 233.

<sup>254</sup> *Ibid.* at 371.

the US Court in the *Bridgeman Art Library, Ltd. v. Corel Corp.* Case,<sup>255</sup> applied Lord Oliver's argument to deny conferral of copyright protection to transparencies, including photographic reproductions of paintings. Likewise, Garnett and Davies argue that the compilations made under the UK Copyright Act relied on the criterion of the 'sweat of the brow', not 'skill and judgment', in the selection of their constituent parts, so they actually are not protected as original works under UK law.<sup>256</sup>

The CJEU in the recent *Football Dataco Ltd. v. Yahoo! UK Ltd.* Case<sup>257</sup> referred to that skill and labour criterion is not indicative of the existence of intellectual creation in the work, and instead stated that the 'selection and arrangement criteria' should be used, "[t]he fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author, ... cannot as such justify the protection of it by copyright under directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data."<sup>258</sup> However, the thesis opposes this step also.

The thesis supports Ong's confirmation that the time, effort or labour, spent in creating the work should not have "any direct bearing on the originality of a work for the purposes of copyright protection"<sup>259</sup> as "[a] hastily scribbled poem or roughly painted canvas may produce a literary or artistic masterpiece, while mediocre monstrosities may emerge from authors who labour for years over their works."<sup>260</sup> This thesis supports his opinion, here also, that the work should be produced with the requisite of "authorial intent"<sup>261</sup> as this supports the thesis's search for authorship in works seeking copyright protection.

## **-2- 'Skill and Labour' Measures the Preparation for the Work, not the Characteristics of the Work Itself**

There is an enquiry about whether this criterion is required in the process of producing the work or in the work itself. Garnett and Davies have confirmed that it is necessary to make "a distinction between skill and labour required for the compiling of information

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<sup>255</sup> *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421, *supra* note 244.

<sup>256</sup> K.M. Garnett and G. Davies, *Copinger and Skone James on Copyright*, *supra* note 231, at 3-147, footnote (22)

<sup>257</sup> *Football Dataco Ltd. v. Yahoo! Uk Ltd.*, 2012, C-604/10, Court of Justice of the European Union

<sup>258</sup> *Ibid.* at 1763.

<sup>259</sup> Burton Ong, 'Originality from Copying: Fitting Recreative Works into the Copyright Universe', *Intellectual Property Quarterly*, 2 (2010). p. 171.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*

and the skill and labour required for the presentation of it, as only the latter being relevant for the purposes of the originality requirement and copyright protection.”<sup>262</sup>

The requirement for originality in the work itself has an inherent significance, as it measures whether the work benefits people and promotes science and the arts, as the preparatory steps may lead to the creation of useless work, or work that is not beneficial to people, or may be useful but does not lead to progress in the sciences and arts, as stated in the Statute of Anne.

### **-3- Uncertainty around the ‘Skill, Labour and Judgement’ Criterion**

In the case of *Redwood Music Ltd. v. Chappell*,<sup>263</sup> although Judge Robert Goff was exposed to the skill, labour and Judgement criteria, and though the subject of the case was the ordinary arrangement of music, and that “an arrangement of a popular song for a dance band is a purely mechanical operation, which musicians can easily carry out using ordinary skill,”<sup>264</sup> he confirmed that it suffices that the work originates from the author. Judge Goff allowed the arranger of the music to obtain the copyright on the arrangement: “All that is required is that the work in question should originate from the arranger or adaptor rather than being a mere copy of another's work.”<sup>265</sup>

The strange thing with this decision is that although Judge Robert Goff confessed that the unlicensed arrangement of music is an infringement of the adaptation right of the original author, he confirmed that this does not mean that the arranger cannot get copyright on his arrangement, as he justified this by saying: “it does not of course follow that the owner of the copyright in the original work owns the copyright in the arrangement, for example, the film script or play; if that were so, it would lead to the absurd conclusion that the owner of the copyright in the original work, having licensed the adaptation-possibly for a substantial consideration-would be free to exploit the adaptation himself.”<sup>266</sup> This case raises questions about the validity of the ‘skill labour and judgment’ criteria as an interpretation of originality in UK, or was it invented as a substitute for the originality criteria; the thesis thinks it is the latter.

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<sup>262</sup> K.M. Garnett and G. Davies, *Copinger and Skone James on Copyright, supra note 231*, at 3-147; Canadian justice has confirmed the same meaning, excluding creativity, as judges brought together the ‘skill, judgement and labour’ criteria to ensure the work is not trivial or produced by a mechanical process, and the non-copying criteria as an evidence for independent creation, to be used in identifying the works eligible for copyright protection, and creativity is not required to make a work original, see, *Cch Canadian Ltd and Others V. Law Society of Upper Canada*, 2004, 5 LRC 428, 2004 SCC 13, Canada, Supreme Court Para. 25.

<sup>263</sup> *Redwood Music Ltd. V. Chappell & Co. Ltd.*, 1982, RPC 109, The High Court of Justice–Queen’s Bench Division.

<sup>264</sup> *Ibid.* at 115.

<sup>265</sup> *Ibid.* at 117.

<sup>266</sup> *Ibid.* at 117.

Also in G. A. Cramp & Sons, Limited v. Frank Smythson,<sup>267</sup> the Court stressed the effort put into creating works: “Whether enough work, labour and skill is involved, and what its value is, must always be a question of degree.”<sup>268</sup> [Underlining added]. There is a lot of uncertainty surrounding the ‘skill, labour and Judgement’ criterion’s application and the amount of skill or judgment required to prove the existence of originality. Lord Reid, in Ladbroke v. William Hill,<sup>269</sup> has affirmed the uncertainty of this combined condition. He confirmed that this criterion is not used with great precision or disjunctively,<sup>270</sup> and may be sometimes used cumulatively, and it is occasionally accompanied by other criteria or normative terms, like work, capital, effort, industry, knowledge, taste, ingenuity or experience.<sup>271</sup>

This view is supported by Ricketson, who said that “there was nothing said in any of the speeches defining the minimum degree of labor, skill and judgment sufficient to make a work original. Thus, the dividing line between original (and therefore protected) works, and unoriginal (and therefore unprotected) works, remains an uncertain and shifting one.”<sup>272</sup> Laddie *et al.* argue that the required amount of skill and effort is not large, and it suffices if it was insubstantial, or if there is a substantial amount of purely routine mental effort, this may be enough to satisfy the originality requirement.<sup>273</sup>

Garnett and Davies decided that originality is the mere condition needed to confer copyright protection to a work, in the sense that it “originated from an author”.<sup>274</sup> They additionally thought the requirement of ‘skill, labour, and Judgement’ in the created work is impossible to apply as it relies on the amount of those characteristics and whether they are sufficient or not.<sup>275</sup> They argued that there is a line that “cannot be drawn between the efforts involved in developing ideas and that minimal efforts required in setting these ideas down on paper.”<sup>276</sup> Since the recognised efforts are those expended in the expression stage, or in ‘setting ideas down on paper’, not in the preparatory procedures, accordingly, Garnett and Davies confirmed that the criterion ‘skill and labour’ cannot be taken into consideration at all.<sup>277</sup>

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<sup>267</sup> G. A. Cramp & Sons, Limited V. Frank Smythson, Limited 1944, A.C. 329, House of Lords.

<sup>268</sup> *Ibid.*

<sup>269</sup> Ladbroke (Football) Ltd. V. William Hill (Football) Ltd., 1 W.L.R. 273, *supra* note 235.

<sup>270</sup> *Ibid.*

<sup>271</sup> L. Bently and B. Sherman, *Intellectual Property Law* (third edn.: Oxford University Press Oxford:, 2009)., p. 95.

<sup>272</sup> S. Ricketson, 'The Concept of Originality in Anglo-Australian Copyright Law', *Journal of the copyright society of the USA*, 39 (1992). p. 280.

<sup>273</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 155, at 3.57.

<sup>274</sup> K.M. Garnett and G. Davies, *Copinger and Skone James on Copyright*, *supra* note 231, at 3-130

<sup>275</sup> *Ibid.* at 3-130

<sup>276</sup> *Ibid.* at 3-147.

<sup>277</sup> *Ibid.*

The same view was confirmed by Ricketson, who contended that as long as there is no exact definition of the minimum degree of the elements included in the criteria of skill, labour and judgement that can grant originality to a work, so the dividing line between original and not original works remains uncertain. Ricketson argued that Judge Peterson's statement, wherein he stated the renowned argument "after all, there remains the rough practical test that what is worth copying is prima facie worth protecting"<sup>278</sup> is preferable.<sup>279</sup>

### **3.7 Intellectual Creation:**

Though the 'skill, labour and judgment' was, and somehow still is, prevalent in the UK, this criterion faces strong confrontation with the global trend to raise the interpretation of originality in works and to include personal and mental creation as a major component of the copyright criteria, even, and especially, a desire to abandon it. We have seen in the introduction<sup>280</sup> the trend in the international legislation (Berne, TRIPS, WIPO, and EU directives) towards adopting intellectual creation as an interpretation or substitute for the originality criterion. Though this criterion was settled in the 1996 EU Database Directive,<sup>281</sup> it was difficult for the English courts to abandon their age old skill and labour criterion regarding databases. In this situation, the CJEU has played a special role in imposing this criterion on the English judicial system.

This approach is a step towards complete separation between works that have mental authorship and those lacking this characteristic, and there is much evidence for this in both the UK and the US. In the UK the whole issue is happening through pressure from the CJEU, which will be clarified below. In the US this trend was apparent since the Trade-Mark Cases<sup>282</sup> and Burrow-Giles<sup>283</sup> cases and has been revived again in the Feist v. Rural Case.<sup>284</sup> However, due to factual work's nature is different as they cannot cope with the application of conditions that measure mental and personal characteristics, so a discussion of the nature of authorship and 'non-authorship' works is required to settle the suitable conditions that are compatible with the inner features of every work, and that which this thesis will do in Chapters Six and Seven.<sup>285</sup>

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<sup>278</sup> See, University of London Press V. University Tutorial Press, 2 Ch. 601, *supra* note 235, p. 611.

<sup>279</sup> S. Ricketson, 'The Concept of Originality in Anglo-Australian Copyright Law', *supra* note 272, p. 280.

<sup>280</sup> See Chapter One at 1.2.

<sup>281</sup> 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 154.

<sup>282</sup> Trade-Mark Cases V. Steffens, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, *supra* note 107.

<sup>283</sup> Burrow-Giles Lithographic Co. V. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 108.

<sup>284</sup> Feist Publications, Inc. V. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

<sup>285</sup> See Chapter 6 at 6.3 and Chapter 7 at 7.2.

The CJEU confirmed this issue in the *Infopaq v. Danske* Case<sup>286</sup> (*Infopaq* 1), when it required that the author should have done sufficient ‘intellectual creation’ in the work to be eligible for copyright protection, and confirmed “[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.”<sup>287</sup> This is also apparent in the court comment on Berne Convention requirements in this regard: “It is, moreover, apparent from the general scheme of the Berne Convention, in particular arts 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.”<sup>288</sup>

The CJEU has confronted the ‘skill and labour’ criterion and decided that: “the fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author, as mentioned in section (c) of that same question, cannot as such justify the protection of it by copyright under directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data.”<sup>289</sup> So, skill and labour *per se*, regardless of their degree, are not important. What counts is the original selection or arrangement even if there is minimum labour or skill; this means that the UK ‘skill and labour’ criterion has been suspended by the CJEU. This is confirmed when the Court argued that selection or arrangement is stipulated to be: “an original expression of the creativity of the author of the database.”<sup>290</sup>

The ‘intellectual creation’ criterion seems to prioritise the personal creativity perspective. However, it is believed that this trend is a high wave that will be followed by a lower one, once the investors’ interests in databases are affected to continue the precedent practice of uncertainty, unless a separation between works is adopted.

In the *SAS Institute Inc. v. World Programming Ltd* Case<sup>291</sup> the Court of Chancery Division asserted at the start that originality means whether the work is an “intellectual creation”.<sup>292</sup> Later, it analysed the elements of originality that we should search for, quoting *Infopaq v. Danske*, “[i]t is only through the choice, sequence and combination of those words, figures or mathematical concepts that the author may express his

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<sup>286</sup> *Infopaq International a/S v. Danske Dagblades Forening*, 2009, E.C.D.R. 16, C-5/08, Court of Justice of the European Communities (Fourth Chamber).

<sup>287</sup> *Ibid.* at 265.

<sup>288</sup> *Ibid.* at 271.

<sup>289</sup> *Football Dataco Ltd. v. Yahoo! Uk Ltd.*, C-604/10, *supra* note 257, at 1763.

<sup>290</sup> *Ibid.* at 1763.

<sup>291</sup> *Sas Institute Inc. v. World Programming Ltd*, 2013, EWHC 69 (Ch), Chancery Division.

<sup>292</sup> *Ibid.* at 428.

creativity in an original manner and achieve a result.”<sup>293</sup> The elements ‘choice’ and ‘sequence’ are expressing the same meaning of ‘selection and arrangement’ and those which this thesis has proposed to rely on to find originality in authorship works.

Moreover, the CJEU, in *Football Dataco v. Yahoo Case*,<sup>294</sup> confirmed that creating a work depending on predetermined rules or techniques does not help to show creative authorship. “[T]hat criterion [intellectual creation in the selection or arrangement] is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom.”<sup>295</sup> Note here, that compilations of facts, in most cases, depend on technical selection and arrangement and is mostly undertaken by companies that specialise in creating them, especially maps, catalogues, and compilations of laws or reports. This was also confirmed by the Court in *SAS Institute Inc. v. World Programming*: “elements ‘differentiated only by their technical function’ must be disregarded”<sup>296</sup> [Underlining added].

Eventually, the Court in *SAS Institute Inc. v. World Programming* explicitly advocated the civil law system of personality and individuality, stating: “[w]hat is required is something on which the author has stamped his ‘personal touch’ through the creative choices he has made.”<sup>297</sup> [Underlining added].

### 3.8 ‘Originating From the Author’

Here, the thesis will expose some decisions that considered that the work be ‘originated from the author’ sufficed for it to be an ‘original’ work and so eligible for copyright protection. Discussing such criteria shows how interpretations of a single term without theoretical background can empty the term of its meaning.

Judge Peterson, in the UK case *University of London Press v. University Tutorial Press*,<sup>298</sup> severed ties between the term ‘originality’ and its direct lingual, theoretical and historical interpretation,<sup>299</sup> when he stated: “The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought.”<sup>300</sup> He decided that ‘original’ does not seem to mean ‘original’, but means ‘originate’. “The Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the

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<sup>293</sup> *Infopaq International a/S V. Danske Dagblades Forening*, E.C.D.R. 16, C-5/08, *supra* note 286, at 272, referred to in *Sas Institute Inc. V. World Programming Ltd*, EWHC 69 (Ch), *supra* note 291, at 438.

<sup>294</sup> *Football Dataco Ltd. V. Yahoo! Uk Ltd.*, C-604/10, *supra* note 257.

<sup>295</sup> *Ibid.* at 1763.

<sup>296</sup> *Sas Institute Inc. V. World Programming Ltd*, EWHC 69 (Ch), *supra* note 291, at 445.

<sup>297</sup> *Ibid.* at 445.

<sup>298</sup> *University of London Press V. University Tutorial Press*, 2 Ch. 601, *supra* note 235.

<sup>299</sup> See this Chapter footnote 173.

<sup>300</sup> *University of London Press V. University Tutorial Press*, 2 Ch. 601, *supra* note 235, at 608.

author.”<sup>301</sup> [Underlining added]. In spite of his confirmation that it suffices that a work has originated from the author, and that inventive thought is not required, he refused to consider work that included the questions of examinations and the creators added their answers and criticisms to these questions, as an original work. This was on the ground that the included examinations are not created by them but by the examiners, though the questions are only a small part of the work.

In *Dr. Lionel Sawkins v. Hyperion Records*<sup>302</sup> it was also confirmed by Judge Mummery that to fulfil the requisite of originality it suffices that the work originated from the alleged author, “[a] work need only be ‘original’ in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person”.<sup>303</sup>[Underlining added].

It should be confirmed that the ‘originating from the author’ criteria has the same meaning as the ‘independent creation’ and the ‘non copying from precedent works’ criteria. In the US, this criterion is prevalent,<sup>304</sup> as work cannot be copied from other work, and should embody some modest amount of individual labour in order to get the title ‘work of authorship’ and to get copyright protection. For instance, Circuit Judge Frank stated in *Alfred Bell v. Catalda*<sup>305</sup> “No matter how poor artistically the author’s addition, it is enough if it be his own.”<sup>306</sup>

In the case of *Alfred Bell v. Catalda*,<sup>307</sup> due to the silence of the Copyright Act 1909 in determining the requirements for conferring copyright protection, the defendant claimed that ‘novelty’ is required for copyrighting works, arguing that the word ‘original’ has meanings like “startling, novel or unusual, a marked departure from the past.”<sup>308</sup>

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<sup>301</sup> *Ibid.* at 609, it is worth noting that Judge Peterson attracts attention even today with his renowned criterion, “after all, there remains the rough practical test that what is worth copying is *prima facie* worth protecting.” *Ibid.* at 611. This thesis criticises this argument, as, if his assumption were true, this means that all defendants in infringement cases are infringers as the existence of alleged infringement fulfils the first part of this stipulation, which is the desire to have a copy. However, MacQueen *et al.* see that Judge Peterson didn’t mean to consider this a criterion for originality of the work, but roughly refer to the copied work’s value so it may possibly need copyright protection to ensure that the owner receives the revenues he deserves. see, H.L. MacQueen et al., *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, UK, 2011)., Para 2.35.

<sup>302</sup> *Lionel Sawkins V. Hyperion Records Ltd.*, EWHC 1530 (Ch); E.C.D.R. 10; R.P.C. 32 *supra* note 160.

<sup>303</sup> *Ibid.* at 3288.

<sup>304</sup> Whether between judges or scholars, see, Circuit judge Frank in *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et Al.*, 1951, 90 U.S.P.Q. 153, 191 F.2d 99, United States Court of Appeals, Second Circuit.; and Circuit Judge in *Novelty Textile Mills, Inc., V. Joan Fabrics Corporation*, 1977, 558 F.2d 1090, No. 998, Docket 77-7067., United States Court of Appeals, Second Circuit. See also, Steven S. Boyd, 'Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work', *Santa Clara Law Review*, 40 (2000)., p. 328.

<sup>305</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et Al.*, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 304.

<sup>306</sup> *Ibid.* at 103.

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.* at 102.

However, the Court confirmed that originality, in the context of copyright law, just means that “the particular work ‘owes its origin’ to the ‘author. No large measure of novelty is necessary.”<sup>309</sup>

Durham also confirmed this interpretation “Originality does not require any measure of talent. The humblest doodle is as ‘original,’ in the sense of ‘owing its origin’ to its creator, as the most sophisticated work of art.”<sup>310</sup> His interpretation just confines originality’s meaning to ‘originating’ as he states: “a valid copyright can subsist in a work that is indistinguishable from other works that preceded it, so long as it was not copied from its predecessors.”<sup>311</sup>

Independent creation or the originating from the author interpretation are nothing but another expression of the sweat of the brow doctrine. Requiring that the author has made the work himself requires investigating the labour, effort and time expended in creating this work, which in fact applies protection to the labour of the precedent author.”[t]he requirement of independent research comes dangerously close to protecting facts themselves”<sup>312</sup>

This is consistent with the case of United Telephone Co. of Missouri v. Johnson Publishing Co.<sup>313</sup> Although the court applied independent creation as a criterion of copyright, the court considered the defendant as an infringer because he began with the plaintiff’s work through verifying the data included, as the industrious collection of the work requires that the compiler do the whole work independently.

### **‘Non-Copying From Other Works’, or ‘Little More Than Non-Copying’:**

The ‘non-copying’ criterion used by courts has the same meaning as the latter criterion –‘originating from the author’- as the work owes its origin to the author if he didn’t copy it from precedent works. At the same time, the work is not considered to be copied from other works if the author proves he created it himself, even if there is substantial similarity. This criterion is attributed also to Judge Peterson in University of London Press v. University Tutorial Press.<sup>314</sup> He actually combined the ‘non-copying’ interpretation and the ‘originating from the author’ interpretation of originality, when he

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<sup>309</sup> *Ibid.* at 102, the Court cited here the *Baker v. Selden* Case.

<sup>310</sup> Alan L Durham, ‘Speaking of the World: Fact, Opinion and the Originality Standard of Copyright’, *Arizona State Law Journal*, 33 (2001). p. 806.

<sup>311</sup> *Ibid.* p. 806.

<sup>312</sup> Michael J. Haungs, ‘Copyright of Factual Compilations: Public Policy and the First Amendment’, *supra* note 73, p. 364

<sup>313</sup> United Telephone Co. Of Missouri V. Johnson Publishing Co., 1988, F.2d 604, United States Court of Appeals, Eighth Circuit

<sup>314</sup> University of London Press V. University Tutorial Press, 2 Ch. 601, *supra* note 235.

stated: “the work must not be copied from another work — that it should originate from the author.”<sup>315</sup> [Underlining added]

In the US, Abrams also argues that the originality threshold required for copyright until the end of the twentieth century was something more than the complete copying of precedent works.<sup>316</sup> The Circuit Judge in *Novelty Textile v. Joan Fabrics*<sup>317</sup> confirmed that a work can be original even if it is completely identical to prior work, provided that it can be proved that no direct or indirect copying has happened and the work is a product of an independent effort.<sup>318</sup> Judge Campbell, in the US case *Hoague-Sprague v. Frank*,<sup>319</sup> made his renowned statement in this regard: “the originality required in case of copyright means little more than a prohibition of actual copying.”<sup>320</sup> [Underlining added]

Most cases that required ‘non-copying’ attached to it also the requirement of ‘originating from the author’, as, e.g., Judge Frank in *Alfred Bell v. Catalda*,<sup>321</sup> who confirmed: “Originality in this context ‘means little more than a prohibition of actual copying’<sup>322</sup> and that “[o]riginal’ in reference to a copyrighted work means that the particular work owes its origin’ to the ‘author.’”<sup>323</sup> Also, in *Batlin v. Snyder*<sup>324</sup> ‘non-copying’ and ‘originating from the author’ were taken into consideration, as it confirmed that, “[o]riginality, as copyright prerequisite, means that work owes its creation to author, and this in turn means that work must not consist of actual copying.”<sup>325</sup>

On the other hand, Ong criticised this interpretation, and especially Judge Peterson’s claim, arguing: “[d]oing so would inaccurately reduce ‘originality’ into an unworkable negative criterion that could not be sensibly applied to a wide range of cases in which some form or degree of copying was involved in the production of a copyright work.”<sup>326</sup>

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<sup>315</sup> *Ibid.* at 609.

<sup>316</sup> Howard B Abrams, ‘Originality and Creativity in Copyright Law’, *supra* note 4, p. 15.

<sup>317</sup> *Novelty Textile Mills, Inc., V. Joan Fabrics Corporation*, 558 F.2d 1090, No. 998, Docket 77-7067., *supra* note 304.

<sup>318</sup> *Ibid.* at 1093 as the court cited Melville B Nimmer, *Nimmer on Copyright* (1976). s 10.1 at 34.

<sup>319</sup> *Hoague-Sprague Corporation V. Frank C. Meyer Co.*, 1929, 31 F.2d 583, District Court, E.D. New York..

<sup>320</sup> *Ibid.* at 586, and *Bleistein V. Donaldson Lithographing Co.*, 1903, 188 U.S. 239, 23 S.Ct. 298, Supreme Court of the United States at 251.

<sup>321</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et Al.*, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 304.

<sup>322</sup> *Ibid.* at 103 quoting *Hoague-Sprague Corporation V. Frank C. Meyer Co.*, 31 F.2d 583, *supra* note 319; the same meaning repeated in *Tennessee Fabricating Co. V. Moultrie Mfg. Co.*, 1970, 421 F.2d 279, United States Court of Appeals, Fifth Circuit at 282.

<sup>323</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et Al.*, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 304.

<sup>324</sup> *L. Batlin & Son, Inc., V. Jeffrey Snyder and Etna Products Co.*, 1976, 536 F.2d 486, United States Court of Appeals, Second Circuit..

<sup>325</sup> *Ibid.* at 486.

<sup>326</sup> Burton Ong, ‘Originality from Copying: Fitting Recreative Works into the Copyright Universe’, *supra* note 259, p.171.

In this criterion there are two different approaches; at the first any differentiation between the two works suffices, even if there is copying, any addition or amendment over this copying can fulfil the originality condition. The other requires complete non-copying, even if there is similarity it should be of the work of the author. This latter approach is apparent in cases which group between the 'non-copying' and 'originated from the author' criteria to raise the originality criteria. For instance, in the *Batlin*<sup>327</sup> case a degree of originality was required in addition to 'non-copying from works', "[a] considerably higher degree of skill is required, true artistic skill, to make the reproduction copyrightable."<sup>328</sup> This approach was taken by Drone also as he explained: "In all cases, whatever may be the kind or the character of the work for which protection is claimed, the true test of originality is whether the production is the result of independent labor or of copying."<sup>329</sup>

In *Alfred Bell v. Catalda*<sup>330</sup> also it was stipulated that if there is copying, a distinguishable variation should exist. "Despite statutory provision declaring that no copyright shall exist in works in public domain, a copy of something in public domain will support a copyright if it is a distinguishable variation."<sup>331</sup> In addition, the same Court argued that copyright needs something more than copying, something beyond trivial work, and it should be made by the author independently. As it confirmed: "Constitutional provision and statutory provisions relating to copyrights are satisfied if the author contributes something more than mere trivial variation in previous work and work may be copyrighted if there is something recognizably the author's own and not mere copying of another work."<sup>332</sup>

### **Criticising the 'Non-Copying' Criterion:**

This criterion can lead to two different ends, as its two meanings will lead to protecting a work in one case and precluding this protection in another. This is a result of the different approaches of Judges in interpreting the meaning of a legal term without investigation into it, and the lack of coordination between courts in interpreting cases. The system proposed by this thesis to categorise works will clarify much of the confusion that has happened and make the conflict of cases less apparent.

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<sup>327</sup> *L. Batlin & Son, Inc., V. Jeffrey Snyder and Etna Products Co.*, 536 F.2d 486, *supra* note 324.

<sup>328</sup> *Ibid.* at 491.

<sup>329</sup> Eaton Sylvester Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States: Embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions*, *supra* note 60, p. 208

<sup>330</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et Al.*, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 304.

<sup>331</sup> *Ibid.* at 99.

<sup>332</sup> *Ibid.*

The UK CDPA 1988 stated that copyright may not subsist in works other than literary, dramatic, musical, and artistic works, which are sound recordings, films, broadcasts, and typographical arrangements: 'if, or to the extent that, it [reproduce or infringe the copyright] of a previous [work].'<sup>333</sup> This conversely means that the former works (literary, musical, etc. ) require a higher threshold in order to be protected. The law refused to equate the two kinds of works in the meaning of originality. The specification of a special requirement that depends mainly on not copying and on originating from the author, presumes that originality has a higher meaning than just non-copying.

### 3.9 Novelty

UK and US jurisprudence<sup>334</sup> and judiciaries distanced novelty from possible originality interpretations by confirming that copyright law does not require the work to be unprecedented or new.<sup>335</sup> However, we find some calls to equate originality with novelty, or to merge some of novelty's meaning with originality. As an instance for the first case we find Boyd determined that: "[w]hile courts continue to shape the concept of originality, it is clear that originality is distinct from the concepts of novelty and creativity."<sup>336</sup> Likewise, Laddie *et al.* neglected the role of creativity and inventive thought in the process of granting copyright protection by asserting: "It is not necessary that the work should be the expression of inventive thought"<sup>337</sup>

Bently and Sherman confirm that one of the shared characteristics in the British and European conceptions of originality is that both are concerned with the relationship between an author and the work, and novelty is concerned with the characteristics of the work itself, so originality cannot mean novelty at all times.<sup>338</sup> On the other hand, the novelty required in patent law is concerned with the relationship between the invention and the state of the art.<sup>339</sup> The same principle is confirmed by the UK judiciary, as in e.g., in *Christoffer v. Poseidon Film*,<sup>340</sup> where it was held that the film script entitled 'The Cyclops' based on a tale 'The Cyclops from Homer's Odyssey', was an original

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<sup>333</sup> Synopsis of CDPA S 5. A (2), 5. B (4), 6(6), and 8(2).

<sup>334</sup> See, Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 155; Steven S. Boyd, 'Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work', *supra* note 304; L. Bently and B. Sherman, *Intellectual Property Law*, *supra* note 271.

<sup>335</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 155, Para 3.59.

<sup>336</sup> Steven S. Boyd, 'Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work', *supra* note 304, p. 332.

<sup>337</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 155, at 3.57.

<sup>338</sup> L. Bently and B. Sherman, *Intellectual Property Law*, *supra* note 271, p. 93.

<sup>339</sup> *Ibid.* p. 93.

<sup>340</sup> *Christoffer and Another V. Poseidon Film Distributors Ltd and Another*, 2000, E.C.D.R. 487 High Court of Justice (Chancery Division).

work, although the story and characters were known ages before.<sup>341</sup> So, novelty is missing in such cases.

In the US, the Supreme Court in Baker v. Selden<sup>342</sup> confirmed that: “[t]he copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright.”<sup>343</sup> This was also approved in the case of Alfred Bell v. Catalda,<sup>344</sup> and in the case U.S.A v. Edward Hamilton,<sup>345</sup> as it was decided that “ [o]riginality requires only that the work display something irreducible, which is one man's alone, ... not that the work be novel in comparison with the works of others. ... [and] when a work displays a significant element of compilation, that element is protectible even though the individual components of the work may not be.”<sup>346</sup> In Baltimore Orioles v. Major League<sup>347</sup> it was decided that: “for a work to be copyrightable, it must be original and creative, but need not be novel” .<sup>348</sup>

On the other hand, there is contrary opinion, for instance, Castanaro claims that artists nowadays like to think of their works as original and unique, but, on the contrary, he submits that the public does not think this about most of the works on the market, as many seem ‘dubiously’ similar to previous original work, as the public need and seek for something more creative.<sup>349</sup> Accordingly, he proposes that originality should be applied beside novelty in order to promote the creativity of works, suggesting that a mix of originality and patent novelty will promote the creation of interesting works that will stand for the entire catalogue of pre-existing works and will enhance the literary and musical works’ market, “[a] hybrid of copyright originality and patent novelty would best serve the interests of promoting the creation of new works without stifling the creative process in music.”<sup>350</sup>

In Burrow-Giles v. Sarony<sup>351</sup> novelty was mentioned as a condition in literary works. It was argued that: “an engraving, a painting, a print, does embody the intellectual

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<sup>341</sup> *Ibid.* at 493.

<sup>342</sup> Baker V. Selden, 1879, 101 U.S. 99, WL 16689, Supreme Court of the United States.

<sup>343</sup> *Ibid.* at 102.

<sup>344</sup> Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et AL, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 304, at 103 p. 4.

<sup>345</sup> United States of America V. Edward Sylvester Hamilton, 1978, 583 F.2d 448 , No. 77-1230., United States Court of Appeals, Ninth Circuit.

<sup>346</sup> *Ibid.* at 451.

<sup>347</sup> Baltimore Orioles, Inc., Et AL, V. Major League Baseball Players, 805 F.2d 663, *supra* note 122.

<sup>348</sup> *Ibid.* no. 6 p. 8.

<sup>349</sup> Valeria M. Castanaro, 'It's the Same Old Song: The Failure of the Originality Requirement in Musical Copyright', Fordham Intellectual Property, Media & Entertainment Law Journal 18 (2007). p. 1274.

<sup>350</sup> *Ibid.* p. 1287.

<sup>351</sup> Burrow-Giles Lithographic Co. V. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 108.

conception of its author, in which there is novelty, invention, originality, and it therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author.”<sup>352</sup> This confirms the confusion between originality and novelty in interpreting copyright’s requirement for protection.

### **3.10 Creativity, Innovation, or Inventive Thought:**

Originality has been interpreted as creativity, innovation or inventive thought in different scholars’ opinions and court decisions. It is believed that this interpretation is the closest to the true meaning, or what it should be, of originality.

In the UK, Garnett and Davies have confirmed that creativity should be the interpretation of originality, and they ascertained that creativity was only mentioned on the author’s side; however, a low level of creativity was required.<sup>353</sup> Although Boyd refused to connect between originality, novelty and creativity, he confirmed that courts are confusing originality, novelty and creativity in the process of shaping the originality concept.<sup>354</sup> He argued that in the US in order for a work to be original it should combine a ‘minimal degree of creativity’ and ‘independent work’. <sup>355</sup> Castanaro has directly interpreted the originality threshold by confirming that a work will meet originality criteria if independently created with a modicum of creativity.<sup>356</sup> Strowel argued that the author’s rights system (civil law) does not give protection to works unless they have proved an extensive quantum of creativity, whereas the copyright system (common law) confers protection with a lower degree of creativity, so he confirmed the stipulation of creativity under the US Copyright Act 1976.<sup>357</sup> This approach is no longer valid, as the EU directives and the CJEU are pushing all EU members’ national legislations to adopt creativity and personality as constituent elements of originality.

US courts have used the criterion of ‘a modicum of creativity’ as an application of the originality requirement to determine protected works.<sup>358</sup> They have confirmed that the level of creativity required is normally low level, as confirmed in the *Feist v. Rural* Case: “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

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<sup>352</sup> *Ibid.* at 59.

<sup>353</sup> K.M. Garnett and G. Davies, *Copinger and Skone James on Copyright*, *supra* note 231, at 3-126.

<sup>354</sup> Steven S. Boyd, 'Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work', *supra* note 304.

<sup>355</sup> *Ibid.* p. 332.

<sup>356</sup> Valeria M. Castanaro, 'It's the Same Old Song: The Failure of the Originality Requirement in Musical Copyright', *supra* note 349, p. 1287.

<sup>357</sup> Alain Strowel, *Droit D'auteur Et Copyright, Divergences Et Convergences, Etude De Droit Compare* (Etablissements Emile Bruylant, 1993). Para 293.

<sup>358</sup> J. Campbell, 'Authorship, Incentives for Creation, and Copyright in the Digital 21st Century', *Proceedings of the American Society for Information Science and Technology*, 43/1 (2006). p. 3.

at least some minimal degree of creativity.”<sup>359</sup> In *Batlin v. Snyder*<sup>360</sup> it was confirmed that a “minimal element of creativity is above the requirement of independent effort.”<sup>361</sup>

In *Atari v. Ralph*<sup>362</sup> it was ordered that to fulfil the originality requirement and ensure the existence of a work of authorship that deserves copyright protection, the work should pass a “creativity test”, proving that it embodies at least a “modest amount of intellectual labour”.<sup>363</sup> [Underlining added] It is noticed that a US Court has interpreted originality by creativity, and then interpreted creativity as a modest amount of intellectual labour.

### **Criticism of Creativity or Innovative Input:**

Campbell finds that the US Copyright Act of 1976<sup>364</sup> confirmed the same principle – which is the equation between originality, creativity and modest amount of intellectual labour- when it demanded that originality be “little more than a prohibition of actual copying”.<sup>365</sup> He adds that the requirement for an “appreciable amount of creative authorship” is null and impractical.<sup>366</sup> Abrams confirmed that compilation works were protected without any reference to a high originality threshold, so creativity, *a fortiori*, is not required.<sup>367</sup> He assures that creativity cannot be required in copyright law at all. In fact, Abram’s opinion relies on the consideration that copyright law should adopt one interpretation of originality that can be applied to all works of authorship, and if any interpretation is not applied to one kind or category of these works it should be excluded for other works also. This thesis does not believe in the validity of such a claim, as it argues that the works should be separated into three categories and every category should have a dedicated interpretation of originality that suits its nature. This depends on a belief that the unified criterion is harmful to copyright law, both theoretically and practically, as will be shown in Chapters Six and Seven.

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<sup>359</sup> See, Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, *supra* note 64. § 2.01 [a], [b] cited by *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 345.

<sup>360</sup> *L. Batlin & Son, Inc., V. Jeffrey Snyder and Etna Products Co.*, 536 F.2d 486, *supra* note 324.

<sup>361</sup> *Ibid.* at 490.

<sup>362</sup> *Atari Games Corporation, V. Ralph Oman, Register of Copyrights.*, 1989, 888 F.2d 878, No. 88-5296., United States Court of Appeals, District of Columbia Circuit.

<sup>363</sup> *Ibid.* at 2 p. 5.

<sup>364</sup> 'Copyright Act of the United States', *supra* note 22.

<sup>365</sup> J. Campbell, 'Authorship, Incentives for Creation, and Copyright in the Digital 21st Century', *supra* note 358, p. 6 citing Patry's understanding, see, Alan Latman, William F Patry, and Herbert Allen Howell, *Latman's the Copyright Law* (Bureau of National Affairs, 1986). p. 23.

<sup>366</sup> J. Campbell, 'Authorship, Incentives for Creation, and Copyright in the Digital 21st Century', *supra* note 358 p. 6.

<sup>367</sup> Howard B Abrams, 'Originality and Creativity in Copyright Law', *supra* note 4, p. 15.

## Creativity Should Prevail:

The creativity criterion should be supported and reinforced, whether *per se* or within the selection and arrangement criterion that the thesis supports. 'Creativity' has a direct influence on the authorship doctrine, as it presumes the intervention of personal authorship and mental labour, and whenever creativity is mentioned the personal element is confirmed.<sup>368</sup> For instance, in the *Feist v. Rural Case*, it was confirmed through the creativity condition that the concept of authorship no longer relies solely on the author's labour in creating work through gathering information, but that 'independent imagining' - as Ginsburg described it -<sup>369</sup> is required, and 'subjective' selection or arrangement is also required to manifest the authorship in it. "The more subjective the choices as to selection or arrangement, the more authorship would likely be found."<sup>370</sup> [Underlining added].

Even the understanding of *Feist* to the decision of the *Trade-Mark Cases v. Steffens* case correlated creativity and the personal intervention, that was evident from the 'emphasis' the Supreme Court used in the quotation of the latter case, "[i]n The Trade-Mark Cases ... The Court explained that originality requires independent creation plus a modicum of creativity: '[W]hile the word *writings* may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like."<sup>371</sup> This emphasis, through using italic, refers to the notion that the writings can be original only if the fruits of intellectual labour are reflected, and this was used as an evidence of the creativity requirement.

The orientation towards the personalisation of the authorship within copyright law is an undeniable fact, for instance, the EU Directive 2001/29<sup>372</sup> states in the preamble that "[i]f authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work".<sup>373</sup> Accordingly, the EU legislator expressed the view that it is the author who must be rewarded to achieve the

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<sup>368</sup> Teresa Scassa, 'Original Facts: Skill, Judgment, and the Public Domain', *supra* note 246 p. 10. As she confirmed that "'Creativity' places more emphasis on the effort of the author to "create" something new."

<sup>369</sup> Jane C. Ginsburg, 'The Concept of Authorship in Comparative Copyright Law', *supra* note 250, p. 1078.

<sup>370</sup> *Ibid.* p. 1078.

<sup>371</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2, at 346.

<sup>372</sup> 'Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', 2001/29/EC (EU, 2001), *ibid.*

<sup>373</sup> Recital 10 of the preamble of the EC Directive 2001/29.

continuation of creative works' production, and it is not the producers' or society's interests, that should be given priority.<sup>374</sup>

### 3.11 Conclusion:

In this Chapter all the possible interpretations of originality have been exposed, for two reasons. Firstly, to challenge them to show the validity of every interpretation; secondly, to use these interpretations under the proposed categorisation of works, as high authorship works use the high interpretations of originality, and the low authorship works use the lower interpretations.

The thesis criticises the 'sweat of the brow' doctrine as a general criterion through which to protect all works of intellectual creation. Instead, it argues that works should be divided into those which require effort in their creation so these can be assessed depending on the 'sweat of the brow' doctrine, or 'skill, labour and judgment' criterion.<sup>375</sup> Other works with creative elements more distinguished than effort alone should not be assessed by the 'sweat of the brow' doctrine, but instead through examination of the characteristics of the work itself, using the 'creativity' criterion, which is largely similar to the 'intellectual creation' criterion. Both look to the personal and mental features of the work.

Besides a criticism and discussion of some issues, this Chapter was fundamental for the thesis's argument, for instance, in its criticism of the *Walter v. Lane*<sup>376</sup> Case, which had and still has significant influence on UK's jurisprudence and judiciary, however, it has a negative effect to authorship and copyright stability.<sup>377</sup> In addition the discussion of the *Feist v. Rural*<sup>378</sup> Case finds that the Supreme Court believed in the personal and mental features of works as a condition for copyright protection, but when this collided with the nature of databases, the condition's substance and level was lowered substantially. A discussion of this case was necessary to show the reason for the reduction in the meaning of creativity when the Court applied it to factual works as a typical case of the effect of factual works on judges' orientation towards originality.<sup>379</sup>

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<sup>374</sup> The term 'author' here refers to the 'human author' not publishers or right holders in general, as in other provision in the same directive it was stressed that that the existence of effective copyright protection will achieve the: "safeguarding [of] the independence and dignity of artistic creators and performers". The dignity is undoubtedly a characteristic that cannot exist unless in relation to human beings. See, Recital 11 of the preamble of the EC Directive 2001/29.

<sup>375</sup> It has been shown that the 'sweat of the brow' and the 'skill, labour and judgment' criteria are similar, and both ignore creative input in works. See, this Chapter at 3.6.1

<sup>376</sup> *Walter V. Lane*, A.C. 539, *supra* note 159.

<sup>377</sup> See this Chapter at 3.5.

<sup>378</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 2.

<sup>379</sup> See this Chapter at 3.4.1 and 3.4.2.

From these discussions it is concluded that the confusion in interpreting originality is not the actual sickness that infected authorship or copyright in general, but is just a symptom of several major problems underneath. The real problem is diagnosed to lie in disregarding the personality of authorship, which is an inherent characteristic in copyright that is generated from its nature as a property right. Therefore, personality should be manifest in every work that is considered an intellectual work.

This disregard for the personality in works returns to their different natures, and the difficulty in finding a unique criterion that can be applied to all of them. This was supported by Curtis's argument: "[i]t is very difficult to lay down any legal definition of originality in a literary composition, that may be resorted to as a universal test. ... [because] in every species of composition, in all literatures, there is of necessity a constant reproduction of what is old, mixed with more or less what is new, peculiar and original. There are also large classes of works, the materials of which are common to all writers."<sup>380</sup>

In the belief in the personal and mental features that every intellectual work should show, applying this to factual works will thus entail depriving them of copyright protection as due to their nature these works lack personal and mental features. Courts were therefore compelled to protect them under any pretext, so as to protect the investment expended in creating them, even by twisting the orthodox personality and mentality of copyright law and arguing that they exist in such works, as in the *Feist v. Rural* Case in the US, or by arguing that copyright law does not require any personal or mental features, as happened in the *Walter v. Lane* Case in the UK.

The main argument of this thesis aims to drive copyright law to return to its origins in order to overcome the distortions that happened to its fundamental principles. This can happen through protecting only works that have personal and mental features, separating works that lack these features in a different *sui generis* system that does not need to apply the notions of personal authorship. This proposed distinction will be shaped and formulated in the Chapter Eight, and those personal and mental features will be extracted from English jurisprudence and confirmed in Chapter Six. However, the authorship concept still needs some refinement, due to several challenges and claims against it, before it is built upon in the Chapters that follow. This will be done in Chapters Four and Five by challenging the 'death of the author' and 'romantic author' doctrines.

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<sup>380</sup> George Ticknor Curtis, *Treatise on the Law of Copyright* (London; Boston: A. Maxwell and Son; Charles C. Little and James Brown, 1847).p. 171



## **Chapter Four: Literary Authorship and Legal Authorship Refining Authorship from the Claim That It Is Language That Speaks Not the Author**

### **4.1 Introduction:**

The last Chapter established the core concern of this thesis, namely, the level of confusion encountered in assessing the existence of protection conferred by copyright law in the UK and the US. As was concluded in last Chapter, the conflict that is apparent in courts' decisions is not an actual sickness which has infected copyright law, but is instead a symptom of profound problems in the philosophical fabric, or principles, that copyright law is based upon. It was argued in the last Chapter that the reason for that conflict is the underlying conflict in these philosophical foundations of copyright law, which have been encouraged by interested right holders.

Judges have been put in a bind between legislative shortcomings in reconciling copyright's orthodox concepts and these works (non-authorship works), and the failure to provide protection to producers' interests and their fear of the loss of their capital in the case that such protection is not achieved.

However, before investigating these principles or philosophical foundations, it is of equal importance to refer first to the arguments of scholars who have built on this confusion and reached a result: 'the death of the author'<sup>1</sup>. It is also necessary before pursuing the thesis's proposition, namely, providing a balance in copyright protection through dividing works into three grades of authorship and three modes of protection, that we ensure that authorship is a stabilised concept in theory and practice.<sup>2</sup>

As a synopsis of this research's approach until now, it can be found that the confusion in copyright law rulings on deciding on the copyrightability of works, which were explained in Chapters One and Two, has led to two results. First, the confusion around the interpretation of originality, which was explained in the second and third Chapters. Second, the claim of the death of authorship, which is the subject of this Chapter

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<sup>1</sup> See Michel Foucault, 'What Is an Author?', in Donald F. Bouchard (ed.), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1980)., also, Woodmansee in her works: M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *Cardozo Arts & Entertainment Law Journal*, 10 (1991). ; Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author'', *Eighteenth Century Studies*, (1984). and Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press Books, 1994).. And Jaszi in his works Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *Duke Law Journal*, (1991a). and Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *Cardozo Arts & Entertainment Law Journal*, 10 (1991b).

<sup>2</sup> The thesis's proposition is the subject of Chapters Seven and Eight.

(Chapter Four). The following Chapters will build on this in order to pave the way to the thesis's proposition.

#### 4.2 Barthes's and Foucault's 'The Death of the Author' Doctrine:

The aim of presenting these views in this part is to analyse the counter views to the thesis's approach in defending and upholding the authorship concept, as the dependence on authorship, originality and the author's personality in this research needs first to confront any opinions that argue differently and either prove their defects or prove that they are baseless. This has been done in regard to the first claim, which is based on the thought of Barthes and Foucault, who argued that the death of the author was through the birth of his writing. This also was argued through the claim that authorship is an alien concept to English law, as will be considered in the next Chapter.

The death of the author doctrine is based on an article published by Barthes in 1968 with the percussive title "The Death of the Author"<sup>3</sup> and also in Foucault's lecture given in 1969, which was entitled "What Is an Author?"<sup>4</sup> These works established "the anti-humanist slogan of the science of the text, both for his partisans and his adversaries."<sup>5</sup>

Barthes confirmed that when the author starts writing he enters his own death, for when "the voice loses its origin, the author enters into his own death, [and] writing begins."<sup>6</sup> He finds that the 'death of the author' is shown in the 'effacement of the individual characteristics of the writer' through the confrontations that the writer establishes between himself and his text that cancel the signs of his particular individuality. These confrontations are also confirmed in Foucault's thoughts.<sup>7</sup> Barthes cited Mallarmé to confirm how, in France, language had to replace the author, as "it is language which speaks not the author ... only language acts, 'performs', and not 'me'"<sup>8</sup>

In Balzac's story 'Sarrasine' he wrote "[t]his was woman herself, with her sudden fears, her irrational whims, her instinctive worries, her impetuous boldness, her fussings, and her delicious sensibility."<sup>9</sup> Barthes wonders who is speaking there. Is it Balzac, or the hero of the story? Is this a universal wisdom, or romantic psychology?<sup>10</sup> Barthes reaches the conclusion that writing destroys the identity of the author: "Writing is the destruction of every voice, of every point of origin. Writing is that neutral, composite,

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<sup>3</sup> Roland Barthes, 'The Death of the Author', *Image, Music, Text* (Fontana Press, 1977).

<sup>4</sup> Michel Foucault, 'What Is an Author?', *supra* note 1.

<sup>5</sup> Antoine Compagnon, *Literature, Theory, and Common Sense* (Princeton University Press, 2004).p.32.

<sup>6</sup> Roland Barthes, 'The Death of the Author', *supra* note 3, p. 142.

<sup>7</sup> Michel Foucault, 'What Is an Author?', *supra* note 1, p. 117.

<sup>8</sup> Roland Barthes, 'The Death of the Author', *supra* note 3, p. 143.

<sup>9</sup> Honoré de Balzac, 'Sarrasine (1830)', *Michel Serres, L'Hermaphrodite. Sarrasine sculpteur, précédé de Balzac, Sarrasine, Paris, Flammarion, (1987).*, Referred to in Roland Barthes, 'The Death of the Author', *supra* note 3, p. 142

<sup>10</sup> Roland Barthes, 'The Death of the Author', *supra* note 3, p. 142.

oblique space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing”<sup>11</sup>

Barthes is actually trying to prove the author’s inexistence in his writings, or that language does not bear the identification of the person who utilises it. For him, this does not - and should not - matter. Although a superficial look at this argument may find it destroys the authorial basis of copyright law, a closer look will show that this argument has nothing to do with authorship as we understand it in law, as will be elaborated later.<sup>12</sup>

Foucault tried to prove that authorship and ownership are recent concepts that have harmed writing and culture more than they have benefitted them. He argues that in older times literary works were accepted and circulated without any question about the identity of their authors, because their age-old was a sufficient proof of their authenticity.<sup>13</sup> He also suggests that a discourse was not a product or possession, but an action or gesture that might be lawful or unlawful before becoming a possession, like the value of property.<sup>14</sup>

Foucault imagines a system of culture where discourses are circulated without the need to know their authors, in a ‘pervasive anonymity’, and instead of asking who the author is, or about the authenticity or originality of works, we ask: what are the other modes of the existence of this discourse? Where does it come from? Who controls it? And, who can fulfil the diverse functions of the subject? At the end, he concludes: “What does it matter who’s speaking?”<sup>15</sup>

Krause expressed a similar contention also. He argues that the ideas which are included in a book that is sold by the author cannot remain the author’s property, as: “[a] published book is a secret divulged”,<sup>16</sup> and he asks how the preacher can prohibit the printing of his homilies by listeners? Or how a professor can stop his students from using his propositions?<sup>17</sup> Krause criticises the basis of intellectual property and insists that “the concept of intellectual property is useless”<sup>18</sup>, as he argues that property

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<sup>11</sup> *Ibid.* p. 142.

<sup>12</sup> See this Chapter at 4.4.

<sup>13</sup> Michel Foucault, 'What Is an Author?', *supra* note 1, p. 125.

<sup>14</sup> *Ibid.* p. 124

<sup>15</sup> *Ibid.* p. 138. As a quick response, this thesis confirms that wondering about the persons incorporated in the process of creating or developing a discourse did not disappear from Foucault’s proposed questions, as in his question: ‘where does it come from?’ This refers to the author as the source of the work, and his name can reveal much information about the time and place of its production. In regard to the question: ‘Who controls it?’, it mostly asks about the author or the owner of rights.

<sup>16</sup> Christian Sigmund Krause, 'Ueber Den Büchernachdruck', *Deutsches Museum*, 1 (1783). p. 415-17.

<sup>17</sup> *Ibid.* p. 415-17 referred to in Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author"', *supra* note 1, p. 444.

<sup>18</sup> Christian Sigmund Krause, 'Ueber Den Büchernachdruck', *supra* note 16 p. 417.

should be exclusive to the owner, who should have the ability to dispose of it and retrieve it unconditionally.<sup>19</sup> The the fact that Krause is a literary and not a legal writer, has confused ideas and expression protection in copyright law in this regard, as copyright law does not provide any protection for unexpressed ideas.

Ironically, the arguments of Foucault and Barthes, and that advocated by Krause, are similar to those proposed by the pirates of books who published in the age of the printing press in England, as they used the same philosophical defences to justify their practices. For instance, one contended that “[t]he book is not an ideal object,... it is a fabrication made of paper upon which thought symbols are printed. It does not contain thoughts; these must arise in the mind of the comprehending reader. It is a commodity produced for hard cash.”<sup>20</sup> So both Foucault and the infringing printers of the seventeenth century have argued that ‘language’, or ‘symbols’, are what have importance, not the ideas of the author.

It seems that the arguments of pirates, used to defend their acts, resemble those argued by post-structuralist theorists, who claim that authors do not have anything to be protected in their works, and all their thoughts can be appropriated by others. Woodmansee implicitly advocates this view, as she proposes that if the value of the book were reduced to its physical foundation (ideas and letters or drawn lines) it would be impossible for the author to claim any ownership of it once he has delivered it to the publisher.<sup>21</sup>

Though Foucault criticises the current position of the author in his statement “[t]his reversal transforms writing into an interplay of signs, regulated less by the content it signifies than by the very nature of the signifier.”<sup>22</sup> Actually, this differentiation is misleading, as the content and the personality of the writer are two faces of one coin - both are correlated and cannot be separated from the other, as will be proved later.<sup>23</sup> In fact, content, signification and ideas that emanate from the writing are the core expression of the personality of the author, as will be demonstrated later.<sup>24</sup>

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<sup>19</sup> *Ibid.*16, p. 415-17, referred to in Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author', *supra* note 1, p. 444.

<sup>20</sup> Heinrich Bosse, *Autorschaft Ist Werkherrschaft: Über Die Entstehung Des Urheberrechts Aus Dem Geist Der Goethezeit* (Ferdinand Schöningh, 1981). p. 13, referred to in Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author', *supra* note 1, p. 443.

<sup>21</sup> Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author', *supra* note 1, p. 443.

<sup>22</sup> Michel Foucault, 'What Is an Author?', *supra* note 1, p. 116.

<sup>23</sup> See Chapter Six on personal authorship,

<sup>24</sup> See discussion in Chapter Six.

## Individualisation in literature and Law:

It is evident that Barthes would like to attack the concept of the author both theoretically and historically, since he argued that: “[t]he author is a modern figure, a product of our society insofar as, emerging from the Middle Ages with English empiricism, French rationalism and the personal faith of the Reformation, it discovered the prestige of the individual, of, as it is more nobly put, the ‘human person.’”<sup>25</sup> Barthes thus finds that the ‘author’ concept has discovered the prestige of the individual, and he seemingly looks to the issue negatively, as he confirmed that this position has made literature the “epitome and culmination of capitalist ideology”,<sup>26</sup> since it attaches importance to the author. This point constitutes the starting point, or main cause, for Barthes’ criticism of authorship.

Foucault, in his criticism of the ideas of the author and authorship, describes the idea of authorship as a modelling of individualisation, affirming that “the coming into being of the notion of ‘author’ constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy, and the sciences.”<sup>27</sup> He questioned and denounced the individualisation of the author concept and the theories of authenticity and attribution, as well as the “systems of valorization in which he [the author] was included”<sup>28</sup> or the emerging of the concept of “the man and his work.”<sup>29</sup> Foucault tries to separate ‘authorship’ and the principle of ‘individualisation’ or ‘personality’ in intellectual property and copyright law, which are essential components in copyright law. Proving the invalidity of this claim will help to support the position of authors and the importance of authors’ personalities and unique intellects in works, rather than just the language, or the skill or profession of writing. This will not be achieved unless by defending personality and individuality, and that is discussed in Chapter Six.

Foucault’s and Barthes’s claims that authorship reflects individualisation in literature are irrelevant to law. As, individualisation, the author and authorship concepts in literature are different from those in law. Individualisation in literature means reliance on the author alone in understanding or interpreting the text, although, in law, it means giving superiority to the author’s personality, rather than to capital or funds. The solution lies in separating law and literature in both theories and concepts.

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<sup>25</sup> Roland Barthes, ‘The Death of the Author’, *supra* note 3, p. 142-43.

<sup>26</sup> See, *ibid.* p. 143.

<sup>27</sup> Michel Foucault, ‘What Is an Author?’, in Josue V. Harari (ed.), *Textual Strategies: Perspectives in Post-Structuralist Criticism* (Methuen & Co. Ltd, 1979). p. 141.

<sup>28</sup> *Ibid.* p. 141.

<sup>29</sup> Michel Foucault, ‘What Is an Author?’, *supra* note 1, p. 115.

For instance, Barthes criticised the 'author' concept as it was being used to reinforce capitalism and positivism through dependence on the sanctification of the individual author. Barthes' thoughts of anti-individualism and singularity appear when he confirms that "[t]he image of literature to be found in ordinary culture is tyrannically centred on the author, his person, his life, his tastes, his passions, while criticism still consists for the most part in saying that Baudelaire's work is the failure of Baudelaire the man, Van Gogh's his madness, Tchaikovsky's his vice."<sup>30</sup> Note here that, firstly, in copyright law, individualisation, from most sides, has an argument that is parallel to personalisation, and that is against the capitalism that cares about funds more than the person. Secondly, Barthes finds that the author's personality or individuality is different from his personal circumstances, e.g., illness or personal traits; this differentiation is not relevant in law.

### **4.3 'The Death of the Author' Doctrine in Law:**

Although Foucault did not address the 'death of the author' in the legal context, as argued by this thesis,<sup>31</sup> and will be more supported below,<sup>32</sup> It was Rose who made this connection and, accordingly, he is responsible for the confusion that gripped the authorship doctrine in copyright law within this scope. This is especially so when he confirmed, in his book's preface: 'authors and owners, the invention of copyright', - although it is a long quotation, is very substantial evidence for the thesis's argument: "As a legal witness, I became conscious of the contradiction between the romantic conception of authorship -the notion of the creative individual - that underlies copyright, and the fact that most work in the entertainment industry is corporate rather than individual. Furthermore, many of the characteristic products of the industry - game shows, soap operas, situation comedies, police stories, spy stories, and the like - tend to be formulaic. Romantic conceptions of authorship seem as inappropriate in discussing these cultural productions as in discussing the equally formulaic productions of some older periods, ballads, say, or chivalric romances. I found these contradictions between the ideology of copyright and the actual circumstances of litigation intriguing and provocative."<sup>33</sup>

The death of the author argument that was initiated by Barthes and Foucault, was echoed by legal scholars, who built upon it and argued that, historically: "[i]f the two concepts of authorship and literary property emerged at the same time, based on common conceptions of individualism, personality and creativity, then it might be

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<sup>30</sup> Roland Barthes, 'The Death of the Author', *supra* note 3, p. 143.

<sup>31</sup> As discussed above and will be detailed under 4.4.

<sup>32</sup> See this Chapter at 4.4

<sup>33</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993). p. viii.

reasonable to expect the concepts to disappear at the same time.”<sup>34</sup> This is not Bently’s own argument, but his view about the advocators of the death of the author notion and its influence on legal doctrine. For instance, Aufderheide argued that Foucault and Barthes developed legal regime policies, if compared to the ‘romantic era notion of the author’.<sup>35</sup>

Rose builds his argument of the modernity of the author doctrine on the enactment of the author in law, although there is some conflict and irrationality in his argument, as follows. Rose stated “in practice, English booksellers of the sixteenth and seventeenth centuries seem to have recognized an obligation to pay authors for their ‘copies.’”<sup>36</sup> [Underlining added] However, he then affirms that: “[d]espite eighteenth-century assertions about authors’ ancient common law property rights, no such authorial right was ever established or even, so far as I know, asserted by an author.”<sup>37</sup> [Underlining added] It is proposed that legal theory of authorship can be traced back to practice of writing in ancient times, and any proof of the existence of these practices can be considered to be an origin of the legal theory of copyright law and author’s rights.

Rose even confirmed that authors had literary rights –he means moral rights- prior to the Statute of Anne, as he confirmed: “[i]n sixteenth-century Venice, for example, the Council of Ten decreed that printers must not publish works without the author’s written consent.”<sup>38</sup>[Underlining added]. Besides, he adds: “[i]n England, according to an edict proclaimed by the Long Parliament ... all books identified the author on the title page and that no book was published without the author’s consent.”<sup>39</sup>

On the other hand, Rose’s understanding of the Statute of Anne and the rights of authors prior to this statute was imbued by his experience as a professor of English<sup>40</sup>, as although he confirms<sup>41</sup> that the author has had property of his work since the sixteenth century, “A sixteenth or seventeenth-century author did, of course, own his manuscript, and this might be sold to a bookseller or to a theatrical company.”<sup>42</sup>

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<sup>34</sup> Lionel Bently, 'Copyright and the Death of the Author in Literature and Law', *The Modern Law Review*, 57/6 (1994)., p. 976.

<sup>35</sup> Patricia Aufderheide, 'Creativity, Copyright and Authorship', in David Gerstner and Cynthia Chirs (ed.), *Media Authorship* (New York: Routledge, 2012). p. 1.

<sup>36</sup> Mark Rose, 'The Author in Court: Pope V. Curll (1741)', *Cardozo Arts & Entertainment. Law Journal*, 10 (1991)., p. 479.

<sup>37</sup> *Ibid.* p. 479.

<sup>38</sup> *Ibid.* p. 478 as he cited Horatio F Brown, *The Venetian Printing Press, 1469-1800: An Historical Study Based Upon Documents for the Most Part Hitherto Unpublished* (Gérard Th. van Heusden, 1969).

<sup>39</sup> Mark Rose, 'The Author in Court: Pope V. Curll (1741)', *supra* note 36, p. 478

<sup>40</sup> Mark Rose is a Professor in the English Department at the University of California, Santa Barbara, see, University of California - Santa Barbara, 'Department of English', <<https://www.english.ucsb.edu/people/rose-mark>>, last

<sup>41</sup> In his article Mark Rose, 'The Author in Court: Pope V. Curll (1741)', *supra* note 36.

<sup>42</sup> *Ibid.* p. 478

[Underlining added]. He confirms that: "Prior to the passage of the statute [Statute of Anne], authors could not be said to "own" their works."<sup>43</sup> [Underlining added].

Rose expressed his own belief that this acknowledgment of the author's personal and property rights is based on concepts of honour and reputation, not the acknowledgment of the property in the work: "[t]he acknowledgement of the author's personal right to control the publication of his texts was a principle based on concepts of honor and reputation consistent with the traditional patronage society. It was not necessarily the same as the acknowledgement of a property right in the sense of an economic interest in an alienable commodity."<sup>44</sup> He maintained this argument with some rhetoric about the "image management" that Pope<sup>45</sup> practised, that was a reason for suing the publishers, and not for protecting his copyright.<sup>46</sup>

This treatment of circumstances that surrounded the codification of legal rules is not to be considered in the history of legal concepts and doctrines. Rose's argument addresses the issue from a literary angle, that may look to the law like a reflection of society, although this may be correct, this is not conditional either for making laws or for historical studies of law.<sup>47</sup> Bently confirms that the study of the history of copyright law is related to the scope for works protected, and not as attached to personal rights as to the aim of providing protection: "the history of copyright is the history of its expansions into new domains - photography, sound recordings, films, computer programs. Only from a very limited viewpoint can its failure to expand into the domain of protecting personality rights be seen as signalling copyright's (or the author-in-copyright's) demise. Copyright remains a stronger and preferable form of protection for creators and proprietors in the considerable area to which it extends."<sup>48</sup> This supports the thesis's view that what copyright law is merely interested in regarding authorship is how it can be used to confer protection to works.

The argument by Rose, has employed Foucault's deconstructionist philosophy in literature in the legal context, as Rose exploited the identical terminology that existed in this regard between law and literature, and from then the doctrine of the 'death of the author' in law started to grow, and that which was later maintained by Woodmansee

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<sup>43</sup> *Ibid.* p. 477

<sup>44</sup> *Ibid.* p. 478-479

<sup>45</sup> That was when he was talking about Alexander Pope as he confirmed that "Despite his involvement in the literary marketplace, Pope characteristically presented himself as a gentleman and a scholar rather than as a professional and was almost obsessively concerned with what we would today call image management." See, *ibid.* p. 480

<sup>46</sup> *Ibid.* p. 478-481

<sup>47</sup> The history of the authorship concept and of intellectual property actually began in these decrees of the sixteenth century. The chronicle does not wait until the social establishment of the rule, which is that something may be related to literary or social studies, but not legal studies.

<sup>48</sup> Lionel Bently, 'Copyright and the Death of the Author in Literature and Law', *supra* note 34, p. 976-977.

and Jaszi in their book: "The construction of authorship: Textual appropriation in law and literature."<sup>49</sup> From then on, any research on authorship in copyright law tends to include authorship in literature, although, as the thesis confirms, the scope of work for both is different.

Ultimately, It worth referring to some attempts by literary scholars to impose a literary doctrine on legal discourse and challenge the different nature of the two sciences. For instance, the Professor of Literature and English, Jane Gaines,<sup>50</sup> confirms the concerns about the coherence of law after the emergence of poststructuralist modes of analysis, however she finds that this is not as something that affected the foundations of legal theory because legal discourse is considered "somehow of a different (oftentimes higher) order than that of literary form and language."<sup>51</sup> She claims that lawyers and legislators lend an ambiguity in legal language "in order to settle perplexing matters with finality"<sup>52</sup>, depending on the belief that "legal discourse has 'consequences' while literary discourse does not"<sup>53</sup>. Gaines thus argues that "in terms of intellectual property, there are structural similarities between legal and literary discourse (both essentially positing the bourgeois subject in their notion of what constitutes an author). Comparisons of the two in terms of 'effects' are irrelevant. In this branch of Anglo-American law, at least, the two discourses inform each other, because they share the same cultural root, buried deep in the seventeenth century."<sup>54</sup>

### **Reflections by the thesis:**

Those who contend that there is a substitution of authors by language (Barthes and Foucault) confirm two points; first, that the language is the thing that expresses and conveys information, not the author, so after the expression has been emanated the role of the author should disappear. Second, that the author himself does not make something ingenious, as he merely interrelates the letters of the language to transfer some idea or concept from a space to a form, so the secret or importance lies in the language not the author. In fact, they depend on literary and weak historical arguments, and that no legal or literary benefits will return from such anonymity.

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<sup>49</sup> Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, *supra* note 1.

<sup>50</sup> See her page on Duke University. <http://literature.duke.edu/people?subpage=profile&Gurl=/aas/Literature&Uil=imgaines> ; last accessed 12/08/2014

<sup>51</sup> Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Univ of North Carolina Press, 1991). p. 23

<sup>52</sup> *Ibid.* p.23

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* p. 23.

If Barthes and Foucault's views on the importance of language may find an echo in the idea/expression dichotomy in copyright law; this is only a superficial resemblance. The law does not literally mean to not protect ideas, but, in fact, it protects detailed and formed ideas, but only those that are written or recorded, for evidential reasons only. As explained by Judge Park in *Hadley v. Kemp*,<sup>55</sup> when commenting on the claim that there is no copyright in the musical work until it recorded, he confirmed: "Although the songs were not reduced to writing or another material form prior to their being recorded by the group, so that copyright did not subsist, this did not mean that the musical works did not exist. On the contrary, a musical work could exist before it was reduced to material form."<sup>56</sup> [Underlining added] And he considered the defendant's claim though not registering his songs before recording, and depended on the evidence from him and plaintiffs to consider the work copyrighted.<sup>57</sup>

So the protection of copyright is present in expression exceptionally, not because it is the intended subject of protection, but for legal reasons resulting from the difficulty in delimiting the exact boundaries of the protected idea, and in determining its attribution to a specific person. Besides, this research asserts that language is a fabric that can be shaped in limitless forms. However, the resulting form, or the selection and arrangement of this language's elements, depends on the ideas they transfer or want to express, so the language is only a way to transfer or convey ideas, whether this language is writing, musical notes, the lines of drawing, the movements of dance or mime, or even sign language.

Foucault has committed some obvious legal errors that halt the confidence in, and the importance of, his argument for legal discussions. For instance, he did not recognise the existence of an author for letters, contracts and posters: "a private letter may have a signatory, but it does not have an author; a contract can have an underwriter, but not an author; and, similarly, an anonymous poster attached to a wall may have a writer, but he cannot be an author."<sup>58</sup> Foucault confirms that there are writers, but they are not authors. Note here that he did not relate the writing and the originality of the work in deciding the absence of the author from these works, but he offered a general rule that all these works do not or cannot have authors. This argument discloses how, in literature, there is a big difference between writers and authors; such differentiation does not exist in statute, as will be elaborated below.<sup>59</sup> This argument supports the thesis's contention that it is important to distinguish between the literary and legal

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<sup>55</sup> *Hadley V. Kemp*, 1999, E.M.L.R. 589, High Court, Chancery Division

<sup>56</sup> *Ibid.* at 591

<sup>57</sup> *Ibid.* at 636

<sup>58</sup> Michel Foucault, 'What Is an Author?', *supra* note 1, p. 124.

<sup>59</sup> See this Chapter at 4.4.

meanings of authorship, as they are separate areas, dealing with the same terminology from separate perspectives or angles.

Foucault confirmed that he addressed the 'author' concept in the limited sense of "a person to whom the production of a text, a book, or a work can be legitimately attributed."<sup>60</sup> However, he did not talk about determining the author as the person who produced the work through his talk about the different roles that the author represents or embodies within the writing process. That role of the author as the creator of the work is the only facet that interests the law. For instance, when Foucault analysed the different personalities can be found in a novel, he found that the author personality cannot be distinguished from the fictional personalities or narrator: "[i]t would be as false to seek the author in relation to the actual writer as to the fictional narrator."<sup>61</sup> Also, in regard to a mathematical treatise, he differentiates between the person who indicates the circumstances of composition, and the person who concludes a demonstration within the body of the text, and that who tells about the treatise's goals.<sup>62</sup> All these roles Foucault considered as separate authors, and it would be tricky to define who the author is among those persons. However, he did not address the author from the legal side as being the creator of the whole work, as the law does not distinguish between all these different roles played by the author in one work. What is important to the law is who put the pen to paper and wrote such ideas and thoughts.

This research maintains that Barthes's and Foucault's arguments were all meant to be considered in literature, and applying them to law is an improper stretching of such claims. This is apparent from Barthes' argument, when he states, negatively or critically, that the explanation of the work is sought through the author who produced it: "The explanation of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction,

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<sup>60</sup> Michel Foucault, 'What Is an Author?', *supra* note 1, p. 131.

<sup>61</sup> This diversity in the persons in the novel is apparent in his statement "in a novel narrated in the first person, neither the first person pronoun, the present indicative tense, nor, for that matter, its signs of localization refer directly to the writer, either to the time when he wrote, or to the specific act of writing; rather, they stand for a "second self" whose similarity to the author is never fixed and undergoes considerable alteration within the course of a single book. It would be as false to seek the author in relation to the actual writer as to the fictional narrator;" see, *ibid.* p. 129.

<sup>62</sup> The diversity in persons in regard to a mathematical treatise is evident in his statement "In a mathematical treatise, the ego who indicates the circumstances of composition in the preface is not identical, either in terms of his position or his function, to the 'I' who concludes a demonstration within the body of the text. The former implies a unique individual who, at a given time and place, succeeded in completing a project, whereas the latter indicates an instance and plan of demonstration that anyone could perform provided the same set of axioms, preliminary operations, and an identical set of symbols were used. It is also possible to locate a third ego : one who speaks of the goals of his investigation, the obstacles encountered, its results, and the problems yet to be solved and this "I" would function in a field of existing or future mathematical discourses." See, *ibid.* p. 130.

the voice of a single person, the author 'confiding' in us." <sup>63</sup> So, all Barthes' interest is in the literary side, or the interpretation of texts, not in the legal aside or in the authentication or attribution of the work to a specific author.

Woodmansee has differentiated between the concept of 'author' and the practice of 'writing', arguing that the notion of the author never coincided with the practice of writing. <sup>64</sup>Foucault also argued that the 'notion of the author' is a relatively recent one, and does not reflect contemporary practices in writing. <sup>65</sup> Likewise, Foucault's argument that the emergence of the author concept is different from the emergence of the writer concept, is also irrelevant in law.

Barthes' and Foucault' arguments did not discuss and investigate in depth the theoretical and ideological basis of copyright law. They also did not challenge the social or economic sides that copyright law addresses, as copyright law is not –as this thesis claims- only a bundle of theoretical concepts and philosophical principles, but is a mechanism that aims to achieve a balance between legal aims, economic interests and cultural needs. However, we find Foucault and Barthes and their followers (Woodmansee, Jaszi and Kaplan) confine copyright law's focus to the characteristics of authorship and literature so as to reach a result that is the inexistence or insignificance of the author.

#### **4.4 'The Death of The Author' Is A Literary Doctrine:**

From the above discussion, we can conclude that all that Barthes and Foucault argue and wanted to prove from their articles is related to the intention of the author or the author's function in literature or, in other words, the function that literary scholars suppose that the author's existence will perform in interpreting texts. Their arguments were not aiming to abolish the author or his name definitively from works. This appears from Foucault confirmation that "I shall not offer here a socio-historical analysis of the author's persona. ... I want to deal solely with the relationship between the text and author and with the manner in which the texts points to this "figure"[he means the author]."<sup>66</sup> [Underlining added].

Foucault himself did not intend the extension of his argument into legal discourse. All he did was an interrogation, or a call for investigation on when the author became individualised and when studies of authenticity and attribution began. Other scholars – especially in copyright law- caught this thread and built on Foucault's interrogation. However, authorship was not affected, even after that involvement of literary meaning

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<sup>63</sup> Roland Barthes, 'The Death of the Author', *supra* note 3, p. 143.

<sup>64</sup> M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *supra* note 1, p. 279.

<sup>65</sup> Michel Foucault, 'What Is an Author?', *supra* note 1.

<sup>66</sup> Michel Foucault, 'What Is an Aauthor?', *supra* note 27, p. 141.

into the legal discourse. Authorship has the main and primary role in copyright law as a means for assessing proprietorship. Without authorship, the author and owner of the work and subsequent rights cannot be determined.

In fact, Foucault's attack on the author was not directed to questioning the existence of the author as a person and preferred its disappearance from the legal perspective. Foucault was differentiating between the author and the writer and wanted to banish the first for the benefit of the latter, or to be confined to the writer characteristic while alienating the author, who relates theoretically to the interpretation of texts.<sup>67</sup> This is a differentiation known in the literature, but the law does not build consequences on it. As well, Foucault's argument does not apply to the legal discourse, "[y]et Foucault, though he himself makes this distinction, does not attack the writer. It is the author."<sup>68</sup> We believe that the 'authorial intention', as a way of interpreting texts, is the main thing that literary scholars and philosophers adhere to in interpreting texts and this is what Barthes and Foucault wanted to banish. They wanted to eliminate the author's function in doing this job.

This differentiation between the author and the writer does not just appear in Foucault's own argument, but can be understood even from critics of Foucault's argument, as all of them –Foucault and his critics- discuss the issue from a literary perspective: "[w]riters enter a system with a life of its own; many of its features elude their most unconscious grasp. ... But the author, produced jointly by writer and text, by work and critic, is not a person; it is a character who is everything the text shows it to be and who in turn determines what the text shows. The author has no depth."<sup>69</sup> [Underlining added] Foucault's treatment of the history of the author figure -his belief that it appeared during the enlightenment-<sup>70</sup> is also different from the history of the author as being causally and legally responsible for the work, which has a longer and more complicated history than Foucault offered, as will be discussed in the next Chapter.<sup>71</sup>

The research finds that the legal shortcomings in Foucault's context are many, and that is because, firstly, he is not a legal scholar, and, secondly, he did not intend to be understood in a legal context. At the end of this discussion it can be concluded that Foucault's opinion is self-defeating, or that the influential discussion depended on Foucault's notion of 'the death of the author', is against Foucault's own idea of the death of the author within the literary context. As Foucault's intention was necessary to understand his own doctrine, and delimiting it to literary scope, however, disregarding

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<sup>67</sup> Michel Foucault, 'What Is an Author?', *supra* note 1 p. 125-126

<sup>68</sup> Alexander Nehamas, 'What an Author Is', (The Journal of Philosophy, 1986), 685-91. p. 690.

<sup>69</sup> *Ibid.* p. 689.

<sup>70</sup> Michel Foucault, 'What Is an Author?', *supra* note 27, p. 144.

<sup>71</sup> Alexander Nehamas, 'What an Author Is', *supra* note 68, p. 690.

his intention caused confusion due to it was considered in legal discourse also. Accordingly, the 'death of the author' or the 'disregard of the author intention' can lead to confusion and uncertainties as proved by Foucault's text itself.

Bently, in his criticism of Foucault's argument, described what Foucault has argued from a literary viewpoint and that had influenced law as follows, "[i]n truth, it seems, the author-function [in Foucault's speech] has operated in different contexts at different times and in different ways, all of which have been layered one on top of another."<sup>72</sup> This is what the thesis argues that Foucault has done in law and literature, even if involuntarily. In order to better understand Foucault's argument it is favourable to investigate literary scholars understanding of Foucault, this is believed to help in distinguishing authorship doctrine in law away from the use of the term in literature. This discussion is important to prove that the author's 'death' argument is not related to copyright law but might be valid for literature only. This helps to refine the authorship concept from such challenges of death or abolition.

All that Foucault wanted to express is the abolition of the author from the interpretation of texts, as Nehamas confirmed: "His essay [Foucault's] calls for abolishing this figure altogether and for establishing a new and different way of dealing with literary texts."<sup>73</sup>

Although this thesis criticised Foucault through his statement that "[a] private letter may have a signer - it does not have an author",<sup>74</sup> and has argued that this is a legal flaw in his argument according to the legal principles of copyright. None of his legal proponents, Woodmansee or Jaszi, addressed this point. This statement is valid in the literature rhetoric, and this is clear in Nehamas' comment on Foucault's above statement, "[t]he distinction is crucial. All texts have writers, but only some have authors ... [t]o treat writers as authors, therefore, is to take a particular attitude toward their texts: it is to ask of them a certain type of question and to expect a certain type of answer."<sup>75</sup> It is obvious that whether the person has created the work or not is not Foucault's concern, but that the issue is related to the process of writing itself. Nehamas clarified the role of the author in literature that Foucault wanted to attack: "[w]e study literary texts in order to determine this (ideally) consistent and profound intention and thus to recapture the state of mind that led to their production. But this, Foucault argues, is an impossible goal which leads us in the wrong direction."<sup>76</sup>

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<sup>72</sup> Lionel Bently, 'Copyright and the Death of the Author in Literature and Law', *supra* note 34, p. 977-978

<sup>73</sup> Alexander Nehamas, 'What an Author Is', *supra* note 68, p. 685.

<sup>74</sup> Michel Foucault, 'What Is an Author?', *supra* note 1, p. 124

<sup>75</sup> Alexander Nehamas, 'What an Author Is', *supra* note 68, p. 685.

<sup>76</sup> *Ibid.* p. 685.

Nehamas argues that Foucault's aim in abolishing the author is merely for literary purposes while interpreting the author's texts only, not by abolishing his name and his existence, as is understood by legal scholars. As Nehamas contends that Foucault thinks "we appeal to the author in order to exclude, in the name of 'the correct interpretation,' new uses and extensions of literary texts. We thus cannot see that they mean whatever they can be taken to mean, that they are simply occasions for further writing."<sup>77</sup> Foucault also – according to Nehamas - thinks that: "The author allows critics to think of their work as purely descriptive, aiming to reveal once and for all the underlying meaning of each text and, therefore, rendering further writing unnecessary."<sup>78</sup> Accordingly, Foucault proposed this death or –more accurately- ignorance of the author when interpreting his texts to open the way for all possible interpretations of that text, even if they are "implausible,' ... [or]... 'inaccurate' readings."<sup>79</sup>

Likewise, Nehamas posited that the attack to the author doctrine has a critical purpose: "[i]n attacking the author, Foucault therefore attacks just this descriptive and interpretive conception of criticism as a whole."<sup>80</sup> [Underlining added]. According to Nehamas, Foucault's argument makes sense regarding the distinction between the reality and appearance of the meanings of texts, and bearing the author personality or intention in mind when interpreting his texts is one of the things that limit the possible – and perhaps conflicting - interpretations of a single text.<sup>81</sup>

Accordingly, the historic point that is superficially understood from Foucault's argument, that 'author' is a modern or new concept that has been confirmed by legal scholars, is crashed under the literary understanding when a distinction is made between the writer and the author, for "[w]riters are actual individuals, firmly located in history, efficient causes of their texts."<sup>82</sup> All that matters is that Foucault wanted literary interpreters to consider that "[w]riters truly exist outside their texts. They have no interpretive authority over them."<sup>83</sup>

It appears that Bently has touched on this distinction between 'the disappearance' of the author in literature and in law in his article 'Copyright and the Death of the Author in Literature and Law'<sup>84</sup>, as he stated "[a]lthough this radical questioning [he refers to Foucault's and Barthes' question about the death of the author] ... has proved

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<sup>77</sup> *Ibid.* p. 686.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* p. 686.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.* p. 687, as Nehamas has confirmed "Interpretation ends when interest wanes, not when certainty, or an ultimate meaning, is reached." See, *ibid.* p. 688.

<sup>82</sup> *Ibid.* p. 686.

<sup>83</sup> *Ibid.*

<sup>84</sup> Lionel Bently, 'Copyright and the Death of the Author in Literature and Law', *supra* note 34.

extremely influential within literary scholarship and clearly has potential significance for law in general, and copyright law in particular. After all, copyright law is a legal institution ... to which the notion of the author appears to be central - in defining the right owner, in defining the work, in defining infringement.”<sup>85</sup> As he reported –in explaining other legal scholars’ understanding- : “[i]f the legal walls establishing ownership of the text were built on the same intellectual foundations as romantic authorship, and those premises turn out to be sand rather than rock, copyright will sooner or later come tumbling down”.<sup>86</sup>

Bently strongly objected to this consequence, as he sees that this will lead to the death of copyright law: “[t]his argument that 'copyright is dead' is, however, unconvincing. Although it is true that copyright law has failed to be the prime legal mechanism for the expression of the needs or interests of those involved in character or personality merchandising, it is difficult to see how this failing represents the death of copyright law.”<sup>87</sup> One writer confirms that it is the author’s name that leads to the quality, value and reliability of the specific thoughts included, it is not a matter of words in a specific genre of writings, but the thoughts these words bear: “the biggest reason people buy a specific work of fiction is that they’ve read and enjoyed another work by that same author.”<sup>88</sup>

To advocate Bently’s opinion, we attract attention to the advantages of the author’s existence in copyright law in performing the functions of authenticity and the credibility of works,<sup>89</sup> and even of marketability. For credibility, this thesis argues that author’s name is the main requirement for ensuring the credibility of the work and included information. Take the case of Herodotus as an example; a lot of his writings were questioned in regard to credibility or truthfulness. Imagine if Herodotus’s name was not on all his writings, and if it proved that some of his works were not authentic, imagine how much information would be considered real and how much mess and conflict might occur to reporting on historic events, facts and studies, taking into consideration

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<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* p. 974.

<sup>87</sup> *Ibid.* p. 976.

<sup>88</sup> Teresa, 'The Life Expectancies of Books', <<http://nielsenhayden.com/makinglight/archives/007181.html>>, last accessed 16/02/2014.

<sup>89</sup> For the importance of the author’s name in credibility and marketability of works see, Mario Biagioli, 'Recycling Texts or Stealing Time?: Plagiarism, Authorship, and Credit in Science', *International Journal of Cultural Property*, 19/03 (2012). p. 453 and note. 1. See, Wilhelm Spiegelberg and Aylward Manley Blackman, *The Credibility of Herodotus' Account of Egypt in the Light of the Egyptian Monuments: With a Few Additional Notes by the Translator, Aylward M. Blackman* (B. Blackwell, 1927). ; Lionel Pearson, 'Credulity and Scepticism in Herodotus', *Transactions and Proceedings of the American Philological Association* (JSTOR, 1941), 335-55.; Zola Marie Packman, 'The Incredible and the Incredulous: The Vocabulary of Disbelief in Herodotus, Thucydides, and Xenophon', *Hermes*, (1991). ; and also, O Kimball Armayor, 'Did Herodotus Ever Go to the Black Sea?', *Harvard Studies in Classical Philology*, (1978)..

the antiquity of his works.<sup>90</sup> In regard to marketability, Gasaway confirms that the author's name can add value to work in the market, even if the addition was just notes to a digital copy of a book "the fame of an individual could make this annotated digital work valuable."<sup>91</sup>

Authorship has a practical role in copyright law, which is allocating who own the work and who is responsible for dealings on the work, it may thus be called 'the identification of the author' for "[a]uthorship has an extraordinary convenience for this purpose insofar as it affixes the origin of the work and provides an original property-holder."<sup>92</sup> So, authorship is only a path that leads to ownership, which represents all the powers and rights the copyright law confers to the author.

In fact, Foucault's contention, that the author's name or entitlement is not important in fictional or historical works,<sup>93</sup> is just a personal opinion, as this is an issue that differs from one society to another according to cultures or conventions. Furthermore, this argument does not reflect upon the legal aspect, as although it may be discussed in literary rhetoric that readers are not searching for authors' names in some works, the law cares about these details as long as they still cause legal disputes relating to infringement, plagiarism, or breaching legal rules against unauthorised reproduction, or pursuant to the unjust enrichment rules, or common law rules.

Although it was confirmed by Foucault that the language got a superior position over the author: "the historical experience of language underwent a fundamental shift toward the end of the eighteenth century, when language took on a life of its own and became an 'objectivity'."<sup>94</sup> This claim is found to be untrue depending on the understanding of Hobbes's argument. As Hobbes confirmed that if the opinion or facts told and acquired by us were proven to be untrue, the one to be blamed is the historian, not the person these facts or biography is about. "If Livy say the Gods made once a cow speak, and we believe it not; we distrust not God therein, but Livy."<sup>95</sup> Thus, it is the writer of language who is blamed and language itself cannot stand as an evidence of inner meaning it bears.

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<sup>90</sup> See, Wilhelm Spiegelberg and Aylward Manley Blackman, *The Credibility of Herodotus' Account of Egypt in the Light of the Egyptian Monuments: With a Few Additional Notes by the Translator, Aylward M. Blackman*, *supra* note 89; Lionel Pearson, 'Credulity and Scepticism in Herodotus', *supra* note 89; Zola Marie Packman, 'The Incredible and the Incredulous: The Vocabulary of Disbelief in Herodotus, Thucydides, and Xenophon', *supra* note 89; and also, O Kimball Armayor, 'Did Herodotus Ever Go to the Black Sea?', *supra* note 89.

<sup>91</sup> See, L.N. Gasaway, 'Libraries, Users, and the Problems of Authorship in the Digital Age', *DePaul Law Review*, 52 (2002).p. 1226.

<sup>92</sup> Patricia Aufderheide, 'Creativity, Copyright and Authorship', *supra* note 35, p. 2.

<sup>93</sup> Michel Foucault, 'What Is an Author?', *supra* note 1, p. 129.

<sup>94</sup> *Ibid.* p. 8.

<sup>95</sup> Thomas Hobbes, *Leviathan* (1969 edn.: Scolar Press, 1651). p. 44.

To conclude, following this discussion, two consequences will result; firstly, Foucault's and Barthes' articles should be re-read and understood, but from their point of view. Secondly, it seems that the intention of the author does not limit the interpretation of the text as Foucault argues, but it is important in directing the understanding of the readers, as although the blind interpretation of texts can open a lot of discussions and writings,<sup>96</sup> these discussions and writings may probably be faulty, and subsequently help produce more works that build an unsound doctrine and may be not suitable for other disciplines, or cause disruption or distortion, as happened in the effect Foucault's lecture caused to legal doctrine, as the thesis argues.

#### **4.5 The Misunderstanding of Law by Literary Writers:**

Barthes, in his claim of 'the death of the author', has relied on linguistic scholars, such as Mallarmé, Valéry,<sup>97</sup> and Proust.<sup>98</sup> He was also a professor of linguistics,<sup>99</sup> and his argument was within the beliefs of linguistics: that it is language that speaks and the author, writers or scribes are just a subject. The ideas of the death of the author are not initiated by him. Before him Mallarmé wrote "the elucutory death of the poet, who cedes the initiative to words."<sup>100</sup>

Kushner, in his comment on his own play '*Angels in America*', argues that the belief that artistic labour happens in isolation is a fiction, and that such a provenance of individual talents is "politically charged and, ... repudiated by the facts."<sup>101</sup> Kushner confirms that although the primary labour on the play was his, he confesses that he depended on "over two dozen people" who contributed "words, ideas and structures".<sup>102</sup>

In a quick reference to the thesis's argument, this discussion aims to clarify that most dealings of literary writers with authorship are only from the literary side of that expression, and they ignore or misunderstand the legal side of this concept. In this part we want to prove that legal scholars should not rely on literary scholars' understanding of authorship and apply this directly to law discourse, a filtering through legal concepts is required before making this transfer.

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<sup>96</sup> As Foucault argued in p. 121

<sup>97</sup> Roland Barthes, 'The Death of the Author', *supra* note 3, p. 143

<sup>98</sup> *Ibid.* See p. 144

<sup>99</sup> His famous works are *Le Degre zero de l'écriture* (1953), *Mythologies* (1957), *Elements de semiologie* (1964), *S/Z* (1970), *L'Empire des signes* (1970), see, *ibid.*3, p. 2.

<sup>100</sup> Stéphane Mallarmé, 'Correspondance, Lettres Sur La Poésie Éd', (Bertrand Marchal (Préface d'Yves Bonnefoy), Paris: Gallimard, coll."Folio-Classique, 1995). p. 366, cited in Antoine Compagnon, *Literature, Theory, and Common Sense*, *supra* note 5, p. 32.

<sup>101</sup> Tony Kushner et al., *Angels in America* (Royal National Theatre, 1995). p. 283.

<sup>102</sup> *Ibid.* p. 283.

Back to Kushner's play, it is believed that there is a legal misunderstanding here and that this play is a collective work. He had to include these individuals: 'two dozen people', as joint authors, as long as they had expressed their 'words' and 'structures' and not just their 'ideas'. Although the appropriation of other people's ideas is not protected, the contribution of other persons' 'words' and 'structures' is considered authorship. So, the problem is not in copyright law and its concepts, but in its understanding. Kushner's misunderstanding of copyright rules and the building of concepts on it, is what needs to be corrected.

This thesis thus cannot agree with Zemer when he argues that copyright law, in its rejection of collective authorship, adopts the 'classical notions of property',<sup>103</sup> as the such classical notions allow the shared proprietorship of physical objects or real estate and that which copyright law adopted in joint authorship and collective authorship.

The mixing of literary and legal concepts of authorship appears also in the reliance of Woodmansee in her article in the book 'The construction of authorship Textual appropriation in law and literature'<sup>104</sup> on the writings of Herder,<sup>105</sup> Goethe,<sup>106</sup> Coleridge<sup>107</sup> and Wordsworth,<sup>108</sup> who are literary writers in English literature, or are history scholars or artists, and this is the reason for looking at the issue from the literary side. Even they confess that their perspective is confined only to authorship in literary theory. For instance, Lunsford<sup>109</sup> and Ede,<sup>110</sup> who Woodmansee cited, contend that "The concepts of author and authorship, [are] so radically destabilized in contemporary literary theory"<sup>111</sup>, and they do not insist on applying their thoughts in law.<sup>112</sup>

The arguments around the historical perspective of authorship in literature, whether by Foucault or Woodmansee,<sup>113</sup> are not actually important for copyright law as long as they did not affect the laws enacted in their time, so they will not affect the laws enacted three hundred years later, simply because the law's focus is different from that of the literature. Bently confirms the thesis's argument, as he argued that although poststructuralist critiques have affected authorship in the literary field, they have had a

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<sup>103</sup> Lior Zemer, *The Idea of Authorship in Copyright* (Ashgate Pub Co, 2007)., p. 1.

<sup>104</sup> Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, *supra* note 1.

<sup>105</sup> Johann Herder (1744-1803) was a German philosopher, poet, and literary critic.

<sup>106</sup> Johann Goethe (1749-1832) was a German writer, poet, novelist.

<sup>107</sup> Samuel Coleridge (1772-1834) was an English poet, literary critic and philosopher.

<sup>108</sup> William Wordsworth (1770-1850) was an English poet.

<sup>109</sup> Andrea A. Lunsford, Professor of English, Ohio State University.

<sup>110</sup> Lisa Ede, Professor of English, Oregon State University.

<sup>111</sup> Andrea A. Lunsford and Lisa Ede, 'Collaborative Authorship and the Teaching of Writing', *Cardozo Arts & Entertainment Law Journal*, 10 (1991)., p. 681.

<sup>112</sup> *Ibid.*, p. 681.

<sup>113</sup> Woodmansee views will be articulated in next chapter.

minimum effect on authorship in the legal context.<sup>114</sup> Bently returns this weak effect to the flaws that exist in Foucault's and Rose's historical justifications. He confirmed that the studies 'suggested by Foucault and maintained by Rose' to make a historical connection between authorship in law and literature were "strongly in need for qualification."<sup>115</sup>

In Aufderheide's study<sup>116</sup> she referred to the beliefs or opinions of 'professors of films'. These views reflect the opinion of scholars of authorship in literature. According to their views films will be original and creative 'only' when makers rely on their work and not on others' works. The flaw here is their belief that the law does not "recognize the creative elements in recombining existing works."<sup>117</sup> This belief might logically entail their indignation with copyright law legislation. This is why they implicitly argue that works relying on existing works can be creative and should be valued.<sup>118</sup> Aufderheide, as a solution, referred to their ignorance of 'psychological studies' that proved that 'all' creative works are based on existing culture,<sup>119</sup> but she forgot that the law already accepts this fact through rejecting the principle of novelty in protecting literary and artistic works. Thus, romantic authorship is not a legal concept since it combines novelty and originality, although the dichotomy between them has been stabilised since the seventeenth century.<sup>120</sup>

At the end, we should acknowledge that the escape from the genius and romantic conceptions of the author cannot be done through resorting to the death of the author. As, both are literary extremisms. The focus on the legal substance of authorship is the proper perspective that should be adopted.<sup>121</sup> Having discussed the first extremism

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<sup>114</sup> He argued that "The poststructuralist critique of authorship appears so far to have had no significant influence on copyright law which has continued to employ romantic images of authorship, at least in some contexts. This immunity of copyright law's notion of authorship to the radical destabilisation of the same notion in the literary field seems less surprising", see, Lionel Bently, 'Copyright and the Death of the Author in Literature and Law', *supra* note 34, p. 977.

<sup>115</sup> *Ibid.* p. 977.

<sup>116</sup> Patricia Aufderheide, 'Creativity, Copyright and Authorship', *supra* note 35, p. 11.

<sup>117</sup> *Ibid.* p. 11.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> Cropper argued that although the expression 'new' may be used in the seventeenth century but it meant to express original: "Novelty in painting does not principally consist in a subject never seen, but in good and new disposition and expression, and in this way the subject from being ordinary and old become special and new." See Elizabeth Cropper, *The Domenichino Affair: Novelty, Imitation, and Theft in Seventeenth-Century Rome* (Yale University Press, 2005). p. 4. On the other hand, the English Monopolies Act in the seventeenth century provided that novelty is required for patents, as s. VI provided for "hereafter to be made of the sole working or making of any manner of new Manufactures within this Realme". 'An Act Concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures Thereof', 21 Jac. 1, c. 3 (England, 1623).

<sup>121</sup> Durham advocated this point of view also, see A.L. Durham, 'Copyright and Information Theory: Toward an Alternative Model of Authorship', *Brigham Young University Law Review*, (2004). p. 72.

which is the death of the author in this Chapter, next Chapter will discuss the second one which is the romantic authorship.

#### **4.6 Conclusion:**

The thesis confirms that Foucault's desire to interpret texts away from the author's intentions may lead to confusion and this was first proved through his own text. This is specially so if we look at the quantity of literature built on his article that seeks the widespread abolition of the author in law and literature and every field of life, which is argued to be impossible and unfounded legally. The nature of things presupposes that we know who the creators of them are and nothing justifies why a blind eye should be turned to this nature or eternal characteristic. Otherwise, we should remove the signatures or names of Picasso, van Gogh, or Shakespeare from their works.

Proving that literary authorship is different from legal authorship will help not just in refuting arguments on the 'death of authorship', but also in supporting the thesis's argument, which finds opposition from anti-authorship claims that refuse to confess any importance for the author's personality or for fostering his mind's creations. The latter elements are essential to categorise works into authorship and non-authorship works.

Legal scholars who are influenced by 'the death of the author' argument have the view that the author is the romantic generator, or inventor, of works, a definition which was never intended by copyright law legislators -according to the belief of this thesis.<sup>122</sup> This discussion will help to separate legal authorship from all discussions on literary authorship. It will also help to understand why authorship, in copyright law, has continued its stable and sophisticated functioning, despite the long lasting challenges against the concept.

Though literary discourse has some influence on legal practice and studies: "[r]ecent copyright decisions show that even as scholars in literary studies elaborate a far-reaching critique of the received Romantic concept of 'authorship,' American lawyers are reaching out to embrace the full range of its implications."<sup>123</sup> It is found that this influence is harmful and leads to consequences that are inconsistent with other legal theories or that distract the functions the law is supposed to achieve, namely, protecting works and conferring rights to right holders.

Calls for the 'death of authorship' were spurred on by those who believed that originality and authorship have the same meaning in law and literature. This trend led some courts and scholars to adopt originality in its 'high' meaning, due to the unclear

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<sup>122</sup> See Chapter 5 at 5.5.1.

<sup>123</sup> Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *supra* note 1, p. 299-300.

principles of copyright law in this regard, and the consequence was the exclusion of many works from copyright law's protection umbrella. Thus, death of the author was a way of escape from this consequence, and resorting instead to other determinants that go beyond copyright law rules, like the usefulness of works, the protection of business and market rules.

Both arguments, exclusion in one side and full adopting of protection in the other regarding non-authorship works, are incorrect. The solution lies in the adoption of a dual system that can satisfy their nature and provides proper treatment for them, at the same time preserving principles of copyright law and maintain its justifications. In other words, copyright law needs to compromise between its literary extracted concepts, - originality and authorship - and its legal function. This will be discussed in more detail in the next Chapter.

This Chapter discussed how literary scholars could not distinguish between the legal and literary arguments when dealing with the death of authorship argument, and this caused disruption to copyright law through them or through legal scholars who relied on their arguments. For instance, Rose confirms that romantic authorship is a feature of the ideology of copyright that is no longer appropriate to the current circumstances of the cultural industries, as romantic authorship is an old concept that contradicts the current practices of the collective production of comedies, police stories and soap operas. He affirmed: "I found these contradictions between the ideology of copyright and the actual circumstances of litigation intriguing and provocative."<sup>124</sup> This is so, although collaborative authorship existed long before the emergence of the romantic authorship concept, as Woodmansee confesses,<sup>125</sup> at the same time she also argues that romantic authorship is no longer appropriate to collaborative authorship practices.<sup>126</sup>

### **The Substance of the Originality Criteria within Legal Authorship:**

This thesis contends that what happened in relation to originality as used in law and originality used in literature, is just fortuitous, and it is not necessary that authorship get the same meaning on the both scopes. It was like lending the terminology used in literature to the legal arena, without commitment to any concomitant or inter-mingled development of authorship in literature. The same argument was used by Bently, "[t]he emergence of the proprietary author at the end of the eighteenth century may thus represent the growth of the powerful, modern, romantic conception of authorship, but

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<sup>124</sup> Mark Rose, *Authors and Owners: The Invention of Copyright*, *supra* note 33, p. viii.

<sup>125</sup> See, M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *supra* note 1, p. 281.

<sup>126</sup> *Ibid.* p. 288-292.

the histories fail to establish conclusively any causative, necessary or determining link between the legal and the literary. All there is is a complimentary and reinforcing connection, a parallel development.”<sup>127</sup>

The change in the meaning of originality in literary and artistic context does not thus mean that the same change should happen in the legal context. The law is more interested in pursuing its objectives and in achieving a balance between concerned interests, rather than keeping pace with the development of the literary substance of the terminology used.

The thesis argues that originality was chosen, not as an application of romantic authorship, but as a threshold for the application of legal protection. It is not a reflection of an ideology that is adopted by the law to refer to qualities that should exist in human authors, but it is a guide to the kind of works that might achieve special purposes if it fulfils this criterion, such as being able to ‘maintain learning’ or being ‘useful’.<sup>128</sup> The law never thus resorted to the ‘genius’, but the law does require special features or characteristics in works and the ‘originality’ criteria is required to achieve this aim. Accordingly, literary authorship thus relies on the person, whereas legal authorship relies on the work.

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<sup>127</sup> Lionel Bently, 'Copyright and the Death of the Author in Literature and Law', *supra* note 34.

<sup>128</sup> To achieve the aim of the Statute of Anne “encouragement of learning”, see the Statute’s title; and achieving the aims of the US constitution “To promote the Progress of Science and useful Arts,” § 8 (8).



## **Chapter Five: Romanticism and Legal Authorship**

### **5.1 Introduction**

This thesis argues that authorship, as a component of copyright,<sup>1</sup> emerged in the antiquity era<sup>2</sup>, but that the fully developed concept of 'authorship and ownership' was formulated in the medieval period, especially in the twelfth and thirteenth centuries, and the connection between 'individual authorship' and the concept 'ownership' was resolved in the fifteenth century in regard to patents, and in the 16<sup>th</sup> century in regard to copyright protection.<sup>3</sup> However, there are many claims –as will be shown below –<sup>4</sup> that argue that the copyright and author concepts emerged in the eighteenth century,<sup>5</sup> yet that these claims do not represent the historical facts.

Accordingly, we should discuss the claim that the 'romantic author' concept stands against collective authorship practices, and assesses the relationship between romanticism and authorship. This discussion will help also in settling the claims that argue that authorship should be abolished as it limits the ability of copyright law to deal with a wide range of collective works. Challenging this claim will help to reinforce the authorship concept and its validity when used by copyright law to deal with all kinds of works. Its validity will then be relied upon by this thesis to distinguish between works in the proposal clarified in Chapters Seven and Eight.

### **5.2 Is Authorship Historically A Concept Strange To English Law? (Romanticism and Authorship)**

Rose argues that the German romantic theory was introduced into English thought by Coleridge at the start of the 19<sup>th</sup> century, and what helped the dissemination of romantic theory was the long debate in England about copyright.<sup>6</sup> Rose contends that notions of originality and authorial personality, as elements of the romantic theory,

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<sup>1</sup> Long argues that intellectual property has numerous components, which are: "craft knowledge, authorship, and invention", see, Pamela O Long, 'Invention, Authorship," Intellectual Property," and the Origin of Patents: Notes toward a Conceptual History', *Technology and Culture*, (1991). p. 848.

<sup>2</sup> As explained below under this Chapter at 5.3.

<sup>3</sup> See discussion in this Chapter about the history of literary property and authorship, and see, Pamela O Long, 'Invention, Authorship," Intellectual Property," and the Origin of Patents: Notes toward a Conceptual History', *supra* note 1, p. 847; regarding the two senses of authorship, Long argues that the authorship term is not confined to the copyright concept but "Authorship can refer to written authorship or the authorship of making and inventing material things." see, *ibid.* p. 847.

<sup>4</sup> See this Chapter at 5.3.

<sup>5</sup> See, Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author"', *Eighteenth Century Studies*, (1984). p. 425-27.

<sup>6</sup> M. Rose, 'The Author as Proprietor: Donaldson V. Becket and the Genealogy of Modern Authorship', *Representations*, /23 (1988). p. 76.

appeared as answers to the questions: “[w]hy should an author have a property right to his work? What does that work consist of? How is a literary composition different from a mechanical invention?”<sup>7</sup> For Rose the notions of romanticism were invented as a “necessary completion of the legal and economic transformation that occurred during the copyright struggle”.<sup>8</sup>

Rose also affirms that the legal regulation of the author preceded the social construction of the title, “[i]t is a striking fact that in England the legal empowerment of the author as a proprietor preceded the social formation of professional authorship.”<sup>9</sup> [Underlining added]. Woodmansee argued that England did not experience romantic authorship until the end of the eighteenth century through Wordsworth’s writings<sup>10</sup> and those of Samuel Taylor Coleridge, as she posited that according to historical scholars and philosophers, romantic authorship was a concept alien to UK and was imported from foreign cultures.<sup>11</sup> Jaszi has the same view. He affirms that authorship was a recent regime and negatively resulted in a ‘radical reconceptualization’ of the creative process, culminating “less than 200 years ago in the heroic self-presentation of Romantic poets”.<sup>12</sup>

Woodmansee even argues that the property of one’s ideas is a modern concept,<sup>13</sup> as in the middle of the seventeenth century German authors were offered ‘honoraria’, and she cited Zedler’s Universal-Lexikon definition of such an honorarium as a recognition or reward to the author for his efforts and not a compensation or wage.<sup>14</sup> Woodmansee confirmed that intellectual property appeared in Germany only in the eighteenth century, when writers began to demand fluctuating honoraria based on the sales of their works.<sup>15</sup> What is interesting is that Woodmansee describes the ‘author’ as the individual who earns his livelihood from writing, or who is entitled to the property of his writings. She claims that after this group appeared in Germany in the eighteenth century the concept of authorship found its modern form.<sup>16</sup>

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<sup>7</sup> *Ibid.* p. 76.

<sup>8</sup> *Ibid.*

<sup>9</sup> Mark Rose, ‘The Author in Court: Pope V. Curll (1741)’, *Cardozo Arts & Entertainment Law Journal*, 10 (1991).

<sup>10</sup> Woodmansee argues that the modern idea of authorship dates back to ‘radical conceptualization of writing’ caused by Wordsworth’s essay ‘Supplementary to the Preface’ in 1815. See M. Woodmansee, ‘On the Author Effect: Recovering Collectivity’, *ibid.* ( p. 280.

<sup>11</sup> *Ibid.* p. 281.

<sup>12</sup> See introduction to Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press Books, 1994)., p. 3.

<sup>13</sup> Martha Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The’author”, *supra* note 5, p. 426.

<sup>14</sup> *Ibid.* p. 434.

<sup>15</sup> *Ibid.* p. 430-31.

<sup>16</sup> *Ibid.* p. 426.

Woodmansee and Jaszi argue explicitly that authorship and romanticism were imported from Germany and such importation was against the will of English authors, and such concepts were strange to English society.<sup>17</sup> Furthermore, Jaszi writes that the introduction of the 'author' in English law was not an outcome of the philosophically-grounded arguments for 'authors' rights' like those that took place in Germany.<sup>18</sup> However, he says that the appearance of this term was a result of the circumstances of publishing and piracy and the need to establish a law that protected publishers' rights.<sup>19</sup>

This approach by Woodmansee is intended to confirm that authorship did not emerge in England, and it has been inserted or imported to the English culture from its neighbouring countries especially Germany, and that the motives for its emergence were not available in England. This Chapter aims at proving the invalidity of this claim - among others - in order to prioritise the authorship concept and the author's position in the face of, in particular, concepts of ownership and the position of capitalists who, this thesis argues, are the only beneficiaries of the death of the author claim that results from these views.

Aufderheide argued that over the last 150 years, and especially in the last 30 years, copyright law privileged the author's position through extending authorial rights and reverencing the authorial role.<sup>20</sup> This argument presupposes the non-acknowledgment of the historical background of the author concept or a fragile recognition of it, which is believed to be untrue, as the author and his authorial role were recognised centuries before the romantic era, as illustrated below.

Foucault's understanding concurred with the views of Woodmansee and Aufderheide, as he argued that studies should be made around how the practices of writing and reading were organised in relation to the idea of the 'author', and that the idea of authorship was neither natural nor inevitable, and was invented only as a means to constrain the "proliferation of meaning".<sup>21</sup> However, we have confirmed, above, that Foucault's whole focus was on the literary context, and this is even apparent in his interrogation here, as he meant by authorship the consideration of the author when interpreting texts, and this consideration can constrain the proliferation of meaning that

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<sup>17</sup> *Ibid.* p. 433-438.

<sup>18</sup> Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *Cardozo Arts & Entertainment Law Journal*, 10 (1991d), p. 296.

<sup>19</sup> *Ibid.*

<sup>20</sup> Patricia Aufderheide, 'Creativity, Copyright and Authorship', in David Gerstner and Cynthia Chirs (ed.), *Media Authorship* (New York: Routledge, 2012), p. 4.

<sup>21</sup> Michel Foucault, 'What Is an Author?', in Josue V. Harari (ed.), *Textual Strategies: Perspectives in Post-Structuralist Criticism* (Methuen & Co. Ltd, 1979), p. 148-49.

may result if the author is ignored, so he proposed the disregard of authorship for this purpose only.

Boyle, on his part, confirms that authorship is a recent concept, as in medieval times originality was not preferred for “[o]ur notion of ‘authorship’ is a concept of relatively recent provenance. Medieval church writers actively disapproved of the elements of originality and creativeness.”<sup>22</sup> However, he asserts that, in the middle of eighteenth century, “[i]t is the originality of the author, the novelty which he or she adds to the raw materials provided by culture and the common pool, which ‘justifies’ the property right”<sup>23</sup>

Goldschmidt also confirms historical conceptions, such as “‘self-expression’, the ‘individuality’ and the ‘genius of an author’, fame earned by literary composition, these are not medieval ideas at all, they were born in the renaissance period.”<sup>24</sup> He clarified the opinion of medieval writers on authorship through his statement: “[i]t is a fact we must always keep in mind when discussing medieval writers that from their point of view the acquiring of knowledge was the difficult and admirable part of a scholar’s life work, the displaying of knowledge gained the easy and enjoyable result.”<sup>25</sup>

Finally, Ginsburg argued that copyright law manifested characteristics of two rationales, the investments rights in the eighteenth century, as it was grounded in “the need to spur investment in the means of disseminating works of authorship”,<sup>26</sup> and a newer rationale, the recognition of the property rights that arise out of the act of creation.<sup>27</sup> However, this does not detract from its existence in English law, as will be discussed in the next section.

### **5.3 The History of Authorship and Literary Property:**

The discussion of the history of authorship is important here in order to reply to contentions that authorship is a modern concept, and its importance should be diminished or replaced due to the instability it has caused, as it cannot cope with some kinds of works. Nevertheless, authorship is inherent to English history, both literally and legally,<sup>28</sup> thus the reliance on authorship in this thesis is well founded. Firstly, it will be proved that authorship and the individuality of the author were characteristics as

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<sup>22</sup> James Boyle, *Shamans, Software, and Spleens* (Harvard University Press, 1996)., p. 53.

<sup>23</sup> *Ibid.* p. 54.

<sup>24</sup> Ernst Philip Goldschmidt, *Medieval Texts and Their First Appearance in Print* (Biblo & Tannen Publishers, 1943). p. 112.

<sup>25</sup> *Ibid.* p. 110.

<sup>26</sup> Jane C. Ginsburg, 'The Author's Place in Copyright after Trips and the Wipo Treaties', *International Review of Intellectual Property and Competition Law*, 39/1 (2008/03/06 2008).p. 4.

<sup>27</sup> *Ibid.*p. 4.

<sup>28</sup> Subject to qualifications in Chapter four.

prevalent in England as in Germany and France, and that they have a basis in writings before the enactment of the Statute of Anne. A historical investigation is therefore important to prove this issue, following the rule "History matters to philosophy".<sup>29</sup> Secondly, it will be proven that romanticism, meaning genius, was never adopted by the law and that it is a literary concept, and that individuality and personality are, in law, different from romanticism, though this latter point discussed in Chapter Four it will be made clear in this Chapter.

### **The Rise of the Concept of 'Authorship':**

Authorship, as a practice or profession that is used to produce arts and literature, returns to a time in ancient civilisations and antiquity when people valued, or were able to perceive, intellectual works.<sup>30</sup> However, generally, artists and intellectual creators were faced with philosophical beliefs in God's will and metaphysical theories, while people believed that intellectual works were created by God, not by the author himself. So the creator of intellectual works was not allowed to own them<sup>31</sup> as he was just a representative of God's power, as Dougherty posited: "the gods and heroes of classical antiquity ... function as sources of creative inspiration for poets, novelists, artists, composers, filmmakers and designers."<sup>32</sup> However, some<sup>33</sup> in antiquity argued that these creatures belong to their creators not God, but this belief in God's power was enforced by "the idealism of Plato and the teleological orientation of Aristotle"<sup>34</sup> until the medieval period.

In the medieval period the belief in God as a source of the authorship and creativity of creators was transferred to ancient authors, as it was believed that these authors were the reason that new authors obtained the ability to make new works. Even the making of a new work was not an acceptable term, but it was believed that reforming and

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<sup>29</sup> Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Aldershot, 1996). p. 13.

<sup>30</sup> See, Pamela O Long, 'Invention, Authorship, Intellectual Property, and the Origin of Patents: Notes toward a Conceptual History', *supra* note 1 p. 848; and

<sup>31</sup> Pamela O Long, 'Invention, Authorship, Intellectual Property, and the Origin of Patents: Notes toward a Conceptual History', *supra* note 1, p. 848.

<sup>32</sup> Carol Dougherty, *Prometheus* (Taylor & Francis, 2006). p. xii.

<sup>33</sup> Xenophanes, 5<sup>th</sup> century B. C. , suggested that inventions and discoveries are brought by human ingenuity rather than divine gift. Anaxagoras, a philosopher who lived around 500 B. C. , also believed that humans are distinguished from other living beings due to their ability to develop arts and crafts, see, Pamela O Long, 'Invention, Authorship, Intellectual Property, and the Origin of Patents: Notes toward a Conceptual History', *supra* note 1, p. 849-50, she refers to Xenophanes' ideas; see also, Desmond John Conacher, *Aeschylus' Prometheus Bound: A Literary Commentary* (University of Toronto Press, 1980). p. 84, and, as a source for Anaxagoras's writings, see GB Kerferd and Paul Edwards, 'The Encyclopedia of Philosophy', (Macmillan New York, 1967).

<sup>34</sup> For an extensive discussion of the fluctuations in arguments that have addressed creations by humans and whether they were the authorship of humans or God, see Pamela O Long, 'Invention, Authorship, Intellectual Property, and the Origin of Patents: Notes toward a Conceptual History', *supra* note 1, p. 848-51.

representing the old works in a new shape was the maximum that anybody could do.<sup>35</sup> Long clarified that authorship was known since Athens in the mid-to-late 5th century B.C and especially by the Romans in the 1st century B.C. where they placed “greater emphasis on the credit and honor” to old authors, and showed “explicit condemnation of the theft of writings.”<sup>36</sup> Putnam also confirmed that Greek and Roman’s dealings on books shown that there was author’s ownership of his works, and there were debates between authors and publishers regarding the unauthorised publishing or stealing books.<sup>37</sup>

To correlate with the research’s argument, this discussion aims to prove the existence of author’s rights to his works in ancient times, and that will prove the falseness of the claim that authorship and literary property are modern concepts, as Woodmansee, Jaszi and Rose argue.

### **Authorship in the Middle Ages:**

The ‘Middle Ages’ are intended to mean the period from the fifth to the fifteenth century, in this time the theory of authorship ‘i. e. , the literary theory’ was centred on the concepts of ‘*auctor*’<sup>38</sup> which means ‘a distinguished writer’ or ‘author’ and ‘*auctoritas*’<sup>39</sup> which means the ‘authority of writers’ or ‘authorship’. What distinguishes authorship theory in the Middle Ages - especially in the later period – is the consistency between medieval scholars in understanding and dealing with this theory, although there were many categories, degrees, and characteristics of authorship argued by scholars in this age.<sup>40</sup> It is worth noting that although ‘*auctor*’ is meant to refer to the author, ‘*auctoritas*’ didn’t just refer to the work of the author or to authorship, but was defined by Huguito of Pisa as a ‘*sententia digna imitatione*’ which means ‘a profound saying worthy of imitation or implementation’.<sup>41</sup>

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<sup>35</sup> Alastair J. Minnis, *Medieval Theory of Authorship, Scholastic Literary Attitudes in the Later Middle Ages* (second edn.: Gower Publishing Company Limited, 2009)., p. 9-11.

<sup>36</sup> Pamela O Long, 'Invention, Authorship, Intellectual Property, and the Origin of Patents: Notes toward a Conceptual History', *supra* note 1 p. 851-853.

<sup>37</sup> George Haven Putnam, *Authors and Their Public in Ancient Times: A Sketch of Literary Conditions and of the Relations with the Public of Literary Producers, from the Earliest Times to the Fall of the Roman Empire* (GP Putnam's sons, 1896). p. 58.

<sup>38</sup> This term is derived from the Latin verbs ‘*agere*’ to act or perform, ‘*augere*’ to grow, ‘*auieo*’ to tie, and the Greek noun ‘*autentim*’ authority, so ‘*auctor*’ means that person who has performed the act of writing and brought something into being, see, Alastair J. Minnis, *Medieval Theory of Authorship, Scholastic Literary Attitudes in the Later Middle Ages*, *supra* note 35, p. 10; afterwards the term ‘author’ was derived from the term ‘*auctor*’

<sup>39</sup> ‘*Auctoritas*’ meant any abstract or quotation from the work of the ‘*auctor*’, and it included strong connotations of veracity and sagacity, ‘*auctoritas*’ modern match is ‘authority’, see, *ibid.* p. 10.

<sup>40</sup> As Minnis argued, see *ibid.* p. 2.

<sup>41</sup> The phrase was mentioned in Alexander Neckam, *Distinctions Verborum* (Oxford: Bodleian Library, MS Hatton). p. 333, cited in Alastair J. Minnis, *Medieval Theory of Authorship, Scholastic Literary Attitudes in the Later Middle Ages*, *supra* note 35, Note. 10.

It was believed that the term 'auctor', or its modern match 'author', is "an accolade bestowed upon a popular writer by those later scholars and writers who used extracts from his works".<sup>42</sup> This award of an accolade depends on two factors: the 'intrinsic worth' of the work, and 'authenticity'. Concerning 'authenticity', it was essential for a work to be the genuine production of a named *auctor*, otherwise it would be an inferior source for further works<sup>43</sup>. This attitude was an application of the long-time old metaphor which believed that no 'modern' writer could decently be called an *auctor* in a period in which men saw themselves as 'dwarfs standing on the shoulders of giants', i. e. the 'ancients'.<sup>44</sup>

This argument is an evidence not just of the existence of the author and the recognition of his work, but included minute details about the principles that are considered the origin of modern originality, which was then called 'authenticity'. 'Authenticity' was something interesting to old societies, they looked for the works of old writers and considered them to be the origin of all useful works, and new works should refer to them to have any value.<sup>45</sup> This pursuit of authenticity in works proves the existence of the authorship and the interest in details such as: Who is the author? When was the work written? What references has the author cited? Even the origin of the originality term lies in that age.

Historical evidence of the existence of literary property in England can be found in the case of *St. Columba* v. *St. Finnian*,<sup>46</sup> in 567 A. D, wherein St. Columba copied the Irish Psalter from his teacher St. Finnian, and the copy was reclaimed under the decision of King Dermott, in the Halls of Tara. Finnian's argument was that this book was his work, and nobody could copy it unless he agreed. Columba's response was that neither Finnian nor the book suffered from his copying, and the knowledge and the divine words enclosed should be spread and shared among tribes. King Diarmait mac Cerbhiail, the High King of Ireland, ruled in favour of Finnian, and made this renowned statement: "to every cow belongs its calf; to every book its copy"<sup>47</sup>, in other words, that the author of the original book owns the copies of his book.<sup>48</sup> According to this case and the previous arguments, it can be confirmed that authorship was existent as a

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<sup>42</sup> Alastair J. Minnis, *Medieval Theory of Authorship, Scholastic Literary Attitudes in the Later Middle Ages*, *supra* note 35, p. 10.

<sup>43</sup> *Ibid.* p. 11-12.

<sup>44</sup> *Ibid.* p. 12.

<sup>45</sup> *Ibid.* 35, p. 11-12.

<sup>46</sup> *St. Columba* V. *St. Finnian*, 567 The High King of Ireland.

<sup>47</sup> *Ibid.*.

<sup>48</sup> See, Pamela Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised', *Berkeley Technology Law Journal*, 14 (1999). p. 168, 169; see also, Howard Abrams, 'Copyright and Legislation: The Kastenmeier Years', *Law & Contemporary Problems Journal*, 55 (1992).

recognised concept in the English culture from the sixth century, but the existence of its terminology in statutes was barred for other reasons -mostly political- subsequently, it is believed that authorship is inherent to England and this reinforces the thesis's argument, which defends authorship and the author's position at the moment as an issue that has a historical background and is not due to the importing of foreign concepts.

Writers tended to refer in their works to their dependence on old works so as to add value to their works, as Lilliat did when he stressed the dependence on the 'Prophecies' of the Bible to gain legitimacy and authorship status for his work.<sup>49</sup> Even Thomas commented in his article "[t]hat need for legitimation literally frames the poem."<sup>50</sup> Likewise, the 'Dissuasio Valerii', when written by Walter Map in the twelfth century, his contemporaries doubted the attribution of this work to Map, and he commented: "my only fault is that I am alive, ... and after I am gone ... authorship will be credited to me ... because ... old copper will be preferred to new gold."<sup>51</sup> It seems, therefore, that the status of '*auctor*' or author could only be bestowed posthumously.<sup>52</sup> Although this is an extreme practice, it reflects the interest in old works and the necessity for the existence of resources to the work or old authors. How can any argument on the death of the author live up to such a history of authorship and authenticity?

However, it is argued by Goldschmidt that in the middle ages compilation works were valued more than original or creative works: "almost everyone could now, in a few afternoons spent with Migne's *Patrology* within reach, bring together an analogous accumulation of passages strung together by a few connecting words, it should not be forgotten that for the medieval scholar such a work of compilation was not a menial task, but an achievement on which years of very real exertion and the utilization of very exceptional opportunities had been most usefully employed."<sup>53</sup>

At the end of the Middle Ages and before the emergence of printing press<sup>54</sup> "Long before books were printed, men knew that by books they could master more than facts. Long before printing, therefore, they also knew that there are elements in some books

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<sup>49</sup> Lilliat's writings were the focus of Thomas in his article, Max W Thomas, 'Reading and Writing the Renaissance Commonplace Book: A Question of Authorship', *Cardozo Arts & Entertainment. Law Journal*, 10 (1991).

<sup>50</sup> See, *ibid.* p. 677-78.

<sup>51</sup> Cited in Alastair J. Minnis, *Medieval Theory of Authorship, Scholastic Literary Attitudes in the Later Middle Ages*, *supra* note 35, p. 12.

<sup>52</sup> Max W Thomas, 'Reading and Writing the Renaissance Commonplace Book: A Question of Authorship', *supra* note 49, p. 676.

<sup>53</sup> Ernst Philip Goldschmidt, *Medieval Texts and Their First Appearance in Print*, *supra* note 24, p. 110.

<sup>54</sup> Supposed to be in 1476 according to Harry Hunt Ransom, *The First Copyright Statute: An Essay on an Act for the Encouragement of Learning, 1710* (University of Texas Press, 1956). p. 18.

which cannot be bought and sold.”<sup>55</sup> Ransom confirms that “remote sources of the first copyright law lay in those early centuries [1476-1559] of activity among authors and sellers of manuscript literature; for even thus early, problems of plagiarism and piracy, confused text, and justice to the individual author occasionally arose.”<sup>56</sup>

To conclude, In the Middle Ages the attribution of discourse to old authors was the core of authorship, although this harmed contemporary authors, as the reference to the old author was not pushed by the preference of referring to authority but was a necessity to prove the validity of the information quoted or appropriated.<sup>57</sup> Concerning contemporary authors, it could have been said that it was “easier to say what the writer was not than what s/he was.”<sup>58</sup> Ultimately, this pursuing of validating works through referring to old authors is certainly confirming the importance of author and authorship terminology in the Middle Ages.

### **Authorship in the Seventeenth and Eighteenth Century:**

The concepts of quality and authenticity continued through the following centuries, until authorship, as the profession of letters, was ‘well established’ in the eighteenth century.<sup>59</sup> However, the attitude to the old concept of ‘*auctoritas*’ has changed, as it was no longer dependent on old works, and their authors were no longer recognised unless posthumously; as by the mid-seventeenth century publishers offered authors an ‘*honorarium*’ for their ‘*new*’ works.<sup>60</sup> This compensation was not limited to the modest sums that authors took, but was a ‘token of esteem’, in the shape of ‘acknowledgment, reward, recognition, or favor’ and it was not equivalent to the efforts made by the author to create his work, and different from wages paid to workers and payments paid in contracts.<sup>61</sup> This “honorarium resembled the gifts made to poets by aristocratic patrons.”<sup>62</sup> Bracha writes that the roots of the authorship concept can be traced back to the Renaissance (the cultural movement that spanned the period from the 14<sup>th</sup> to

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<sup>55</sup> *Ibid.* p. 18.

<sup>56</sup> *Ibid.*

<sup>57</sup> Michel Foucault, 'What Is an Author?', in Donald F. Bouchard (ed.), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1980), p. 126.

<sup>58</sup> Max W Thomas, 'Reading and Writing the Renaissance Commonplace Book: A Question of Authorship', *supra* note 49, p. 679.

<sup>59</sup> Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge University Press, 1999). p. 101.

<sup>60</sup> Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (Columbia University Press, 1994). p. 42.

<sup>61</sup> Johann Heinrich Zedler, 'Großes Universal Lexikon Aller Wissenschaften Und Künste', *Halle/Leipzig*, 1735 ( Referred to in Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics*, *supra* note 60. p. 42

<sup>62</sup> Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics*, *supra* note 60, p. 43.

seventeenth centuries) and it gradually developed over time until today.<sup>63</sup> Zimmerman explains that in the seventeenth and eighteenth centuries “authorship was not a profession; writers could survive economically only on private wealth or through patronage.”<sup>64</sup>

Foucault affirmed that the seventeenth - eighteenth centuries’ era attests to the differentiation between the protection of literary contributions on one side and of facts and ideas on the other, as he contends that, in this period ‘authentication was no longer required’ regarding scientific texts, as they were accepted on their own merits, even if they were anonymous.<sup>65</sup> On the other hand, literary discourses cannot be accepted or appreciated unless accompanied by the author’s name, date, place and the circumstances of writing, otherwise every effort will be expended to locate the author, “Literary anonymity was of interest only as a puzzle to be solved as, in our day, literary works are totally dominated by the sovereignty of the author.”<sup>66</sup>

This all refers to the entrenchment of authorship in history and its distinct development in the seventeenth and eighteenth centuries did not appear in a vacuum, but was an evolution of the same concept and similar practices in antiquity and the Middle Ages. So, to confirm again, the argument that intellectual property and authorship are modern concepts is undoubtedly baseless, and the contention that the author is dead after he has created his work<sup>67</sup> is something about which there is no evidence in the history of copyright law, but the opposite is actually right, as the author lives, especially through his name, after publishing his work and even after his physical death, and that happens when works take their validity from referring to the author’s work and his name being disseminated and recognised.

### **The Situation before the Statute of Anne:**

The situation that prevailed in the two centuries before the enactment of the Statute of Anne was very critical, as the printing press was invented in the 16<sup>th</sup> century led to the emergence of the commercial market for books.<sup>68</sup> Although the ‘fraternity of publishers’ (later called ‘the Stationers’ Guild’) in London had a monopoly over any publishing throughout England, this was endowed by the Crown for the purposes of the censorship of treasonous and seditious materials. For instance, in the Lake, Bar. v.

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<sup>63</sup> Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright', *The Yale Law Journal*, (2008), p. 192, note. 5.

<sup>64</sup> D.L. Zimmerman, 'Authorship without Ownership: Reconsidering Incentives in a Digital Age', *DePaul Law Review*, 52 (2002). p. 1131

<sup>65</sup> Michel Foucault, 'What Is an Author?', *supra* note 57, p. 126.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Pamela O Long, 'Invention, Authorship, Intellectual Property, and the Origin of Patents: Notes toward a Conceptual History', *supra* note 1, p. 848, note. 4.

King, Ar. Case<sup>69</sup> the Court's main concern regarding literary works being debated was whether "the defendant published 'a certain false, scandalous, malicious, and defamatory libel of and concerning the said plaintiff.'"<sup>70</sup> This was also confirmed explicitly in the The Company of Stationers v. Seymour Case,<sup>71</sup> when the Court stated: "since printing has been invented, and is become a common trade ... matters of State, and things that concern the Government, were never left to any man's liberty to print that would."<sup>72</sup>

Throughout the seventeenth century, publishers in London, through their Guild, faced tough competition over the printing and publishing of works.<sup>73</sup> That is why the Statute of Anne is believed to have been a fallacious victory for the principles of authorship and the recognition of authors' rights, but what is intended is actually the keeping of censorship of the published material, through continuing to have publishers as the controllers of the rules of the market, whether by ownership of works, or by allowing its publishing, or by controlling the facilities of publishing.<sup>74</sup> Jaszi maintained this, saying: "[a]lthough labelled 'An Act for the Encouragement of Learning,' the Statute was, in fact, promoted primarily by the London-based fraternity of British publishers ... Their preferred solution was to solicit legislation that gave the 'proprietors' of 'copyrights' a right of action against those who trespassed on their literary property. The publishers expected, of course, that in most instances, they would be the 'proprietors'."<sup>75</sup>

Historically, this thesis does not concur with the belief that publishers are the proprietors of the literary works,<sup>76</sup> as Jaszi claimed, whether before or after the Statute of Anne. As we can find clearly in the The Company of Stationers v. Seymour Case,<sup>77</sup> that the court presumes that the work should have an author, otherwise the King owns

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<sup>69</sup> Lake, Bar. V. King, Ar., 1666, Hil. 19 & 20 Car. II. Reg. Rol. 1179.,

<sup>70</sup> *Ibid.* at 121.

<sup>71</sup> The Company of Stationers V. Seymour, 1677, 29 CAR. 2,

<sup>72</sup> *Ibid.* at 258.

<sup>73</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', Duke Law Journal, (1991a), p. 468.

<sup>74</sup> Lionel Bently, Uma Suthersanen, and Paul Torremans, Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace (Edward Elgar Publishing, 2010). p. 110 as it was argued that "the publishers tried to utilize Lockean rational natural rights theories, and loosely grounded references to common law, to argue in favour of a perpetual ownership right ... This inevitably led them to point to the author as point of attachment."

<sup>75</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 468.

<sup>76</sup> Stern advocates this thesis's approach, as he argues that the members of bookselling industry may be used the author's right as "a self-serving feint", but "its appeal to those who heard the argument may also be traced to a fledging Lockean theory that had already been aired during the previous decade." He adds that the limitation of protection inspired by the hostility to legal monopolies that publishers established, and also it was extended after the first fourteen years only if the author was alive which reflects its association with the author. See Simon Stern, 'Copyright, Originality, and the Public Domain in Eighteenth-Century England', Originality and Intellectual Property in the French and English Enlightenment, Reginald McGinnis, ed. (2008). p. 76.

<sup>77</sup> The Company of Stationers V. Seymour, 29 CAR. 2, *supra* note 71.

the work, and 'may' confer this property to the Company of Stationers:<sup>78</sup> "The book which this defendant has printed, has no certain author; and then, according to the rule of our law, the King has the property; and by consequence may grant his property to the company."<sup>79</sup> This research agrees with Patterson's argument as he claimed that the Statute of Anne "was designed to destroy the booksellers' monopoly of the booktrade and to prevent its recurrence."<sup>80</sup> Accordingly, 'literary property' of the work was established before the Statute of Anne, and not only that, but the author was the initial proprietor of his works. Consequently, the Statute of Anne did not invent this status as Jaszi stated.<sup>81</sup>

The political policy applied then does not affect the legal situation, as what was established and current is that authors own their works. All that matters is that the publishing of these works and the checking of their appropriateness for publishing, from the point of view of politics and religions could not be done unless through designated booksellers. All related parties knew this and were sure that the transfer of property was an arbitrary decision and not based on legal or social foundations.<sup>82</sup>

Thus, the Statute of Anne's return to the original treatment of this issue through recognition of the author as being the real owner of his work, is not a strange thing if understood within the peculiar circumstances of English law and the role of politics in England. In addition, when the terminology of romanticism appeared after the Statute of Anne, some scholars (like Woodmansee and Jaszi) linked it with what the Statute of Anne had adopted and extracted from this the notion that the authorship concept adopted in this statute was imported from abroad. In fact, this opinion is a shortsighted one and the politics of copyright in England restrained the appearance of authorship in legislation, although it was recognised, and even practised, in courts centuries before, as illustrated above.<sup>83</sup>

In the first instance, Woodmansee's confirmation that "the property of one's ideas is a modern concept" and that it appeared in Germany from the seventeenth century is an incorrect argument. According to Armstrong's investigation of the history of literary property, it seems that the privilege had been granted to authors in Germany and Italy from the 15<sup>th</sup> century. She confirmed that in Germany in 1479 the privilege was granted

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<sup>78</sup> This is what the court called the Stationers' Guild in this case.

<sup>79</sup> *The Company of Stationers V. Seymour*, 29 CAR. 2, *supra* note 71, at 257.

<sup>80</sup> L. Ray Patterson, 'Understanding the Copyright Clause', *Journal of Copyright Soc'y Usa*, 47 (2000). p. 379

<sup>81</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 468.

<sup>82</sup> See this Chapter p. 144-148 above. and Harry Hunt Ransom, *The First Copyright Statute: An Essay on an Act for the Encouragement of Learning, 1710*, *supra* note 54, p. 10.

<sup>83</sup> According to the case of *St. Columba V. St. Finnian*, *supra* note 46 and the case of *The Company of Stationers V. Seymour*, 29 CAR. 2, *supra* note 71, see above p. 145, 150.

to the author, publisher or printer, when requested.<sup>84</sup> In discussing the issue of the author's property in general, as seems apparent from Woodmansee's argument, it is beneficial to refer to a very important incident to the author's the property on his work, and even its dependence on, it can be said, the 'sweat of the brow doctrine' or 'skill, labour and judgment', and that was in 1492. According to Armstrong the author Donatus Bossius requested Letters Patent privileg on his work 'Cronaca' and in supporting that Bossius "represented the time and labour he had expended in composing the book, and the injustice which would ensue if other people were free, as soon as it was in print, to reprint it and so rob him of the profit which he might otherwise expect. This argument was accepted by the duke, who added that the author was entitled to the fruits of his exertions in addition to the honour and glory which the publication would bring to him ... and granted a privilege for ten years for the Cronaca [the author's work] whether in Latin or in Italian, within his dominions."<sup>85</sup>

Although it is often stated that authorship was first recognised by the passing of the first copyright legislation, the Statute of Anne, 1710,<sup>86</sup> wherein the author had his property rights recognised by the law and this can be defended.<sup>87</sup> The 'literary property of the author to his work' was established before the Statute of Anne, as was evident in the The Company of Stationers v. Seymour Case,<sup>88</sup> as stated above.<sup>89</sup> Besides, the Court in Donaldson v. Beckett<sup>90</sup> confirmed that the right of the author in his copies had been a stable notion since the introduction of 'the art of printing into England', and even the name 'copyright' had been used before, as it confirmed "[f]rom the first introduction of the art of printing into England, this peculiar species of property has been known by the expressive name of 'copy right'"<sup>91</sup> [Underlining added], and even "It is a point too well established to be denied."<sup>92</sup> [Underlining added].

The Court even confirmed that the privilege of the king on the copies of acts of parliament and proclamations was granted depending on his peculiar interest in this

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<sup>84</sup> Elizabeth Armstrong, *Before Copyright: The French Book-Privilege System 1498-1526* (Cambridge University Press, 2002), p. 2-3.

<sup>85</sup> *Ibid.* p. 4.

<sup>86</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 468.

<sup>87</sup> This thesis confirms that the author had property rights on his work in the Statute of Anne, this is apparent from the statement: "the author of any book ... shall have the sole right and liberty of printing such book and books for the term of one and twenty years". See s. 1 of 'Statute of Anne', 8 Anne, c. 19 (England, 1710). This confirms a property right to the author on his works, and the right to exploit it.

<sup>88</sup> The Company of Stationers V. Seymour, 29 CAR. 2, *supra* note 71. Wherein the court confirmed: "There is no particular author of an almanack; and then, by the rule of our law, the King has the property in the copy." at 258.

<sup>89</sup> See this Chapter p. 149.

<sup>90</sup> Donaldson V. Beckett, 1774, 1 E.R. 837, HL, II Brown 129.

<sup>91</sup> *Ibid.* at 144.

<sup>92</sup> *Ibid.*

privilege and not based on his prerogative over the printing process itself.<sup>93</sup> The confirmation of the age of the concept 'literary property' was also stated in a case five years earlier, *Millar v. Taylor*,<sup>94</sup> when the King's Bench inaugurated the case by saying "[t]his case was a revival of the old and often-litigated question concerning literary property".<sup>95</sup> [Underlining added].

For those who claim that copyright law and authorship are modern concepts,<sup>96</sup> it is argued that the historical development that led to this law is very important, and it may be that there were stable regulations that meant that the law not needed, especially under the political and religious circumstances in England at that time –namely, the censorship by the church and the king. As will be elaborated below, in England the Statute of Anne was the result of a long development of the concept of literary property before its enactment, even before Caxton's printing.<sup>97</sup> Also, as a response to Woodmansee and Jaszi's arguments, Barthes, who contended the death of the author, has confessed that the modern notion of the author appeared in the Middle Ages, or before the 15<sup>th</sup> century, "The author ... emerging from the Middle Ages with English empiricism, French rationalism."<sup>98</sup> [Underlining added].

Although Woodmansee and Jaszi<sup>99</sup> have investigated the history of authorship and applied this to copyright law in order to conclude the inexistence of romanticism or individual authorship in England before the eighteenth century, and then to exclude the author concept from the focus of copyright law. Ransom confirms that it is difficult to decide which theory dominated the copyright rules before the Statute of Anne. It certainly cannot be said whether it is romanticism or not, as the legal history of the 'communication of ideas' has no continuous status or connected history in England.<sup>100</sup> At one time the Crown obtained the upper hand in deciding and developing the concept of copyright, at other time it was the Stationers' Company, at yet other times it was the

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<sup>93</sup> *Ibid.* at 144. As the Court stated: "the copies of acts of parliament, proclamations, and other papers of a public nature, belongs to the King and his patentees; not in consequence of any prerogative over the art of printing, but on account of his peculiar interest, as the executive power, in all publications and acts of state, flowing from himself, or parliament."

<sup>94</sup> *Millar v. Taylor*, 1769, 4 Burrow 2303, Court of King's Bench

<sup>95</sup> *Ibid.* at 202.

<sup>96</sup> See, Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author'', *supra* note 5, p. 426.

<sup>97</sup> Harry Hunt Ransom, *The First Copyright Statute: An Essay on an Act for the Encouragement of Learning, 1710*, *supra* note 54, pp. 3-4 as he stated: "[the] historical meaning of the Statute and much of its later significance depend upon the long and sometimes obscure development of literary from the property time of Caxton to the end of the seventeenth century."

<sup>98</sup> Roland Barthes, 'The Death of the Author', *Image, Music, Text* (Fontana Press, 1977), p. 142-43.

<sup>99</sup> See their writings in Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, *supra* note 12.

<sup>100</sup> Harry Hunt Ransom, *The First Copyright Statute: An Essay on an Act for the Encouragement of Learning, 1710*, *supra* note 54, p. 4.

parliament who decides.<sup>101</sup> Consequently, there are many 'stopping places' at which 'theory and practice' evoke different concepts and procedures according to the controller of the legislation.<sup>102</sup> The conclusion is that it is "impossible to trace a steadily progressive development of copy-right in England."<sup>103</sup>

What supports the difference in the English position from that of other neighbouring countries is the instability of the legal and social position of authors in English law and society compared to other European nations. Authors have tried to impose their right to royalties, also, 'right-in-copy' and 'property rights' on their works as the creators and owners of their works. Unfortunately, that was done, but through an unclear mutual relationship with book traders that kept authors' works under their eyes due to the connection between cultural works and politics in England at that time.<sup>104</sup>

Authors' relations with publishers were not stable, as disagreement was more frequent than agreement between them,<sup>105</sup> and there was neither motive nor a long enough history of practice to guarantee stability in dealings in the manuscript era. This situation continued in the printing press era.<sup>106</sup> In short, what stood as a barrier before the enactment of the author's position and his legal rights in English law was instability in all respects - on the one hand, the political and economic relationship to the invention of printing press, on the other, the social and psychological attitudes of English authors towards the ownership of their works and towards publishers.<sup>107</sup>

However, Ransom confirms that this vague view about authors' rights was due to the individualistic character of English writers, as they were "highly individualistic in methods of work."<sup>108</sup> Accordingly, the individualistic, or romantic, self-view of English authors was inherent to English literature before the enactment of the Statute of Anne in 1710. In addition, English writers rarely tend to organise their profession or to be conformed into patterns, and that was by choice as they tended to be different: "authors are highly individualistic in methods of work, the writing 'profession' appears to be disordered from the start, and disorganised by choice. [Accordingly] [a]rtistic consciousness may stimulate an author [in England] to be different",<sup>109</sup> this supports

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<sup>101</sup> *Ibid.* pp. 4-5.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.* pp. 4-5. He confirmed that belief, which depended on the "Legal and quasi-legal records [that] provide an obvious means of defining early English literary property."

<sup>104</sup> *Ibid.* p. 10.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* p. 11.

<sup>109</sup> *Ibid.*

the thesis's view, as the search for the differentiation in their works means that they have already guaranteed the property of these works and are looking for originality.

Thus, we find that an author's career in England was less stable than that in Germany, France and Italy, largely due to political events in England, but, in any case, the importing of the authorship and author concepts from abroad was no more than importing the terminology of already existent and applied concepts that had been accepted ages before in England.

These historic glimpses demonstrate that authorship and individuality concepts were not strange to the English legal arena, for they were practised on the social and economic levels. However, the political or cultural circumstances did not allow for the codification of these ideas into an earlier statute. Although England should have reached the same result in Germany and France: an established authorship concept and copyright laws, the emergence of the printing press and the following sudden bouts of illegal reprinting that followed, urged English legislators to adopt the ready concepts of authorship from neighbouring jurisdictions, finding general acceptance among English society and English authors.<sup>110</sup> Accordingly, this discussion helps to reinforce the position of authorship in English society and law and that it is historically inherent to England, and not, as Woodmansee and Jaszi argue, it has no foundation in England and should be abolished. Ultimately, this proves that authorship can be relied upon in English copyright law, as will be explained in the next section.

### **5.3.1 Falseness of the Claim That Authorship is a Historically Strange Concept in English Culture:**

Saunders sees that the best solution to the historical complexities of copyright and authorship development, or to "untamed cultural historicism",<sup>111</sup> lies in ignoring them, and concentrating instead on the modern legal development of authorship, addressing the current problems that were facing protection and the copyright balance.<sup>112</sup> He argues that resisting this 'imagined' continuity of aesthetic and legal development from ancient literature to modern copyright law was preferred, and we should instead limit ourselves to the legal relations of authorship and publication in the eighteenth and nineteenth centuries.<sup>113</sup>

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<sup>110</sup> Although printing itself reached England at a later stage, as the English printer, William Caxton, had been preceded by German and French printers in London, see *ibid.* p. 14, the Court in *Donaldson v. Beckett* argued that this was in 1471, as it confirmed that "Printing was invented at Mentz in Germany, anno 1458. In 1471, Caxton, a mercer of London, brought the art into this kingdom." See, *Donaldson V. Beckett*, 1 E.R. 837, *supra* note 90, at 135

<sup>111</sup> D. Saunders, *Authorship and Copyright* (Taylor & Francis, 1992). p. 8.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

Saunders attributes his opinion to the non-unified meaning or definition of authorship, as it did not fall within a “single historical or theoretical space”,<sup>114</sup> so it cannot fit into a single framework of explanation. In sweeping words, he confirms that: “[t]he delineation of legal and aesthetic personalities and the manners of their occupation by individuals who write and publish obeyed no single logic or necessity.”<sup>115</sup> Although this view has some validity when comparing different views, this result or phenomenon does not return to the lack of continuity in legal development, but to the confusion that occurs between the literary and legal developments of authorship, and the failure to take into account the political circumstances affecting this development.

As mentioned above, Woodmansee argues that the romantic concept appeared in Germany and France in the eighteenth century and was exported to England, appearing in Wordsworth’s writings.<sup>116</sup> If Woodmansee meant the literary side of romanticism, this may be correct, but the legal side of romanticism which means, in law, the ‘individual author’ or ‘authorship’ and ‘intellectual property’, has been present in England since the 16<sup>th</sup> century, or even before, according to some sources.<sup>117</sup>

One of the main flaws in Woodmansee’s argument is her confirmation of the emergence of the author at the end of eighteenth century although Locke and Hobbes in the seventeenth century addressed the author and authorship concept.<sup>118</sup> Although Woodmansee has argued that the ‘author’ concept appeared in Germany in the eighteenth century, she claimed that this concept had no unified interpretation. She argued that ‘author’ had two meanings. First, the ‘craftsman’, or the person who masters a body of rules, using them so he can manipulate traditional materials to create the rhetoric and poetics prescribed by the audience in order to earn his livelihood.<sup>119</sup> Secondly, when the author makes something “much more than craftsmanship”<sup>120</sup> and then is supposed to be inspired by external powers, divine or God.<sup>121</sup>

In her promotion of this argument, she cited Alexander Pope,<sup>122</sup> who argued that “the function of the poet is not to invent novelties, but to express truths hallowed by

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<sup>114</sup> *Ibid.* p. 8.

<sup>115</sup> *Ibid.* p. 8.

<sup>116</sup> See above p. 121 and below p. 144.

<sup>117</sup> See the *St. Columba V. St. Finnian*, *supra* note 46.

<sup>118</sup> See, ‘liberty of the press’, in John Locke, *Political Essays* (Cambridge University Press, 1997). And Thomas Hobbes, *Leviathan* (1969 edn.: Scolar Press, 1651).

<sup>119</sup> Martha Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The ‘author’’, *supra* note 5, p. 426.

<sup>120</sup> *Ibid.* p. 427.

<sup>121</sup> *Ibid.*

<sup>122</sup> He was an eighteenth century English poet (1688-1744).

tradition".<sup>123</sup> However, Woodmansee cited Pope's reference to the original writing, as he commented: "the other seemingly anomalous view of the writer," as he argued that he: "is capable ... of achieving something that has never been achieved before"<sup>124</sup> [Underlining added], and this can be done when the poet "violate[s] the rules of his craft".<sup>125</sup> She contended that this referred to a case of working beyond established rules that was an exception for Pope,<sup>126</sup> but she did not provide an explanation of his argument, nor how or why she considered it an exception, although, this statement by Pope is considered to be an explicit reference to original authorship.

Jaszi also criticises the authorship concept's presence in copyright legislation, as he argues that the concept of authorship is an "ideologically charged concept" that "has been an active shaping and destabilizing force in the erection of copyright doctrine."<sup>127</sup> However, authorship *per se* is not the source of problems but it is the disregard of studying and developing or maintaining authorship with the different natures of works that is the reason for that authorship being deemed a 'destabilizing force'.

### 5.3.2 Shifts in the Ideology of Authorship

During the seventeenth and eighteenth centuries different theories that debated authorship's ideological construction appeared, and the analysis of its constituent elements were widely discussed, especially regarding the individualism, originality and ownership that contributed to the formulating of the relationship between the work and its creator.<sup>128</sup>

#### Authorship as an Expression of the Individual:

The term 'author' was a common issue in the literature of copyright and authorship in the mid-seventeenth century, just before the enactment of the Statute of Anne and when the creators of literary and artistic works designated themselves 'authors'. In the eighteenth century, 'romantic authorship' became a dominant concept in the literary and legal fields, and in the late-eighteenth century the doctrinal structures that had

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<sup>123</sup> Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author'', *supra* note 5, p. 428, as she referred to his book Alexander Pope, *Essay on Criticism* (London: W. Lewis 1711).

<sup>124</sup> Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author'', *supra* note 5, p. 428.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.* p. 429 as she confirmed that "[s]uch moments of inspiration, in which the poet snatches a grace beyond the reach of the rules and poetic strategies that he commands as the master of a craft, are still the exception for Pope."

<sup>127</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 456.

<sup>128</sup> Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright', *supra* note 63, p. 192.

dominated copyright until then emerged.<sup>129</sup> Drabble asserted that authorship in this period became "an extreme assertion of the self and the value of individual experience, together with the sense of the infinite and the transcendental."<sup>130</sup> Jaszi argues: "In fact, British and American copyright present myriad reflections of the Romantic conception of "authorship".<sup>131</sup>

Jaszi also confirmed that the term 'author' was used before the Statute of Anne, albeit it referred to a kind of power, even before the use of 'authorship' in the romantic era,<sup>132</sup> and Boyle explained that 'author' or 'authorship' was a reference to "authority" that implies control over individual creation.<sup>133</sup> This meaning was confirmed by Hobbes: "For that which in speaking of goods and possessions, is called an owner... speaking of actions, is called author. As the right of possession, is called dominion; so the right of doing any action, is called 'authority'."<sup>134</sup> So, authorship was called authority before the Statute of Anne.

This interest in authorship and its principles existed before the Statute of Anne,<sup>135</sup> but it was theorised in Locke's writings, in individualism and liberalism, in the late-seventeenth century.<sup>136</sup> The Romantic Movement was spurred by the Statute of Anne and the mention of author's rights in the copy. This stimulated unexpected movement in the direction of romantic authorship, depending from the individualism and property rights set by Locke and Hobbes.

As MacPherson sustains, writing about this time: "the original seventeenth century individualism contained the central difficulty, which lay in its possessive quality. Its possessive quality is found in its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them. The individual was seen neither as a moral whole, nor as part of a larger social whole, but as an owner of himself."<sup>137</sup> Locke privatised the notion of individualism on authorship,

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<sup>129</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 455. However, he argues that authorship appeared before romanticism prevailed, but he didn't discuss this issue. See, *ibid.* p. 456.

<sup>130</sup> See, Margaret Drabble, *The Oxford Companion to English Literature* (Oxford University Press, 2006). Referred to in Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 455.

<sup>131</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 456.

<sup>132</sup> *Ibid.* p. 470.

<sup>133</sup> Jerome Frank, *Law and the Modern Mind* (6th edn.; London: Stevens & Sons Limited, 1930). Referred to in Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 470.

<sup>134</sup> Thomas Hobbes, *Leviathan*, *supra* note 118, p. 107.

<sup>135</sup> See this Chapter at 5.3 p. 123-126.

<sup>136</sup> See, especially, 'Liberty of the Press', p. 329 of his work, John Locke, *Political Essays*, *supra* note 118, and 'Some thoughts concerning reading and study for a gentleman', *Ibid.*, p. 348.

<sup>137</sup> Crawford B Macpherson and Thomas Hobbes, *The Political Theory of Possessive Individualism* (Clarendon Press Oxford, 1962). p. 3.

and his main theory of the property or ownership of one's labour was what dominated his philosophy of copyright discourse.<sup>138</sup>

### **Authorship as an Economic Motive:**

Authorship helped to encourage and incentivise authors to make new works, and has been kept as a mascot for publishers. As Jaszi confirmed: " 'authorship' has remained what it was in eighteenth-century England -a stalking horse for economic interests that were (as a tactical matter) better concealed than revealed, and a convenient generative metaphor for legal structures that facilitated the emergence of new modes of production for literary and artistic works." <sup>139</sup>

Saunders confirmed this shift in copyright ideology from the seventeenth to the eighteenth centuries, to the modern day 20<sup>th</sup> century.<sup>140</sup> As the former time distinguished the romantic character of authorship or "the 'birth' of the author". On the other hand, the recent times have witnessed the defeat of the structuralism's account of authorship, and the post-structuralist theory of authorship has popularised the 'death' of the author theme that criticised the author concept and believed in emancipation from the "individualised authorial subject of Romanticism". <sup>141</sup>

### **Authorship and the Conflict of Interests:**

Ultimately, although in the time of the Statute of Anne authorship was not an explicit concept with inclusive principles, the idea of authorship was already utilised for the protection of booksellers, and gradually attracted the ideas of 'creativity, originality and inspiration'<sup>142</sup> until it became a complete ideology *per se* by the early nineteenth century. From this point and throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries, publishers' rights 'disappeared' from the general discourse of copyright. <sup>143</sup> From the mid-20<sup>th</sup> Century the conflict between author's and users' rights floated to the surface, and in a strange development we find authors' rights and even users' rights are fading, for the interests of a third party, which is publishers rights<sup>144</sup> supported again by the countering of theories of individualism and structuralism, led by Foucault and Barthes, who,

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<sup>138</sup> Lior Zemer, *The Idea of Authorship in Copyright* (Ashgate Pub Co, 2007)., p. 147.

<sup>139</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 500.

<sup>140</sup> In-between, which is the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century, the peak of structuralist theory and its implications for authorship was witnessed.

<sup>141</sup> D. Saunders, *Authorship and Copyright*, *supra* note 111, p. viii.

<sup>142</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 471.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.* p. 471, as he sees that "the "authorship" construct accumulated force and circumstantiality, the strategic manner in which the construct initially had been deployed was effaced."

endorsed by extensive utilitarianism, expanded into common law and even into most of the civil law of most countries.<sup>145</sup>

This manifestation of the ideologies that affected authorship paved the way for this thesis to prove how court decisions have conflicted from the mid-20<sup>th</sup> century until now, and how such conflict can be treated in the future.

#### 5.4 Is the Notion of Authorship Consistent with Collective Works?

It is confirmed by many scholars, e.g., Aufderheide,<sup>146</sup> Jaszi,<sup>147</sup> Boyle,<sup>148</sup> Hyde,<sup>149</sup> McLeod<sup>150</sup> and Vaidhyanathan,<sup>151</sup> that the concept of authorship is not consistent with the collaborative authorship practice or with collective creativity. Kaplan argues that the collaborative creation of works by teams will abate the principles of proprietorship in literary works and will modify conceptions of copyright, as he thinks that this will diminish the principles of original creation and exclusive ownership.<sup>152</sup>

Jaszi insists that the persistence of the notion of 'authorship' in US copyright law is an impediment to the emergence and maintenance of collective creativity.<sup>153</sup> He argues that copyright can no longer adapt to the 'collective, corporate, and collaborative'<sup>154</sup> authorship that he finds as realities of contemporary writing practice. He evidenced his argument by 'folkloric' works, as he finds that they have been excluded from protection of copyright law due to the non-recognition of collective authorship.<sup>155</sup>

Jaszi thinks that the law does not comprehend the non-individualistic works and that the extension of copyright protection to new works entails the suppression of complicating details on their mode of production.<sup>156</sup> In order to prove his argument, Jaszi contended that the attitude of the Supreme Court in *Feist v. Rural*<sup>157</sup> was not an

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<sup>145</sup> See, for the approach between civil law and common copyright laws and the prevailing of the policies of common law copyright in the global arena, Giuseppina D'Agostino, 'The Globalisation of Copyright: A Comparative Analysis of the Anglo-American and Continental European Copyright Laws in Relation to the Author', *Hibernian Law Journal*, 2 (2001).

<sup>146</sup> Patricia Aufderheide, 'Creativity, Copyright and Authorship', *supra* note 20.

<sup>147</sup> Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *supra* note 18.

<sup>148</sup> James Boyle, *Shamans, Software, and Spleens*, *supra* note 22.

<sup>149</sup> Lewis Hyde, *Trickster Makes This World: Mischief, Myth, and Art* (Macmillan, 1997).

<sup>150</sup> Kembrew McLeod, *Owning Culture [Microform]: Authorship, Ownership, and Intellectual Property Law* (Peter Lang Publishers, 2001).

<sup>151</sup> S. Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (NYU Press, 2003).

<sup>152</sup> Benjamin Kaplan and William C Warren, *An Unhurried View of Copyright* (118: Columbia University Press New York, 1967). p. 117.

<sup>153</sup> Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *supra* note 18, p. 295.

<sup>154</sup> *Ibid.* p. 302.

<sup>155</sup> *Ibid.* p. 302.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 1991, 499 U.S. 340, 111 S.Ct. 1282, Supreme Court of the United States.

advocacy of creativity and an application of the simple rule of not protecting facts: “If we seek non-circular justifications for the law's refusal to extend protection to such information collections, we must look beyond the naive distinction between the pre-existent and the ‘original.’”<sup>158</sup> Jaszi argued that romantic authorship is a ‘live’ concept in US legal culture, and the *Feist* Court could not recognise “non-individualistic culture productions” as they are marginalised or invisible.<sup>159</sup>

Jaszi argues that the Supreme Court, instead of investigating the collective nature of the telephone listings, simply resorted to a ‘fictitious’ distinction between uncreated facts and created works. As he confirms that the problem with facts - telephone listings, as, in *Feist*, is not their lack of human intervention, but the opposite, they have “an embarrassment of very human sources.”<sup>160</sup> As they “sum up a complex amalgam of choices, to which the subject of a given entry, as well as her parents, friends, teachers, and others - such as various real estate developers and government employees - have made contributions over time”.<sup>161</sup> So, Jaszi finds that telephone listings have incorporated several personal and laborious efforts in their creation process, and that the Court in *Feist*, and other previous courts, instead of investigating this reality of these factual works, just resorted to romantic authorship as a stalking horse or plea. “Feist, once again, provides an example of this process of marginalization [of the collective creativity].”<sup>162</sup>

Zemer believes that any intellectual work is in fact a collective work that includes not just the efforts of the author named on its cover, but the works of many anonymous individuals from society, “[e]very copyrighted entity represents the creative collectivity. It is a joint enterprise of both the individual author and the public.”<sup>163</sup> Woodmansee also holds a similar opinion as she finds that modern authorship is distinguished by collaborative or corporate writing,<sup>164</sup> she cites Lunsford and Ede<sup>165</sup> confirming that most areas of writing are not individualistic, whether they are business, government, industry, science or social science writings, however, they contend that just arts and humanities that are “last bastion of solitary origination.”<sup>166</sup> Aufderheide argues that

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<sup>158</sup> Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *supra* note 18, p. 303.

<sup>159</sup> *Ibid.* p. 302.

<sup>160</sup> As he confirmed “the real problem with the “facts” involved in *Feist* is not that they fail to reflect human agency, but that they have - in fact - an embarrassment of very human sources.” See, *ibid.* p. 303.

<sup>161</sup> *Ibid.* p. 303.

<sup>162</sup> *Ibid.* p. 303-04.

<sup>163</sup> Lior Zemer, *The Idea of Authorship in Copyright*, *supra* note 138, p. 1.

<sup>164</sup> M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *supra* note 10, p. 281.

<sup>165</sup> See Lisa S. Ede and Andrea A. Lunsford, *Singular Texts/Plural Authors: Perspectives on Collaborative Writing* (SIU Press, 1990).

<sup>166</sup> See, *ibid.* Referred to in Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics*, *supra* note 60, p. 281.

collaborative authorship has banished the synchronisation between copyright law and the cultural notion of the author.<sup>167</sup>

Woodmansee adds another hypothesis to support her claim, that authorship is a collaborative, not a romantic or individual act. As she quoted a statement by Zinck in 1753, wherein he defines the book in his dictionary and confirms that the manufacturing books is an industry that fed many mouths, the author being counted as one of them. "Many people work on this ware before it is complete and becomes an actual book in this sense. The scholar and the writer, the papermaker, the type founder, the typesetter and the printer, the proof-reader, the publisher, the book-binder, sometimes even the gilder and the brass-worker, etc. Thus many mouths are fed by this branch of manufacture."<sup>168</sup> Accordingly, Woodmansee concludes that the author, since the emergence of writing, has never had a superior position but was "on a par with other craftsmen."<sup>169</sup>

The mention of other individuals engaged in the book industry does not mean that they are equal with the scholar or writer who was first mentioned, but it is believed that this was intended to refer to the fact that book production in general requiring many efforts, rather than just the authorship of the scholar, a view that reflects an economic perspective. Besides, it is argued that Zincke gave a superior position to the author when mentioned him at the beginning. Even, Zincke's argument is still correct, as the cultural industries are a major source of income to countries and those engaged in them, and it includes all these crafts and much more, and although the author is the first beneficiary, many individuals work in the same 'profession', like the paper maker, typesetter, proof-reader, editor, printer, book-binder, etc.

To support this argument, we find Hobbes,<sup>170</sup> in the seventeenth century, a century before Zinck, arguing that there is a faith and belief in the author of discourse, as when we rely on the opinions of the author we have faith in his ability to know the truth, or his honesty in not deceiving, so there is 'faith in the man' and a belief 'both of the man, and of the truth of what he says'.<sup>171</sup> Such an argument confirms the degree of importance and focus that was located on the personality of the author as a source of information.

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<sup>167</sup> Patricia Aufderheide, 'Creativity, Copyright and Authorship', *supra* note 20, p. 1.

<sup>168</sup> Georg Heinrich Zincke, *Allgemeines Oeconomisches Lexicon*, trans. Martha Woodmansee (3rd. edn., 1753), *ibid.*p. 442, cited in M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *supra* note 10, p. 281.

<sup>169</sup> M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *supra* note 10, p. 280.

<sup>170</sup> Thomas Hobbes (1588 – 1679) an English philosopher.

<sup>171</sup> Thomas Hobbes, *Leviathan*, *supra* note 118, p. 43.

#### 5.4.1 Romanticism and Collective Authorship:

Woodmansee has insisted that collective authorship was more prevalent in older times, not individual works, and that the romanticism that appeared in the late eighteenth century has caused confusion and disruption to copyright law, because romanticism and the romantic author concept embedded the inclusion of collective works in copyright law. She cited St. Bonaventura's<sup>172</sup> statement, wherein he argues that there are four ways to make books, although it is a long quotation, it is worth mentioning here, as he states: "A man might write the works of others, adding and changing nothing, in which case he is simply called a 'scribe' (scriptor). Another writes the work of others with additions which are not his own; and he is called a 'compiler' (compiler). Another writes both others' work and his own, but with others' work in principal place, adding his own for purposes of explanation; and he is called a 'commentator' (commentator). . . Another writes both his own work and others' but with his own work in principal place adding others' for purposes of confirmation; and such a man should be called an 'author' (auctor)."<sup>173</sup>

Likewise, St. Bonaventura's argument supports originality and individual authorship; it does not abolish it, as he distinguished accurately between different kinds of authorship, as if he describes the contemporary way of writing, including the thesis's proposition in categorising creative skills. St. Bonaventura confirms that those who just compile previous works are called compilers, and those who comment on previous works are commentators, and those who write his own theories and add others to support his opinion, are authors.

This categorisation filters original authors from other less original writers. This argument has facilitated the distinguishing of original authors – or romantic authors, in the words of Woodmansee - and works from other writers, and it supports the calls to give original authors a superior position over the compilers of factual works or compilations, who are not original authors in St. Bonaventura's -and the thesis's- belief.

However, this quotation was used also by Eisenstein<sup>174</sup> to justify that there is no work that is completely 'original' in the meaning of 'new' or 'genius' work, and that novelty is not a condition for literary and artistic works.<sup>175</sup> On the other hand, Woodmansee used it to justify that none of literary works are solitary work, and that all works use previous works, so none of the works show genius authorship. Then Woodmansee inferred that

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<sup>172</sup> The Franciscan, St. Bonaventura, (1221-1274) was an Italian medieval scholastic theologian and philosopher.

<sup>173</sup> St. Bonaventura, a Franciscan, cited in Elizabeth L Eisenstein, *The Printing Press as an Agent of Change* (1: Cambridge University Press, 1980). p. 121-122.

<sup>174</sup> See *ibid.* 173, p. 120-24.

<sup>175</sup> *Ibid.* p. 120-24.

romantic authorship is a false or erroneous concept and should be replaced by collective authorship.<sup>176</sup>

Woodmansee's criticism of the originality which has seeped into authorship in general was initiated by her belief that, historically, authorship emanated from the 'romantic authorship' concept. Woodmansee argues that the romantic authorship refers to works that are new and unique, and has never relied or extracted from previous works, and these are created by 'genius' individuals.<sup>177</sup> She also argues that originality refers to this meaning, as she confirms that the notion of the writer is of recent provenance and it is "a by-product of the romantic notion that significant writers break altogether with tradition to create something utterly new, unique in a word, 'original'."<sup>178</sup>

In this discussion, this research asserts that romanticism has a literary substance<sup>179</sup> that does not find a place in copyright law. Although in literature it bears the meanings of the genius or the sole author, copyright law does not confine itself to the sole author, as collective authorship has been recognised in copyright law since its emergence.<sup>180</sup> Besides, copyright law has never adopted the ideas of the romantic author or the genius author. This notion will be reinforced in the next section.

### **5.5 Authorship and Originality Do Not Include the Meaning of Genius:**

Firstly, writings and thoughts about genius and originality emerged in England and Germany simultaneously, as in England many writers, like William Sharpe, Edward Young, William Duff, and Alexander Gerard, have written about it,<sup>181</sup> and in Germany, at the same time, Friedrich Maximilian Klinger, Johann Georg Hamann, Jakob Michael Reinhold Lenz and Johann Wolfgang von Goethe wrote in the 'Sturm und Drang' period about 'genius' and originality,<sup>182</sup> as Faflak confirmed: "German Romanticism is roughly contemporary with English Romanticism."<sup>183</sup>

Secondly, Tenger argued that the 'genius' concept appeared in England to support the argument that productive forces in society must be organized according to the natural intellectual powers of individuals.<sup>184</sup> However, that argument competed with the discourse of 'political economy', which confined 'genius' to discussions of art and

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<sup>176</sup> M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *supra* note 10, p. 281.

<sup>177</sup> *Ibid.* p. 280.

<sup>178</sup> *Ibid.* p. 280.

<sup>179</sup> For the discussion of the legal and literary meanings of authorship see Chapter 4 at 4.5.

<sup>180</sup> as will be explained in next section.

<sup>181</sup> Joel Faflak and Julia M Wright, *A Handbook of Romanticism Studies* (1: John Wiley & Sons, 2012). p. 3.

<sup>182</sup> *Ibid.* p. 3.

<sup>183</sup> *Ibid.* p. 3.

<sup>184</sup> Zeynep Tenger and Paul Trolander, 'Genius Versus Capital: Eighteenth-Century Theories of Genius and Adam Smith's Wealth of Nations', *Modern Language Quarterly*, 55/2 (1994)., p. 170-71.

literature.<sup>185</sup> It is also argued that ingenuity appeared as a reaction to the growth of the commercial market for literature,<sup>186</sup> whilst others contended that it was a consequence of the autonomy of society, and authors especially, from political and religious authorities.<sup>187</sup> In the meantime, it is important to mention here that this thesis's attention is not focused on the reason for the emergence of the 'genius' concept, but the meaning of ingenuity in the literary context and its correlation to law.

It was argued by Lavater in 1775 that "[g]enius is not learned, not acquired . . . It is our unique property, inimitable, divine, it is inspired . . . Gods in human form! Creators!"<sup>188</sup> Accordingly, 'genius' in ancient times referred to the person's disposition or inclination, which was thought to be inspired by God. However, its current meaning, under the romanticism doctrine, is the "instinctive and extraordinary capacity for imaginative creation [and] original thought"<sup>189</sup> that is embodied in the term 'romantic author' that emerged at the beginning of the eighteenth century. The genius term has been downgraded the virtues of emulation and education, and was one of the things that fuelled the 'Cultural Revolution' in Europe.<sup>190</sup> This argument, which this thesis is calling for is not just that romanticism in literature does not apply in law, but also that its meaning should be revised, as it refers to the inspiration that the person has when creating his work, something similar to the meaning of creativity in modern times.

It is worth referring to the fact that one of the main reasons for the deployment of the 'genius' term being the practices of journals in the sixteenth century, which used 'romantic' and 'genius' terminology in order to distinguish themselves from their competitors. Romanticism was a sort of exaggeration of the importance of their publications and embodying them as inventions, in order to protect them from populist periodical writings. So the real content of romanticism 'on the ground' can be described as follows: "Magazine accounts of genius, then, were caught between the supposedly debased literary culture in which they were produced and read, and the supposedly pure realm of autonomous creativity that they often sought to describe."<sup>191</sup>

Young, although he wrote during the early history of authorship, has differentiated between genius, original and imitation. He stated that: "the mind of a man of genius is a fertile and pleasant field, pleasant as *Elysium*, and fertile as *Tempe*; it enjoys a

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<sup>185</sup> *Ibid.*

<sup>186</sup> Raymond Williams, 'Culture and Society', *London: Chatto & Windus*, (1959). p. 38.

<sup>187</sup> Pierre Bourdieu, 'Intellectual Field and Creative Project', *Social Science Information*, 8/2 (1969).

<sup>188</sup> J Lavater, 'Physiognomical Fragments', (Leipzig: Weidmann, 1775). Cited by David Higgins, *Romantic Genius and the Literary Magazine: Biography, Celebrity, Politics* (Routledge, 2007). p. 2.

<sup>189</sup> David Higgins, *Romantic Genius and the Literary Magazine: Biography, Celebrity, Politics*, *supra note* 188, p. 2.

<sup>190</sup> *Ibid.* p. 2.

<sup>191</sup> *Ibid.* p. 1.

perpetual spring. Of that spring, originals are the fairest flowers *Imitations* are the quicker growth, but fainter bloom. *Imitations* are of two kinds; one of nature, one of authors. The first we call *Originals*, and confine the term *Imitation* to the second.”<sup>192</sup> This statement can serve the thesis’s argument on three points: firstly, that original works are the result of the mind of the man that Young described as the fertile land that will produce the fairest flowers.<sup>193</sup> Secondly, that intellectual works in that age were not limited to creation that was based on nature, nor the innovative thinking that produces novel works. But also can appear in the ‘imitation’ of the previous works of other authors. Thirdly, the term ‘genius’ in the mid-eighteenth century (the supposed time of the emergence of romanticism) was not confined to the works that were considered ‘new’ and ‘novel’, and those do not resemble any other works,<sup>194</sup> but Young’s approval of the imitation as a type of works that a genius can produce although it is a lower grade: “the quicker growth, but fainter bloom”<sup>195</sup> confirms that genius was referring to the making of intellectual work either novel or imitation of previous work.

This important statement by Young confirms that the word ‘genius’ was merely expressing that the work comes from the mind abilities of the author, distinguishing them from other uncreative individuals, or recognising the author’s ability to do what not everybody can do. Accordingly, being a genius did not mean –as the current connotation of romanticism is claimed to mean - the unprecedented ingenious work, but just the ability to produce a mental work. Besides, the language limitations of that age enforced the use of this word for any person who has some abilities of mind that are different from those of other individuals. The term ‘genius’ was used to refer to those who write literary works or invent machines, as both create and mould their mind abilities in a work. We have mentioned above,<sup>196</sup> St. Bonaventura’s argument, cited by Woodmansee as a reference to the non-recognition of the author’s position. However, this research understands it – as explained – as having the opposite meaning, so as to be consistent with Young’s argument.

In addition, Woodmansee’s insistence that the romantic authorship concept that appeared at the end of the eighteenth century meant new or ‘genius’ authorship, is an accusation against contemporary copyright and patent legislation. Namely, that there was a confusion of novelty and originality requirements in regard to literary works and

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<sup>192</sup> Edward Young and Samuel Richardson, *Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison* (Printed for A. Millar, 1759). p. 9.

<sup>193</sup> *Ibid.* referred to in Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author", *supra* note 5, p. 431.

<sup>194</sup> As stated by Elizabeth Cropper, *The Domenichino Affair: Novelty, Imitation, and Theft in Seventeenth-Century Rome* (Yale University Press, 2005).p. 4. See also Chapter 4 at 4.5 footnote 124.

<sup>195</sup> Edward Young and Samuel Richardson, *Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison*, *supra* note 192. p. 9.

<sup>196</sup> See this Chapter at 5.4.1.

inventions. Article 6 (b) of the Statute of Monopolies of King James I in 1623<sup>197</sup> granted patents for “the term of 14 years ... of the sole working or making of any manner of new manufacture.”<sup>198</sup>[Underlining added]. This provision confirms the basis of “the grant is that the 'manner of manufacture' is new”,<sup>199</sup> and “an alleged invention, to be patentable, must be new”<sup>200</sup>, in order to encourage the creation of new inventions.<sup>201</sup> On the other hand, such a condition was not required in regard to literary works in the Statute of Anne, and instead it granted monopolies<sup>202</sup> for “useful books” in order to ‘encourage authors and learning’,<sup>203</sup> - a condition which afterwards was contained within the term ‘original’ in the cases Gyles v. Wilcox<sup>204</sup> and Millar v. Taylor<sup>205</sup> and afterwards in the Fine Art Copyright Act of 1862.<sup>206</sup>

Accordingly, the differentiation between novelty and originality and between authors and inventors had been an established rule since the seventeenth century, and may have been stabilised even before, as the English Crown was granting ‘letters patent for monopolies’ in the 16th century, and the first patent was awarded to William Hyde Price as the first English patent for invention in 1561.<sup>207</sup> So, the claim that romantic authorship or the romanticism that emerged at the end of the eighteenth century has meant that an author should be a genius and should write works that are new and have never been written before, is something that has not relied on a historical basis or on the historical development of laws for intellectual works, or this may be a literary doctrine, not a legal and historical doctrine. This trend might be related to the literary movements that appeared at this period, but this has nothing to do with the laws that were enacted before or after this time. In other words, although the romantic authorship concept can be argued within a literary context, this is unsupported and unsound in the legal context and according to legal chronicles.

Woodmansee argues that originality first appeared in the writings of Edward Young (1759) and the subsequent writings of Wordsworth. Herein, Woodmansee’s reliance on Wordsworth’s argument is criticised, as she confused novelty and originality in

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<sup>197</sup> 'An Act Concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures Thereof', 21 Jac. 1, c. 3 (England, 1623)..

<sup>198</sup> *Ibid.*

<sup>199</sup> G.A. Bloxam, 'Letters Patent for Inventions: Their Use and Misuse', *The Journal of Industrial Economics*, 5/3 (1957). p. 157.

<sup>200</sup> *Ibid.* p. 160.

<sup>201</sup> *Ibid.* p. 157.

<sup>202</sup> As section I of the 'Statute of Anne', *supra* note 87, provided that: “the author of any book ... shall have the sole right and liberty of printing such book and books for the term of one and twenty years”,

<sup>203</sup> The Statute of Anne was entitled, “An act for the encouragement of learning”, *ibid.*

<sup>204</sup> Gyles V. Wilcox, 1740, 27 E.R. 682, 368, Barnardiston Chancery.

<sup>205</sup> Millar V. Taylor, 4 Burrow 2303, *supra* note 94.

<sup>206</sup> As explained above at 2. 1. 1 and 2. 1. 1. 1.

<sup>207</sup> See, Laura Ford, 'Monopoly as Rhetoric: The Case of Letters Patent', *CASRIP Newsletter*, 12/1 (2005). Note 94.

intellectual works as if they are equal. Wordsworth argued “[o]f genius the only proof is, the act of doing well what is worthy to be done, and what was never done before Of genius in the fine arts, the only infallible sign is the widening the sphere of human sensibility, for the delight, honor, and benefit of human nature. Genius is the introduction of a new element into the intellectual universe or, if that be not allowed, it is the application of powers to objects on which they had not before been exercised, or the employment of them in such a manner as to produce effects hitherto unknown.”<sup>208</sup> [Underlining added].

Wordsworth actually offers two meanings of ‘originality’, first, he argues that in fine arts the genius work is “the widening the sphere of human sensibility, for the delight, honor, and benefit of human nature.”<sup>209</sup> Such a definition, is not stringent, as it is similar to those which the Statute of Anne and the US Constitution have stipulated in works of art and literature that reflect the utilitarian approach, whether through encouraging learning or to ‘promote the Progress of Science and useful Arts’. In his words, ‘genius work’ actually means original work, in the legal meaning of originality in contemporary thinking.

Subsequently, in the second half of his statement, he argues that genius is the “introduction of a new element into the intellectual universe”, although he supposed that works should include a ‘new’ element, this statement does not refer to the strict meaning of novelty, as Woodmansee recommends, for two reasons. Firstly, he followed this statement by confirming: “if that be not allowed, it is the application of powers to objects on which they had not before been exercised, or the employment of them in such a manner as to produce effects hitherto unknown.”<sup>210</sup> The other alternative conditions that Wordsworth provided indicate that he talks, in the second half of his statement, about the patent system not copyright, as he argues that the genius may be provided in the ‘application’ of powers to creating ‘new objects’, or the ‘employment’ of these powers in a different way to produce ‘unknown’ or ‘new effects’. Such terms are familiar in patent law, and we may recognise a similar application of this distinction in our modern patent systems. To conclude, it can rationally be supposed that Wordsworth talks about intellectual property in general, without differentiating between copyright and patent. Secondly, There are similar statements to

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<sup>208</sup> William Wordsworth, ‘Essay, Supplementary to the Preface’, *The prose works of William Wordsworth*, 3 (1815). Referred to in M. Woodmansee, ‘On the Author Effect: Recovering Collectivity’, *supra* note 10, p. 280.

<sup>209</sup> William Wordsworth, ‘Essay, Supplementary to the Preface’, *supra* note 208, p. 184.

<sup>210</sup> *Ibid.*

that of Wordsworth in later courts' decisions that express the confusion of some Judges who have faced difficulty in interpreting originality in copyright law. <sup>211</sup>

### **5.5.1 Romanticism is a Literary Concept:**

Regarding the claim that romanticism is against the inclusion of collective or informational works in copyright law, romanticism is a literary concept and its parallel concept in law is individuality or personality, which is premised on the theory of personality that was developed by Hobbes, Hegel and Locke.

Although not insisting on the 'death of the authorship' idea, Aufderheide argues that the increase of production of recombinant works, collective works and adaptations changed cultural production practices and introduced new kinds of cultural production, such as 'pastiche works, appropriation arts, remixes, mash-ups, and aggregation blogs'. She adds that these works show the limitation of copyright law in dealing with, or absorbing, such developments and thus it was argued that copyright law should change its policies to accommodate these changes. <sup>212</sup> This argument includes an improper belief that copyright law cannot deal with collective works, and this belief emanates from a literary interpretation of the terminology used within copyright law provisions, such as authorship and originality.

Through investigating the views of Hobbes, Hegel and Locke on personality and intellectual works and the rights of authors and inventors, which will be the subject of the next Chapter, it can be discerned that they adopted principles of copyright law that continue today, including the possibility of making collective works, and even the works for hire doctrine. <sup>213</sup> So the literary view of the romanticism where the authors are considered as being unique is existent only in literary rhetoric, and it is that view alone that is upheld by those literary authors that Woodmansee and Jaszi have cited in their writings in endeavouring to prove that romanticism dictates the provisions and decisions of copyright law.

The contention that copyright law disregards the collective nature of authorship emanates from the research and analysis of the history of authorship and romanticism by literary scholars, who discovered therein the differentiation between the concept of romantic authorship in the eighteenth century and the current practices of authorship, without investigating the collective authorship practices in law in earlier times also.

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<sup>211</sup> See Chapter 3 at 3.9.

<sup>212</sup> Patricia Aufderheide, 'Creativity, Copyright and Authorship', *supra* note 20, p. 8, as she argued "mashups, remixes, vids, political satire ... blogs commenting on everything ..., and memes of all kinds" that "spurred by digital facility" have challenged the romantic notion of authorship.

<sup>213</sup> See Chapter 6 at 6.2.

Literary scholars developed the definition of 'romantic authorship' to refer to the genius author or the self-contained individual.<sup>214</sup> Consequently, the supposed 'death of authorship' had an influence on law only when they confronted the literary beliefs of genius or romantic authors with collaborative authorship and considered it to be a reference to the end of the romantic author era.<sup>215</sup> In fact, this direction is inaccurate as it presupposes two claims both of which are questionable. Firstly, this belief supposes that collaborative authorship is something that has emerged recently and did not exist before the romantic authorship era at the end of the eighteenth century, and this has been proven to be untrue, according to Hobbes' writings.<sup>216</sup> Secondly, they have supposed that law embraces the concepts of literature and develops with it step by step, which is not true, as until today, the law adopts authorship within the scope of copyrightability regardless of the situation in regard to literary authorship. Besides, literary authorship is totally different from legal authorship, as this thesis maintains.<sup>217</sup>

Although the law of copyright adopted the concept of authorship as the general sphere that surrounds all elements of writing, art and culture, it did not adopt the 'romantic' or 'solitary' authorship concept, in the meaning that literary scholarship has given it, because it has never ignored or rejected collaborative authorship, besides, novelty has never been a condition in copyright law. Although the Statute of Anne gave copyright to the individual author and did not mention collaborative authorship, this might be due to the modernity of such a rule, and the nature of this legislation as the first act concerning copyright rules. The following amendments interpreted and broadened the scope of authorship to include joint, collective and collaborative authorship.<sup>218</sup> Although most of the scholars' opinions offered above<sup>219</sup> show the flaws in romantic authorship due to the rise of collaborative and collective authorship, it is argued that the typical collective works is distinguished by "theoretical ambiguity, methodological pluralism, diversity of approach and procedure, and heterogeneity in the fields of study it represents."<sup>220</sup> As, creating a work with a unified methodology cannot be achieved unless through one author, even if his role was coordination between different contributions, so the role of the individual author cannot disappear in making

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<sup>214</sup> As Thomas Carlyle, *The Hero as Man of Letters* (G. Bell, 1897). And William Wordsworth, 'Essay, Supplementary to the Preface', *supra* note 208.

<sup>215</sup> See, Benjamin Kaplan and William C Warren, *An Unhurried View of Copyright*, *supra* note 152; Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *supra* note 18, and Patricia Aufderheide, 'Creativity, Copyright and Authorship', *supra* note 20.

<sup>216</sup> See Chapter 6 at 6.2.

<sup>217</sup> See Chapter 5 at 5.6.

<sup>218</sup> For instance the Copyright Act of 1911 defined collective works in s.35 (1)

<sup>219</sup> See Zemer and Jaszi at 5.4.

<sup>220</sup> Josué V. Harari, *Textual Strategies: Perspectives in Post-Structuralist Criticism* (699: Routledge, 1980). p. 11 Harari mentioned this in his description of his anthology, as a typical example of collective work.

intellectual works as long as every mind is different from the other, with the recognition of the importance of the collective efforts in making works.

### **The Need for the Author Doctrine:**

In order for copyright law to function it requires, as stated elsewhere,<sup>221</sup> the attribution of the work to an identified author to facilitate the application of law and the marketing of works, and it does not matter whether there is one author or several authors, as long as they are all identified as co- or joint authors. In the case of unidentified authors, the law, for practical reasons, may decide that specific persons represent other persons so as to achieve the functioning of copyright law in regulating dealings or transactions of the work. The same argument was offered by Aufderheide, when she argued that “copyright law, against the actual reality of production routinely assigns authorship to fewer people than contribute to the work to achieve greater efficiency, and where there are multiple authors, copyright policy fails entirely to recognize collective creation except as an aggregation of individual authors. These practices, which fail to recognize any special right of individuals who may have contributed to corporate endeavours through work-for-hire arrangements, or a collective process in which the genius of authorship is exercised collaboratively, have practical advantages in the commodification of the intellectual ‘property’.”<sup>222</sup>

Copyright law thus recognises the importance of the individuality of the author, but does not insist on it as the law takes collective contributions into consideration, and if practical considerations impose that the law determine some individuals to be right holders, this is not against the philosophy of copyright law since, from the beginning, it did not adopt romanticism but individuality in a relative meaning. This confirms that there is an obvious distinction between authorship in the literary context and in the legal context.

### **Literary and Legal Authorship:**

The conclusion as Aufderheide puts it, is that originality and other romantic terminology in literature have no effect on their counterparts in the legal context: “[a]nd finally, changes in copyright law ~~changes~~ do not map neatly onto zeitgeist shifts in the Romantic conceptualization of the author.”<sup>223</sup> [Amendment done] The law relies on them to achieve its own aims and concepts, whether by conferring protection, granting property or regulating transactions, but it is not influenced by the changes that happen in the field of literature: “the law [is] a product of contingent decision-making, accreting

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<sup>221</sup> See Chapter 4 at 4.4.

<sup>222</sup> Patricia Aufderheide, 'Creativity, Copyright and Authorship', *supra* note 20, p. 2.

<sup>223</sup> *Ibid.* p. 2.

around conflicts over property rights and with an associational but not necessary connection with cultural notions of authorship.”<sup>224</sup> This distinction between authorship in law and the ‘literary notions of authorship,’ due to its fundamental importance to the thesis’s main argument in enforcing authorship over ownership in copyright law without the impediments of the claims that authorship should be banished for such literary substance.

The practical situation reflects this understanding, as legal regimes continue to employ and enforce the concept of authorship, and have not been influenced by literary arguments that aim to break up concepts of personality and individuality, although they are inherent to many doctrines in law, i. e. , property. Aufderheide confirmed that even businesses that deal with collaborative creations, like blogs, Facebook and TwitPics, adopt individual property models, as they offer their works on an individual basis not through collective property. <sup>225</sup>

## **5.6 A Distinction between Legal and Literary Rhetoric of Authorship Should Be Set:**

The discussion of the death of the author that emerged from literary and philosophical scholars and linguistics should be confined to the philosophy and literature fields of study, not reflected in law. Though this may seem inconsistent with Derrida’s deconstructionist view of the disciplines, subjects and institutions, and the need to invent new interdisciplinary branches in science and research.<sup>226</sup> Allowing the ‘death of the author’ doctrine to be interdisciplinary between literature and law has caused destructive effects to the authorship doctrine in law and unfortunately that was done by legal scholars.

As stated above, it was argued by Woodmansee, Jaszi and Kaplan that collaborative authorship is challenging romantic authorship. <sup>227</sup> This may challenge the idea of romantic authorship in literature and diminish its scale to allow for the concept of collaborative authorship, that seems against romanticism in its meaning of solitary and genius authorship. However, copyright law regulates the transactions of literary works that are formulated by several authors as a practice that should be regulated by law.

It is posited in this thesis that copyright law is not confined to a single theory or concept, but employs whatever beneficial theory or mechanism to achieve its regulatory functions. So, although single authorship is the basis of copyright law, this

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<sup>224</sup> *Ibid.* p. 3.

<sup>225</sup> *Ibid.*

<sup>226</sup> In his book, Jacques Derrida, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (Fordham Univ Press, 1997). See especially pp. 5-7,

<sup>227</sup> See Chapter 3 at 3.3.

does not mean that copyright law is confined to the romantic authorship that appeared in literature at the end of eighteenth century and which referred to as the 'genius' author. The two concepts are different, it is a matter of coincidence, and the evidence for this is the philosophers' statements of the seventeenth century, who addressed singular and collaborative authorship without qualms, as noted below.<sup>228</sup>

It appears from the discussion about the supposed 'death of the author' that authorship offers interesting discussions in literature rather than the law, and the discussions in the literary discourse inspires and affect legal discussion. This thesis stresses the importance of inspecting that part of authorship that benefits the law and focuses on the importance of differentiating between the two sides: literature and law.

The problem with this confusion between, or mixing of literary and legal studies is that the literary discussion on the romantic author addresses the author as the genius individual who creates unprecedented and novel works, which is not in accordance with the legal perspective. This influenced literary scholars who look to artistic creation as a whole, and therefore they resorted to theories of the death of authorship, as a solution for the inclusion of other collective practices of authorship under the copyright law, which is seen as the patron of individual authorship only. Hence "It is of course possible - perhaps even desirable - for copyright law to be responsive to changes in artistic thinking and practice, provided that any increased intolerance of imitation and/or appropriation is carefully balanced against rights traditionally granted to authors and currently protected by copyright."<sup>229</sup>

In addition, this research advocates Compagnon's opinion, that the author has been sacrificed in the death of the author debate. As he questions: "by asserting that the author makes no difference in the signification of the text, hasn't theory pushed logic too far and sacrificed reason to the pleasure of a fine antithesis? And especially, hasn't it mistaken its target? Indeed, isn't the interpretation of a text always a matter of making conjectures about a human intention in action?"<sup>230</sup> Compagnon's criticism is confined to the literary side of the argument, however, we find that the 'author's intention' is important to that side of the argument. It is evident that considering 'author's intention' is better for a proper understanding of texts as explained in regard to Foucault's own argument.<sup>231</sup>

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<sup>228</sup> See Hobbes and others under Chapter 6 at 6.2 and after.

<sup>229</sup> Bill Morrow, 'Originality: Primary, Initial, First', *Alternative Law Journal*, 20 (1995). p. 165.

<sup>230</sup> Antoine Compagnon, *Literature, Theory, and Common Sense* (Princeton University Press, 2004)., p. 30.

<sup>231</sup> See above Chapter 4 at 4.4.

It is not necessary for literary concepts used in copyright law to be applied with the same meaning they have in literature. Although the same terminology exists in both discourses, each should be dealt with from a different perspective that complies with other theories in that particular discourse.

## 5.7 Conclusion:

This Chapter has discussed that although romanticism's meaning in the literary context is the genius author, the history of protecting authors' works does not have such a conception in the legal context. In other words, the works that include pre-existing works, or that have been created by several authors, were not deprived of protection, as mentioned in Young's distinction<sup>232</sup> between original and imitation works, and St. Bonaventura's 'the compiler, scriptor and author' distinction.<sup>233</sup> Having identified this, this thesis insists on the differentiation between the legal and literary contexts when dealing with terms like 'romanticism' and 'authorship'. Accordingly, we found that it is essential to pose some questions at this stage: Why do modern scholars demonise romantic authorship?<sup>234</sup> Does it really refer to the individuality or personality of the author, or the genius author? Why is it correlated with new works and novelty?

It is argued that Woodmansee and Jaszi have confused, in their investigation of the development of literary property, the literary angle of authorship and its legal angle. They did not investigate authorship from the legal standpoint, in terms of who is the creator? the relations between authors and publishers; the circumstances of evoking authorship in the Statute of Anne, and the history of the author concept and intellectual property in English history, which goes back to the 6<sup>th</sup> century, according to the case of St. Finnian.<sup>235</sup>

They, instead, looked at the issue from a literary perspective. They looked at how authors look to themselves, and the writing profession. They discussed whether authors were considered in the 15<sup>th</sup> or 16<sup>th</sup> centuries as the real authors of their works, or whether they took inspiration from outside through divine power.<sup>236</sup> They confined themselves to the literary meaning of romantic authorship that appeared at the end of the eighteenth century, although individuality and the acknowledgment of the author and his property in the work appeared three centuries earlier.<sup>237</sup> Accordingly, this thesis cannot agree with Woodmansee in confirming that intellectual property is a

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<sup>232</sup> See Chapter 6 at 6.3.1.

<sup>233</sup> See this Chapter at 5.4.1.

<sup>234</sup> As Woodmansee and Jaszi confirmed, see this Chapter at 5.2.

<sup>235</sup> St. Columba V. St. Finnian, *supra* note 46.

<sup>236</sup> See Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The 'author'', *supra* note 5, p. 427-428. And Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *supra* note 73, p. 459 – 460.

<sup>237</sup> As discussed above, see this Chapter at 5.3.

modern concept,<sup>238</sup> especially with the examples from Germany and Italy, and even England, mentioned above.<sup>239</sup> So, on a legal ground, what was factual and applicable is that authors were seeing these works as their own creations and that they deserved the full entitlement of 'authorship', regardless of these romantic conceptions. Romantic conceptions of authorship and discussions thereof should be confined to the literary context only, as they were never considered by legal scholars or philosophers in the seventeenth or eighteenth centuries.

Through the thesis's theoretical and digital treatment of the subject of authorship it hopes that it could restate authorship into the language of the information theory, and alienating authorship the literary substances associated with it like romanticism and fears like the death of the author. This can be done through concentrating on the characteristics of the work as personal and intellectual product of the author. "The romantic model of authorship can be restated in the language of information theory. The mind of the author is the message source. The work is the message, and its purpose is to convey the sender's intentions to the awaiting audience."<sup>240</sup>

The individual author is looked at in law as the person worthy of protection, and this position is granted to the author, not just in modern laws or as a result of the romantic authorship conception, but it was a stable concept in both theory and practice before the appearance of romanticism in the literary context, and even before the enactment of any related law, as stated above.<sup>241</sup> Furthermore, collaborative authorship, in practice, appeared earlier in history and was accepted and absorbed by society and contemporary regulating rules,<sup>242</sup> so the authorship concept has not stood against collaborative authorship in either ancient or modern times.

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<sup>238</sup> See, Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author'', *supra* note 5, p. 426.

<sup>239</sup> See discussion under 5.3.

<sup>240</sup> A.L. Durham, 'Copyright and Information Theory: Toward an Alternative Model of Authorship', *Brigham Young University Law Review*, (2004). p. 105.

<sup>241</sup> See above under 'History of authorship' at 5.3.

<sup>242</sup> As explained above, at 5.3. & 5.6.

## Chapter Six: The Personal and Mental Features of Intellectual Works

### 6.1 Introduction

The theoretical argument of this thesis attempts to elevate or reinforce the values of the authorship and originality concepts. However, this theoretical argument intends to solve the practical problem which was explained in the first Chapter, namely, the 'conflict in judicial decisions on the copyrightability of works'. The third Chapter showed the external or superficial reason for the conflict, which is the confusion around the interpretation of the originality criterion regarding not just different works, but also works of the same nature. This thesis will investigate the nature of intellectual works and what the elements that have to be measured are. Ultimately, this will help to tailor the most suitable criteria for every nature or type of work.

The lack of investigation into the nature of intellectual works and the relation between the work and the author has led to a misunderstanding in copyright law and allowed literary scholars<sup>1</sup> to give suggestions, such as the 'death of the author', and, even further, it allowed legal scholars<sup>2</sup> to adopt it as a solution to the confusion and conflict in copyright subsistence decisions.

This Chapter will investigate how to make copyright law concepts and applications, or theories and judicial applications, coherent. The solution proposed by this thesis falls between two policies; firstly, the preservation of orthodox theories and concepts; secondly, providing a system that can employ these concepts to serve new challenges, in brief, confining the authorship concept to works that include personal authorship and excluding others into a separate system.

This Chapter will pave the way for the existence of such a system through proving that works can be divided into authorial and non-authorial works, depending on the differentiation between their different natures. Such a distinction will help to settle confusion in most of the cases relating to the copyrightability of works. However, this distinction does not aim to deprive any type of work from protection, as it concludes

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<sup>1</sup> Like Foucault and Barthes. In the first's speech: Michel Foucault, 'What Is an Author?', in Donald F. Bouchard (ed.), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1980). And the second's article: Roland Barthes, 'The Death of the Author', *Image, Music, Text* (Fontana Press, 1977).

<sup>2</sup> Like, Woodmansee and Jaszi in their works, Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The "author"', *Eighteenth Century Studies*, (1984).; M. Woodmansee, 'On the Author Effect: Recovering Collectivity', *Cardozo Arts & Entertainment Law Journal*, 10 (1991).; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *Duke Law Journal*, (1991a).; and Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *Cardozo Arts & Entertainment Law Journal*, 10 (1991b).

that both types of works should be protected, but with different levels of protection. This distinction will help Judges to decide the copyright subsistence cases through an analysis of the works in front of them and offering several elements to decide upon, namely, the 'nature of the work', the existence of authorship, the classification of works, then, the suitable originality interpretation for each category.

The focus of this chapter on the personal, mental and creative elements of works, is not an advocacy of the idea of romantic authorship or genius. Simply what is discussed here is that works are not equal in nature and that there are works existent with no intellectual or mental intervention. According to this differentiation, we can conclude that criteria that assesses intellectual elements should be confined to works that have intellectual elements, and vice versa.

The work should have personal and mental elements in order to qualify as an intellectual work, so the first half of this chapter will focus on personal authorship, and the second half will concentrate on the mental intervention by the author. The thesis will investigate the opinion of personality philosophers, especially the English ones, in addition to an inspection of the development of modern copyright law towards requiring personal and mental elements.

Personal authorship is the main characteristic of intellectual creation in the common and civil law systems, however, it may be argued<sup>3</sup> that this approach – the prevalence of authorship and personality - could not be adopted in the Anglo-American legal regime, and that the 'self-expression' and 'self-representation' concepts are against the Anglo-American system and should be rejected.<sup>4</sup> However, personal authorship was established in English culture even before the Statute of Anne and, of course, before the appearance of literary romanticism, and this can be identified through the writings of Hobbes, Locke and Hegel.

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<sup>3</sup> See Kim Treiger-Bar-Am, 'Kant on Copyright: Rights of Transformative Authorship', *ibid.*25 (2008), p. 1066.

<sup>4</sup> As Kim argued that "It may be argued that Kantian principles are appropriate for Continental authors' rights regimes, but that they are an anomaly in the United States and the United Kingdom. Reliance upon Kant may be said to represent a transplant of foreign ideas." *Ibid.* p. 1064. He also explained the difficulties facing Kantian theory in Anglo-American system in p. 1066.

## **6.2 Personal Authorship and Literary Property in Hobbes' Writings: The Personality of the Author is Prevalent in his Works (Justifying Literary Property):**

In affirming the role of the author's personality and the importance of his mental work in intellectual works, Hobbes confirms that a legal entity, or, as he named it, the 'artificial person', owns the words and actions of the author in order to represent him in front of others. This legal entity is called 'the actor', and the person who made the words and actions is called 'the author', and that this 'actor' acts through the 'authority' he gets from the author, or, as he confirmed: "[o]f persons artificial, some have their words and actions owned by those whom they represent. And then the person is the actor; and he that owneth his words and actions, is the AUTHOR in which case the actor acteth by authority."<sup>5</sup> [Underlining added]. Accordingly, Hobbes clearly confirms that the author stays the author and owner of his works and ideas, even if somebody else represents him. This is so –as the thesis argues- even if this representation was by law, somebody like the employer, or a contract as in collective works (i.e., a newspaper). This argument, which is also supported in the following paragraphs, confirms that in England, sixty years before the Statute of Anne, the author had his position as creator and owner of his works recognised. Any legal entity, such as publishers, just represents the author. This consolidates the position of authorship in England and opposes any claims of considering authorship a foreign concept.

Hobbes also confesses the potential for the existence of the artificial person, a corporation or entity that can represent the intellectual works of other persons for practical reasons, as he confirmed: "When they [words and actions] are considered as his own, then is he called a natural person and when they are considered as representing the words and actions of another, then is he a feigned or artificial person."<sup>6</sup> This also confirms the unique position that the author, or individual author, and the human personality had for the authorship of works in the seventeenth century. This was confirmed also when Hobbes refuted that inanimate institutions (non-natural persons) could be authors. He posited that: "Inanimate things, as a church, an hospital, ... cannot be authors."<sup>7</sup> [Underlining added] This also reflects the personality and individualisation approach in which Hobbes believes, and it reflects the understanding of the culture of copyright in England in the seventeenth century.

Accordingly, Hobbes' writing on the ownership of "words and actions", and that the owner of words may be represented but cannot be neglected, undoubtedly reflects the

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<sup>5</sup> Thomas Hobbes, *Leviathan* (1969 edn.: Scolar Press, 1651), p. 107.

<sup>6</sup> *Ibid.* p. 106.

<sup>7</sup> *Ibid.* p. 108.

position of writers as being the owners of their 'words', whether written or delivered in speech. This appears also in his differentiation between the normal 'owner' of 'goods and possessions', and the 'author', as an owner of intellectual things that he called 'actions'. This was clear when he argued: "For that which in speaking of goods and possessions, is called an owner, and in Latin *dominus*, in Greek *xvewç*; speaking of actions, is called author."<sup>8</sup> Hobbes argues that the real owner, as regards goods and possessions, is called the 'owner', and in actions and words is called the author, and the author's right in his works is called 'dominion' or authority.<sup>9</sup> So, we can infer that Hobbes believed in the author's own right on his works, and if there are others who can represent him (like publishers), they are not considered authors but they deal under authority gained from the author.

In advocating this thesis's conclusion that 'actions' refer to intellectual works, and the 'author' here is meant to refer to the author as we know it today, we find Rose confirms that in olden times texts were recognised as actions, rather than as things: "the very notion of owning a text as property does not quite fit the conception of literature in the early modern period in which it was common to think of a text as an action rather than as a thing."<sup>10</sup> [Underlining added] Foucault also affirmed that, in antiquity, literary works were considered to be actions.<sup>11</sup> This helps to understand Hobbes' argument better.

Hobbes also linked the possibility of obtaining the title 'author' with some personal traits, like 'rationality' or the mental capacity of the author, as he precluded intellectually disabled persons from being the authors of their actions or words: "children, fools, and madmen that have no use of reason, ... can be no authors".<sup>12</sup> This also somehow reflects a degree of value that should be in the works in order that they get protection.

This research contends that Hobbes' arguments on the personality of the author and the importance of the author's work, and the refusal of corporate persons to be authors, are evidence from an English writer of the existence of a special English author's rights system that existed in the seventeenth century. Authorship is thus a concept that is inherent to English culture, so when we argue that the author should gain a superior position and that works that include authorial contribution should be separated from works that are devoid of this contribution, this should not be considered a strange proposal for English culture. As, that has been the case since the seventeenth century, which is why Hobbes' argument is very central to this thesis's argument.

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<sup>8</sup> *Ibid.* p. 107.

<sup>9</sup> *Ibid.*

<sup>10</sup> Mark Rose, 'The Author in Court: Pope V. Curll (1741)', *Cardozo Arts & Entertainment Law Journal*, 10 (1991), p. 477.

<sup>11</sup> Michel Foucault, 'What Is an Author?', *supra* note 1, p. 124.

<sup>12</sup> Thomas Hobbes, *Leviathan*, *supra* note 5, p. 108.

Hobbes also confirmed that no discourse can end in fact or absolute knowledge, as the fact comes from the perceptions of senses, and the knowledge of science and consequence is not absolute but conditional: “[n]o man can know by discourse, that this, or that, is, has been, or will be; which is to know absolutely but only, that if this be, that is; if this has been, that has been”<sup>13</sup> under the conditional belief of human minds. This argument supports the thesis’s contention that it is the author and his mind, ideas or opinions, that matter, and when information or knowledge is absorbed, the name of the author is attached to this information because - as Hobbes suggested - the scope or quantum of facts in our life is so limited, it is all made up of theories or personal opinions.

### **Works are whether Science or Opinion:**

Hobbes has distinguished two kinds of intellectual work in which the author’s mental work is required. The first kind of works includes information that is gathered and interconnected through ‘syllogisms’. The author then produces a conclusion. The second kind of works is devoid of information, or the information included is not logically joined and the author has to insert a conclusion also. A quotation by Hobbes is here important for clarifying the thesis’s argument, as he stated: “when the discourse is put into speech, and begins with the definitions of words, and proceeds by connexion of the same into general affirmations, and of these again into syllogisms; the end or last sum is called the conclusion; and the thought of the mind by it signified, is that conditional knowledge, or knowledge of the consequence of words, which is commonly called SCIENCE. But if the first ground of such discourse be not definitions; or if the definitions be not rightly joined together into syllogisms, then the end or conclusion is again OPINION.”<sup>14</sup> [Capitalising in original, Underlining added]. Accordingly, in both kinds of works, Hobbes suggested that there should be a conclusion or a result, whether it resulted from justifiable syllogism, when this is science; or if the information inserted does not reach a conclusion logically, this is an opinion work. This is considered as evidence that the personal intervention of the author and his mental work was required in works in England in the seventeenth century, and this, in fact, was the basis of copyright at that time.

### **A Reply to ‘the Death of the Author’:**

Hobbes,<sup>15</sup> in the seventeenth century, argued that there is faith and belief in the author of a discourse, as when we rely on the opinions of the author we have faith in his ability

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<sup>13</sup> *Ibid.* p. 42.

<sup>14</sup> *Ibid.* p. 43.

<sup>15</sup> Thomas Hobbes (1588 – 1679), an English philosopher.

to know the truth, or his honesty in not deceiving.<sup>16</sup> According to Hobbes there is a 'faith in the man' and a belief 'both of the man, and of the truth of what he says'.<sup>17</sup> Such an argument constitutes evidence of the importance and focus that was located in the 'personality of the author' as a source of information, not in the language *per se*. If this argument is accompanied by the practice of the Middle Ages,<sup>18</sup> which is reliance on the thoughts of old writers and their citing to prove the 'authenticity' of the work,<sup>19</sup> this helps to confirm that, even in the seventeenth century in England, it was not the language *per se* that had the importance, as Foucault argued,<sup>20</sup> but the importance lies in the authors and the relation between them and the works they had created.

Hobbes stresses the role of the speaker's personality, arguing that when we rely in our discourse on a person or the authority and the good opinion of that person, then this person becomes the reference to our argument: "[T]he speaker, or person we believe in, or trust in, and whose word we take, the object of our faith; and the honour done in believing, is done to him only."<sup>21</sup> This thesis asks: is this argument not similar to the definition of the romantic conception of authorship and the sanctification of the author which Woodmansee and Jaszi criticised as a modern concept that cannot comply with collaborative authorship? If this were understood with Hobbes argument about collaborative authorship, as explained in the next section, then the conclusion is that, in law, there is, and there was not ever, a contradiction between the superiority of the author's position and the pluralism of the author in the collective works.<sup>22</sup>

### **Hobbes' Opinion in Collaborative Authorship:**

Hobbes, in 'Leviathan' in the mid-seventeenth century, posited the existence of collaborative authorship in a concept similar to the modern one, as he confirmed the possibility of the existence of many authors in one work.<sup>23</sup> Moreover, he supposed the necessity for one person to represent them in any transactions, and it is that approach which is adopted in modern copyright law. "A multitude of men, are made one person,

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<sup>16</sup> Thomas Hobbes, *Leviathan*, *supra* note 5, p. 41.

<sup>17</sup> *Ibid.*, p. 43.

<sup>18</sup> See Chapter 5 at 5.3.

<sup>19</sup> As explained above, under the title of 'authorship in the Middle Ages', see Chapter 5 at 5.3.

<sup>20</sup> See chapter 4 at 4.2.

<sup>21</sup> Thomas Hobbes, *Leviathan*, *supra* note 5, p. 44.

<sup>22</sup> In addition, it is worth noting that Hobbes used the term 'original writer' as a direct reference to the 'author', which was in his investigation of "[w]ho were the original writers of the several Books of Holy Scripture". [Underlining added], see *ibid.* p. 252. The search for the author and authorship of works has been a stable doctrine ever since, and the intellectual property of words or actions was recognised regardless of the terminology used. So Hobbes, in the 17<sup>th</sup> century, was actually following the principles of romanticism that Woodmansee criticised and considered something alien to the English culture, or invented, by the end of 18<sup>th</sup> century. See Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The 'author'', *supra* note 2, p. 426-27, 430-31.

<sup>23</sup> Thomas Hobbes, *Leviathan*, *supra* note 5, p. 109.

when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular.”<sup>24</sup> He also confirmed that the unity in representation does not change the reality that every represented person is an author: “because the multitude naturally is not one, but many; they cannot be understood for one; but many authors, of everything their representative saith, or doth in their name”.<sup>25</sup> [Underlining added] In brief, he concludes that “everyone is author.”<sup>26</sup> So, this research asks, is this not an establishment of the collaborative authorship concept in modern copyright law, dependant on the collaborative property concepts of Hobbes?

Furthermore, Hobbes has set rules for collaborative workings and how the collaborative authors can be represented, and how decisions are taken, and how the opinions of authors can be counted in the decision process, and when the authors’ opinions contradict the greater number should be considered the voice of all.<sup>27</sup> All these rules were settled sixty years before the enactment of the first Copyright Act, however, this Act did not provide for them.

It can be seen from the foregoing that Hobbes has settled for personal authorship and also for collaborative authorship. Although he gave the author the potential to own his works and the corporate person cannot be the author, he allowed for the existence of several authors of the same work, which is the concept of collaborative authorship. Although, it was argued that maintaining collective authorship is against the romantic view of the author for “[p]reservation of the collective, and conservation of a rich and diverse array of cultural and social properties rarely conjure a romantic view similar to that of the lone author.”<sup>28</sup>

This research argues the opposite, as the focus on the author refers to the concept, not the individual author. In other words, this thesis refers to the requirements or demands that should exist to establish the status of authorship, such as originality and creativity, whether these requirements have been provided by one person or different persons.

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<sup>24</sup> *Ibid.* 5, p. 109.

<sup>25</sup> *Ibid.* p. 109.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* p. 109. As, under the title ‘a multitude of men how one person’ Hobbes argues “[a] multitude of men, are made one person, when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular. For it is the unity of the representer, not the unity of the represented, that maketh the person one. And it is the representer that beareth the person, and but one person: and unity, cannot otherwise be understood in multitude.” And under the title ‘everyone is author’ Hobbes states that “because the multitude naturally is not one, but many; they cannot be understood for one; but many authors, of everything their representative saith, or doth in their name; every man giving their common representee, authority from himself in particular; and owning all the actions the representer doth, in case they give him authority without stint: otherwise, when they limit him in what, and how far he shall represent them, none of them owneth more, than they gave him commission to act.”

<sup>28</sup> Lior Zemer, *The Idea of Authorship in Copyright* (Ashgate Pub Co, 2007), p. 2.

To respond to Woodmansee's argument, mentioned above,<sup>29</sup> that the concepts of the 'author' and 'intellectual property' are modern; historically, these concepts were identified in England a century before the Statute of Anne, according to Hobbes.<sup>30</sup>

### **6.3 Personal And Mental Authorship in Locke's Writings:**

This section will investigate the opinion of a second English philosopher, namely Locke, and his writings before the Statute of Anne. Locke required personal and mental elements in works of authorship. Firstly, we will show how he identified the mental elements in works, and how he described in detail the mental operations needed in making works, through differentiation between sensations and reflections. Secondly, these mental elements will be relied upon to interpret Locke's personal labour theory, which was suggested to support protection for works created by manual labour only.

#### **Locke's Differentiation between Sensation and Reflection:**

Locke differentiated two processes of the mind when it deals with external objects, namely, sensation and reflection as sources of ideas.<sup>31</sup> For Locke, sensation is the first source of ideas, as the senses convey into the mind "several distinct perceptions of things."<sup>32</sup> This process can happen through observation and experience of the work around and from which the knowledge is extracted.<sup>33</sup>

The second source of ideas is reflection: "the other fountain from which experience furnished the understanding with ideas is - the perception of the operations of our own mind within us, as it is employed about the ideas it has got".<sup>34</sup> [Underlining Added]. The operations in the mind of the acquirer of this information furnish knowledge and generate more ideas. Such 'furnishing' (as Locke calls it) happens when the soul "comes to reflect on and consider, do furnish the understanding with another set of ideas."<sup>35</sup> [Underlining added]. This reflection or furnishing is a complex process wherein the mind does "thinking, doubting, believing, reasoning, knowing, willing, and all the different actings of our own minds"<sup>36</sup>[underlining added] to get more ideas from within. This source of ideas is something related to the internal side of the person, and is nothing that senses do or participate in. Locke has called it an 'internal sense' for "[t]his source of ideas every man has wholly in himself; and though it be not sense, as having

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<sup>29</sup> See Chapter 5 at 5.2.

<sup>30</sup> See Thomas Hobbes, *Leviathan*, *supra* note 5, p. 106.

<sup>31</sup> John Locke, *An Essay Concerning Human Understanding* (1700), p. 87.

<sup>32</sup> *Ibid.* p. 87 as he argued "The objects of sensation are one source of ideas. First, our Senses, conversant about particular sensible objects, do convey into the mind several distinct perceptions of things".

<sup>33</sup> *Ibid.* p. 87.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* p. 88.

<sup>36</sup> *Ibid.*

nothing to do with external objects, yet it is very like it, and might properly enough be called internal sense.”<sup>37</sup> [Underlining added].

We depend on this argument to conclude that Locke’s ‘internal sense’ is the evidence that works created by thinking, doubting or reasoning, etc. are works of the mind and sensations and should, then, be called works of intellect or creative works which embody the author’s personality and mentality. This is differentiated from works that are created using the ‘outer senses’, only registering what the eyes and ears have sensed without passing this through any internal thinking, doubting or reasoning. These works do not differ from one person to another, as the senses work the same way in all humans, but in the internal senses they differ from one person to another, as Locke affirms in the next paragraph. Such differentiation, which this thesis attempts to reflect in the categorisation of works into authorship and non-authorship works.

Both categories do not have the same value due to the intellectual effort required in the first category of works, which is absent in the latter. Such intellectual or ‘internal sense’ has a rare value, and does not exist within every person. When found, its result (the resulting work) should be valued over other works. This belief is confirmed by Locke’s argument, when he ascertained that individuals have fewer or more ideas depending on two factors: the richness and variety of the things he observes and perceives, and then the level of the operations of their minds - “[m]en are differently furnished with these, according to the different objects they converse with. Men then come to be furnished with fewer or more simple ideas from without, according as the objects they converse with afford greater or less variety; and from the operations of their minds within, according as they more or less reflect on them.”<sup>38</sup> [Underlining added].

Accordingly, the first source of ideas put forward by Locke includes the general information and facts that humans can obtain from noticing the world around them in its abstract status, without processing. What compilers’ work concerns is just the collection of these abstract facts and information into one place. The second source of information includes works that have been done by special persons who have the capabilities to ‘think’, ‘analyse’, ‘reason’, and so on, and that is why we argue that the latter kind of works are the only ones that have authorship, which relates to the extra work by the author that is done in making these works. The first kind does not include such complex processes that require the working of the mind, except perhaps the small process that is required to present the information, such as arrangement and organisation,<sup>39</sup> where the presenter or collector has not touched this information or

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* p. 89.

<sup>39</sup> As explained in Chapter 7 at 7.4.

changed it through processing it in the mind. Those who have these factors at a high level are the only ones that can produce works rich with internal effects or ideas, and these works should be valued over other works that are confined to the collection of abstract information and facts.

### 6.3.1 Locke's Personal Labour Theory for Intellectual Property

Locke is considered the originator of a property theory that is based on personal labour, as he founded his idea on two concepts: first, that the earth and the fruits it naturally produces belong to mankind in common, second, that everybody owns his body and personality: "every Man has a property in his own Person".<sup>40</sup> The labour of the person's body and the 'work of his hands' are thus his property.<sup>41</sup> Locke combined the two concepts to reach the result that the person can remove from what is common that with which he has mixed his labour or has gained through his labour, and then it becomes his property: "[f]or this Labour being the unquestionable Property of the Labourer".<sup>42</sup> Locke stressed the necessity of resorting to labour as the means of appropriating property of things, even in the simplest cases, when fruit is gathered from trees it is owned by the gatherer: "if the first gathering made them not his, nothing else could."<sup>43</sup>

Although Locke may seem to have a view opposite to Hegel's (on the role of personality and the will in creating works),<sup>44</sup> when Locke says: "every Man has a property in his own Person," and follows that by confirming that: "[t]he Labour of his Body, and the Work of his hands ... are properly his",<sup>45</sup> what may be understood is that labour only can justify the property of the produced work.<sup>46</sup> Locke's full understanding requires the connection between his labour theory and his ideas regarding the role of ideas and thoughts to create works.

Locke's theory was criticised by Fichte who argues that although Locke's theory may help to confer upon an author a monopoly or control over his works, Locke, as Fichte argues, has failed to express the uniqueness of intellectual works as a special

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<sup>40</sup> John Locke, *Two Treatises of Government*, ed. Peter Laslett ((ed., 1967) edn.; Cambridge, England: Cambridge University Press, 1690). §. 26-27.

<sup>41</sup> *Ibid.* §. 26-27.

<sup>42</sup> *Ibid.* §. 28.

<sup>43</sup> *Ibid.*

<sup>44</sup> See above, p. 182.

<sup>45</sup> John Locke, *Two Treatises of Government*, *supra* note 40, p. 101.

<sup>46</sup> Dan Burk and Tarleton Gillespie, 'Autonomy and Morality in Dm and Anti-Circumvention Law', *Burk, Dan and Gillespie, Tarleton. AUTONOMY AND MORALITY IN DRM AND ANTI-CIRCUMVENTION LAW, Triple C: Cognition, Communication, Cooperation*, 4/2 (2006). p. 240, as he argues that Locke's labour theory is depended upon to "redress various artistic violations of cultural works, such as the colorization of classic films originally shot in black and white."

expression of the author's mind and thoughts.<sup>47</sup> However, the 'labour' term is usually separated from the context of Locke's argument as a whole. We understand that Locke meant that the effort that is expended by the person to transfer something from nature to his position, or to acquire it, is the main way to gain ownership of that thing provided that it reflects creator's personality when in regard to intellectual works.

Given that intellectual works –according to Locke- are nothing other than ideas, thoughts and general knowledge cannot be acquired unless by expressing them through a form of expression - as this is the only way to express and also acquire them.<sup>48</sup> So Locke's labour doctrine leads to consideration of the work as the property of a person when he creates it by himself, and when his source is only nature, or common knowledge. Locke's theory thus considers any attempt to appropriate from others, or to amend their works or imitate them, as not being works, or, at least, as being lower grade works, because the work that it is taken from is actually in the possession of another person.<sup>49</sup>

Locke's rule suggests that the liberty to acquire property is limited by the freedom of others.<sup>50</sup> He limits copyright works to those 'completely created by the author', ones that include only his own ideas, thoughts and general knowledge, or facts that are available to everybody, and that exclude any adaptation, imitation or appropriation of previous works. Appropriating the works of other persons, or relying on any of them, is considered –according to the thesis's analysis of Locke as will be explained below-<sup>51</sup> an assault on the freedom of other persons to enjoy their rights on their works completely.

This direction was confirmed by Mr Justice Holmes in the US *Bleistein v. Donaldson* Case,<sup>52</sup> when he argued that we cannot say that portraits by Velasquez or Whistler<sup>53</sup> are common property, because others can "try their hand on the same face"<sup>54</sup> as "[o]thers are free to copy the original [the face]. They are not free to copy the copy."<sup>55</sup> So once 'nature' has been recorded, the recorder has copyright over it because his

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<sup>47</sup> Graham Mayeda, 'Commentary on Fichte's 'the Illegality of the Unauthorised Reprinting of Books': An Essay on Intellectual Property During the Age of the Enlightenment', *University of Ottawa Law & Technology Journal*, 5/1&2 (2008)., p. 143. And Johann G Fichte, 'Proof of the Unlawfulness of Reprinting', *Berlinische Monatschrift*, (1793).

<sup>48</sup> John Locke, *Two Treatises of Government*, *supra* note 40, p. 102

<sup>49</sup> *Ibid.*, p. 102.

<sup>50</sup> *Ibid.*, p. 102.

<sup>51</sup> *Ibid.*, p. 103-105.

<sup>52</sup> *Bleistein V. Donaldson Lithographing Co.*, 1903, 188 U.S. 239, 23 S.Ct. 298, Supreme Court of the United States.

<sup>53</sup> Diego Velázquez was a famous Spanish painter of the 17<sup>th</sup> century (1599 - 1660), and James Abbott McNeill Whistler was a famous American born, but British based painter in the 19<sup>th</sup> century (1834 - 1903).

<sup>54</sup> *Bleistein V. Donaldson Lithographing Co.*, 188 U.S. 239, 23 S.Ct. 298, *supra* note 52, at 249.

<sup>55</sup> *Ibid.*

personality is reflected in the way he recorded it, and because every person will do it differently. "The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."<sup>56</sup> This understating tends to raise the originality interpretation not reducing it.

Bentham also was a proponent of the labour property theory in order to support utilitarianism, although he did not discuss it in depth in his writings, he confirmed that property can come from labour and, in addition, property can be a result of hand labour or mind labour.<sup>57</sup> So he advocated Locke's property theory of works of mind, as he argued that "[b]y a man's property is to be understood, whatever he has in store independent of his labour. By the profit of his labour is to be understood the growing profit. As to labour, it may be either of the body principally, or of the mind principally, or of both indifferently nor does it matter in what manner, nor on what subject, it be applied, so it produce a profit."<sup>58</sup> Although he recognised the role of labour in approving property to the person who exerts it in the products of his labour, and although he distinguished manual and mental labours, Bentham did not build on this differentiation, as he argued that what matters is that such property can produce a profit, which helped his own theory of utilitarianism.

From analysing copyright philosophies, Hughes contends that personality theory is more welcomed under copyright law than labour theory, as "there seem to be no categories of intellectual property that are especially more or less hospitable to the labor theory. This is not true with the personality justification. Some categories of intellectual property seem to be receptacles for personality; others seem as if they do not manifest any 'personality' of their creators."<sup>59</sup> However, he adds "Poems, stories, novels, and musical works are clearly receptacles for personality."<sup>60</sup>

### **Young's Personality and Mentality:**

Young<sup>61</sup> has backed the special position and importance of the author's mind in creating works. He argues that the creation process of original works from the roots of genius resembles the growth of plants, and he distinguished this from imitations that are not independent in their emergence and suggests they should be in a lower grade, "[a]n original may be said to be of a vegetable nature; it rises spontaneously from the

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<sup>56</sup> *Ibid.* at 250.

<sup>57</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1781). p. 48.

<sup>58</sup> *Ibid.*

<sup>59</sup> Justin Hughes, 'The Philosophy of Intellectual Property', *Georgetown Law Journal*, 77 (1988). p. 340.

<sup>60</sup> *Ibid.*

<sup>61</sup> Edward Young is an English literary philosopher and poet, wrote several works on literature and philosophy

vital root of genius; it grows, it is not made; imitations are often a sort of manufacture wrought up by those mechanics, art, and labour, out of pre-existent materials not their own.”<sup>62</sup> Young confirms that the more original the work, the better it is, because original works “extend the republic of letters, and add a new province to its dominion”,<sup>63</sup> so he has identified original works and preferred them to imitations. He confirmed that imitations, although they may provide something profitable, are duplications: “[i]mitators only give us a sort of duplicates of what we had”.<sup>64</sup>

Young gives an interesting depiction of this distinction between original and imitation works that is worth quoting here: “[t]he pen of an original writer, like Armida's wand, out of a barren waste calls a blooming spring. Out of that blooming spring an imitator is a transplanter of laurels, which sometimes die on removal, always languish in a foreign soil.”<sup>65</sup> [Underlining added]. He even describes the glamour of original works in that “[t]hey engross our attention, and so prevent a due inspection of ourselves; they prejudice our judgment in favour of their abilities, and so lessen the sense of our own; and they intimidate us with the splendour of their renown and thus under diffidence bury our strength.”<sup>66</sup> An expressive statement by Young, in differentiating between the original and imitated works, must be quoted again: “[t]he mind of a man of genius is a fertile and pleasant field, pleasant as Elysium, and fertile as Tempe; it enjoys a perpetual spring. Of that spring, originals are the fairest flowers. Imitations are of quicker growth, but fainter bloom. Imitations are of two kinds; one of nature, one of authors. The first we call Originals, and confine the term imitation to the second.”<sup>67</sup> Goethe expressed the same meaning: “the reproduction of the world around me by means of the internal world which takes hold of it, combines, creates anew, kneads everything and puts it down again in its own form, manner.”<sup>68</sup>

In antiquity, Aristotle said that ‘auctoritas’, by which he means authorship, is the judgment of the wise man in his chosen discipline,<sup>69</sup> and he defined wisdom as the combination of comprehension and knowledge, which not every normal person can

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<sup>62</sup> Edward Young and Samuel Richardson, *Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison* (Printed for A. Millar, 1759)., p. 12.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* p. 10.

<sup>65</sup> *Ibid.* p. 12.

<sup>66</sup> *Ibid.* p. 17.

<sup>67</sup> *Ibid.* p. 9.

<sup>68</sup> Goethes Briefe, *Goethe to Jacobi* (Hamburg: Christian Wegner, 1962). Referred to in Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The 'author'', *supra* note 2, p. 447, note. 49.

<sup>69</sup> Johannes Balbi, *Catholicon* (1286). Referred to in Alastair J. Minnis, *Medieval Theory of Authorship, Scholastic Literary Attitudes in the Later Middle Ages* (second edn.: Gower Publishing Company Limited, 2009)., p. 10.

have.<sup>70</sup> This argument specifically shows how authorship, since its emergence, has been based on mental work.

It is worth referring to Young's advice about how the mind works and how authors use the thoughts and the ideas they have. "Learn the depth, extent, bias and full sort of thy mind; contract full intimacy with the Stranger within thee: excite and cherish every spark of Intellectual light and heat, however smothered under former negligence or scattered through the dull, dark mass of common thoughts; and collecting them into a body, let thy genius rise (if a genius thou hast) as the fun from chaos."<sup>71</sup>

### **Herder's personality:**

Herder deepened our understanding of the nature of thinking and the perception of human soul,<sup>72</sup> as he matched the process of making intellectual works with the process of digesting food and transferring it as new beneficial elements to our bodies, since he finds that ideas are consumed and processed in the mind, and then authors produce new forms of work that differ from pre-existing works he has previously read.<sup>73</sup>

In addition, it is interesting to refer to Herder's argument that every poem is a betrayer of its creator.<sup>74</sup> However, his argument is different from that of Foucault,<sup>75</sup> as he finds that the poem describes everything about its writer, as people can see through it his senses, inclinations while writing it, how he understands events, the favourite places of him.<sup>76</sup> Herder thus concludes that intellectual work is an imprint or record of the living human soul, which is its author, and that language does not separate itself from the author. Indeed, conversely, it expresses the author, and we find that this notion more

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<sup>70</sup> Aristotle and J Barnes, *The Complete Works of Aristotle* (Princeton Univ. Press. Original work VI BCE Princeton, NJ, 1995). p. 90.

<sup>71</sup> Edward Young and Samuel Richardson, *Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison*, *supra* note 62, p. 53.

<sup>72</sup> In his book, Johann Gottfried Herder, *Vom Erkennen Und Empfinden Der Menschlichen Seele: Bemerkungen Und Träume* (JF Hartknoch, 1778). Cited in Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author", *supra* note 2, p. 447, note. 50.

<sup>73</sup> Johann Gottfried Herder, 'Sammtliche Werke, Ed. By Bernhard Suphan. 33 Vols', *Berlin, 1877-1913*, (1892)., p. 175-76. He stated: "[t]he herb draws in water and earth and refines them into its own elements; the animal makes the lower herbs into the nobler animal sap; man transforms herbs and animals into organic elements of his life, converts them to the operation of higher, finer stimuli." referred to in Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author", *supra* note 2, p. 447.

<sup>74</sup> Johann Gottfried Herder, 'Sammtliche Werke, Ed. By Bernhard Suphan. 33 Vols', *supra* note 73, p. 176.

<sup>75</sup> See, Michel Foucault, 'What Is an Author?', *supra* note 1.

<sup>76</sup> Johann Gottfried Herder, *Vom Erkennen Und Empfinden Der Menschlichen Seele: Bemerkungen Und Träume*, *supra* note 72. Referred to in Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author", *supra* note 2, p. 447, note. 50.

reflective of the truth of authorship, and the personal relationship between the author and his work.<sup>77</sup>

### **Conclusion- English Philosophers:**

Hobbes, Locke, and Young who are all English philosophers, all support the thesis's claim that authorship in England, both before the Statute of Anne, and since the formulation of the first sense of literary property in the seventeenth century, was imbued with personality, and the mental creation of the work was one of the distinctive characteristics that make it original. Works that lack these personal and mental characteristics should be considered to be in a lower grade of authorship as they are not of the same importance. It has been confirmed that originality was an established conception even before the Statute of Anne, which did not mention it.

This historical justification is important in combination with a theoretical discussion of the different natures of factual works that lack authorship, and the conflict these works have caused to copyright subsistence decisions. All serve the argument of this research that authorship should be put in a higher position, and copyright law should be confined to authorship works since, historically and theoretically, this was the rule and still should be. Otherwise instability and unlimited uncertainties will exist in copyright law. The works that lack authorship should also be separated into a different category and be regulated through different concepts and rules. The next section in this Chapter will resort to German philosophers, namely, Hegel and Kant, to complete the image of personal and mental authorship in order to conclude the elements of authorship that should exist in a work so it can be called a work of intellect or an authorship work.

### **6.4 Hegel's Role in Personality Theory:**

In supporting the personal and mental elements in works we resort to the most famous philosopher in this regard, namely, Hegel, though he was a German philosopher, he strongly supports the personal approach and his opinion is important for the thesis. Many of his views are logical and can be used to support personal and mental authorship in any society. Hegel explicitly expressed the ways in which an author creates a work himself and manifests his personality in it, so as to be considered an author and the creation is considered an intellectual work.<sup>78</sup>

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<sup>77</sup> Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The'author'', *supra* note 2, p. 447.

<sup>78</sup> See this Chapter at 6.4.1. and 6.4.2.

### **Works Created by Free Will vs. Works Created Only by Hand:**

Hegel differentiated between works made by the free will of the author and reflecting his personality, and works that are made by his hands but do not reflect his personality, this is evident in his statement: “[t]he Athenian slave had possibly lighter occupation and higher kind of mental work than is the rule with our workmen. But he was a slave notwithstanding, since the whole circle of his activity was controlled by his master.”<sup>79</sup>[Underlining added]. Accordingly, although the ‘Athenian slave’ does a higher kind of ‘mental work’ than ‘workmen’, his works do not express him, because his activity was ‘controlled by’ his master. Here, the will or personality of ‘the worker’ did not control the production process, and he cannot claim property over this work, since he was not ‘an author’ and he executed the work by ‘physical effort’. This philosophy supports this thesis’s argument to exclude any skills or efforts that are not a reflection of mental will or personal ideas, from the character of intellectual work.

This is confirmed when Hegel differentiates between property and personality, and puts intellectual works between them as including the two concepts. He argued that as long as the property of something is owned by the will, then it may be relinquished by will also. However, he affirms that although the product of personality, and freedom of will can be transferred to others, they do not ‘perish through lapse of time’.<sup>80</sup> However, he writes that this connection between personality and property can be dismantled in the case that a person relinquishes his will or acts according to somebody else’s will. Such relinquishing of reason, or disposal of will, only happens when “I delegate to others the authority to prescribe for me what kind of acts I shall commit,”<sup>81</sup> as then it is not the individual’s will which has participated in acquiring the property, but somebody else’s will.

Hegel relies heavily on the ‘will’ as it is what makes the human acquires the property of anything, for “[e]very man has the right to turn his will upon a thing or make the thing an object of his will.”<sup>82</sup> What might have an influence on intellectual property is Hegel’s argument that the object has no end in itself as the object “receives its meaning and soul from his will”.<sup>83</sup>

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<sup>79</sup> Georg Wilhelm Friedrich Hegel, 'The Philosophy of Right (1820), Translated by Sw Dyde, Originally Published in English in 1896', (Prometheus Books, London, 1996). p. 73.

<sup>80</sup> *Ibid.* §. 66.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.* §. 44.

<sup>83</sup> *Ibid.*

#### 6.4.1 Hegel's Differentiation between Mechanical and Spiritual Activity:

Hegel confirmed that the registration of art in material form, or, as he called it, the materialization of art, or the sensuous side of art, is not the entire thing we can have, but this sensuous side should bear a spiritual side, which cannot be perceived unless by mind, and this consequently requires that spiritual meanings are expressed through mind effort also not through senses' work only. As he stated "[t]hese sensuous shapes and sounds appear in art not merely for the sake of themselves and their immediate shape, but with the aim, in this shape, of affording satisfaction to higher spiritual interests, since they have the power to call forth from all the depths of consciousness a sound and an echo in the spirit. In this way the sensuous aspect of art is spiritualized, since the spirit appears in art as made sensuous."<sup>84</sup> This argument, with the next argument, help to differentiate between works that include spiritual values, because they are created by spiritual skills, and works that do not, because they are created by mechanical or manual skills.

Hegel confirms that no work can be considered a work of art unless it bears or conveys spiritual values from the author to the audience: "an art-product is only there in so far as it has taken its passage through the spirit and has arisen from spiritual productive activity."<sup>85</sup> Hegel has described how the process of creating works is a spiritual process that included the transfer of internal spirits into sensuous material, and he explicitly refuted that the process of creating works of art can be mechanical, although it can include some mechanical aspects, such as the use of tools, and so on, it cannot be 'a purely mechanical work'.<sup>86</sup> This is evident in his answer to the question "in what way is the necessary sensuous side of art operative in the artist as his subjective productive activity?"<sup>87</sup> His answer was that: "[t]his sort and manner of production contains in itself, as subjective activity, just the same characteristics which we found objectively present in the work of art; it must be a spiritual activity which yet contains, at the same time, the element of sensuousness and immediacy. Still, it is neither, on the one hand, purely mechanical work, a purely unconscious skill in sensuous manipulation, or a formal activity according to fixed rules to be learnt by heart, nor, on the other hand, is it a scientific production which passes over from the sensuous to abstract ideas and thoughts or is active entirely in the element of pure thinking. In artistic production the spiritual and the sensuous aspects must be as one."<sup>88</sup> [Underlining added].

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<sup>84</sup> Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol.1* (I: Clarendon Press, 1988). p. 39.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

Hegel's argument merely focused on works that aim to satisfy spiritual interests, so he refused to consider works that are created by mechanical process or those that include abstract ideas and thoughts. By default, Hegel refuses to consider those works that do not include either sensations or thoughts as works, because although they are made by persons they have been made by purely mechanical or unconscious skills. This mechanical feature has been refuted by Hegel through investigating the inner values that the work bears, this thesis has also resorted to investigation of the nature of the skills used to create these works, in order to have certain proof that they do not include authorial or mental skills, but only manual and mechanical skills.<sup>89</sup>

for clarification purposes, it is argued that the term 'works of art' is meant to refer to authorship works in general (literary, artistic, musical and dramatic works) in Hegel's and Collingwood's writings also. For instance, Collingwood has argued that the: "artist ... must have means of communication...; and these means are something bodily and perceptible, a painted canvass, a carved stone, a written paper, and so forth."<sup>90</sup> Likewise, Hegel confirmed that: "The absolute shape has the connection of content and form, soul and body",<sup>91</sup> and this presupposes "a real existent equally subjective through its bearing on the other ideas, feelings, and thoughts of the spirit."<sup>92</sup>

### **The Work should have Inner Meaning:**

Hegel has required that works should have an inner meaning, as this is what makes the work meaningful to us, otherwise it will be an abstract, external thing.<sup>93</sup> He gives an example of symbols and words, as, without the inner meaning we know about them they are nonsense shapes. Though a long quotation but important to the research's argument, as Hegel stated that "[i]n a work of art we begin with what is immediately presented to us and only then ask what its meaning or content is. The former, the external appearance, has no immediate value for us; we assume behind it something inward, a meaning whereby the external appearance is endowed with the spirit. It is to this, its soul, that the external points. For an appearance that means something does not present itself to our minds, or what it is as external, but something else. Consider, for example, a symbol, and, still more obviously, a fable, the meaning of which is constituted by its moral and message. Indeed, any word hints at a meaning and counts for nothing in itself ... It is in this way that the work of art is to be significant and not appear exhausted by these lines, curves, surfaces, carvings, hollowings in the stone,

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<sup>89</sup> As will be detailed in this Chapter at 6.7

<sup>90</sup> Robin George Collingwood, *The Principles of Art* (11: Oxford University Press, USA, 1938). p. 300.

<sup>91</sup> Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol.1, supra note 84*, p. 396.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* p. 19.

these colours, notes, word-sounds, or whatever other material is used; on the contrary, it should disclose an inner life, feeling, soul, a content and spirit, which is just what we call the significance of a work of art.”<sup>94</sup> [Underlining added] This section completes the last one, on the mechanical and spiritual activity, as the work should have an inner meaning, which is embodied in the feeling, soul or spirit that the work bears, in order to be considered an intellectual work. Accordingly, the work that lacks these elements cannot be an intellectual work, and this will be included in the elements of authorship that the thesis has extracted.<sup>95</sup>

### **Evaluation of Inner Feelings:**

Hegel argues that deciding whether a given work is beautiful, expressive, etc., is a matter of individual perception that differs from one person to another as what somebody may see as a fantastic, fine work of art, others may see as a trivial work.<sup>96</sup> Though the work of art is a sensuous object which can be apprehended by one of human senses,<sup>97</sup> it is meant to be apprehended by spirit and to achieve some satisfaction of a spiritual need.<sup>98</sup> For Hegel, it is proven that the time and place that witnessed the creation of the work affects judgement of its value.<sup>99</sup> In addition, the artist himself and his technical development of his art has an important role in the evaluation process, as all these elements should be taken into consideration when practising connoisseurship in regard to works of authorship.<sup>100</sup>

This level of satisfaction is what is expressed by words like the: ‘innovation, originality or creativity’ of the work, to decide its eligibility for copyright protection, Hegel has called it ‘capacity’ or ‘fancy’ which is said to be “the most prominent artistic ability”.<sup>101</sup> Accordingly, Hegel argues that unless a work of art arouses these spiritual reflections it cannot be considered a work at all.<sup>102</sup> Thus, in order for the work to be considered a

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<sup>94</sup> *Ibid.* p. 19-20.

<sup>95</sup> See this Chapter at 6.7.

<sup>96</sup> Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol.1, supra note 84*, p. 38.

<sup>97</sup> *Ibid.* 84, p. 38, and Hegel adds that: “The sensuous aspect of art is related only to the two theoretical senses of sight and hearing, while smell, taste, and touch remain excluded from the enjoyment of art.” as “artistic objects, ... are meant to maintain themselves in their real independence and allow of no purely sensuous relationship.”

<sup>98</sup> *Ibid.* p. 36. In this context, he contended, regarding natural products, that “the fact that this is what the work of art is meant to be explains at once how it can in no way be a natural product or have in its natural aspect a natural vitality, whether a natural product is supposed to have a higher or a lower value than a mere work of art, as a work of art is often called in a depreciatory sense.”

<sup>99</sup> *Ibid.* p. 35.

<sup>100</sup> *Ibid.* p. 35.

<sup>101</sup> *Ibid.* p. 281.

work of art, it has to be apprehended by the spirit to have an inner reflection, thus such a spiritual reflection is one of the authorship elements the thesis argues.

#### 6.4.2 Hegel's Perception Theory:

Hegel concentrates on the issue of perception of works to deduce that works that thoughts and sensations are perceived from are intellectual works, if no thoughts and sensations come from the work it cannot be considered a product of mind.

Hegel addressed works of art<sup>103</sup> especially and insisted that they are product of humans, produced for the apprehension by man's senses and this is meant to arouse feelings,<sup>104</sup> so it is some kind of means of communication. He affirmed that: "[t]he work of art is a bodily and perceptible thing, and earns the title of work of art by producing in the audience the desired result. The artist's relation to his audience is thus essential to his being an artist."<sup>105</sup>

Hegel confirms that the investigation of the aesthetic and expressive values of fine art is an investigation into the feelings that rise in individuals, not just those who are meant to receive the work, but also those who created it.<sup>106</sup> However, the problem here is that such investigation cannot get far because: "feeling is the indefinite dull region of the spirit",<sup>107</sup> as what the individual feels is something vague and cannot be fully expressed and cannot be unified among those who see or hear the same work.<sup>108</sup> For example, "fear, anxiety, alarm, terror are of course further modifications of one and the same sort of feeling, but in part they are only quantitative intensifications, in part just forms not affecting their content, but indifferent to it."<sup>109</sup> This contention is not a problem for this research's argument, as what needs to be proven is whether works have feelings or not, and the degree of that feeling does not matter, for what is required is to know whether they are authorship works or not.

Locke also discussed the difference in perception depending on the mind of the receiver, as "[m]en are differently furnished with these, according to the different

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<sup>103</sup> 'Works of art' here refers to all intellectual works and not just artistic works, this was originally used by Hegel and Collingwood to describe all works created by imagination, whether artistic, musical, dramatic, etc. , as Collingwood argued that "artist ... must have means of communication...; and these means are something bodily and perceptible, a painted canvas, a carved stone, a written paper, and so forth." See Robin George Collingwood, *The Principles of Art*, *supra* note 90, p. 300.

<sup>104</sup> Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol.1, supra* note 84, p. 32.

<sup>105</sup> Robin George Collingwood, *The Principles of Art*, *supra* note 90, p. 300.

<sup>106</sup> Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol.1, supra* note 84, p. 32.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* p. 32.

<sup>109</sup> Reflection along these lines dates especially from Moses Mendelssohn's time, 1729-86. *Über die Empfindungen* (1755) or *Betrachtungen über das Erhabene u. s. w.* (1757). Referred to in *ibid.* p. 32, fn. 1.

objects they converse with. Men then come to be furnished with fewer or more simple ideas from without, according as the objects they converse with afford greater or less variety; and from the operations of their minds within, according as they more or less reflect on them.”<sup>110</sup> Hegel argues that the perception of feelings or sensations depends on which ones the author intended to include in the work, and he cites Hirt<sup>111</sup> in this regard. Hirt argues that the corner stone in the recognition of taste, i. e., ‘beauty’, is ‘the concept of the characteristic’. Accordingly, he defines the term ‘beautiful’ as “the perfect which is or can be an object of eye, ear, or imagination”<sup>112</sup>, in addition, he defined the term ‘perfect’ as “what corresponds with its aim, what nature or art intended to produce in the formation of the object within its genus and species”.

Consequently, following Hirt’s theory, in order to Judge something as beautiful, we have to assess whether the art has characteristics that correspond with its aim or not, which already constitutes its ‘essence’.<sup>113</sup> As an application of Hirt’s law of art, all the following characteristics are important in deciding the beauty of the work of art: ‘forms, movement and gesture, mien and expression, local colour, light and shade’,<sup>114</sup> and the importance of these factors is that they connect the characteristics of the content with the expression of that content. As these characteristics refer to “the degree of appropriateness with which the particular detail of the artistic form sets in relief the content it is meant to present.”<sup>115</sup>

To conclude this discussion, this thesis adopts this approach, the investigation in the essence, and adds it to the personality and mentality notions of Hobbes and Locke in order to reach the elements that should exist in the authorship process so as to be considered personal and mental authorship work. Accordingly, a work cannot be an ‘intellectual’ work unless through the existence of these elements. Ultimately, this will help to clarify that the process of creating factual and information works, and the selection and arrangement thereof do not reflect any mental or spiritual side, because they do not convey any thoughts or sensations. Accordingly, they cannot be considered works of intellect or sensation.

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<sup>110</sup> John Locke, *An Essay Concerning Human Understanding*, *supra* note 31, p. 89.

<sup>111</sup> Hirt was one of the greatest genuine connoisseurs in Hegel’s time.

<sup>112</sup> A. L. Hirt, ‘Die Schönheit Der Kunst’, *Die Horen*, (1797). p. 7, referred to in Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol. 1*, *supra* note 84, p. 17.

<sup>113</sup> Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol. 1*, *supra* note 84, p. 17.

<sup>114</sup> A. L. Hirt, ‘Die Schönheit Der Kunst’, *supra* note 112, referred to in Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol. 1*, *supra* note 84, p. 18.

<sup>115</sup> Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol. 1*, *supra* note 84, p. 18

On the other hand, the opinion of Collingwood is worth noting, as he argues that although the work of art includes emotions and sensations, extracting or perceiving them depends on the audience, not the author himself. Collingwood argues that: “[a]rt ... contains nothing that is due to intellect. Its essence is that of an activity by which we become conscious of our own emotions. Now, there are emotions which exist in us - at the level of psychical experience - but of which we are not yet conscious.”<sup>116</sup> Art therefore, according to Collingwood, finds, through psychical experience, a space to induce the emotions and ideas of the audience, nothing to do with the intention of the artist or author. As Collingwood asserted, “the work of art, as we have seen, is not a bodily or a perceptible thing, but an activity of the artist; and not an activity of his 'body' or sensuous nature, but an activity of his consciousness.”<sup>117</sup> He amplified this argument by assuming that perception is an inward experience that happens in the mind of the person who enjoys it. <sup>118</sup> He asserted that: “if aesthetic experience in the artist is something wholly independent of such outward things, but in the audience is something dependent upon them and derived from contemplation of them, how is it an experience of the same kind in the two cases, and how is there any communication?” <sup>119</sup>

In addition, Collingwood argued that the artist paints to identify the experience and ideas that occupy his mind, and not to enjoy himself or the audience through his aesthetic experience. <sup>120</sup> Moreover, he argues that the person who paints well can see well, and who sees well can paint well, and he argues that, here, ‘see’ refers to the awareness not the sensation, or noticing what you see. <sup>121</sup>

This thesis opposes this opinion, arguing that the thoughts that emerge in the mind of the reader depend on the thoughts behind these symbols, as symbols themselves are meaningless. For instance, if these symbols are just put in random order would they lead to the emergence of any thoughts, besides, if their order expressed a modest thought from the writer, will the same thoughts emerges that would emerge from symbols ordered by a genius or a creative writer or painter. So, it is the writer’s mind and his abilities which give the book its value, and not the symbols or the writing, or the physical embodiment itself. It is something not seen by the eyes but by the mind.

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<sup>116</sup> Robin George Collingwood, *The Principles of Art*, *supra* note 90, p. 293.

<sup>117</sup> *Ibid.*p. 300.

<sup>118</sup> *Ibid.*p. 301.

<sup>119</sup> *Ibid.*p. 302.

<sup>120</sup> *Ibid.*p. 303.

<sup>121</sup> *Ibid.*p. 304.

### **The Need for the Object vs. the Desire of the Audience:**

In confirming the role of personality in copyright we can cite Hegel's confirmation that the search for the property of objects does not emanate from the 'need for this object' but from whether the elements and factors of property put by theories and laws are available in a certain object or not, regardless of the desire of the audience: "[i]f emphasis is placed on my needs, then the possession of property appears as a means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end."<sup>122</sup> Hegel's view here is considered to be a rejection of the utilitarian justification for property, as he articulated how such a dependence on needs will produce a distorted concept of property,<sup>123</sup> which is why we advocate the abandonment of the utilitarian approach for the sake of the personality justification to include utilitarian works under copyright protection.

Hegel has linked personality and freedom: "[a] person must translate his freedom into an external sphere in order to exist as Idea. Personality is the first, still wholly abstract, determination of the absolute and infinite will, and therefore this sphere is distinct from the person, the sphere capable of embodying his freedom, is likewise determined as what is immediately different and separable from him."<sup>124</sup> Building on this, Hegel adopts the personality theory that takes the person's will or freedom as a source of the property, or, in other words, the work or the owned object is an embodiment of the person's will.

That relation between the person and the things into which he put characteristics of his personality is something definite: "a person has a natural existence partly within himself and partly of such a kind that he is related to it as to an external world".<sup>125</sup> This natural existence of the person in his works is that which the thesis attempts to use in dividing works, as the collection of facts does not embody the personality of anybody, thus they are not the property of the person who collected the facts.

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<sup>122</sup> Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, trans. TM Knox (New York: Oxford University Press, 1952). p. 42.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.* p. 40, also, according to the translation by Wood and Nisbet, the same paragraph is translated as "The person must give himself an external sphere of freedom in order to have being as Idea. The person is the infinite will, the will which has being in and for itself, in this first and as yet wholly abstract determination. Consequently, this sphere is distinct from the will, which may constitute the sphere of its freedom, is likewise determined as immediately different and separable from it." See, Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, trans. H. B. NISBET (Cambridge University Press, 1991).

<sup>125</sup> Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, *supra* note 122, p. 40.

Hegel allowed dealings on intellectual works when the author expresses them, or their 'alienating' (as he calls it), but he stressed the nature of these works as part of the personality of the author: - "It may be asked whether the artist, scholar, &c. , is from the legal point of view in possession of his art, erudition, ability to preach a sermon, sing a mass, &c. , that is, whether such attainments are 'things'. We may hesitate to call such abilities, attainments, aptitudes, &c. , 'things', for while possession of these may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental about it,... Attainments, erudition, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them".<sup>126</sup> [Underlining added]. This is a confirmation by Hegel that intellectual works are mind works and can be owned by the person who expressed them. This means that works devoid of mental inner values are not to be considered works, and when the person registers mental values that are not his own, then the work cannot be owned by him, as he will be considered just a registrar, not an author of these values.

#### **6.5 Kant: The Work Expresses the Author's Personality:**

Kant is also a renowned philosopher in the argument around personal authorship, as he confirmed that the work bears or presents the author's personality as the work is a registration of his speech: "In a book, as a writing, the author speaks to his reader; and the one who has printed the book speaks, by his copy, not for himself but simply and solely in the author's name."<sup>127</sup> Although Kant may be seen to advocate or support the publishers rights in trading in authors' works, depending from utilitarian or capitalism theory, but a closer look at his argument shows us how he prioritises the author's rights over publishers' powers, especially when addressing the publisher as "the agent of the author".<sup>128</sup> Fichte cited an argument by Kant, which stated: "an author has a 'natural, inborn, and inalienable right of ownership' in his work."<sup>129</sup>

In addition, Kant, when talking about the unauthorised publisher, reassured about the superiority of the author in this regard and how such un-authorisation had happened because the publisher did not take permission from the author, as he stated that "an unauthorized publisher not only takes upon himself, without any permission of the owner, the affair (of the author) but does so even against his will. The reason he is an

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<sup>126</sup> *Ibid.* p. 40-41.

<sup>127</sup> Immanuel Kant, *Practical Philosophy*, eds Mary J. Gregor and Allen Wood (The Cambridge Edition of the Works of Immanuel Kant; Cambridge: Cambridge University Press, 1992). at 8. 80.

<sup>128</sup> Kim Treiger-Bar-Am, 'Kant on Copyright: Rights of Transformative Authorship', *supra* note 3, p. 1062.

<sup>129</sup> Johann G Fichte, 'Proof of the Unlawfulness of Reprinting', *supra* note 47, p. 461. Cited in Anne Barron, 'Kant, Copyright and Communicative Freedom', *Law and philosophy*, 31/1 (2012)., Note. 18.

unauthorized publisher is that he attacks in his affairs another who has been empowered to publish by the author himself.”<sup>130</sup>

The above discussions confirm that this thesis’s approach is sound, as proving the sustainability of the author’s personality and intellect is something that supports the thesis’s main argument of prioritising the creativity element in authorship in the face of works that lack such mental and creative elements. This distinction between the characteristics of works is the main requirement for the categorisation of works and then the resolution of the confusion and uncertainty in judicial decisions on copyright subsistence.

## **6.6 Personal and Mental Contributions in Modern Copyright Law:**

Copyright law is concerned with authorship and works that contain authorial contributions and thoughts, ideas or sensations that need to be conveyed through the work, and to be perceived by the audience. Theoretically speaking, it is the authorial contribution, the personality expressed in the work, that copyright law wants and with which the personality theory is mainly concerned. “Copyrighted works reflect their makers’ knowledge and abilities such as the creative ability and the ability to internalize social and cultural external elements, then translate and embody them in different ways.”<sup>131</sup>

This argument was stressed by Nimmer, who stated that: “[t]he one indispensable element of authorship is originality. One who has slavishly or mechanically copied from others may not claim to be an author.”<sup>132</sup> This is also confirmed in the US Copyright Act of 1976,<sup>133</sup> and the US ‘Code of Federal Regulations’, where it is written that “Works consisting entirely of information that is common property, containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.”<sup>134</sup> Copyright law in the US is thus limited to works that only show "originality" or "authorship.”<sup>135</sup>

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<sup>130</sup> Immanuel Kant, *Practical Philosophy*, *supra* note 127, at 8. 81, also see his essay, Immanuel Kant, 'Of the Injustice of Counterfeiting Books', *Essays and Treatises on Moral, Political and Various Philosophical Subjects* (1; London, 1798)..

<sup>131</sup> Lior Zemer, 'Towards a Conception of Authorial Knowledge in Copyright', *Buff. Intell. Prop. LJ*, 3 (2005). p. 86. This is explained in the discourse of explaining 'Shapin's Formula'.

<sup>132</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (M. Bender, 1990). §. 1. 06[A].

<sup>133</sup> §. 102 stated that all works protected by copyright law are described as “original works of authorship”. See, 'Copyright Act of the United States', *Ch8-10; 12-17 of Title 17 of the US code* (US, 1976).

<sup>134</sup> s. 202. 1 (d) of United States Government, 'Code of Federal Regulations, Title 37 Patents, Trademarks, and Copyrights', (U.S. Government Printing Office, 2014).

<sup>135</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', *Columbia Journal of Law & Social Problems*, 23 (1989)., p. 350.

It is argued that the US Constitution implies the original authorship requirement in works, as in the statement “[c]ongress shall have the power to ‘promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’”<sup>136</sup> The mention of ‘authors’ implies that authorship is the essence of the right to protection.<sup>137</sup> Talking about the progress that such works should achieve, presumes also that works should have creativity and a contribution to current knowledge in order to make such progress, that was confirmed in the Chamberlin v. Uris Sales Case,<sup>138</sup> when Judge Frank confirmed “[t]he constitutional power to grant monopolies or exclusive franchises to authors whose works promote the progress of science and the useful arts does not authorize such a monopoly grant to one whose product lacks all creative originality.”<sup>139</sup> [Underlining added]. The report of the register of copyrights on the general revision of the U.S. copyright law (1961), has explicitly mentioned that the work is “an author's intellectual creation [that] has the stamp of his personality and is identified with him.”<sup>140</sup> [Underline added]

The philosophy that stipulated the conditioning of novelty in patents is the same one that requires the addition of an authorial contribution in copyright works, as in the US both were organized by the same constitutional provision. This is confirmed in John Deere v. Cook Chemical,<sup>141</sup> when the Court stated that “[i]nnovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must promote progress of useful arts”<sup>142</sup> Accordingly, only the addition to current knowledge that is qualified for protection and that cannot be achieved unless by requiring the addition of thoughts to created works to get protection.

Recently, the US Copyright Office has stated its opinion that although some works are intangible, they are not a work of intellect. For instance, in the ‘Compendium of US Copyright Office Practices’ it is mentioned that copyright cannot protect intellectual works made by animals,<sup>143</sup> as although they were photographs, paintings, or other

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<sup>136</sup> Art. 1, S 8, cl. 8 of 'The Constitution of the United States of America', No. 110-50 (United States, 1787)..

<sup>137</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, supra note 132, §. 1. 06[A].

<sup>138</sup> Chamberlin v. Uris Sales Corporation, 1945, 150 F.2d 512, United States Court of Appeals, Second Circuit.

<sup>139</sup> *Ibid.* at 512-513.

<sup>140</sup> 'The Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law ', (July 1961).

<sup>141</sup> John Deere Company of Kansas City Et Al. V. Cook Chemical, 1966, 383 U.S. 1, 86 S.Ct. 684, Supreme Court of the United States.

<sup>142</sup> *Ibid.* at 688.

<sup>143</sup> The copyright office gave examples of these works, as “• A photograph taken by a monkey. • A mural painted by an elephant. • A claim based on the appearance of actual animal skin. • A claim based on

artistic or musical works, the office refused to register these works due to the inexistence of a human author.<sup>144</sup> Under the title “The Human Authorship Requirement”,<sup>145</sup> the US Copyright Office expressly required that the office could register a work “provided that the work was created by a human being.”<sup>146</sup> [Underlining added]. The office also refused to copyright any work that was created by machines without any intervention from people: “the Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”<sup>147</sup>

The office in supporting its argument cited two major cases. Firstly, Trade-Mark Cases,<sup>148</sup> in its argument that the copyright law only protects “the fruits of intellectual labor that ‘are founded in the creative powers of the mind’”.<sup>149</sup> Secondly, the Burrow-Giles v. Sarony<sup>150</sup> case in its confirmation that copyright law is limited to the “original intellectual conceptions of the author”.<sup>151</sup> It is believed that this reference to cases of the 19<sup>th</sup> century is a return to the theory of personality as the principal reference in interpreting copyright terminology to lessen the distortion to copyright law concepts.

The rule that governs the above example, regarding the US copyright office and works deprived of registration, is the ‘existence of authorship’ in the work as the main and initial criterion for copyrightability before originality.<sup>152</sup> These works did not include any mental work of authorship that include the desire to transfer ideas in the form of words or shapes to convey them to the reader or viewer, but they were random shapes which, although ‘intangible’, were not ‘intellectual’. On this basis, this thesis reminds of the categories of works that Hobbes excluded from being authorship works such as the works of young children or intellectually disabled,<sup>153</sup> as although the resulting work may not be copied from antecedent work, and thus may be said to be original, it is not an ‘intellectual work’ as it was not intended to transfer any sensations or ideas. This partly brings to mind the authors’ intention as a condition for recognition of the work as

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driftwood that has been shaped and smoothed by the ocean.” See, United States Copyright Office, ‘Compendium of U.S. Copyright Office Practices’, (Third edn., 2014)., Para. 306.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> Trade-Mark Cases V. Steffens, 1879, 100 U.S. 82, 10 Otto 82, WL 16583 (U.S.N.Y.), 25 L.Ed. 550, Supreme Court of the United States.

<sup>149</sup> United States Copyright Office, ‘Compendium of U.S. Copyright Office Practices’, *supra* note 143. at 306.

<sup>150</sup> Burrow-Giles Lithographic Co. V. Sarony, 1884, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, Supreme Court of the United States

<sup>151</sup> United States Copyright Office, ‘Compendium of U.S. Copyright Office Practices’, *supra* note 143. at 306.

<sup>152</sup> As stated above at 1.3.

<sup>153</sup> See this Chapter at 6.2. p. 178.

copyright work, applying this to support the research's categorisation of works into authorship and non-authorship works is essential.

In proving that the work is original and fulfils the originality condition of the Copyright Act 1911, the Court in *University of London v. University Tutorial*<sup>154</sup> confirmed that the work of the examiners is that: “[t]he setting of the papers entailed the exercise of brain work, memory, and trained judgment, and even the selection of passages from other authors' works involved careful consideration, discretion, and choice.”<sup>155</sup> [Underlining added]. This thesis attempts to show the importance of the element of ‘brain work’ for returning stability between copyright law’s theoretical principles and applications.

In the US, the Supreme Court confirmed that what is required for copyright protection is the personal contribution, and then the work can be considered to be an authorship work, as Mr Justice Holmes confirmed: “[t]he copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone.”<sup>156</sup> [Underlining added]. The terms, ‘personal reaction’, ‘personality’, ‘unique’, ‘singularity’, ‘one man’s alone’, all undoubtedly show that the work should be a product of the person’s mind and creative thinking. However, “this concept of personality [it appears in this case] has been overlooked in the factual works decisions.”<sup>157</sup>

Regarding the situation in UK legislation and case law, it is claimed that the mental authorial contribution is what is mainly required in CDPA for intellectual works, although it has not been explicitly expressed. The CDPA, in separating databases into a different system under *sui generis* provisions -according to the Databases Regulations-<sup>158</sup>, and by limiting the originality interpretation for these works to the “author’s own intellectual creation”,<sup>159</sup> reflects the desire of law makers to keep the originality interpretation for other works (literary, artistic musical and dramatic) in a different interpretation, particularly a higher one. As, the latter works were preceded by the term ‘original’ without limitations. However, we believe that the term ‘intellectual creation’ bears also a lot of meanings that are related to the personal mental creation which databases lack.

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<sup>154</sup> *University of London Press V. University Tutorial Press*, 1916, 2 Ch. 601, Chancery Division.

<sup>155</sup> *Ibid.* at 604

<sup>156</sup> *Bleistein V. Donaldson Lithographing Co.*, 188 U.S. 239, 23 S.Ct. 298, *supra* note 52, at 250.

<sup>157</sup> Elizabeth M Saunders, 'Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection', *Notre Dame L. Review*, 62 (1986), p. 767, as Saunders confirmed as a comment on the *Bleistein v. Donaldson* Case, that “Holmes seems to have rested his opinion of originality on the idea that the author’s personality is its key.” See, *ibid.* p. 767.

<sup>158</sup> 'The Copyright and Rights in Databases Regulations', (UK, 1997).

<sup>159</sup> s. 3[A] 2 of the 'Copyright, Designs and Patents Act (Cdpa)', (UK, 1988).

In the nineteenth century there was a consistency on situations of England and the US regarding the personal and mental features that had to exist in works. For instance in *Burrow-Giles v. Sarony*, Judge Miller referred to the English case of *Nottage v. Jackson*,<sup>160</sup> decided in the previous year, and the definition of the author proposed by Judges Bowen and Cotton<sup>161</sup> in this case to infer that the understanding of the nature of authorship and originality and intellectual creation expressed in this English case is the same that he wanted to prove within the US constitution.<sup>162</sup> As, Judge Bowen in *Nottage v. Jackson*<sup>163</sup> confirmed that “the true definition of “author” for the purpose of the Act ... the man who really represents or creates, or gives effect to the idea or fancy, or imagination.”<sup>164</sup>

In the case of *Infopaq v. Danske*,<sup>165</sup> the CJEU’s argument reflects the situation in the EU regarding the authorial contribution, as the court confirmed in multiple places that the author, as a human person, is the priority of the EU directives, and intellectual creation is what copyright law should protect.<sup>166</sup> For instance, in deciding whether the extracts made by Infopaq from the newspaper were a reproduction, the CJEU confirmed that the national court should make sure that the part taken: “contain[s] a number of elements which are such as to express the intellectual creation of the author of that work.”<sup>167</sup> Note here that the CJEU did not resort to a quantitative criterion to decide whether there was substantial copying or not, but it insisted that there should be intellectual creation elements that cannot be inserted unless by a human being. The CJEU thus confirms that the issue is not in the originality of the selection and arrangement or in the quantity of copying, but in the authorial effort or creativity embodied in the work.<sup>168</sup> This is also confirmed in the EU Directives, for instance, Art. 1 (3) of Council Directive 91/250,<sup>169</sup> and Art. 3(1) of Directive 96/9.<sup>170</sup> According to these

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<sup>160</sup> *Nottage and Another V. Jackson*, 1883, L.R. 11 Q.B.D. 627, The Court of Appeal.

<sup>161</sup> Judge Bowen defined the author as “the man who really represents or creates, or gives effect to the idea or fancy, or imagination.” See *ibid.* at 637. Also, Judge Cotton’s definition is that “author” involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph.” See *ibid.* at 635.

<sup>162</sup> As he claimed that “[t]hese views [of Judges Cotton, and Bowen in the English case *Nottage v. Jackson*] of the nature of authorship and of originality, intellectual creation, and right to protection, confirm what we have already said.” See *Burrow-Giles Lithographic Co. V. Sarony*, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 150, at 61.

<sup>163</sup> *Nottage and Another V. Jackson*, L.R. 11 Q.B.D. 627, *supra* note 160.

<sup>164</sup> *Ibid.* 160, at 637.

<sup>165</sup> *Infopaq International a/S V. Danske Dagblades Forening*, 2009, E.C.D.R. 16, C-5/08, Court of Justice of the European Communities (Fourth Chamber).

<sup>166</sup> *Ibid.* at 261, 272.

<sup>167</sup> *Ibid.* at 272, 273.

<sup>168</sup> *Ibid.* at 271.

<sup>169</sup> Art. 1(3) of ‘Council Directive on the Legal Protection of Computer Programs’, 91/250/EEC (European Community, 1991). provided that: “A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.”

provisions, the database and computer software were to be conferred copyright protection only if they were the author's intellectual creation.

In the UK, in the *Interlego v. Tyco Case*,<sup>171</sup> the plaintiffs claimed that they had copyright in Lego bricks, the defendants copied their design from the blocks. The plaintiffs were granted an injunction. The defendants appealed, basing their case on the fact that the drawings existed pre-1973 and were not copyrightable, as they were designs registered under the Registered Design Act of 1949, and those post-1972 were protected by copyright as original works even though they were re-drawings of earlier works. Here, Lord Oliver differentiated, rightly, between the authorial contribution and the technical or manual contribution, as he argued that drawing a picture is not like imitating a preceding drawing, even if there is much labour and time consumed in this process - even if it were perfect, it does not reflect 'original' authorship. As Lord Oliver confirmed: "The significant thing about all these changes is that they involve no substantial alteration to the drawing as such."<sup>172</sup> Note here that substantial alteration of the previous work is required, and that the alteration should be of an authorial nature and not a technical or mechanical one: "[t]he significant changes, however important technically, are not indicated by any substantial alteration of the drawing as an artistic work. That remains basically the same and was admittedly copied from the 1968 drawing in the same way as if it had been actually traced."<sup>173</sup> [Underlining added].

In applying this general rule to the case of reproducing a previous work, and showing the irrelevance of the skill used for copyright law concepts, Lord Oliver stressed: "the re-drawing of an existing drawing with a few minimal visual alterations does not make it an original artistic work, however much labour and skill may have gone into the process of reproduction."<sup>174</sup> [Underlining added]. To apply that to the disputed works, he explained that although the mechanism used to prepare the dimensions and figures that are considered 'manufacturing instructions' for those who will design the moulds, 'from which the finished articles will be produced' and it "may be and no doubt is the case that that information involves important functional concepts, and even a good deal of technical research."<sup>175</sup> He rectifies this by saying that they do not make an original artistic work: "What is important about a drawing is what is visually significant, and the

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<sup>170</sup> Art. 3(1) of 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', 96/9/EC (EU, 1996). provided that: "In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection."

<sup>171</sup> *Interlego A.G. V. Tyco Industries Inc.*, 1989, A.C. 217; R.P.C. 343 Privy Council.

<sup>172</sup> *Ibid.* at 258.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.* at 258.

re-drawing of an existing drawing with a few minimal visual alterations does not make it an original artistic work, however much labour and skill may have gone into the process of reproduction, or however important the technical significance of the verbal information that may be included in the same document by way of information or instruction.”<sup>176</sup>

Judge Floyd in *Football Dataco Ltd. v. Britten Pools Ltd.*<sup>177</sup> cited the German Court of Appeal’s decision in order to support his argument in separating: “[a] purely deterministic” or “manual labour or schematic” work, and “individual creative work” to support his argument that the latter group of works are only those which satisfy the copyright law criteria.<sup>178</sup> On the other hand, Gorman has an opposite opinion, as he argues that what copyright law protects is not the social value in the work, or its mark of personality, or its reference to individuality, but the effort, time, expense and, in certain cases, the skill employed to produce the work “which does not require special intellectual competence”.<sup>179</sup> Actually, such a requirement equates intellectual work with manual or a mechanical work. Others oppose the latter opinion and stress that authorship is not a mechanical act because “[a]uthorship is not a purely mechanical act. The notion of authorship indicates something more than just a mechanical act, perhaps hinting that there is a degree of originality present, rather than a mere transcription.”<sup>180</sup>

## **6.7 Elements of Authorship (conclusion of philosophers’ views):**

According to the personality philosophies of Hobbes, Locke, Hegel and Kant on the elements that should exist in a work for it to be considered a work of intellect, the thesis has extracted the elements that, if they exist in a work will be evidence that it is a work of intellect, and if they are not found in a work, it is not a work of intellect - even if it were an intangible work. These elements are called the ‘elements of authorship’.

Depending on these elements, we can differentiate between authorship and non-authorship works, and then use this to separate the originality interpretations that are

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<sup>176</sup> *Ibid.* at 258.

<sup>177</sup> *Football Dataco Ltd v. Britten Pools Ltd*, 2010, R.P.C. 17, High Court of Justice (Chancery Division).

<sup>178</sup> As the Court in *Pharma Intranet Information Ag V. Ims Health Gmbh & Co. Ohg*, 2005, ECC 12, Oberlandesgericht (Court of Appeal) used several interesting phrases to support this view, as cited by the CJEU at 544, “the individuality differentiates the work protected ... from purely physical labour, routine performance. A selection or organisation that anyone would undertake in a particular manner does not constitute individual creation. ... then there is no room for individual creative work. ..., the decision goes beyond that which is manual labour or schematic and the decision allows sufficient manoeuvring room for an individuality”.

<sup>179</sup> Robert A Gorman, 'Copyright Protection for the Collection and Representation of Facts', *Harvard Law Review*, 76 (1962). p. 1570.

<sup>180</sup> J.G.H. Griffin, 'The Need for a New Paradigm in Ip Law: A Focus on Authorship', *Information & Communications Technology Law*, 14/3 (2005)., p. 268.

explained in Chapter Three into two groups, one to measure the authorial elements of mental and personal authorship, and the other to measure the manual and mechanical efforts and investment expenditure in works that are devoid of authorship.

Ultimately, such a differentiation between works and the separation of originality interpretations will reduce the current conflict in copyright decisions, especially around decisions on which interpretation of originality used is not suitable to the nature of the disputed work. According to the opinions of previous philosophers, Hobbes, Locke, Kant and Hegel, in order for work to be a work of intellect it should manifest the following characteristics: Firstly, for Hobbes, the work should include syllogisms of information and a conclusion that depends on this information, thus, if the work does not include such a relationship between its contents it cannot be considered a work of intellect, which confirmed also in the thesis's view around the wholeness of the work.<sup>181</sup>

Secondly, according to Locke, the work should be the result of mind processes that information has passed through, and which then produce something different that bears the personality of the author and his mentality. The produced work will, then, include the thoughts and sensations of the author through his reflection on the perceived information. Otherwise, if the work is perceived through registering or noting what the senses have perceived, without passing on any mind processes, the resulting work is not a work of intellect. Young has also confirmed that the work should be the result of mental effort.<sup>182</sup> Hegel also offered a similar argument, as he confirmed, firstly, that the work should be the result of the free will of the creator, so any steps dictated by another person, or following a mechanical pre-determined way of production, do not produce a work of intellect. Secondly, Hegel emphasised that works of art should reflect sensations as the registering of any intangible elements in a material form does not *per se* constitutes a work of art.

Thirdly, for Hegel, Kant and also Locke, the work should have inner meanings, something to be perceived by the mind or spirit of the recipient. They confirm that the work is to be considered a work of authorship only if created by the intellect or spirit, and perceived also by the intellect or spirit. Otherwise, it will be something external to the mind and spirit and cannot be named a work of intellect. As Hegel put it: "there is also something inward and mental about it... Attainments, erudition, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it."<sup>183</sup> This was confirmed by Palmer in his interpretation of Hegel's statement:

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<sup>181</sup> See Chapter Eight at 8.5.1.

<sup>182</sup> Edward Young and Samuel Richardson, *Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison*, *supra* note 62, p. 10.

<sup>183</sup> Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, *supra* note 122, p. 40-41.

"[p]ersonality does not simply require external objects for its development. Its development is its objectification through externalization of its will."<sup>184</sup> So it is not a matter of putting intangible works into a material form, but what these intangible works represent, or from where they emanate. If they have emanated from thinking or spirit and should be perceived only by mind or spirit, then they are intellectual works, otherwise they are only intangible works and should not be dealt with under the same principles and rules as intellectual works.

This conclusion is what the thesis attempts to use to put dividers within the big category of intellectual works in order to distinguish between works with authorship and those without it. Authorship, here, expresses that the work is a product of the mind or spirit of the author. On the other hand, other manual or mechanical work that the author does without incorporating his free will, mind processes, thoughts or sensations, into every work produced is considered a product of a mechanical process, not a work of intellect. Such as, when following specific learned rules or mathematical measurements. It is confusing to think about, analyse and investigate authorship in works in which no authorship processes have actually happened. Authorship is all about the work of minds, and not mechanical efforts.<sup>185</sup> Works of utility can be made by computer software, like telephone directories, maps, and catalogues of pictures, that then can be owned by the person who made the necessary procedures or the programmer, but they are not authorship works, as will be detailed in the following paragraph.

**Practical example:**

A software code can be copyrighted as long as the selection and arrangement is different from antecedent ones; but the works created by this program have different legal situations. If the program collects materials and presents it in a specific way, using a formula put in by the programmer, the situation differs according to the nature of that collection. If the programmer or the user of the program uses it to produce any kind of intellectual works the programmer or the user owns the produced work, as long as the computer program is used as a tool with which to execute the detailed instructions entered by the programmer or user.

Regarding any collection job that the program may perform, the situation depends on whether the process is intended to present the information as it is, regardless of the way this information is presented, or whether the author wants to present his thoughts

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<sup>184</sup> Tom G Palmer, 'Are Patents and Copyrights Morally Justified-the Philosophy of Property Rights and Ideal Objects', *Harv. JL & Pub. Pol'y*, 13 (1990). p. 838.

<sup>185</sup> As Hegel argues, see this chapter at 6.4.1 p. 191.

through this specific arrangement –such as proving something, then the arrangement will be original and thoughtful.

In the first case, in regard to presenting information as it is, the work does not have an author; it is a non-authorship work, although the work can be owned by the author of the program, or the user who applies the software to specific information, herein the program is the compiler of the information and nothing else has been done, or we may say that the work expresses no more values than dispersed pieces of abstract information not connected in logical way. In the second case, regarding the presenting of thoughts through specific arrangement, the work is an authorship work and its author is the author of the program, as the program was used as a tool to present his ideas, as the computer cannot put thoughts in a human logic way to convey thoughts or sensations. The work thus holds this author's specific ideas and modes of thinking.<sup>186</sup>

### **6.8 Distinction between Mental and Manual Skills in Creating Works:**

Depending on the elements of authorship explained above, we maintain that the skills and capabilities used in creating novels or photographs, sculptures and paintings are different from the skills and capabilities used in making databases, compilations, anthologies, catalogues, dictionaries and travel guides, the first are authorship skills and the latter non-authorship skills.

In the UK, the difference between the two skills was confirmed in the case of *Hadley v. Kemp*<sup>187</sup> as it was stated: “there is a vital distinction between composition or creation of a musical work on the one hand and performance or interpretation of it on the other.”<sup>188</sup> [Underlining added]. The Judge also said: “It is certainly true that the members of the band sang or played in their own ways (and, in so far as I am able to Judge, did so excellently). But these are matters of performance, not matters which go to the creation of a new musical work.”<sup>189</sup>

There are two skills to be differentiated between in the making of works, the skill of mere collection and the skill that includes collection and then processing in the mind and presenting the content as a creative or original product. Knowledge and facts: “never exist[s] in concentrated or integrated form, but solely as dispersed bits of incomplete and frequently contradictory knowledge, which all the separate individuals

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<sup>186</sup> This differentiation between human authorial contribution and others is the reason of why the programmer is the author of the computer generated works as the person who takes the necessary steps in creating the program.

<sup>187</sup> *Hadley V. Kemp*, 1999, E.M.L.R. 589, High Court, Chancery Division.

<sup>188</sup> *Ibid.* at 646.

<sup>189</sup> *Ibid.* at 646.

possess.”<sup>190</sup> Two separate processes can be done in relation to these pieces of knowledge, whether that is the mere collection of them in order to present them to the audience to serve their need for the collection of facts in a specific field, or, the processing of the facts to build different thoughts or sensations that are based on them and that were not previously existing.

When courts give great importance to collectors of this knowledge and equate them through protection and rights with those who absorb these dispersed bits of knowledge to produce a consistent and coherent piece of art or literature, the courts are not just unfair with the latter group of works. But, they sacrifice the established philosophies and concepts of intellectual property in prioritising those latter works, or even by considering them the only works of intellect, according to the philosophies of the work of intellect and the necessary elements they should include, as explained above.<sup>191</sup>

Hayek advocated this argument as he stressed that society does not need such allocation or collection of knowledge – as represented in factual works - but what matters is the use of such knowledge. “The economic problem of society is thus not merely a problem of how to allocate "given" resources .... It is rather a problem of how to secure the best use of resources known to any of the members of society.”<sup>192</sup> [Underlining added]. According to Hayek, then, the collection, gathering, organizing, arranging or selecting of information is not a problem, or not an important issue for society. What is important is the use of this information, and that which the mind or intellect does, which gives the work an importance. This serves the thesis’s argument directly to propose that collections of facts are not intellectual works because – according to the Hayekian theory - they do not include that stage where information is used to reach unknown results.

Although Hayek’s argument strips efforts at collection of any importance or value, some kind of protection should be given to such works, as they ease the job for those who do the analysis and processing of such information, and so sustaining such efforts is still important. However, we should bear in mind the grades that every category of works should occupy.

## **6.9 The Idea/Expression Dichotomy is Confusing:**

The idea/expression dichotomy was established in cases before being codified in law, especially in University of London v. University Tutorial<sup>193</sup>, as mentioned above.<sup>194</sup>

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<sup>190</sup> Friedrich August Hayek, 'The Use of Knowledge in Society', *The American Economic Review*, (1945), p. 520.

<sup>191</sup> See this Chapter at 6.7.

<sup>192</sup> Friedrich August Hayek, 'The Use of Knowledge in Society', *supra* note 190, p. 520.

<sup>193</sup> University of London Press V. University Tutorial Press, 2 Ch. 601, *supra* note 154.

However, it has not been codified in the UK, although this does not detract from its status as an established concept in the UK. It finds its legal basis in the TRIPS agreement, as Art. 9(2) stated that “Copyright protection shall extend to expressions and not to ideas...”.<sup>195</sup> The US Copyright Act of 1976 provided for the idea/expression dichotomy concept in § 102 (b).<sup>196</sup>

‘Expression’ has been understood to mean the words and lines that express the ideas. Such a claim was briefly confirmed in the case of *Chamberlin v. Uris Sales*,<sup>197</sup> when Judge Frank confirmed that “[t]he right secured by a copyright is the right to that arrangement of words which the author has selected to express his ideas and not the right to employ ideas expressed thereby.”<sup>198</sup> And also in Judge Peterson’s claim that “the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work.”<sup>199</sup>[Underlining added].

It is argued in this research that the idea/expression dichotomy has confused Judges in regard to the principles and bases of copyright law, as Lord Hailsham stated in *L. B. (Plastics) Ltd v. Swish Products Ltd*:<sup>200</sup> “it all depends on what you mean by ‘ideas’.”<sup>201</sup> We confirm that copyright law is only concerned with the authorship, thoughts and ideas that the author adds to the work through his personality and mind operations, not the expression itself, which is nothing but abstract lines and letters. However, copyright law failed to recognise this formula. As a result of this, Judges have experienced a problem in the “distinction between fact and expression [which] is not always easy to draw.”<sup>202</sup>

It is difficult to determine the difference between ideas and the expression of these ideas: “Saying that only original expressions, but never facts or ideas, are copyrightable proves to be far easier than applying the notion consistently and coherently.”<sup>203</sup> As Judge Hand states in *Peter Pan v. Martin Weiner*<sup>204</sup> that: “[o]bviously,

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<sup>194</sup> Especially when Judge Peterson stated that: “Copyright Acts are not concerned with the originality of ideas, but with the expression of thought” see *ibid.* at 608.

<sup>195</sup> ‘The Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips)’, *O.J. 1994 L.* (1994). p. 213.

<sup>196</sup> As it stated “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.” 17 U.S.C §. 102 (b)

<sup>197</sup> *Chamberlin v. Uris Sales Corporation*, 150 F.2d 512, *supra* note 138.

<sup>198</sup> *Ibid.* at 513.

<sup>199</sup> *University of London Press v. University Tutorial Press*, 2 Ch. 601, *supra* note 154, at 609.

<sup>200</sup> *L.B. (Plastics) Ltd v. Swish Products Ltd*, 1979, R.P.C. 551, House of Lords.

<sup>201</sup> *Ibid.* at 629.

<sup>202</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 1983, 723 F.2d 195, United States Court of Appeals, Second Circuit. at 203.

<sup>203</sup> Paul J. Heald, ‘The Vices of Originality’, *Supreme Court Review*, (1991)., p. 152.

<sup>204</sup> *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 1960, 274 F.2d 487, United States Court of Appeals Second Circuit.

no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*.”<sup>205</sup>

What the thesis stresses is that the protection of ‘words and lines’ alone is dangerous and, as always, the change in the form of expression will entail allowing copyright of infringing works: “[i]t is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.”<sup>206</sup> The originality of the ‘words and lines’ is insufficient to confer copyright protection, and the same judgment should be applied to the requirement for originality in the selection and arrangement itself of factual works.

As Pila confirms: “[a]n LDMA<sup>207</sup> work is, and ought to be, an intentional expression of an LDMA idea; meaning an intentional expression of a particular idea associated with a tradition of LDMA authorship. This explains why even skilfully produced records of works ought not to attract LDMA copyright: because they are not LDMA works. If the creators of such records are to be rewarded with copyright it ought to be mechanical copyright of the type already granted to the makers of records of other LDMA works.”<sup>208</sup>

There is an important distinction should be set between whether the originality is required in the selection and arrangement itself, or in the words and lines themselves, or, on the other hand, is originality required in the thoughts that a specific selection and arrangement bears. In regard to works of authorship, the selection and arrangement of the elements of the works which is its structure, is the thing that expresses that the work has had an intellectual creation and that is why it should be protected.

#### **6.10 Authorship is in the Structure of the work not the Raw Material of Authorship:**

One of the problems of copyright law is the confusion that happens due to the idea/expression dichotomy, because ‘expression’ is interpreted to mean the words and lines in literary and artistic works.<sup>209</sup> This interpretation does not provide protection against up and coming authors who can just use their words to express the same thoughts with the same arrangement that the first author followed. For instance, in novels, the selection of characters and places and the arrangement of the events is what the protection of the novel is depending upon, not the words or the expressions,

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<sup>205</sup> *Ibid.* at 489

<sup>206</sup> *Nichols v. Universal Pictures Corporation*, 1930, 45 F.2d 119, Circuit Court of Appeals, Second Circuit, at 121.

<sup>207</sup> LDMA refers to ‘Literary, Dramatic, Musical and Artistic’ works.

<sup>208</sup> Justine Pila, ‘An Intentional View of the Copyright Work’, *The Modern Law Review*, 71/4 (2008), p. 557

<sup>209</sup> See for instance, Donald L Gelpi, *The Gracing of Human Experience: Rethinking the Relationship between Nature and Grace* (Wipf and Stock Publishers, 2008), p. 215.

as these can be changed in unlimited number of times. A sculptor who makes a sculpture out of a painting is copying the thought and the expressive form, with a change in the physical form.

The reason to support this view is that we understand that expression means the path the author followed in order to transfer his ideas into a material form. Although the ideas are not protected, the way it is materialized in is protected. The registration of ideas or sensations in material form is something emotional that is related to personality, and that appears from the combination of all these elements in a unique way that cannot be repeated. The way to deliver ideas to the audience is where originality lies, and it is not conceivable that originality lies in the choice of a word and the leaving of another, but that the choice of all of the elements of the work and to arrange them in a special order is key, and that this order of these specific elements reflects the personality of the author.

This was confirmed by Mr Justice Laddie, when he differentiated between the words and lines themselves and the ideas these words and lines expressed.<sup>210</sup> He confirmed also that it is wrong to deem the person who make the expression the author, but s/he who provides the ideas is a joint author: “[i]n my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author.”<sup>211</sup> [Underlining added]. Furthermore, he applied this rule to the case and decided that the provider of ideas is not just a joint author, but is the main author.<sup>212</sup> The thesis thus concludes that the expression of thoughts is not the words or the lines used to express them, but the selection of all of the raw materials of the work and putting them into a specific arrangement, so the whole work works as a communication means that can convey the thoughts and sensations of the author. Words and lines themselves are abstract, devoid of any importance, and cannot bear any thoughts or sensations. Changing them does not change the work.

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<sup>210</sup> *Cala Homes (South) Limited and Others V. Alfred Mcalpine Homes East Limited*, 1995, F.S.R. 818, The High Court of Justice—Chancery Division. at 835.

<sup>211</sup> *Ibid.* at 835.

<sup>212</sup> When he confirmed: “In this case Mr Date was a joint author of the drawings for the New Standard House Range. Indeed, not only was he a joint author, in my view he was the major author.”, see, *ibid.* at 836.

The announcement by Mr Justice Laddie can result in several outcomes. Firstly, copyright law primarily protects the ideas and thoughts. Expression is just required for evidence purposes, even if skill is required in the expression itself. Secondly, adaptations, especially those that rely substantially on antecedent works, may not be high authorship works, due to the author of the resulting work use the ideas and thoughts of the original author. Furthermore, if the adaptation just depends on changing the expressive or the physical form of the work, the resulting works may not be an authorship work at all. We confirm that copyright law is concerned in the first place with authorship; Goldstein confirms that copyright law is about authorship, and both about the act of creation and sustaining the conditions of creativity.<sup>213</sup>

The authorial selection and arrangement is the structure or order which produces thoughts that can be perceived by the audience of the work, these thoughts are limited by the amount that the author wanted to transfer, if that arrangement changes, then the thoughts and sensations perceived will change. It is a matter of substance and the arrangement of these substances whether the elements employed are words, expressions or symbols is that constitutes authorship. Otherwise, we will allow for rewritings to be considered original works due to the change in words. Suk attacked such an argument: "I won't bother to write my own work, because I'll be losing money to the rewriter of my book after it becomes famous."<sup>214</sup>

This argument has been confirmed expressly in the Simms v. Stanton case in 1896 when the court cited Drone's statement "[t]he true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether, in substance, it is reproduced; not whether the whole, but whether a material part, is taken. In his view of the subject, it is no defense of piracy that the work entitled to protection has not been copied literally; that it has been translated into another language; that it has been dramatized; that the whole has not been taken; that it has been abridged; that it is reproduced in a new and more useful form. The controlling question always is, whether the substance of the work is taken without authority."<sup>215</sup> [Underlining added] Drone's argument referred to most adaptations or derivations of works that now are called to be creative works although they have just manipulated the same substance and arrangement already created by previous mental efforts.

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<sup>213</sup> Paul Goldstein, 'Copyright', *Law and Contemporary Problems*, 55/2 (1992)., p. 80.

<sup>214</sup> Jeannie Suk, 'Originality', *Harvard Law Review*, 115 HVL (2002)., p. 1998.

<sup>215</sup> Eaton Sylvester Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States: Embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions* (Little, Brown, 1879). p. 385 cited in Simms V. Stanton, 1896, 75 F.6, C.C.N.D. Cal. at 9

## 6.11 Conclusion:

Throughout this Chapter, this thesis has presented the evidence that can support its argument, namely, the elements of authorship. The opinions of the English philosophers Hobbes, Locke and Young constituted the main basis upon which this thesis relied to extract these elements, besides the views of Hegel and Kant. Accordingly, in order for a work to be an authorship work, or a work of intellect, it should include a personal, mental or spiritual contribution by the author. It should “manifests traits of ‘high authorship,’ subjective or creative elements that reveal the author’s own personal influence”<sup>216</sup>

This argument is important at this time, when the EU is following a path that is tending towards the civil law system in copyright law, which considers the personality of the author as the main criterion for the protection of any intellectual work.<sup>217</sup> Even in the US we find the case of *Feist v. Rural*, and other recent cases,<sup>218</sup> as well as the ‘Compendium of the US Copyright Office’ tend to revive the personality and mental elements in the work in order that it be copyrighted.<sup>219</sup>

Though this concentration on personality may seem strange to the orthodox situation that is followed in the UK and the US, as is apparent in the difficulties that UK cases have faced in applying the ‘intellectual creation’ criterion regarding databases, the thesis argues that it is an inevitable direction. However, if this trend is not adjoined to a categorisation of works, the situation will return to the current conflict and confusion, as there should be a path available that provides protection to works that are devoid of a mental and personal contribution, but are made by extensive expenditure of time, effort and investment.

In this situation, protection to be applied through categorisation of works, is a necessary step. Works including personal and mental elements will get the current protection of copyright and will smoothly be able to be the subject of the application of originality in its higher interpretations that measure the author’s personality and creativity. Separating works that do not include any of these characteristics, or where “the authorship is *de minimis* or the work does not contain authorship”,<sup>220</sup> in a different category will spare the court of the need to reduce the originality interpretation to fit any of these works, and will spare the right holders of these works any risks of not protecting their works if the judge has adopted a high interpretation of originality regarding their works.

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<sup>216</sup> Stephen P. Tarolli, 'Comment, the Future of Information Commerce under Contemporary Contract and Copyright Principles', *American University Law Review*, 1639 (1997). p. 1650

<sup>217</sup> See Waelde argument, Charlotte Waelde, 'Database Copyright: The Story of Bhb', *Copyright Law: A Handbook of Contemporary Research* (2009), 109. p. 125.

<sup>218</sup> See Chapter 3 at 3.10.

<sup>219</sup> This was especially apparent in their recourse to the *Trade-Mark Cases* and *Burrow-Giles* cases.

<sup>220</sup> § 201. 7 of United States Government, 'Code of Federal Regulations, Title 37 Patents, Trademarks, and Copyrights', *supra* note 134, p. 537.

## **Chapter Seven: Works that Lack Mental and Personal Contribution (Non-Authorship Works)**

### **7.1 Introduction:**

The non-protection of facts and the pieces of information are supported by the Berne Convention and the TRIPS Agreement. As Art. 2(8) of the Berne Convention says: “[t]he protection of this Convention shall not apply to news of the day nor to miscellaneous facts having the character of mere items of press information.”<sup>1</sup> Art 9(2) of the TRIPS Agreement provided that: “Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”<sup>2</sup> However, the courts and laws have allowed for the protection of these facts, if they are selected or arranged in an original way, and also if the collection included other original work. However, in both cases, it is only the original selection and arrangement of original work can get copyright protection, and not the facts themselves.<sup>3</sup>

The thesis argues that if the given works include information gathered and organized without the existence of thoughts or ideas behind that information. These works are considered devoid of any authorship, because the author did not do any work as an author, but he instead acted as a craftsman. Personal or mental elements cannot appear in mere selection and arrangement. This is why it is argued in this research that selection and arrangement do not include any of the elements of authorship extracted from the philosophers of personal authorship: Hobbes, Locke, and Hegel,<sup>4</sup> as will be explained in a separate section below.<sup>5</sup> Unfortunately, this distinction between what is an authorship work and what is a not, is unclear in copyright law.

Collections of facts and information, although they are important for a lot of individuals, they have not been authored, this because they are devoid of any subjective mind processing. Accordingly, we must prove that, and not attempt to contrive such personal characterization or find a pretext in order to claim the existence of authorship in these works. “Personality-based characterizations of many low authorship informational

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<sup>1</sup> 'Berne Convention', (Switzerland 1886 (Paris act 1971)).

<sup>2</sup> 'The Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips)', *O.J. 1994 L.* (1994).

<sup>3</sup> *American Code Co. V. Bensinger*, 1922, 282 F. 829, 2d Cir. at 834.

<sup>4</sup> See Chapter 6 at 6.7.

<sup>5</sup> See this Chapter at 7.4.

works seem contrived”,<sup>6</sup> as happened in the Supreme Court Case, *Feist v. Rural*,<sup>7</sup> as the thesis has argued and explained above.<sup>8</sup>

Copyright law can provide protection to these works without giving a false impression of the existence of authorship or creating an illusion of the existence of subjective effort in organizing this information, which these works do not need to do in order to perform their essential role in conveying information. This is why Ginsburg suggested: “[m]ore importantly, these characterizations [Personality-based characterizations] seem wholly beside the point. Even if one could discern subjective "arrangement" in works such as maps, address directories, and compilations of judicial decisions, that arrangement may bear little, if any, connection to the work's central importance as a source of information.”<sup>9</sup> [Underlining added].

Demanding something that is not required for the factual works’ construction is not fair or logical. When originality in authorship works is required, it is something logical in order to make sure that authorship is there as a foundational element in literary, artistic and musical works, which are created by mind operations. However, factual works are not required, from the beginning, and are not presumed to be the result of any mind operation, but they do represent efforts and expenses used in the collection. This is why the EU provided protection to collections of facts when they cannot fulfil the copyright criteria under the *sui generis* system<sup>10</sup> as the protection of the expended investment is a vital aim that should be achieved even outside copyright law, and that has been achieved, in the UK, through the *sui generis* database regulation.<sup>11</sup> This is what this thesis attempts to generalise in regard to all non- authorship works, not to databases only, and through a theoretical justification that raises the authorship substance and the originality interpretation regarding authorship works depending on English philosophers, and abolishing it regarding non-authorship works. This is argued in order to reach the practical goal of reducing the conflict in copyright subsistence decisions.

According to this argument, ownership is believed to exist in more instances than authorship. We argue that ownership can be approved in works that are devoid of

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<sup>6</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *Columbia Law Review*, 90 (1990)., p. 1869.

<sup>7</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 1991, 499 U.S. 340, 111 S.Ct. 1282, Supreme Court of the United States.

<sup>8</sup> See Chapter 3 at 3.4.1. and especially 3.4.2.

<sup>9</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 6, p. 1869.

<sup>10</sup> Through 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', 96/9/EC (EU, 1996)..

<sup>11</sup> 'The Copyright and Rights in Databases Regulations', (UK, 1997).

authorship for regulation and marketing purposes, but authorship requires specific elements that are personal and mental, in order to exist to describe a work as an authorship work. The thesis's title has put ownership before authorship as a confession of this phenomenon in modern copyright law.

The cases where absence of authorial contribution appear have been briefed by Durham: "Some works, however, do not so clearly exhibit an 'author's' influence—highly factual works, such as telephone directories, with unremarkable characteristics of selection and organization; works that nearly reproduce existing works by other authors; or works created by mechanical processes with little human intervention. In such cases, the concept of authorship demands closer scrutiny."<sup>12</sup> [Underlining added] and that is why mental contribution and 'selection and arrangement' are seen as the real characteristics or indications of authorship.

## 7.2 Compilations Protection in Legislations and Case Law:

S. 3 of the CIPA articulated that a literary work includes any written or spoken work, including, tables, compilations, computer programs, and databases.<sup>13</sup> The 'originality' criterion is required for these works to be protected by copyright law. However, s. 3A specified a special interpretation of the originality criterion for databases, which is 'the selection and arrangement' of the contents, which constitutes 'the author's own intellectual creation'.<sup>14</sup>

This means that originality is required in regard to all literary works, including fictional works, novels, fantasy, scientific books, etc. , as well as, anthologies, dictionaries, catalogues and travel guides. In addition, originality is required for artistic works, including graphic works, photographs, sculpture, collage, architecture and also artistic craftsmanship works.

Though §. 102 (b) of the US Copyright Act of 1976 provided that: "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of

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<sup>12</sup> A.L. Durham, 'Copyright and Information Theory: Toward an Alternative Model of Authorship', *Brigham Young University Law Review*, (2004). p. 70. Durham even argued that such scrutiny through "distinguish[ing] between the original and unoriginal, or 'authored' and 'un-authored,' aspects of a copyrighted work". *Ibid.* p. 72.

<sup>13</sup> See S.3 of 'Copyright, Designs and Patents Act (CIPA)', (UK, 1988).

<sup>14</sup> S. 3 stated "(1) In this Part— "literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes— (a) a table or compilation [other than a database], . . . (b) a computer program; . . . [(c) preparatory design material for a computer program][and (d) a database]" and s. 3A (2) states: "(2) For the purposes of this part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation." see, *ibid.*

the form in which it is described, explained, illustrated, or embodied in such work.”<sup>15</sup> Factual works in US law are included within the definition of compilation works, which are defined thus: “Compilations are works formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>16</sup>

The US Copyright Act 1976 and the US Copyright Code require originality in all works, whether literary, artistic, musical or dramatic works, and even compilations and derivative works.<sup>17</sup> Accordingly, the US law confers protection to telephone directories, stock market indexes, racing forms, or any other works that are described as original works of authorship. However we find the ‘Code of Federal Regulations’ explains: “[w]orks consisting entirely of information that is common property containing no original authorship, such as, for example, Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.”<sup>18</sup>[Underlining added].

Here, this thesis would like to focus on the fact that courts in the US have been divided in interpreting the conditions of originality and when it can be said to exist in a given work, yet, they ignored the other half of the condition, which is authorship, according to the full condition: “original works of authorship”. As, courts had to make sure that the disputed work is authored first before searching whether this authorship is original or not. If this was first ensured, the interpretation and application of originality would be easier, but, as argued above,<sup>19</sup> judges were left alone before the pressure of the authorship concept and copyright law’s delay in coping with technological changes, and the result was inconsistency everywhere, as stated.<sup>20</sup>

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<sup>15</sup> ‘Copyright Act of the United States’, *Ch8-10; 12-17 of Title 17 of the US code* (US, 1976).

<sup>16</sup> §. 101 of *ibid*.

<sup>17</sup> As, according to §. 102: “(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audio-visual works;
- (7) sound recordings; and
- (8) “architectural works.” See, *ibid*.

<sup>18</sup> §. 202. 1 (d) of United States Government, ‘Code of Federal Regulations, Title 37 Patents, Trademarks, and Copyrights’, (U.S. Government Printing Office, 2014)..

<sup>19</sup> See Chapter 1 at 1.1.

<sup>20</sup> See Chapter 2 at 2.4 and 2.5.

Compilations of facts and information struggle to comply with copyright law principles and theories, and even with current legislation of copyright law. Judge Feinberg in Eckes v. Card Prices<sup>21</sup> argued that “copyright law and compilations are uneasy bedfellows.”<sup>22</sup> Goldstein confirms that protecting factual works under copyright law is “the most troublesome aspect of copyright protection.”<sup>23</sup> Denicola allocated the problem and offered the solution also, as he stated that: “the very vocabulary of copyright is ill suited to analysing property rights in works of nonfiction. Although copyright prerequisites such as originality or creativity may carry significance when applied to Macbeth or Ulysses, their utility is less apparent in the context of a financial report in the Wall Street Journal, and even more obscure with respect to the Manhattan telephone directory. Yet copyright law must concern itself with each.”<sup>24</sup> [Underlining added]. Although, the reason for this uneasy relationship is the thing that needs investigation, that separate dealing with each is the ultimate way out.<sup>25</sup>

Haungs also after discussing the selection and arrangement criteria’s application on compilations of facts and the conflict it causes regarding the protection of underlying facts has concluded that “copyright law should recognize that what is protected in compilations is the effort expended in their creation”,<sup>26</sup> not that minimum selection and arrangement done.

Confusion also exists in scholars’ understandings of the foundations of copyright law, including the concept of authorship that initially requires the existence of an ‘author’. For instance, Geller, in his discussion on the nature of intellectual works as expressions of authors’ personalities made a separation between the author’s thought and personality, and he argued that it is not necessary that the author’s thoughts express his personality, especially in his discussion of Kant’s argument: “[Kant]...

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<sup>21</sup> W. Eckes V. Card Prices Update, 1984, 736 F.2d 859, United States Court of Appeals, Second Circuit..

<sup>22</sup> *Ibid.* at 862.

<sup>23</sup> Paul Goldstein, Stella W Lillick, and Ira S Lillick, *Copyright: Principles, Law, and Practice* (2: Little, Brown Boston, 1989)., p. 180.

<sup>24</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', Columbia Law Review, 81/3 (1981)., p. 516.

<sup>25</sup> There was a an attempt in (1910) to undertake such differentiation between authorship and non-authorship works by considering the functions of every category, that was done by Judge Ward in the US case, West Pub. v. Edward Thompson, when he stated: “there is a great difference between text-books and volumes of reported cases or digests of those cases ... A poem or a novel or a history or a directory or a dictionary or a scientific treatise is intended to please, interest, instruct, or satisfy the reader, so to speak, in itself; but a digest considered by itself is nothing. Its purpose is as a tool to enable Judges to write their opinions, lawyers to write their briefs, and authors to write their text-books.” See, West Pub. Co. V. Edward Thompson Co., 1910, 176 F. 833, Circuit Court of Appeals, Second Circuit. at 838 However, this distinction was not theoretically founded.

<sup>26</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', Columbia Journal of Law & Social Problems, 23 (1989). p. 359 citing Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24, p. 516

observed that authors expressed their own thoughts, not necessarily their personalities, in their 'discourse.'<sup>27</sup>

Although, as discussed before,<sup>28</sup> the Supreme Court in *Feist v. Rural*<sup>29</sup> has settled for the selection and arrangement criterion in compilation works as a condition for conferring copyright protection to them: “[the Supreme Court] established a constitutional barrier to the copyrightability of compilations that lack a ‘modicum of creativity’.”<sup>30</sup> The selection criteria has been settled since the *List v. Keller Case*<sup>31</sup> as “each directory is original to the extent that the selection is original; hence where the compiler of such directory uses a previous directory of the same character, to save himself the trouble of making an independent selection .... he infringes the first compiler's copyright.”<sup>32</sup> [Underlining added].

Although the case of *Feist v. Rural* was thought to constitute a change in the history of the protection of the collection of facts and the interpretation of originality, what happened is that although courts “purported to require originality as a prerequisite for copyright protection, in practice, it simply measured originality as a function of industry.”<sup>33</sup>

### 7.3 The Different Nature of Collections of Facts:

Ginsburg argues that the ‘fluctuation’ or ‘confusion’ within the ‘copyrightability’ in courts’ decisions is returning to “the basis for copyright protection underlying judicial decisions”,<sup>34</sup> as she argues that throughout the eighteenth century and until the mid-19<sup>th</sup> century, the focus was on the labour expended in creating the work as a criterion used when deciding copyrightability, rather than the “inspiration” of the author, due to the excess of interest in informational and utility works. She described this era, “[n]o matter how banal the subject matter, if the author's work resulted from original efforts, rather than from copying pre-existing sources, the author was entitled to a copyright.”<sup>35</sup>

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<sup>27</sup> Paul Edward Geller, 'Must Copyright Be for Ever Caught between Marketplace and Authorship Norms?', *Of authors and origins: essays on copyright law*, (1994)., p. 168.

<sup>28</sup> See Chapter 3 at 3.4.1.

<sup>29</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 7.

<sup>30</sup> Anani S Narayanan, 'Standards of Protection for Databases in the European Community and the United States: Feist and the Myth of Creative Originality', *Geo. Wash. J. Int'l L. & Econ.*, 27 (1993)., p. 460.

<sup>31</sup> *List Pub. Co. v. Keller*, 1887, 30 F. 772, Circuit Court, S.D. New York.

<sup>32</sup> *Ibid.*31, at 772.

<sup>33</sup> Robert Brauneis, *Intellectual Property Protection of Fact-Based Works: Copyright and Its Alternatives* (Edward Elgar Publishing, 2009). p. 25.

<sup>34</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 6, p. 1874.

<sup>35</sup> *Ibid.*p. 1874, she cited the cases, *Longman v. Winchester*, 1809, 16 Vesey Junior 269; 33 E.R. 987, Ct of Chancery and *Bleistein v. Donaldson Lithographing Co.*, 1903, 188 U.S. 239, 23 S.Ct. 298, Supreme Court of the United States

Ginsburg confirmed that from the mid-19<sup>th</sup> century courts adopted a different approach to decide copyrightability which was to focus on ‘personality’ or the author’s “unique individuality” which should manifest in the work to make it distinctive to other works.<sup>36</sup> She further argued that since the emergence of the personality approach the labour approach has not disappeared, but both – although they have conflicting substances and implications – have continued to coexist: “throughout the nineteenth century and into the twentieth, the concept of original authorship embraced both original labor and original creative activity.”<sup>37</sup> [Underlining added] and that has caused the conflict in courts’ decisions.

This paradox has been referred to by some scholars, Gorman, for instance, stressed that “[d]espite the significant difference between the elements protected in fact works and in creative works, courts have nonetheless used the same terms and same tools of analysis in dealing with both types of copyright.”<sup>38</sup> This practice has led to “occasional use of traditional copyright language and concepts in a distorted manner”<sup>39</sup>. Gorman has even argued that copyright law may not be suitable to protect factual works due to this law’s adoption of the protection of expression, for “it must be recognized that the law of copyright, which avowedly protects expression only, may not be the ideal vehicle for the protection of fact works, the value of which is generally attributable to the labor they embody rather than their mode of expression.”<sup>40</sup> For Gorman, if the elements that deserve protection are the labour, effort and expense, so the unfair competition and misappropriation doctrines are the most suitable for application here.<sup>41</sup> In the UK *Laddie et al.* have argued that case law on databases’ protection shows that “a substantial amount of purely routine mental labour may equally well satisfy the statutory requirement,”<sup>42</sup> and that copyright protection can be granted to directories although “no imagination is required to produce these and no skill beyond knowing how to read and write.”<sup>43</sup>

We ascertain that the focus on the assignment of works has concealed the analysis of authorship in the works, as authorship does not hinder the development of works, but

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<sup>36</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 6, p. 1874, she cited the cases, *Bleistein V. Donaldson Lithographing Co.*, 188 U.S. 239, 23 S.Ct. 298, *supra* note 35 and *Charles Jefferys V. Thomas Boosey*, 1854, 10 E.R. 681, House of Lords

<sup>37</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 6, p. 1875.

<sup>38</sup> Robert A Gorman, 'Copyright Protection for the Collection and Representation of Facts', *Harvard Law Review*, 76 (1962)., p. 1570.

<sup>39</sup> *Ibid.* p. 1570.

<sup>40</sup> *Ibid.* p. 1571.

<sup>41</sup> *Ibid.*

<sup>42</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, 2 vols. (Fourth edn., 1: LexisNexis, 2011). at 3. 57.

<sup>43</sup> *Ibid.*

has been neglected, and the concept blamed for the inappropriateness of the application of copyright law principles to collaborative works and collections of facts.

Ginsburg confirmed the existence of this confusion in the US courts through the joining of personal convictions and utilitarian justifications to justify protection. When she discussed the application of the personality or individualism theories of copyright, as judges required personality imprint in a work in a system wholly immersed in utilitarianism.<sup>44</sup> She concluded that: “[c]ourts have reached contradictory results respecting both the originality requisite to inclusion of a work within copyright's subject matter and the kind of copying that constitutes infringement”.<sup>45</sup> So, a criticism of authorship, such as arguing that: “[t]he unusual power and persistence of ‘authorship,’ demonstrating that far from being a non-controversial generalized ‘source’ of copyright doctrine, it in fact is the specific locus of a basic contradiction between public access to and private control over imaginative creations”,<sup>46</sup> is considered an improper criticism, as authorship does not persist in all works. It is the failure of lawmakers to discover that authorship and its elements are not present in them.

According to this confirmation on the different nature of works under copyright law, and the different principles that are suitable to each, it has become impossible to find a theory, concept or criterion that can be applied on all works: “both the making of generalizations as to how to copyright works and the establishment of broad principles that may be of equal applicability throughout those fields of activity have become increasingly challenging tasks.”<sup>47</sup>

The negative impression towards authorship in databases began to appear in UK cases. For instance, in Football Datco Ltd v. Britten Pools Ltd. case<sup>48</sup> Judge Floyd demonstrated that fixture lists involved very significant labour and skill; he confirmed that they were “not mere ‘sweat of the brow’, i. e. , the application of rigid criteria to the

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<sup>44</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 6, p. 1871

<sup>45</sup> *Ibid.* p. 1871, As Ginsburg articulated: “On the one hand, some recent decisions, adhering to the personality concept of original authorship, have held fact compilations insufficiently original to qualify for copyright. On the other hand, some courts are willing not only to include fact compilations within copyright subject matter but also to accord the information contained in these works a very broad scope of protection against copying.”

<sup>46</sup> Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship', *Duke Law Journal*, (1991). p. 457.

<sup>47</sup> Jeremy Phillips, 'Authorship, Ownership, Wikiship: Copyright in the Twenty-First Century', *Journal of Intellectual Property Law & Practice*, 3/12 (2008)., p. 789.

<sup>48</sup> Football Dataco Ltd V. Britten Pools Ltd., 2010, R.P.C. 17, High Court of Justice (Chancery Division).

processing of data; it was unlike the compiling of a telephone directory, in that at each stage there was scope for the application of judgment and skill.”<sup>49</sup>

Authorship is a process that includes the creation and registration of ideas and thoughts that came into the mind and it is different from registering what is directly sensed by eyes or ears. Collections of facts are just the registration of what is sensed by eyes and ears, as they are lacking any processing by mind. Thus, collections of facts are non-authorship works.

Herein, it is worth referring to St. Bonaventura’s<sup>50</sup> statement, which supports this thesis’s view on the differentiation between authorial and non-authorial efforts, as he argues that there are four ways to make books, the scriptor, compiler, commentor and auctor.<sup>51</sup> Accordingly, he classified the degrees of efforts used into four classes, from non-authorship works that the ‘scribe’ and ‘compiler’ do, to the authorship efforts which ‘commentators’ and ‘auctors’ do.

We claim that authorship efforts are superior, more valuable and worthy of appreciation than non-authorship works that are confined to the work of hands, efforts and even the expenditure of money. Thus, authorship works should be given a degree of protection higher than that given to factual works. Phillips has criticised the conferral of copyright protection to databases, and that their creators are considered authors, in an interesting statement: “those august bodies, in directing the legislative drift of their neophyte subject matter, steer their attention away from a work of creative authorship and focus instead upon what is effectively the work of tidy office management, the arrangement of something even as trivially uncreated as raw data, in a systematic or methodical manner by means of which each piece of data is individually accessible. This is to bestow the title ‘author’ on the street-sweeper who brushes facts into tidy piles of data all along the information highway.”<sup>52</sup> So, rightly, Phillip finds that factual works are made through ‘tidy office management’ not through creative authorship.

#### **7.4 ‘Selection and Arrangement’ of the factual works Lacks Authorship:**

Originality in the selection and arrangement of data is of the kind that differs from time to time and from community to another, depending on the level of culture and advancement in technology this community has. Actually, what may be considered a creative arrangement in some places may not be considered so in another, and over time this approach will deter the protection of many future factual works due to the

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<sup>49</sup> *Ibid.* at 523.

<sup>50</sup> St. Bonaventura, (1221-1274) an Italian medieval scholastic theologian and philosopher.

<sup>51</sup> As cited in Chapter 5 at 5.3.

<sup>52</sup> Jeremy Phillips, ‘Authorship, Ownership, Wikiship: Copyright in the Twenty-First Century’, *supra* note 47, p. 791.

similarity between arrangements of works and the lack of possible variations, especially if we compare arrangement of factual works in all fields of knowledge. The arrangement may be the same in a factual work in medicine and in mathematics, but both works will be original, and in the same field the protection of some arrangements will give monopoly rights to the first compiler using that method or arrangement.

Invoking the idea that creativity and originality can exist in the 'expression' in factual works is no longer valid with the technological advancements that have led to software that can paraphrase texts and rearrange information works. Judge Ward rejected this possibility: "extensive copying or paraphrasing of the language of the syllabi would not, we think, be a fair use."<sup>53</sup>

Evidence of this is that we find in cases where the selection and arrangement is missed or non-existent the court still looks to whether the intellectual creation is there or not. For instance, in *Infopaq v. Danske*<sup>54</sup>, when the eleven words extracted from the newspapers are separated from the selection and arrangement they do not show original selection or arrangement.<sup>55</sup> Nevertheless, the Court decided that what is important is *whether they convey the ideas* of the author and work as a means of communicating his thoughts or not. If yes, they can be copyrighted.<sup>56</sup> Accordingly, in compilations of works and factual works, requiring originality in the selection and arrangement *per se* has nothing to do with the conveyance of thoughts, as thoughts are missed in the underlying material, which are facts, and their arrangement. Even in compilations of works, the underlying works are already the works of precedent authors that are collected and arranged merely for the mere collection and not to convey any thoughts. Both should thus be denied authorship and the originality requirement, because its subject matter (thoughts) is non-existent.<sup>57</sup>

"The notion of an arrangement as protectable expression does little violence to basic principles. It is sufficiently narrow to avoid the statutory and constitutional obstacles to

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<sup>53</sup> *West Pub. Co. V. Edward Thompson Co.*, 176 F. 833, *supra* note 25, at 838.

<sup>54</sup> *Infopaq International a/S V. Danske Dagblades Forening*, 2009, E.C.D.R. 16, C-5/08, Court of Justice of the European Communities (Fourth Chamber).

<sup>55</sup> *Ibid.* at 272.

<sup>56</sup> This appears in the Court of Justice confirmation that "the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in art. 2(a) of that Directive." See, *ibid.* at 272.

<sup>57</sup> As was discussed earlier in chapter six.

protecting individual facts or ideas and satisfies the requirement of originality.”<sup>58</sup> [Underlining added].

In the US also, some courts have used ‘selection and arrangement’, not for authorship purposes but to protect the collection *per se*, e. g., in the case *Financial Information v. Moody*<sup>59</sup> FII argued that what it presents is a kind of “simplicity and conciseness of the cards, describing them as appearing in ‘outline form’ without any ‘superfluous matter’.”<sup>60</sup> Besides, the Court’s description of Moody’s work was that it “includes not only the bi-weekly news reports, but also the annual Municipal and Government Manual, which is a comprehensive work containing a great deal of financial information about municipalities. The Moody’s publication serves a far wider audience than the Daily Bond Cards, including libraries and government agencies, as well as financial institutions.”<sup>61</sup> [Underlining added]. Both works are just collections of facts that cannot be considered as authorship works, due to the lack of an authorial creation or contribution to knowledge and the inexistence of any thought or idea that the author wants to convey through this work that the contents of the work express or reflect.

In addition, it is argued that the ‘skill, labour and judgment’ criterion in the UK and the US<sup>62</sup> is used only to justify the conferral of protection to databases in case there was no specific selection or arrangement identified. ‘Skill, labour and judgment’ is an easy criterion with which every work can comply, e. g., in *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* case, the Court affirmed: “In the present case, if it is permissible to take into account all the skill, judgment and labour expended in producing the respondents’ coupon, there can be no doubt that it is “original.”<sup>63</sup>

Selection and arrangement in works based on facts cannot be original or subjective for many reasons, as explained in the subsequent sections:

#### **7.4.1 First, The Nature of Works Based on Facts is Different from Other Works:**

The nature of databases is different from other literary and artistic works, as the content of the database or its body is dispersed pieces of information, and arranging them is a superficial or supplementary procedure to facilitate the use of these contents. Lack of arrangement will not substantially affect either the significance of the work or its

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<sup>58</sup> Robert C Denicola, ‘Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works’, *supra* note 24. p. 527.

<sup>59</sup> *Financial Information, Inc. V. Moody’s Investors Service, Inc.*, 1986, 808 F.2d 204, United States Court of Appeals, Second Circuit.

<sup>60</sup> *Ibid.* at 206

<sup>61</sup> *Ibid.*

<sup>62</sup> See chapter three at 3.6, especially the discussion around the use of this criterion in the US case *Bridgeman Art Library, Ltd. V. Corel Corp.*, 1999, 25 F. Supp. 2d 421, United States District Court, S.D. New York.

<sup>63</sup> *Ladbroke (Football) Ltd. V. William Hill (Football) Ltd.*, 1964, 1 W.L.R. 273, House of Lords p. 278.

nature as beneficial or functional factual work. This is different from other literary or artistic works, as the selection and arrangement is the body of the work, what gives the abstract words or lines that are used a meaning is the selection and arrangement itself, and changing this selection or arrangement changes the whole meaning of the work and the thoughts included. On the other hand, changing the selection and arrangement of data will not change the database, as what the audience are searching for is the contents themselves, regardless of the specific selection and arrangement chosen.

‘Selection and arrangement’ in factual works is not the thing through which the author – or compiler in this case - will benefit knowledge and science with, this thesis does not believe that this criterion is really designed to measure whether compilations will “promote the Progress of Science and useful Arts.”<sup>64</sup> Nor can it decide whether works will help in “the encouragement of learning”.<sup>65</sup>

From another angle, although selection and arrangement is a constituent feature in creating all literary, musical and artistic works, as all works consist of factual parts and elements of public domain that are arranged in different ways or presented with creative additions from the author, since “there is no new thing under the sun”,<sup>66</sup> and that “all writing is, in some sense, rewriting”.<sup>67</sup> ‘Selection and arrangement’ cannot be applied in regard to compilation works.

This thesis’s opinion depends on the belief that selection and arrangement can work in a specific way regarding all authorship works. However, in compilation works it works in a different way. All authorship works comprise of elements from the public domain (raw materials), and the selection and arrangement of these elements can produce a final product that, in sum, is different from previous works, although in its details may have the same elements as a previous work. For instance, a novel consists of letters and words that are in the public domain, and plots or events that are, probably, also in the public domain, but the selection of special words and events and the arranging of them in a special or personal way can convey thoughts or sensations from the author’s mind or intellect to the minds of readers that is different from previous works. In paintings, all the elements used are in the public domain, whether natural or industrialised objects,

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<sup>64</sup> According to article 1 §. 8 (8) of ‘The Constitution of the United States of America’, *No. 110-50* (United States, 1787)..

<sup>65</sup> According to the title of the ‘Statute of Anne’, *8 Anne, c. 19* (England, 1710)..

<sup>66</sup> Originally from the Bible, Ecclesiastes 1:9, “The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun.” and is quoted in many cases to refer to that all works having originated from previous works or common knowledge, see for instance, *Designers Guild Ltd. v. Russell Williams*, 2000, 1 W.L.R. 2416, House of Lords at 2418.

<sup>67</sup> Jeannie Suk, ‘Originality’, *Harvard Law Review*, 115 HVLR (2002). Note 7, Suk even confirms that “[a]uthors of the myriad rewritings of Shakespeare probably learned from Shakespeare himself, whose plays often rewrote prior texts.” *Ibid.* p. 1990

and lines and bends that cannot be copyrighted, but the selection and arrangement of them in a specific and personal way can each time reflect thoughts and sensations in the minds of viewers that were not found in previous works, and this is also the case in musical and dramatic works.

On the other hand, the selection and arrangement of facts and information in compilation works does not aim to reflect any thoughts or sensations that address the minds of readers or viewers. Facts are collected and compiled in that form or another for the mere purpose of collection and compilation. This does not exist in literary or artistic works where the work is not considered a work unless it conveys thoughts and sensations, the public domain elements are not collected merely for the collection and to present that collection to readers. A book that consists of a random selection and arrangement of words that do not aim to convey any meaning to the reader is actually not a book. A child's drawings containing lines and circles that are randomly done does not convey any personal thoughts or sensations. However, such random display can be protected by trademarks if taken as a trademark, but they cannot be a copyright work, and this is so also in other works.

This view was apparent especially regarding the criticism of the *Feist* Case, as although personal expressions – if there are any - are limited in compilation works, O'Connor's belief in the principle that “[o]riginality remains the *sine qua non* of copyright”<sup>68</sup> and that it is a personal feature pushed her to stipulate originality in the little expression added by the compiler, which is the selection and arrangement of the collected data in such works as the only common personal intervention in them. This opinion is supported by O'Connor's statement that if the author did not add any expression, then “[t]he only conceivable expression is the manner in which the compiler has selected and arranged the facts”.<sup>69</sup>

This approach in protecting works through the shape or form they apply, ignoring the labour and investment expended in their creation, “would severely diminish incentive”<sup>70</sup> to create, and what will happen is one of two probabilities:

Firstly, courts could ignore the limitations of copyright law and protect the information, or facts themselves, as corroborated in the following quote by Denicola: “[w]hen appropriated data are used to construct a work that is virtually identical to the original,

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<sup>68</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 7, at 348.

<sup>69</sup> *Ibid.* at 349.

<sup>70</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24, p. 528.

courts can be expected to find infringement without regard for the theoretical limitations of doctrine.”<sup>71</sup> Copyright principles have then been sacrificed.

Also, this is apparent in in the List Pub. Co. v. Keller<sup>72</sup> case, when the Court prohibited defendants from using the plaintiff’s work, also, in College Entrance Book Co. v. Amsco Book Co.,<sup>73</sup> when the defendant was prohibited from using the choice of words and translations in the plaintiff’s vocabulary lists. Likewise, in Edward Thompson Co. v. American Law Book Co.,<sup>74</sup> although the Court decided that while the defendant could use the plaintiff’s work as a guide, he could not remove the citation from a book of quotations and put the texts or references from the original works. Even the decision in Leon v. Pacific<sup>75</sup> was described as “a case whose result can rest only upon a theory that extends copyright protection to the particular collection of data gathered by the compiler.”<sup>76</sup>

Laddie *et al.* have even argued that databases created by collecting and compiling raw materials “from numerous and diverse sources (as in the case of a street directory), the product would be entitled to copyright as an original compilation on the same principles as any other; and here the owner would get a copyright in the underlying text.”<sup>77</sup> This approach was properly settled in the EU Database Directive, as although it explicitly mentioned that copyright only protects the arrangement of data and not the data itself, it allowed for the protection of the data themselves under the *sui generis* system, in order to protect the investment made to collect these data.<sup>78</sup>

Secondly, whether the court respects copyright law and allows for the appropriation of the facts and information gathered, the selection and arrangement criterion can then be proven easily to be inadequate protection for databases on the ground that: “[w]ith its

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<sup>71</sup> *Ibid.* p. 528.

<sup>72</sup> List Pub. Co. v. Keller, 30 F. 772, *supra* note 31.

<sup>73</sup> College Entrance Book Co. v. Amsco Book Co., 1941, 119 F.2d 874, 2nd Cir. at 875.

<sup>74</sup> Edward Thompson Co. v. American Law Book Co., 1903, 122 F. 922 2d Cir. .

<sup>75</sup> Leon v. Pacific Tel. & Tel. Co., 1937, 91 F.2d 484, Court of Appeals, Ninth Circuit.

<sup>76</sup> The National Commission, 'National Commission Report on New Technological Uses of Copyrighted Works,' "CONTU Report" *Final Report* (1978).

<sup>77</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 42, at 32.12.

<sup>78</sup> As Recital 15 provided: “Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author’s own intellectual creation; whereas such protection should cover the structure of the database,” [Underlining added]. Recital 38 of the EC Directive stated that “Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorization, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database,” [Underlining added], see, 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 10.

emphasis on the effort of ordering rather than gathering, it fails to furnish an acceptable approach when the often minimal effort of arranging has not been appropriated.”<sup>79</sup>

The question arises: what if the next compiler uses the same information, but puts it in a different arrangement? In fact, according to copyright theoretical principles he will get copyright protection on his work without the need to prove any effort or money expenditure. This shows the injustice that this criterion will cause, especially if we take into consideration the ease of using technology to arrange pieces of information and even to apply specific criteria for selection to already compiled facts in order to make a different work, without any substantial effort or money. Denicola supports this thesis's opinion, as he finds that selection and arrangement: “[a]t its extreme it would permit a defendant to choose at random bit after bit of data from an alphabetical directory and then simply rearrange the resulting miscellany into the desired scheme... If the data are reordered without resort to the prior work, the protected arrangement would not have been copied”.<sup>80</sup> that ‘extreme’ application here is deemed an application of copyright orthodox principles of originality and idea (or fact)/ expression dichotomy which was confirmed in recital 38 of the EC Database Directive.<sup>81</sup>

This is confirmed in *Simms v. Stanton*:<sup>82</sup> “[t]here is no recognized principle which will prevent a subsequent compiler from copying common materials from an existing compilation, and arranging and combining them in a new form . . . copyright protects only his [compiler's] own arrangement of the materials which he has selected.”<sup>83</sup> This is also confirmed in *Feist*: “a compilation's copyright protects only against unauthorized uses of the work as a whole, however, it does not extend to individual facts.”<sup>84</sup> Nimmer commented on the tendency of courts to protect facts themselves, as their attitude is against the principles of copyright.<sup>85</sup> That is why Denicola confirmed that this conflict is “not inevitable”.<sup>86</sup>

We can conclude that selection and arrangement, which has personal attributes, is not suitable for protecting investments and efforts in collection of facts, which are in need

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<sup>79</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24, p. 528.

<sup>80</sup> *Ibid.* p. 528.

<sup>81</sup> See note 79 above.

<sup>82</sup> *Simms v. Stanton*, 1896, 75 F. 6, 13, C.C.N.D. California.

<sup>83</sup> *Ibid.* quoting, Eaton Sylvester Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States: Embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions* (Little, Brown, 1879).

<sup>84</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 7, at 350.

<sup>85</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (M. Bender, 1990), §. 3. 04.

<sup>86</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24. p. 527, note 64.

for protection. “[T]o the extent that the worth of the work lies in the information, rather than in the form imposed on the facts, modern copyright's emphasis on personality-manifesting characteristics fails to secure the commercial value of these kinds of endeavors, even though the demand for productions such as directories and data bases is ever increasing.”<sup>87</sup> Besides, that constant search for personal features in collections of facts will not succeed.

#### **7.4.2 Second: Selection and Arrangement of Facts Cannot Be Personal:**

In UK law and the EC Database Directive 96/9, databases can be original if “the selection or the arrangement of the contents of the database is the author's own intellectual creation.”<sup>88</sup> It has been argued that being an intellectual creation presumes that some personal features should be available in the selection and arrangement, e. g., Garnett and Davies affirmed: “[h]ow much creativity is required is not made clear in the directive, and will no doubt vary from case to case, but the requirement imposes a significant qualitative factor on the test, requiring some subjective contribution by the author.”<sup>89</sup> [Underlining added].

Garnett and Davies add that the criterion of the sweat of the brow isn't enough to subsist originality, and confirmed that “[t]he Judge according to recital 16 will not exercise a qualitative test to determine the existence of originality or not, but the author must have exercised Judgement, taste, or discretion in selecting the contents, thus e. g., all poems written by someone between 1900-1910 doesn't acquire originality, although a selection by someone of their 1000 favourite poems would be original.”<sup>90</sup> So, here, Garnett supports the qualitative test.

However, even the latter example of selection cannot justify considering the collection of facts as a work of authorship, as this does not reflect the elements of authorship stated above.<sup>91</sup> Having said this, we find Garnett and Davies even going lower, and arguing that: “although a qualitative test is not included, the quantitative test is more dependable in determining the originality and then the protection, therefore, the quantity of 1000 poems would satisfy the quantitative test and get the originality.”<sup>92</sup> So, Garnett and Davies are trying to articulate a vague provision by another inconsistent

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<sup>87</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 6, p. 1869

<sup>88</sup> Recital 15 of 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 10, the same meaning is repeated in Art. 3(1) of the same directive, and s. 3.A (2).

<sup>89</sup> K.M. Garnett and G. Davies, *Copinger and Skone James on Copyright* (16th edn., 1: Sweet & Maxwell, 2009). at 3-148.

<sup>90</sup> *Ibid.* 3-148.

<sup>91</sup> See chapter 6 at 6.7

<sup>92</sup> K.M. Garnett and G. Davies, *Copinger and Skone James on Copyright*, *supra* note 89.

point of view. The truth is that the way to assess originality is unclear when it is related to collections of facts or compilations of pre-existent works.

The thesis completely refutes this criterion, namely the quantity of the data included, as the number or the quantity of the data that exists in the database will thus determine if it has originality or not. For instance, huge databases should be considered original on the basis of the number of pages or amount of data included. Consequently, we can find a common custom: if somebody wants to guarantee copyright protection to his database, he should make it above a certain number of pages in length, which is plainly not sensible.

Databases are merely based on abstract facts and are limited by the nature of the facts that should be included and the desire of the audience. The role of the database's maker is so limited, and there is no place to show his personality, even if the selection and arrangement is different it will be due to the nature of facts, to distinguish his database from similar ones, or just for to fulfil the copyright requirement. "Works of information, though commercially valuable, generally are deemed works of 'low authorship' containing little personal expression. ' Their value lies in the fact that they are accurate and useful, rather than fanciful or creative".<sup>93</sup> Tarolli highlights this practice's adverse effects on copyright law: "Observing that the value of compilation resides in its "collection of information, not its arrangement. If [its) protection is limited solely to the form of expression, the economic incentives underlying the copyright laws are largely swept away. . [Given the nature of] electronic compilations. . an emphasis upon arrangement and form . . becomes even more meaningless than in the past."<sup>94</sup>

Accordingly, the claim that selection and arrangement should be made by subjective decisions to bear the personality imprint is not a proper statement, as personality initially does not appear in the random selection of common materials, but personality appears in the selection that bears thoughts and sensations. Doing any random selection and arrangement that then is claimed to be subjective and considering the resulted work original or a work of intellect is not a proper argument. Any person can do unlimited different arrangements of given facts, say for instance the database about the decisions of courts of appeal, anybody can arrange them according to the subject, the plaintiffs, the place of the court, decisions taken, etc. This although may reflect mental effort but it does not aim at conveying personal thought of the person created the database to the audience that can never –or rarely- be repeated in a similar

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<sup>93</sup> Stephen P. Tarolli, 'Comment, the Future of Information Commerce under Contemporary Contract and Copyright Principles', *American University Law Review*, 1639 (1997)., p. 1650.

<sup>94</sup> *Ibid.* p. 1650, as he cited, *National Business Lists, Inc. V. Dun & Bradstreet, Inc.*, 1982, 552 F. Supp. 89, N.D. 11., Court of Appeal.

database. Any person can do the same arrangement exactly, and this is the core of personal and mental authorship that this thesis addressed and attempts to prove its inexistence in compilations of facts regardless of the selection and arrangement included. That is why we advocate Hicks statement “[c]opyright's primary purpose is in fostering the creation of new works, not superficial rearrangements of existing compilations.”<sup>95</sup>

### **7.4.3 Overstatement of Authorship in Factual Works under Copyright Law:**

Courts, when conferring protection to collections of information and facts, recognise that what needs protection is the collection itself, not the arrangement, but there is a lack of a theoretical basis to do so, as copyright law principles cannot adapt due to their nature. “When courts do in fact protect a compilation's commercial value, they express disconcertion at the incongruence between the result and standard copyright rationales.”<sup>96</sup> Such a situation has been expressed, for instance, by Judge Moran in *National Business lists v. Dun & Bradstreet*,<sup>97</sup> who confirmed: “[c]ompilations ... have value because the compiler has collected data which otherwise would not be available. The compiler's contribution to knowledge normally is the collection of the information, not its arrangement. If his protection is limited solely to the form of expression, the economic incentives underlying the copyright laws are largely swept away. Recognizing this, the courts have long afforded protection under the copyright laws against appropriation of the fruits of the compiler's industry.”<sup>98</sup> [Underlining added]. So, although ‘form of expression’ is the subject matter of copyright protection judges tend to protect the form and the underlying facts against copyright philosophy.

This interpolation of information works under the umbrella of copyright law and its current principles and philosophies, without adopting a different theoretical basis or a justification to suit these work, is uncomfortable, and will help the conflict between courts’ decisions to continue, not just regarding the information works, but regarding all works, due to the distortion to principles that it causes. Latman confirms this view also, “[o]wing, however, to the current conceptual confusion over the proper theoretical basis for protecting conventional compilations, and the occasional (but unfortunate) mixing of the separate issues of protectability and infringement, it is likely that future disputes

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<sup>95</sup> Jack B Hicks, 'Copyright and Computer Databases: Is Traditional Compilation Law Adequate', *Texas Law Review*, 65 (1986). p. 1010

<sup>96</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 6, p. 1869.

<sup>97</sup> *National Business Lists, Inc. V. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, N.D. 11., *supra* note 94.

<sup>98</sup> *Ibid.* at 92.

over electronic data bases will be subject to the same uncertainties as now face their conventional counterparts.”<sup>99</sup>

The major objection to the conferring of protection to factual works emanates from the simple idea that: “it is anomalous that bare facts not subject to copyright are protected when collected or compiled, ... under the same statute used to protect completely original works.”<sup>100</sup> This latter contradiction is what the thesis challenges, through a two-part approach, firstly, proving that collections of facts and their selection and arrangement are devoid of any authorship; secondly, proposing a separate system that will achieve stability through protecting them by a different approach than that used to protect other literary and artistic works.

This overstatement of the theoretical basis in protecting information works and the resulting paradox will be deepened further due to the technological facilities that are characterised not just with the speed of transferring files, but also of the speed in organizing them. So the arrangement and organization of facts is actually a non-sense requirement, as long as the basic functions of computers can do unlimited arrangements of the same work in no time. The Court, in *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*,<sup>101</sup> confirmed this view: “[t]he computer programs are, after all, automated electronic compilations. The information is stored without arrangement and form, capable of being called forth as sheets of stickers at the touch of a button. In those circumstances an emphasis upon arrangement and form in compilation protection becomes even more meaningless than in the past.”<sup>102</sup> [Underlining added].

This research believes that selection and arrangement cannot be original or creative unless it is different or new. So, this requirement is a requirement of novelty, and not originality, as there is nothing creative in stipulating only differentiation. As Ginsburg confirmed – and cited above also:<sup>103</sup> “Personality-based characterizations of many low authorship informational works seem contrived. ... Even if one could discern subjective "arrangement" in works such as maps, address directories, and compilations of judicial decisions, that arrangement may bear little, if any, connection to the work's central importance as a source of information.”<sup>104</sup> For instance, in the famous case *Ladbroke*

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<sup>99</sup> Alan Latman, William F Patry, and Herbert Allen Howell, *Latman's the Copyright Law* (Bureau of National Affairs, 1986). p. 62.

<sup>100</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', *supra* note 26, p. 348.

<sup>101</sup> *National Business Lists, Inc. V. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, N.D. 11., *supra* note 94.

<sup>102</sup> *Ibid.* at 97

<sup>103</sup> See this Chapter at 7.1.

<sup>104</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 6, p. 1869

*Ltd. v. William Hill Ltd.*,<sup>105</sup> the dispute was about ‘fixed odds of football betting coupons arranged in a certain general form’, this work merely includes facts and mathematical suggestions that are made for betting purposes.<sup>106</sup> There are no thoughts or sensations to be sent to the audience. It is just a presentation of facts -which are the matches that will be held in the next week and the expected results.

The selection and arrangement included were not meant to constitute an intellectual work, as it was not meant to use the included elements to make them, and the work as a whole, expressing something different than if they existed in a different arrangement. From another angle, if one of these lists were taken away –and this is current from time to time- this does not affect the usefulness of the work. That is different from novels or musical notes or paintings. On the other hand, all the efforts expended in the selection is what preceded the stage of making the work itself, and, in the opinion of the thesis, that cannot be copyrighted. Thus, the work disputed in *Ladbroke Ltd. v. William Hill Ltd.* should be considered a non-authorship work and should not be protected according to authorship principles and originality, although it can be protected according to a *sui generis* system.

Another example of non-authorship works is the trades’ directory that consists of advertisements classified under different headings, as although, in the case of *Lamb v. Evans*,<sup>107</sup> Lord Judge Bowen stated: “They are the result of literary labour, both as regards the composition of the headings themselves and their collocation or concatenation in the book.” This thesis finds that headings cannot be relied on in order to give protection to compilation of advertisements, as confirmed in the cases of *Dicks v. Yates*,<sup>108</sup> *Francis Day & Hunter Ltd. v. Twentieth Century Fox Corporation Ltd.*<sup>109</sup> and *West Publishing v. Mead Case*.<sup>110</sup> As, in the latter case although the Court started its analysis by confirming that: “The Copyright Act provides copyright protection for ‘original works of authorship fixed in any tangible medium of expression.’”<sup>111</sup> It considered that “considerable labor, talent, and judgment” was invested by West in making the arrangement of the courts’ decisions; although the arrangement was not more than ‘an arrangement in numerical order’,<sup>112</sup> as it explained. Haungs in commenting on this case confirmed that “one senses that the overriding concern of the

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<sup>105</sup> *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, 1 W.L.R. 273, *supra* note 63.

<sup>106</sup> Mathematical concepts are excluded from copyright protection under art. 9 of Trips agreement.

<sup>107</sup> *Lamb v. Evans*, 1892, L. 1855., 1 Ch. 218, Court of Appeal, England at 227

<sup>108</sup> *Dicks v. Yates*, 1881, 18 Ch. D. 76, Court of Appeal, England.

<sup>109</sup> *Francis Day and Hunter, Limited v. Twentieth Century Fox Corporation, Limited.*, 1939, A.C. 112, Privy Council.

<sup>110</sup> *West Publishing Company v. Mead Data Central, Inc.*, 1986, 799 F.2d 1219, United States Court of Appeals, Eighth Circuit.

<sup>111</sup> *Ibid.* at 1223.

<sup>112</sup> *Ibid.*

Eight Circuit was not honestly assessing whether West's compilation was truly original but rather protecting West's labor."<sup>113</sup>

This argument does not just show the lack of rationality in requiring this condition, but also the inherent problems that will revolt by not sticking to the philosophies of laws, or, specifically, the philosophies upon which the conferring of copyright protection is based, namely personal authorship and rewarding creativity, and not the mere labour or expenses used to create works that lead to disregarding other philosophies of copyright law.

In brief, the originality criteria was required just to ensure that works protected are those with authorship. This is based on a belief that copyright law intends to protect the author's personality, or his mind operation, which is embodied in the work. Accordingly, information works lack authorship and its protection through copyright law will harm its philosophies and the whole system. "the industrious collection doctrine allows courts to lower the originality threshold below the level intended under the Constitution, the Copyright Act, and the case law, thus limiting public use of information and overlooking the principle that the law grants the copyright monopoly only to original works that reflect the author's personality."<sup>114</sup>

#### **7.4.4 Third: Selection and Arrangement of Facts does not Require any Mental Effort or 'Reflection':**

Any arrangement made of the collected facts, whether made in a logical or a random way, does not reflect any creative input or inspiration or desire to convey specific thoughts or sensations through this specific selection and arrangement. This feature distinguishes intellectual works, whether literary, artistic or musical from factual works: "[t]he arrangements for which protection is sought tend to be alphabetical or numerical - hardly the sorts of works associated with artistic inspiration. In addition, the quantum of effort involved in executing the arrangement is also frequently minimal."<sup>115</sup>

According to Locke's opinion, in differentiating between sensation and reflection, we find that selection and arrangement that is not a reflection of previous information has been sensed and passed through an 'operation of the mind', and has then appeared in that specific selection or arrangement is not a product of mind. Selection and

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<sup>113</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', *supra* note 26, footnote 43

<sup>114</sup> Elizabeth M Saunders, 'Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection', *Notre Dame L. Review*, 62 (1986)., p. 764.

<sup>115</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24, p. 527-528.

arrangement of factual works are just a mechanical procedure that is proved not to be a work of intellect, according to Hegelian and Lockean philosophies.

Selection and arrangement in compilation works is something that can be done without any creativity, or mental effort,<sup>116</sup> for instance, through computer software. As Denicola confirmed: “[o]nce the data have been accumulated, the arrangement is often dictated exclusively by function and accomplished with the push of a computer key or the shuffling of index cards.”<sup>117</sup> So, this low requirement has somehow kept the application of ‘the sweat of the brow’ as usual, although the terminology used has differed.

#### **7.4.5 Fourth: Selection and Arrangement Is Not Suitable to The Main Function of Factual Works:**

Selection and arrangement can be a barrier to the making of comprehensive and extensive compilations. As, in some instances, the characteristic of comprehensiveness of the database may be favourable, but ‘selection and arrangement’ imposes something beyond the main function of these compilations. This research argues that customers are not concerned with such differentiation, all that matters to them is the inclusivity that such compilations provide of the data concerned in a specific field, and the stipulation of the differentiation of the selection and arrangement may go against the purpose for which this compilation is made.

For instance, it was decided in the English case Whitaker & Sons Ltd v. Publishers Circular<sup>118</sup> that it does not matter whether the collection of information was done in a comprehensive or selective way, as long as there is labour to ensure that the collection or database is complete, and that this collection is made by hand.<sup>119</sup> This adds confusion to the current rule, which has been confirmed in the condition of ‘selection and arrangement’ that is stipulated in the EU Directive and the UK CDPA, confirming that copyright just protects the arrangement.<sup>120</sup>

Likewise, in the case of Eckes v. Card Prices,<sup>121</sup> the US Court of Appeal reversed the decision of the District Court which had refused to confer copyright protection to a compilation of baseball flipping cards. The Court of Appeal relied on the collection *per se* as a justification for protection, not authorship, originality or arrangement, although

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<sup>116</sup> For extensive discussion on the difference between mental and manual efforts in creating works see Chapter 6 at 6.8.

<sup>117</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24, p. 528.

<sup>118</sup> Whitaker & Sons Ltd V. Publishers Circular Ltd, 1946-1949, MacG, Cop. Cas.,

<sup>119</sup> *Ibid.* at 12.

<sup>120</sup> See Recital 38 of 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 10.

<sup>121</sup> W. Eckes V. Card Prices Update, 736 F.2d 859, *supra* note 21.

such dependence on comprehensiveness goes against any arguments on stipulating the creative selection of facts. “The Guide is a comprehensive listing of baseball cards manufactured in the 70-year period from 1909 to 1979. Appellees concede that the Guide is the first extensive listing of its kind.”<sup>122</sup> [Underlining added]. Denicola also argues that aggregation of facts *per se* can be a justification of authorship: “the courts have had difficulty finding in this latter aspect of the copyright owner's contribution an act of authorship to which copyright may attach. One promising approach is to find authorship in the act of aggregating isolated pieces of information.”<sup>123</sup>

Note here also the kind of skills that the Court relied upon to consider the collector and arranger as the author of an authorship work, as the Court stated that: “Beckett testified that he worked on the Guide for 40 hours a week for eight straight months. Relying on his extensive knowledge of trading in baseball cards and his background in statistics, Beckett compiled the prices for all the cards and placed them into either the premium or common category.”<sup>124</sup> [Underlining added] So, the court relied mainly on the labour and time expended.

The reliance on authorship and originality here will make the issue confusing and difficult to decide, as the variations in the defendant's work cannot help to assess whether they make the work original or not, as long as the elements of authorial contribution are missed. As the Court confirmed that the issue is “extremely difficult”.<sup>125</sup>

#### **7.4.6 Fifth: Selection and Arrangement of Facts Lessen the Criteria for All Works of Authorship and Increase Distortion**

The main issue that exaggerates the confusion in US law is that it does not specify a specific provision for databases, as the UK or EU law do. The US courts have to construe the general provisions to protect databases and factual works. That is why the interpretation or requirement of originality and authorship has been reduced so as to fulfil this job.

Nimmer, for instance, has lowered the originality interpretation –in general and regarding all works- to include any kind of skill or labour, whether authorial or mechanical: “a very slight degree of such labor[,] ... almost any ingenuity in selection,

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<sup>122</sup> *Ibid.* at 860.

<sup>123</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24, p. 530.

<sup>124</sup> *W. Eckes V. Card Prices Update*, 736 F.2d 859, *supra* note 21, at 860.

<sup>125</sup> *Ibid.* at 860

combination or expression, no matter how crude, humble or obvious, will be sufficient”<sup>126</sup> to make the work copyrightable.

In addition, the use of selection and arrangement to protect compilations of facts was very thin and did not provide any real protection to them unless wholesale copying happened, “most [compilation works] will pass muster and be protectable, but that does not mean much because the protection will be very thin and infringed only by wholesale reproduction.”<sup>127</sup>

Accordingly, the alienation of databases and factual works, and any works devoid of authorship, into a different category with separate rules will solve this difficulty, and allow more strong protection to the authorship works.

#### **7.4.7 Sixth: Selection and Arrangement in Factual Works Increases the Chances of Getting Monopolies in Copyright Law**

Sometimes the available arrangements are limited in regard to some specific facts, or in some fields of knowledge, thus, the best arrangement may be reserved for the first compilation work in a specific field, and this goes against the philosophy of copyright law, as ‘the merger of idea and expression’ doctrine should prohibit this monopoly. As the *BellSouth v. Donnelley*<sup>128</sup> court confirmed that the claim of copyright depending on the arrangement of facts fails because according to the merger doctrine expression cannot be protected when there is “only one or so few ways of expressing an idea.”<sup>129</sup>

The explicit treatment of works according to their nature is more beneficial, and this can be done through providing a separate category to protect these works that depend on the time, effort and money expended. Denicola supports this view: “the effort that elicits judicial concern with unjust enrichment and disincentive, lies not in the arranging, but rather in the compiling. It is the effort of collecting that must be rewarded in order to preserve incentive and safeguard the author's investment of time and money, not the act of placing Abbott before Baker.”<sup>130</sup>

What this thesis thus tries to prove is the importance of differentiating between works that require manual labour in their creation and those that require mental labour, whether in terms of the criteria used in deciding copyrightability, or in terms of the

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<sup>126</sup> Melville B Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, *supra* note 85, § 1. 08[C][1].

<sup>127</sup> David E Shipley, 'Thin but Not Anorexic: Copyright Protection for Compilations and Other Fact Works', *Journal of Intellectual Property Law*, 15/1 (2007). p. 100.

<sup>128</sup> *Bellsouth Advertising & Pub. Corp. V. Donnelley Information Pub., Inc.*, 1993, 999 F.2d 1436, United States Court of Appeals, Eleventh Circuit.

<sup>129</sup> *Ibid.* at 1442, and it cited *Kregos V. Associated Press*, 1991, 937 F.2d 700, United States Court of Appeals, Second Circuit. at 705.

<sup>130</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24, p. 528.

extent of the protection they get. This system would help to maintain a healthier way of operating copyright law, both theoretically and practically.<sup>131</sup>

Lastly, we maintain that the application of copyright protection on compilations depending on just expression is useless. If a compilation work has obtained copyright protection, either on the expression created by the author or as a result of the selection and arrangement, the facts themselves, which are the subject matter and valuable content of the compilation, are not protectable.<sup>132</sup> So, anybody can take, use or exploit them. Although the compilation work has thus passed the copyrightability criterion, it will fail at the first infringement test, unless, of course, the whole has been copied literally. This was expressly stated by the *Feist* Court, when it stressed that granting copyright protection to compilation works does not mean that the law gives the author the power to “keep others from using the facts or data he or she has collected.”<sup>133</sup> Although this may constitute a secession from the ‘sweat of the brow’ doctrine, it encourages right holders to resort to other laws and technologies for more efficient protection, such as DRM technology. Such a system has neither profited right holders nor copyright law principles. On the other hand, the proposed categorisation system will afford complete copyright protection to right holders in this regard, as explained above and more detailed in next chapter.

‘Selection and arrangement’ is the ultimate interpretation of originality and can achieve not just relative stability in copyrightability decisions, but the differentiation between works into authorship and non-authorship works and the division of authorship works into high and low grades for the benefit of increasing certainty in judicial decisions. However, compilation works actually need other means of treatment, away from the orthodox concepts of copyright law. Thus, we suggest that if the *Feist* Court had insisted on the same principle, but regarding other literary, artistic, or dramatic works, like books, music, paintings, etc., it would have got more success in its application. Accordingly, the Supreme Court’s attitude in *Feist v. Rural*, stipulating ‘selection and arrangement’ in intellectual works, is encouraged by this thesis and is believed to be the correct interpretation of originality to be applied to all authorship works, but the Court attitude has been taken regarding the wrong works, namely factual works, as

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<sup>131</sup> Which was elaborated in Chapter 7 at 7.4.3.

<sup>132</sup> As stated in *Feist*, “No matter how original the format, however, the facts themselves do not become original through association.” See, *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 7, at 349; moreover, the Court stated: “the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.” See, *ibid.* at 351. The Court’s statement also confirmed that copyright is extended only “to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work”, see, *ibid.* at 359/1295.

<sup>133</sup> *Ibid.*

they are non-authorship works.<sup>134</sup> Though ‘selection and arrangement’ can analyse the constituting elements of any work, in factual work it does not work in the same way as in all other works, due to in factual works it is not related to the creation of the work but to its appearance.

Compilations are of a different nature and consequently need special treatment, as, as stated by the Supreme Court of *Feist* case, they do not necessarily contain enough expression to be examined in terms of their originality. As Judge O. Connor confirmed: “Many compilations consist of nothing but raw data-i.e., wholly factual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place.”<sup>135</sup> Subsequently, the Supreme Court resorted to the ‘selection and arrangement’, as the only addition the creator may do while creating such compilations. However, the thesis confirms that compilation works even after inclusion of selection or arrangement are still non-authorship and non-intellectual works, although they are in the shape of intellectual works, they contain no authorship to be examined as original or not, but it rather can be judged whether a specific selection is novel or not.

The pretexts used for conferring copyright protection to whatever the kind of the work should be banned, and explicit differentiation is needed between works protected for creative skills and others protected for their usefulness or legal necessity. The inexistence of such differentiation or categorisation between works will force courts to adopt some pretexts to give protection to non-creative works, which already do not have the same elements as creative works so that they cannot be measured by the same criteria. A separate category for non-creative works, with a *sui generis* protection, will spare copyright law a lot of confusion in both theory and application.

## **7.5 Imitation Lacks Authorship**

Imitation or replication of pre-existing works, with or without changing their physical form, or its size, lacks authorship. This category includes those works created using expenditure of capital, effort, time and skill, but do not include any kind of analysis, investigation, desire to convey feelings or thoughts, and do not differentiate from the original work in the selection and arrangement of the elements of the work, and even the expression form. All that is changed is the physical form. As in transformation from one material to another of the same work, such as changing between photographs, paintings, portraits and sculptures of the same work.

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<sup>134</sup> As explained in the last sections.

<sup>135</sup> *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 7, at 345.

In *Alva Studios, Inc. v. Winninger*<sup>136</sup> it was decided that the “[plaintiff’s] copyrighted work embodies and resulted from its skill and originality in producing an accurate scale reproduction of the original. In a work of sculpture, this reduction requires far more than an abridgement of a written classic; great skill and originality is called for when one seeks to produce a scale reduction of a great work with exactitude.”<sup>137</sup> Laddie *et al.* argue that ‘material alteration’ can be proof of ‘originating something different in kind’, and that “a text in a computer memory is not the same thing as a text written on sheets of paper.” They even confirm that this work can be copyrighted.<sup>138</sup> Laddie *et al.* have supported their argument by citing Lord Atkinson’s confirmation that imparting the work with some quality or character that was not in the raw material can satisfy the skill and labour threshold.<sup>139</sup> They also cited the *Walter v. Lane*<sup>140</sup> decision, wherein the report mirrored the speech of Lord Roseberry, but included a quality or character not in the source.<sup>141</sup> We argue that what Lord Atkinson mentioned does not fall within the same meaning to which *Walter v. Lane* referred, especially if the next phrase by Lord Atkinson is taken into consideration. As he confirmed that: “copying, *per se*, however much skill or labour may be devoted to the process, cannot make an original work. A well-executed tracing is the result of much labour and skill but remains what it is, a tracing.”<sup>142</sup> Even Judge Kaplan in *Bridgeman Art Library, Ltd. v. Corel Corp.*,<sup>143</sup> quoted with approval the Privy Council’s statement in *Interlego A. G. v. Tyco Industries Inc.*, that: “[s]kill, labor or judgment merely in the process of copying cannot confer originality.”<sup>144</sup>

Hegel, in ‘*Philosophy of Right*’, argues that the body does not conform with the mind, and they can be in a coherent relationship that reflects the individual mind in a case: “[i]f it is to be the willing organ and soul endowed instrument of mind, it must first be taken into possession by mind”.<sup>145</sup> This statement inspired the thesis in proposing the convergence between imitation and dictation. Though the work of the scribe is a result of his body’s work, his effort and labour, he does not own that work. This is because it

<sup>136</sup> *Alva Studios, Inc. v. Winninger*, 1959, 177 F.Supp. 265, United States District Court S.D. New York..

<sup>137</sup> *Ibid.* at 267.

<sup>138</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 42, at 32. 11.

<sup>139</sup> He said: “to secure copyright for this product it is necessary that labour, skill and capital should be expended sufficiently to impart the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.” See, *Macmillan & Co V. K & J Cooper*, 1924, 40 TLR 186, Bombay High Court at 188.

<sup>140</sup> *Walter v. Lane*, 1900, A.C. 539, House of Lords, *ibid.*

<sup>141</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 42, at 32. 11

<sup>142</sup> *Interlego A.G. v. Tyco Industries Inc.*, 1989, A.C. 217; R.P.C. 343 Privy Council at 372.

<sup>143</sup> *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421, *supra* note 62 at 198.

<sup>144</sup> *Interlego A.G. v. Tyco Industries Inc.*, A.C. 217; R.P.C. 343 *supra* note 142, at 371.

<sup>145</sup> Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, trans. TM Knox (New York: Oxford University Press, 1952). p. 43.

was not the work of his mind, he just had a skill, though not everybody has, which is that of writing quickly and perhaps also performing language amendments to the dictated text or speech of the kind that rules of language require. So, he should not get any author's rights on that text.

The person who imitates a painting to make a sculpture, although the process contains a lot of skill and labour, he does not use his thoughts but uses his skills, not his mind but his manual skill or craftsmanship, so the work actually does not belong to him but to the original author, and instead of being an author he can easily be considered a 'handicraftsman'. However, if the work was in the public domain he can only get the protection of non-authorship works, as a result of labour and expense invested in producing this work. As, the proposed *sui generis* system can afford protection to those who invest labour or capital in creating works even when there is no authorship expended, as the work is then protected as a commodity or commercial product, something similar to the database *sui generis* protection in the EU Database Directive,<sup>146</sup> but this one is more broadly applied and theoretically founded.<sup>147</sup> To add a further justification, Hegel argues that property over a thing is acquired if the person created or got occupancy over that thing, that is why it is called private property: "[s]ince my will, as the will of a person, and so as a single will, becomes objective to me in property, property acquires the character of private property."<sup>148</sup> The imitator or dictated-to individual does not or cannot practice his will when creating the work, he just copies the will of another person in a perfect way. This meaning was confirmed by Palmer in his interpretation of Hegel's statement "[p]ersonality does not simply require external objects for its development. Its development is its objectification through externalization of its will."<sup>149</sup>

Those who help somebody to make a sculpture according to his instructions cannot be authors, as they just use their manual skills, not their thinking, mind processing, or analysing, because the specific idea and instructions in which it is expressed, selection and arrangement of the elements of the work, were what the author had told them. None of the executors -workers- amended anything; they just executed a craft, like the person who manufactures chairs, tables or shoes, or the person to whom words are dictated. Being an intangible work does not qualify the work as an intellectual or

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<sup>146</sup> 'Directive of the European Parliament and of the Council on the Legal Protection of Databases', *supra* note 10.

<sup>147</sup> See this Chapter at 7.1 and 7.3.

<sup>148</sup> Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, *supra* note 145, p. 42 at 46.

<sup>149</sup> Tom G Palmer, 'Are Patents and Copyrights Morally Justified-the Philosophy of Property Rights and Ideal Objects', *Harv. JL & Pub. Pol'y*, 13 (1990), p. 838.

authorship work, as then it misses this intellect or mental effort element, as will be explained in the following section.

### **Elements of authorship are missed in imitation**

The theoretical basis for the non-protection of imitations is unclear, so the thesis here attempts to apply the philosophies of personal and mental authorship in the last Chapter on the issue of imitation to educe the lack of authorship in these works.

Firstly, imitations are made only by the senses, and the mind's operations are not used in their creation, as, according to Locke's philosophy, the operation of mind (thinking, doubting, believing, reasoning, knowing)<sup>150</sup> appears when the 'furnishing' of the available knowledge happens to produce another set of ideas. 'Furnishing' happens when the soul "comes to reflect on and consider, do furnish the understanding with another set of ideas."<sup>151</sup> So, the ideas that emanate from painting, for instance, will not be different if the same painting were on stone. The work is thus made by 'outer senses' only, so there is no mental authorship in it. Young confirmed that imitators, although they may provide something profitable, it is a duplication: "[i]mitators only give us a fort of duplicates of what we had".<sup>152</sup>

Secondly, the creation of an exact imitation of a work requires a different skill to that used to create original works of authorship. On the one hand, the author of the original work attempts to transfer the inner sensations and thoughts into a sensuous material that can bear his thoughts to the audience. He attempts to choose the most suitable elements in the public domain that can, if put in a specific arrangement, convey his thoughts and sensations. On the other hand, the creator of the imitation has the thoughts already materialised and structured in the work and he uses technical skills to transform the same work from stone to wood, or from painted paper to stone.

From a different perspective, the latter work differs according to the proficiency of the creator, and this proficiency comes through education and training. However, the quality of the work of authorship depends in the first place on the creativity and talent of the author. This was confirmed by Judge Park in *Hadley v. Kemp*: "Contributions by the plaintiffs, however significant and skilful, to the performance of the musical works were not the right kind of contributions to give them shares in the copyrights. ... When each song was presented by the first defendant to the group it was a musical work and the first defendant was the sole author of it. The songs in their recorded form were the

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<sup>150</sup> See, John Locke, *An Essay Concerning Human Understanding* (1700), p. 88.

<sup>151</sup> *Ibid.* p. 88.

<sup>152</sup> Edward Young and Samuel Richardson, *Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison* (Printed for A. Millar, 1759), p. 10.

same musical works which the first defendant had composed, not new and different works.”<sup>153</sup> Accordingly, it is the authorial –or creative- addition that this thesis is looking for and classifies works according to it. This was argued also by Judge Park in other place: “It must have been a contribution to the creation of the musical work. ... [This] is particularly important.”<sup>154</sup>

This argument, namely differentiating between creation and imitation, finds its foundation in Hegel’s answer to the question, “in what way is the necessarily sensuous side of art operative in the artist as his subjective productive activity?”<sup>155</sup> His reply included the elements that support the notion of considering imitation void of authorship, as he argued that: “[t]his sort and manner of production contains in itself, as subjective activity,... it must be a spiritual activity which yet contains at the same time the element of sensuousness and immediacy. Still it is neither, on the one hand, purely mechanical work, a purely unconscious skill in sensuous manipulation or a formal activity according to fixed rules to be learnt by heart, nor, on the other hand, is it a scientific production which passes over from the sensuous to abstract ideas and thoughts or is active entirely in the element of pure thinking. In artistic production the spiritual and the sensuous aspects must be as one.”<sup>156</sup> [Underlining added]. In fact, all of these prohibitions are present in the process of creating imitations of previous works.

This is what was confirmed in the *Interlego* case<sup>157</sup> in the UK and the *Bridgman Art* case in the US, Judge Kaplan in the latter case stated that: “a photograph, which is no more than a copy of the work of another as exact as science and technology permit, lacks originality. ... Surely designing the technology to produce exact reproductions of documents required much engineering talent, but that does not make the reproductions copyrightable.”<sup>158</sup> [Underlining added].

This argument is also corroborated in *L. Batlin & Son, Inc. v. Jeffrey Snyder* when it was decided that the requirement of originality in US law cannot be “satisfied simply by the demonstration of ‘physical skill’ or ‘special training’”,<sup>159</sup> [Underlining added], the court even confirmed that “[a] considerably higher degree of skill is required, true

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<sup>153</sup> *Hadley V. Kemp*, 1999, E.M.L.R. 589, High Court, Chancery Division at 590-591.

<sup>154</sup> *Ibid.* at 643.

<sup>155</sup> Georg Wilhelm Friedrich Hegel, *Aesthetics: Lectures on Fine Art. Translated by T.M. Knox, Vol. 1* (I: Clarendon Press, 1988).

<sup>156</sup> *Ibid.*, p. 39. Though this quotation repeated in another place in this thesis but it serves both places in equal importance.

<sup>157</sup> *Interlego A.G. V. Tyco Industries Inc.*, A.C. 217; R.P.C. 343 *supra* note 142

<sup>158</sup> *Bridgeman Art Library, Ltd. V. Corel Corp.*, 25 F. Supp. 2d 421, *supra* note 62.

<sup>159</sup> *L. Batlin & Son, Inc., V. Jeffrey Snyder and Etna Products Co.*, 1976, 536 F.2d 486, United States Court of Appeals, Second Circuit. at 491.

artistic skill, to make the reproduction copyrightable.”<sup>160</sup> This research advocates the decision in *L. Batlin & Son, Inc. v. Jeffrey Snyder*, when it was argued that the change in physical form cannot prove originality in the work: “to support a copyright there must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium.”<sup>161</sup> [Underlining added].

Thirdly, imitation is not a product of free will, as, according to Hegel, the personality of the author disappears from the work when, as Hegel stated-:“I delegate to others the authority to prescribe for me what kind of acts I shall commit,”<sup>162</sup> and the thesis finds in the keenness of the imitator to follow the same structure and lines of the original work an elimination of his will, as if the original author is there and dictating to him the steps he should follow and he obeys the instructions. This was clear also in the example of the Athenian slave whose work is ‘controlled by’ his master, as then the slave cannot own the work.<sup>163</sup>

This was also confirmed in *Interlego A. G. v Tyco Industries Inc.*,<sup>164</sup> where the Privy Council assessed whether a simple imitation or copy of a drawing is original or not, and the Council ascertained that any specialised craftsman can do such imitation, “Skill, labour or judgment merely in the process of copying could not confer originality. There must in addition be some element of material alteration or embellishment which sufficed to make the totality of the work an original work, having regard to the quality rather than the quantity of the addition”.<sup>165</sup> This was confirmed in *Hadley v. Kemp* case explained in the below section.<sup>166</sup> Laddie *et al.* argue that the core issue here is whether the work replicated is simple or complicated, as if the work that has been replicated is a complicated painting, for instance, then making an exact copy is an original work.<sup>167</sup> Laddie *et al.* argue that the Privy Council –in *Interlego v. Tyco*- stated a general statement that could be true regarding the disputed work then, but “[t]his should be contrasted with, e.g. a painting by Vermeer, where it will be obvious that very few persons, if any, are capable of making an exact replica.”<sup>168</sup> Laddie *et al.* explained that the replicator here should be considered an author.

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<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.* at 491.

<sup>162</sup> Georg Wilhelm Friedrich Hegel, 'The Philosophy of Right (1820), Translated by Sw Dyde, Originally Published in English in 1896', (Prometheus Books, London, 1996)., §. 66.

<sup>163</sup> See the example of the 'Athenian slave' suggested by Hegel and explained in Chapter 6 at 6.4.

<sup>164</sup> *Interlego A.G. V. Tyco Industries Inc.*, A.C. 217; R.P.C. 343 *supra* note 142.

<sup>165</sup> *Ibid.* at 346.

<sup>166</sup> See the next section titled 'Imitation is similar to performance'.

<sup>167</sup> Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, *supra* note 42, at 4.42.

<sup>168</sup> *Ibid.* 42, at 4.42.

Laddie *et al.* find this is a solution to the confrontation that will happen in the case if many individuals set out to copy a painting. Most will do a replication that differs from the original, and then they can obtain copyright because the differentiation will be considered as a reflection of his personality, but if somebody succeeded to make a faithful copy will be deprived protection. “If, however, one of these renders the original with all the skill and precision of a Salvador Dalí, is he to be denied a copyright where a mere dauber is not?”<sup>169</sup> So the solution is that all of them should get copyright protection according to Laddie *et al.* whether depending on the existence of alterations, as then personality is reflected, or if there were no alterations, because the original work was difficult to duplicate. Ong also advocates this opinion.<sup>170</sup>

We do not agree with this argument, as copyright law should not be concerned with the process of replication or copying, but the resulting work. If it has the same structure, or the same authorship elements, the thesis asks what is the difference or contribution that this work adds to previous works, to humanity, or for the development of science or the arts? Copying is always copying, and the skills and efforts expended in creating the work can be appreciated under a different system, but not under the same category of original authorship works.<sup>171</sup> That is why the existence of a parallel system for non-authorship works is important in order to deal with such cases. That this is why the *sui generis* system for databases is enacted by the EU Directive for this purpose when the databases do not satisfy the said originality criteria of ‘selection and arrangement’.<sup>172</sup>

### **Imitation is similar to performance:**

The process of imitation is similar to the process of performance. The performer presents the original work in front of the audience in a different way, and the imitator also represents the work in a different quality every time, however, this cannot qualify him or her as an author.

For instance, in the UK Case *Fylde Microsystems v. Key Radio Systems*<sup>173</sup> although Mr Justice Laddie confirmed that the defendant had participated in making the software by adding several features and requirements so that the plaintiff could complete his work.

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<sup>169</sup> *Ibid.*

<sup>170</sup> As, he argued: “whether or not acts of “copying” ought to be capable of giving rise to “original” artistic works should depend on the qualitative complexity of the antecedent work from which copying has taken place and the probability or likelihood of successfully making an exact replica of that work.” See, Burton Ong, ‘Originality from Copying: Fitting Recreative Works into the Copyright Universe’, *Intellectual Property Quarterly*, 2 (2010), p. 148.

<sup>171</sup> See this Chapter at 7.7.

<sup>172</sup> In the ‘Directive of the European Parliament and of the Council on the Legal Protection of Databases’, *supra* note 10.

<sup>173</sup> *Fylde Microsystems Ltd. V. Key Radio Systems Ltd.*, 1998, F.S.R. 449, High Court of Justice—Chancery Division

He refused to consider him as an author, because he was not considered to contribute in the authorship process of the software. Mr Justice Laddie confirmed that the defendant had fixed errors, reported faults and bugs; made a functional contribution by setting the specifications of what the software was to do; designed a technique for the radio to detect a transmitter signal;<sup>174</sup> he suggested the reasons for some faults; provided technical information about the characteristics of the hardware into which the software fitted; and set parameters and timings within the software.<sup>175</sup> However, Mr Justice Laddie refused to consider this any contribution to the authorship of the software: “[a]lthough all of Mr Barrett’s contributions took a lot of time and were very valuable, they did not amount to contributions to the authoring of Keyport.”<sup>176</sup> [Underlining added].

In the *Hadley v. Kemp* Case<sup>177</sup> it was stated that: “[w]hen each song was presented by the first defendant to the group it was a musical work and the first defendant was the sole author of it. The songs in their recorded form were the same musical works which the first defendant had composed, not new and different works. Although it was true that the members of the group played and sang the songs in their own ways, these were matters of performance and not of creation of a musical work.”<sup>178</sup> [Underlining added].

This is a matter of performance, not a matter of creation; in this differentiation between performance and creation many groups were long ago separated from the authorship, and the category should have been left open to including the new forms of performance or any acts that are not creation. For instance, singers who perform the same song with the same melody and same lyrics, but in their own way in terms of performance, sensation, and talent. The recitation done by a person who makes the poem more sensual than if it were recited by the original poet, does not make him an author. The same can be said regarding the process followed by a painter of a picture, or a sculptor in making a transparency of a painting or picture, etc. All of this is a matter of performance; learned not gifted skills are used.

The investigation about authorship and its level, whether high or low, should not be applied only in cases where disputes arise between the author and his assistants regarding which contribution has an authorial nature and deserves copyright protection, and which is just performance. This investigation should be used also when similar nature of non-authorial acts or even less technical ones are performed by individuals or

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<sup>174</sup> In substance of only specifying what the software was to do, not how it did it.

<sup>175</sup> *Fylde Microsystems Ltd. V. Key Radio Systems Ltd.*, F.S.R. 449, *supra* note 173, at 459 - 460

<sup>176</sup> *Ibid.* at 460

<sup>177</sup> *Hadley V. Kemp*, E.M.L.R. 589, *supra* note 153, at 591

<sup>178</sup> *Ibid.* at 591

legal entities, such as imitation of works, and the law confers them copyright protection and even the same level of protection given to authorial works. This practice lacks theoretical basis, and maintain instability through such unjustified differentiation. Unless there will be a differentiation between the level of protection that every category of works gets and the theoretical foundation that justifies the conferral of protection to both.

In the *Millar v. Taylor* Case,<sup>179</sup> the Court distinguished between the mechanical copying that does not draw conferral of copyright protection, and imitation or appropriation of ideas only, as the Court stated, in differentiating between the patent and copyright protection, that imitation is allowed in patent law and is not allowed in copyright law,<sup>180</sup> and confirmed: “The imitated machine, therefore, is a new and a different work, the literary composition, printed on another man's paper, is still the same.”<sup>181</sup> Hegel also made this comparison, as he confirmed that in literary works “the thought is presented not *en bloc* ... but in a series of separable abstract symbols, while in the second case [invention of a machine] the thought has a mechanical content throughout. The ways and means of producing things of that mechanical kind as things are commonplace accomplishments.”<sup>182</sup>

## **7.6 Is There Authorship in the Creation Process and the Preparatory Steps?**

The question that the thesis poses here is: is originality concerned with the work itself, its contents and characteristics, or the preparatory steps and the creation processes are also included in deciding the originality of the work?

There are several examples of courts that have supported the taking of preparatory work into consideration, like *Collis v. Cater, Stoffell & Fortt Ltd.*<sup>183</sup>, *Canterbury Park Race Co. Ltd. v. Hopkins* and *Ladbroke Ltd. v. William Hill Ltd.*<sup>184</sup> For instance, in the last case, Lord Hodson was of the opinion that preparatory works should be considered when conferring copyright protection, “I cannot accept that preparatory work must be excluded in this case so as to draw a line between the effort involved in developing ideas and that minimal effort required in setting those ideas down on paper.”<sup>185</sup> Lord

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<sup>179</sup> *Millar v. Taylor*, 1769, 4 Burrow 2303, Court of King's Bench.

<sup>180</sup> *Ibid.* at 227, as the Court stated “the property of the maker of a mechanical engine is confined to that individual thing which he has made; that the machine made in imitation or resemblance of it, is a different work in substance, materials, labour and expense, in which the maker of the original machine cannot claim any property; for it is not his, but only a resemblance of his, whereas the reprinted book is the very same substance; because its doctrine and sentiments are its essential and substantial part; and the printing of it is a mere mechanical act, and the method only of publishing and promulgating the contents of the book.”

<sup>181</sup> *Ibid.* at 227.

<sup>182</sup> Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, *supra* note 145, p. 54.

<sup>183</sup> *Collis v. Cater, Stoffell and Fortt Ltd.*, 1898, 78 LT 613,

<sup>184</sup> *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, 1 W.L.R. 273, *supra* note 63.

<sup>185</sup> *Ibid.* at 287.

Devlin, in the latter case, explained the efforts done in preparing the creation of the work: “The respondents are bookmakers who devoted a great deal of time, skill and experience to the preparation of a fixed odds betting coupon for football matches. ... It is common ground that the preparation of a coupon with bets of this sort requires a great deal of industry and skill.”<sup>186</sup> Ong also confirmed that “recreative works” (works substantially derived from antecedent works)<sup>187</sup> can be original depending on the preparatory steps: “when evaluating the originality of such works, the focus of the inquiry should lie in the process by which they were made, rather than by the final output that is produced by such recreative endeavours”<sup>188</sup>

Such claims on the copyrightability of pre-operational steps is one of the main reasons for the misinterpretation of originality and the distortion of copyright law conceptions, as Raskind confirmed: new technologies and the changes in making and distributing works are good reasons for reviewing the structure of copyright law,<sup>189</sup> due to the extension of authorship to include the preparation of products which are “remote from literature and the fine arts in which traditional copyright analysis is steeped.”<sup>190</sup> Even, Castanaro explicitly argues that: “[t]he existing concept of originality is concerned only with the creative process and not the product.”<sup>191</sup>

This thesis advocates Garnett and Davies’s notion that the preparatory steps to creating works are not counted in deciding on the copyrightability of the work: “a distinction between skill and labour required for the compiling of information and the skill and labour required for the presentation of it, as only the latter being relevant for the purposes of the originality requirement and copyright protection.”<sup>192</sup> [Underlining added] That is, the main reason that the criterion of ‘skill, labour and judgment’ in the UK is criticised, because it assesses the features and circumstances out of the product itself. We ask; while copyright protects the work itself, why other elements outside the work should be measured? This has been supported also by the Privy Council in Interlego A.G. v. Tyco Industries Inc. as it confirmed that although making a painting as a faithful copy of other painting or photography need extensive skill, it cannot confer the

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<sup>186</sup> *Ibid.* at 289.

<sup>187</sup> Burton Ong, 'Originality from Copying: Fitting Recreative Works into the Copyright Universe', *supra* note 170 p. 167.

<sup>188</sup> *Ibid.* p. 167. In this article, Ong defined ‘recreative works’ as those works that “are essentially a particular sub-species of derivative works. They are works that have been derived from, and which purport to be perfectly accurate copies of, antecedent works that were created at an earlier point in history.” See, *ibid.* p. 167.

<sup>189</sup> Leo J Raskind, 'The Continuing Process of Refining and Adapting Copyright Principles', *Colum.-VLA JL & Arts*, 14 (1989), p. 125.

<sup>190</sup> *Ibid.* p. 126.

<sup>191</sup> Valeria M. Castanaro, 'It's the Same Old Song: The Failure of the Originality Requirement in Musical Copyright', *Fordham Intellectual Property, Media & Entertainment Law Journal* 18 (2007), p. 1287.

<sup>192</sup> K.M. Garnett and G. Davies, *Copinger and Skone James on Copyright*, *supra* note 89, at 3-147.

resulting work any originality because: “Skill, labour or judgment merely in the process of copying cannot confer originality.”<sup>193</sup> Shipley also confirms that all actions done in order to gather the data for a directory are “techniques for the discovery of facts, not acts of authorship”<sup>194</sup>

Works containing authorial contributions and others that are devoid of it are totally different categories of works. Mental labour appears in the content itself. However, manual labour requires the investigation of things outside this content. For instance, by looking or listening to the authorship work we can know how much thinking and genius are invested in it through the perception of the included thoughts and ideas put by the author. On the other hand, regarding the non-authorial works we have to listen to the creator’s explanation to know how much money and effort s/he has exerted, because the work itself does not contain or show any thoughts or sensations, so, preparatory steps are important only to the latter category.

The reasons that the Supreme Court, in Burrow Giles v. Sarony,<sup>195</sup> considered for protecting photography works, are worth mentioning here. As in its description of the work’s contents or elements it confirmed that the intellectual work is a product of the original mental conception of the author and that is apparent from its explanation: “... posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.”<sup>196</sup> Note here that the Court described how the work was original and depended on the elements of the photograph itself, and it did not require or describe anything about the skill the author practised or the effort or time expended in the preparation of the work.

Although the elements described were prepared before the moment of the creation of the work, they appear in the photograph and can be perceived by the audience. The author is not required to explain hidden or precedent procedures in the preparation of the work that cannot be discerned from looking to –or perceiving- the work. Accordingly, the described procedures in the historic decision of Burrow Giles were authorial procedures because they can be seen in the final work and constitutes its

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<sup>193</sup> Interlego A.G. V. Tyco Industries Inc., A.C. 217; R.P.C. 343 *supra* note 142, at 371.

<sup>194</sup> David E Shipley, 'Thin but Not Anorexic: Copyright Protection for Compilations and Other Fact Works', *supra* note 127, p. 102.

<sup>195</sup> Burrow-Giles Lithographic Co. V. Sarony, 1884, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, Supreme Court of the United States.

<sup>196</sup> *Ibid.* at 60.

contents, then they are justified to be taken in consideration to decide copyrightability of the work. However, procedures that precede factual works or even other authorship works like historic books or biographies, etc., that require research and investigation, cannot be taken into consideration and describing them in judicial decisions to justify copyrightability is not logic in copyright law, because this latter law is just concerned with the subject of protection which is the final work not outside circumstances. This has reflections also on the Walter v. Lane<sup>197</sup> case discussed above.<sup>198</sup> As what is important to copyright law was the work of reporter not other circumstances existent in the time of creating the intellectual work, if it was initially intellectual.

### **Collections of facts increase confusion:**

There is a debate around the copyrightability of the research for facts when creating compilation works of facts. For instance, the District Court in Miller v. Universal<sup>199</sup> argued that although facts are not protected by copyright law, the ‘research’ done by the author and his ‘expenditure of money’ and ‘time’ in gathering facts, should be protected, otherwise, this information and the derived profits would be pirated. It stated that: “an author could not be expected to expend his time and money in gathering facts if he knew those facts, and the profits to be derived therefrom, could be pirated by one who could then avoid the expense of obtaining the facts himself.”<sup>200</sup> The Court concluded: “in the age of television ‘docudrama’ to hold other than research is copyrightable is to violate the spirit of the copyright law and to provide to those persons and corporations lacking in requisite diligence and ingenuity a license to steal.”<sup>201</sup>

Such an argument confused the research intended by copyright law as being embodied in the expression, and the research that is done through the creation of the work or in preparing for its creation, and that will not be manifest in the work. As the Second Circuit in Miller v. Universal City<sup>202</sup> confirmed: “[t]he issue is not whether granting copyright protection to an author’s research would be desirable or beneficial, but whether such protection is intended under the copyright law.”<sup>203</sup> [Underlining added]. The latter court confirmed also that the District Court erred in instructing the jury that research is copyrightable, as this sentence reflects an incorrect legal conception which

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<sup>197</sup> Walter V. Lane, A.C. 539, *supra* note 140.

<sup>198</sup> See Chapter 3 at 3.5.

<sup>199</sup> Gene Miller V. Universal City Studios, Inc., Et Al., 1981, 650 F.2d 1365, C.A.Fla., No. 78-3772., United States Court of Appeals, Fifth Circuit.

<sup>200</sup> *Ibid.* at 1369.

<sup>201</sup> Miller V. Universal City Studios, Inc., 1978, 460 F.Supp. 984, United States District Court, S. D. Florida at 988.

<sup>202</sup> Gene Miller V. Universal City Studios, Inc., Et Al., 650 F.2d 1365, C.A.Fla., No. 78-3772., *supra* note 199.

<sup>203</sup> *Ibid.*, at 1369.

affected the final decision. Accordingly, the Second Circuit concluded that saying that there is a liability against the copying of research is contrary to the intention of legislators.<sup>204</sup>

The research wonders what it is in this equation that provides an incentive for creative creation. As long as the research and effort in collecting information is not protected, then, the direct result of this attitude is the refraining of authors from spending time and effort in such works, as any other author can use the same incidents in doing other works. Alternatively, the most suitable protection for these kinds of works is the protection of the effort and investment expended under a *sui generis* system that differs from copyright law which should not provide protection to these works.

Facts and historical incidents are free to be cited and appropriated, regardless of the writer's authorisation who first mentioned or collected them. However, copyright law's scope should begin from the outer edge of this border, in the sense that any interpretation, analysis, linking events, or drawing conclusions should be protected by copyright law. As then a mental effort which is the core of authorship process has occurred using these abstract pieces of information or facts, then copyright law should be present to protect this authorial contribution.

### **7.7 Justifications for Protecting Factual Works and Imitations:**

According to case law information works are not protected unless there is some kind of personal influence that appears in the organization of the pre-existing works. Then the organization is protected from being copied, but the pre-existing works are free to be copied if they are in the public domain, or there is an authorization to be utilised or copied.<sup>205</sup>

Some courts have conferred copyright law protection for the original selection or arrangement. Such as the argument by some court that: "[a] compilation containing no protectable written expression will meet the minimal degree of originality for copyright protection if it features an original selection or arrangement."<sup>206</sup> [Underlining added], and when confirmed by another that: "sufficient contribution is present when the work evinces originality either by the presence of creative expression within the work or by the selection or arrangement of the pre-existing material"<sup>207</sup> [Underlining added].

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<sup>204</sup> *Ibid.*, at 1372.

<sup>205</sup> *Harper & Row Publishers, Inc. V. Nation Enterprises*, 1985, 471 U.S. 539, 105 S.Ct. 2218, Supreme Court of the United States, at 547, and *Feist Publications, Inc. V. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 7, at 350.

<sup>206</sup> *Harper & Row Publishers, Inc. V. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, *supra* note 205, at 547.

<sup>207</sup> See, Stephen P. Tarolli, 'The Future of Information Commerce under Contemporary Contract and Copyright Principles', *American University Law Review*, 46 (1996). p. 1651, commenting on *Feist*

However, the real justification for collections of facts' protection is the manual labour and the investment expended in their creation, for mostly the person who is protected is not an author, but an investor or entrepreneur. The thesis, even under the *sui generis* system, supports following this approach to justify the protection of these works and not depending on authorship and personality, which are unsuitable for these works' nature.

### **7.7.1 Depending on Manual Labour to Justify Copyright Protection:**

One of the most renowned cases in establishing copyright protection on manual labour only, and refuting any authorship, literary skill, or thoughts, is the *Jeweler v. Keystone Case*,<sup>208</sup> when Judge Learned Hand stated that: “[t]he right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection.”<sup>209</sup> [Underlining added]. He even further explained that the person who walks in the streets and collects the names and numbers of houses and streets “acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.”<sup>210</sup> [Underlining added].

This decision did not just refuse the need for originality but also the authorship and the personal contribution and allowed that copyright law protects any ‘industrious collection’. However, this aids this thesis’s argument, as he rightly describes the process of collecting information in a directory as an ‘industrious collection’ that is devoid of any originality or literary skills. But arguing that copyright protects industrialised and not personal creation has been proved to be an invalid argument, as discussed in the last Chapter.<sup>211</sup>

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*Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, *supra* note 7, see also *Publications Intern., Ltd. v. Meredith Corp.*, 1996, 88 F.3d 473, United States Court of Appeals, Seventh Circuit.

<sup>208</sup> *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 1922, 281 F. 83, Circuit Court of Appeals, Second Circuit.

<sup>209</sup> *Ibid.* at 88.

<sup>210</sup> *Ibid.* at 88, when he argues: “The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.”

<sup>211</sup> See Chapter 6 at 6.6 & 6.7.

The important point in this case is that it put it clearly that there is no personal authorship in collections of facts. That is not mentioned in other cases and legislations, which presumes the existence of originality in the creation process of these works or in the selection and arrangement of facts, which the thesis has found to be untrue.<sup>212</sup>

Other cases conferred copyright protection on the industriousness of the work, labour undertaken and funds invested by the author, as in the case of Matthewson v. Stockdale,<sup>213</sup> and Longman v. Winchester,<sup>214</sup> in the latter case it was held that the calendar is an original work that deserves protection against the copying of substantive parts, depending on the expenses and labor expended and the usefulness of the work. Courts also conferred protection to directory of business listings, compilation of court rules, and navigation charts.<sup>215</sup> However, this research stresses that authorship only means the personal mental labour of the author, not the manual labour, and this distinguishes works of authors from works of manufacturers or manual workers. This belief was confirmed by Saunders, when she stated that “originality is found in the creative powers of the mind; it is the fruit of intellectual labor. To determine the copyrightability of contributions to pre-existing factual material, courts often overlook this creative foundation, and focus instead on the labor portion of the process rather than the original fruits of such labor.”<sup>216</sup> [Underlining added] Haungs confirms that although the terms, ‘selection’, ‘arrangement’ and ‘co-ordination’ found in the statutory definition of compilations of facts reflect the law makers’ desire in requiring originality in these works, it seems that courts applying “the industrious collection standard have sometimes effectively ignored originality, looking to labor itself, rather than to the product of the labor, as the touchstone of protection.”<sup>217</sup> [Underlining added].

The reliance on manual labour in cases of copyright has caused confusion, as some courts have required the exertion of labour and effort in order to confer copyright protection; others argued that works can rely on the preceding work to save labour, effort and time, accordingly, the labour in their tenet is not protected. Such confusion

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<sup>212</sup> See this Chapter at 7.4.2.

<sup>213</sup> Matthewson v. Stockdale, 1806, 12 Vesey Junior 270; 33 E.R. 103, Court of Chancery.

<sup>214</sup> Longman v. Winchester, 16 Vesey Junior 269; 33 E.R. 987, *supra* note 35.

<sup>215</sup> See Trow Directory, Printing & Bookbinding Co. v. Boyd, 1899, 97 F. 586, Circuit Court, S.D. New York. Which is relating to directory of business listings; and see Banks Et Al. v. Mcdivitt Et Al., 1875, 2 F.Cas. 759; 13 Blatchf. 163, Circuit Court, S.D. New York. for compilation of New York state court rules of practice; also, Blunt v. Patten, 1828, 2 Paine 397; 3 F.Cas. 763, Circuit Court, S.D. New York. for navigation charts.

<sup>216</sup> Elizabeth M Saunders, 'Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection', *supra* note 114, p. 769.

<sup>217</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', *supra* note 26, p. 351.

was expressed in the case of Eckes v. Suffolk,<sup>218</sup> when Judge Glasser stated: “The signposts along the way were not compelling in any direction. One such sign temptingly beckoned in the direction of the plaintiffs to discourage these defendants and those who might come after them from using the plaintiffs’ work to save themselves the ‘expense and labor of arriving at those results by some independent road.’ Another sign pointed in the direction of the defendant to permit society to benefit from further improvement that results from the use by another of the same subject matter.”<sup>219</sup>

### 7.7.2 Economic Justifications of Copyright Law

The economic justification of copyright protection appeared with the rise of industrial works that were as important as literary and artistic works and required to be protected by the law. As Curtis wrote: “... every literary laborer shall find in them [the laws] an adequate protection to whatever he can show to be the product of his own labor. ... whether it be a purely original thought or principle, unpublished before, or a new combination of old thoughts and ideas and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill.”<sup>220</sup> He also stated that economic incentive is necessary: “glory may be the reward of genius in solitary and irregular cases; but no man ever wrote a spelling-book or compiled an almanac for that unsubstantial and thankless commodity.”<sup>221</sup>

The research confirms that the protection of intellectual works was never related to their usefulness, whether in the US or UK, and the economic justification never appeared unless regarding collections of facts. For instance, the Supreme Court in Bleistein<sup>222</sup> (1903) decided that artistic works should be protected, regardless of the aesthetic value, as Judges are not qualified to test this, and that every personal reaction must contain something ‘unique’, and express its ‘singularity’, whatever people’s evaluation. The US Supreme Court in Bleistein neglected recognition of the usefulness of works as a criterion for conferring copyright protection, as it stated that: “[t]he Constitution does not limit the useful to that which satisfies immediate bodily needs.”<sup>223</sup> Consequently, it conferred protection to any paintings, whatever the reason they were used or made for, due to the ‘personality influence’ that every work reflects. The Supreme Court supported its decision by claiming that any photograph includes more originality than directories that are protected by copyright law: “[t]he least

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<sup>218</sup> Eckes v. Suffolk Collectables & C.P.U., 1983, 575 F.Supp. 459, United States District Court, E.D. New York.

<sup>219</sup> *Ibid.* at 464.

<sup>220</sup> George Ticknor Curtis, *A Treatise on the Law of Copyright* (1847). p. 171

<sup>221</sup> *Ibid.* p. 21

<sup>222</sup> Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 23 S.Ct. 298, *supra* note 35.

<sup>223</sup> *Ibid.* at 249.

pretentious picture has more originality in it than directories and the like, which may be copyrighted.”<sup>224</sup>

Tarolli argues that early scholars and judges gave great importance to financial returns rather than personal considerations, as: “Labor-intensive works of information were the subject of much early copyright litigation as well, with courts protecting useful works because of the author’s efforts, rather than his creative or literary contributions.”<sup>225</sup> However, the economic justification may not be suitable to all kinds of intellectual works. Denicola argues that unitary dealing with all intellectual works is impossible. “There is little reason to suspect that authors of law review articles, road maps, and detective stories will respond identically to a fixed set of economic stimuli.”<sup>226</sup> Other problem with scholars is the confusion between creativity and usefulness as justifications of copyright, Haungs for instance has criticised those who calls for the un-copyrightability of databases when rearrange materials of antecedent ones, due to they may be useful to the public, according to Haungs, and he ignores whether there is authorship or creativity in these works or not.<sup>227</sup>

Landes and Posner argue that copyright protection depends on two factors: the reward that copyright law offers to incentivise creative labour, and the safeguard it provides for the authorial personality of the author that exists in the work.<sup>228</sup> From this statement it appears that Landes and Posner adopt also the personality theory to determine intellectual works, thus, the economic justification of copyright law that they used was directed towards reinforcing the position of the author’s property. Landes and Posner argue that, in copyright law, striking a balance between access and incentives cannot be achieved unless by “maximize[ing] the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”<sup>229</sup> They required the existence of a kind of trade-off with which copyright law is supposed to engage in, between the costs of limiting access and the incentives for creating more works, as they argued: “[c]opyright protection -the right of the

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<sup>224</sup> *Ibid.* at 250 the Court referred to Eaton Sylvester Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States: Embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions*, *supra* note 83p. 153.

<sup>225</sup> Stephen P. Tarolli, 'Comment, the Future of Information Commerce under Contemporary Contract and Copyright Principles', *supra* note 93, p. 1665.

<sup>226</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 24. p. 519.

<sup>227</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', *supra* note 26, p. 364 see Campbell on the other hand described the justification of copyright in the US is 'wobbly' “However wobbly the philosophical justification for an author’s right may be ...” J. Campbell, 'Authorship, Incentives for Creation, and Copyright in the Digital 21st Century', *Proceedings of the American Society for Information Science and Technology*, 43/1 (2006). p. 5

<sup>228</sup> William M Landes and Richard A Posner, 'Economic Analysis of Copyright Law, An', *Journal of Legal Studies*, 18 (1989), p. 348.

<sup>229</sup> *Ibid.* p. 326.

copyright's owner to prevent others from making copies - trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.”<sup>230</sup>

So, the concentration on the authors' rights and their stimulation is the key to developing a correct copyright balance. Zemer also made this connection when he reflected on Posner's argument and confirmed that free riding creates the risk of not recovering the production costs, which will in turn affects the production of intellectual works. The solution, he argued, lies in: “[t]he allocation of exclusive rights of authorship ... in order to avoid such economically inefficient outcomes”<sup>231</sup>

Bentham also has an argument that might support Landes and Posner, as he stressed that if the author were not compensated for the effort and creativity he had made, he will be driven out of the market, and he stated: “[once] one has invented, all the world can imitate. Without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all his deserved advantages, by selling at a lower price.”<sup>232</sup> Bentham's argument about the inventor is intended to include authors too, and his argument entails that both can be diminished significantly in numbers if such compensation is not taken into consideration.

In fact, the economic justifications can be regarded as belonging to the utilitarian approach in its idealistic substance, as proposed by Bentham, as ‘happiness’ can be achieved through incentivising authors.<sup>233</sup> The designation of a specific theory as being economic, utilitarian or instrumental, depends on the angle from which we see it. Although Landes and Posner did not refer explicitly to the utilitarian approach, their view on rewarding the author to incentivise the creation of socially valuable intellectual works which will ultimately achieve the interests of society is the same view as that of the utilitarian scholars. Both insist on the social interest constantly when conferring protection and property to authors, so, it is a matter of superficial variation. As per Zemer: “[t]he incentive structure in utilitarian arguments focuses on promoting the general public good, not on placing the individual creator as an independent object entitled to a right.”<sup>234</sup> Whether putting author, society or the happiness of both in the

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<sup>230</sup> *Ibid.* p. 326.

<sup>231</sup> Lior Zemer, *The Idea of Authorship in Copyright* (Ashgate Pub Co, 2007)., p. 11.

<sup>232</sup> Jeremy Bentham, *A Manual of Political Economy* (GP Putnam, 1839)., p. 71.

<sup>233</sup> According to Bentham's speech on the ‘happiness’ that can be achieved through compensation and economic incentivisation, see, *ibid.* p. 71.

<sup>234</sup> Lior Zemer, *The Idea of Authorship in Copyright*, *supra* note 231, p. 12.

focal point of discussion, all lead to the same result, that protection is necessary as a reward to achieving interests.

### **7.8 Difference between the Current *Sui Generis* Database System and the Proposed System:**

The satisfaction with a single system to be applied to all intellectual works has entailed that some intellectual works have had to deal with concepts that are inappropriate to their nature and constituent elements. Authorship works normally reflect creativity and originality that cannot be measured by quantity, and, on the other hand, the utilitarian works usually relate to effort, time, and investment. “The purpose of copyright is to provide encouragement for creative endeavour, and differs in that respect from the *sui generis* right which is designed to encourage investment in particular types of data gathering.”<sup>235</sup>

The thesis’s categorisation of works and its proposal for a dual system of protection - the copyright system for authorial works and another *sui generis* one for non-authorship works, is similar to the current dual system applied regarding databases in the EU Database Directive. However, the thesis’s proposal is not limited to databases, but is useful for any other works that are missing the elements of authorship, explained above, like maps, timetables for trains, or matches, receipts, imitations of works, news reports, etc.

The proposal to generate a different category for the non-authorship works aimed at providing protection to these works, and, at the same time, expressly exempting them from the theories and principles of copyright law and authorship that are not suitable to their nature. Accordingly, these works are proposed to have ownership only without authorship. In other words, the protection granted through the *sui generis* system will definitely be attached to somebody as the owner of the work and who will have exclusive rights to the work, however, this ownership did not pass through authorship test, that according to it the author is the first owner, because merely they will fail it. So, although the creator may be considered the owner but he cannot be an author. This policy is believed to achieve the interests of creators of these kinds of works and the interest of the works that can show authorship and originality values.

Relying on authorship and originality to decide copyrightability in all works has caused the confusion we saw in courts’ decisions due to the differentiation in natures of works as explained in the second Chapter. Here, the thesis offers a way to lessen the hustle around whether we should protect those works that have used extensive labour and

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<sup>235</sup> *Football Dataco Ltd V. Britten Pools Ltd*, R.P.C. 17, *supra* note 48, at 542.

expenses and have difficulty in extracting originality from them, and raising the level of certainty around protecting these works and – consequently - the works of authorship.

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The proposed distinction between works of authorship and non-authorship works is expected to help to identify and recognise the reasons for the conflict in decisions on the copyrightability of works and in the theoretical foundations that they adopt in justifying these decisions. Additionally, the research questions why should we specifically allocate a special system for databases and then resort to widening its definition to include any compilations of facts or anthologies? Also, why only these works? What is the theoretical justification behind allowing for their protection under a separate system that does not adhere to copyright protection rules and criteria?

The thesis did not start from the *sui generis* system in the EC Database Directive, but it started with an investigation into the conflict in copyright decisions in interpreting originality and authorship, and the justification of protection in different works, and found that the nature of the work is the reason for that conflict. It then proposed a categorisation of works. That proposed categorisation may be superficially similar to the copyright vs. *sui generis* system in the EC directive, but it is broader in scope, as it is not limited to specific kinds of works, but can be applied to any current, or maybe emerging, kinds of works. In addition, this categorisation is theoretically founded on the concept of authorship and its philosophical elements - their disappearance makes the work a non-authorship work and then beyond the scope of copyright law, and attracts concepts of labour, effort and investment under a '*sui generis*' style system.

## **7.9 Conclusion:**

Having identified the elements that must exist in any intangible work in order to be considered a work of intellect, namely, the elements of authorship in the last Chapter. This Chapter was concerned with analysing whether selection and arrangement of collections of facts can reflect any personal or mental elements that can allow for considering them authorship works.

Though facts *per se* are not protected in the courts, collections of them have been recognised by some courts to be copyrightable, or as being authorship works, so, an investigation into the nature of collections of facts was important in this thesis's argument, as the collection of facts, in their mere presentation, cannot bear any authorship.

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<sup>236</sup> See this Chapter at 7.3.

The thesis then exposed the trend in courts and legislations to consider the selection and arrangement of facts as being original. Then an investigation of whether selection and arrangement can include any of the elements of authorship explained in the last Chapter, and, through six points, the thesis attempted to prove that selection and arrangement cannot reflect enough personal or mental elements to qualify a work as being a product of authorship.

Authorship is about the mental effort of human beings and the personal ideas and messages he or she wants to express. This is why the presentation of the views of English and German philosophers was an essential step towards proving the inherent existence of personal and mental elements in works of authorship in England since the seventeenth century, and even earlier, as has been presumed by scholars and courts in the old eras. This was important as well in responding to the claims of the death of authorship and of romantic authors, as foundations for the claims of banishing the author concept. Likewise, this was used in this Chapter to criticise the trend that collections of facts can be original if the selection or arrangement was original.

In this Chapter, the criticism of applying selection and arrangement to factual works showed that mental and personal contributions cannot appear through just arranging facts. Selection or arrangement of facts cannot be original, it only can be novel, because there is no inner aim or meaning intended through choosing this specific selection or arrangement.<sup>237</sup> This thesis proved that authorship has a deeper meaning than just looking for a difference in form, but that mental or spiritual values are required, as explained in the last Chapter.

The next Chapter will rely on this analysis to support the separation of factual works, and similar works that are devoid of authorship, into the non-authorship category. The authorship works will be seen to also have two grades of works - one high and the other low, depending on the level of authorial contribution involved.

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<sup>237</sup> The same concept applied when registering a trademark, as it should not be similar to previous ones in the same field.

## **Chapter Eight: The Formulation and Implementation of the Thesis's Proposition**

### **8.1 Introduction:**

This thesis argues that when applying the originality criterion of copyright on any intellectual work, we have to first ask whether the given work is an intellectual work? With all what the word 'intellectual' means, whether the work is a product of authorship? Whether the elements of authorship are present in the work? And whether the work is a product of intellect or manual labour?

Throughout the investigation in this research of the protection of research and facts it became evident that the expansion of the protection of copyright and the conferral of extensive protection to facts, as in the case of *Financial Information (FI) v. Moody*,<sup>1</sup> is not consistent with copyright law.<sup>2</sup> On the other hand, diminishing any legal protection to such works, as in the case of *Eckes v. Card Prices*,<sup>3</sup> is not a good policy too, as protection of the investment and the extensive effort expended in making a work is one of the functions of the law.<sup>4</sup> Also, this appears from the conflicted views and decisions on the protection (or not) of mental and manual efforts.

This is why it is argued that copyright law has to incorporate two distinctive systems of protection, one for creative intellectual works, and the other for non-creative works. The lack of dichotomy within copyright law will deprive society of very useful kinds of works that are needed in daily life for individuals when the originality criterion is raised, or will lead to distorting authorship values when get manipulated to suit the nature of non-creative works.

#### **Lack of categorisation will lead to more distortion of authorship and originality:**

The lack of the proposed distinction between authorship and non-authorship works will increase uncertainty about theoretical issues in copyright law, whether uncertainty of courts about the originality interpretation to be applied, or what the justification of copyright is regarding the specific work disputed. This uncertainty leads to the dispersed interpretations of the courts of the originality criteria.<sup>5</sup> It was even argued that protecting factual works will lead to a diminishment of copyright principles and

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<sup>1</sup> *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 1986b, 808 F.2d 204, United States Court of Appeals, Second Circuit.

<sup>2</sup> See chapter 3 at 3.3.

<sup>3</sup> *W. Eckes v. Card Prices Update*, 1984, 736 F.2d 859, United States Court of Appeals, Second Circuit.

<sup>4</sup> As copyright law is the only branch of law that is concerned with such intangible works

<sup>5</sup> As shown in chapter three.

inherent doctrines due to a lack of need for them, as stated in the US Seventh Circuit in the case of *National Telegraph v. Western Union Telegraph*.<sup>6</sup>

Denicola agrees with this thesis's view when criticising the way copyright dealt with both kinds of works, as he asserted that the 'vocabulary of copyright law' is not suitable for fictional and factual works together.<sup>7</sup> He added that although originality and creativity may have a significance when deciding on the copyrightability of works like 'Macbeth or Ulysses', they are less apparent in regard to financial reports or telephone directories, and the variety of such later works deepens the complexity of the situation, or, as he noticed: "Copyright law has always dealt more comfortably with the novelist, painter, or composer, than with the historian, reporter, or compiler."<sup>8</sup> His argument reaches a result, which is that copyright law applies an unfair treatment,<sup>9</sup> as although compilers get the protection of a limited monopoly for their collections, the writer of a historic treatise or a 'biography' is deprived of this protection, and his researched facts are free for appropriation, which is why he says that copyright law "must concern itself with each [work]".<sup>10</sup> [Underlining added]. Accordingly, this thesis proposes that copyright law should incorporate two distinctive systems of protection, one for authorship works, and the other for non-authorship works.

## 8.2 Qualitative Originality and Quantitative Originality:

After demonstrating the difference between the nature of authorship and non-authorship works, how this distinction will help to mitigate the conflict between copyright law decisions and theories should be articulated. The key here is the qualitative/quantitative originality distinction. The copyrightability of 'authorship works' should be decided according to 'qualitative originality interpretations' that measure the existence of personal characters and the intensity of their contribution. On the other hand, non-authorship works are measured using 'quantitative originality interpretations' that take into consideration the amount of effort exerted and the amount of information included.

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<sup>6</sup> *National Telegraph News Co. V. Western Union Telegraph Co.*, 1902, 119 F. 294, Circuit Court of Appeals, Seventh Circuit.. at 297, as the Court of the Seventh Circuit stated: "Little by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, directories, and other works of similar character. Nothing, it would seem, evincing, in its makeup, that there has been underneath it, in some substantial way, the mind of a creator or originator, is now excluded." [Underlining added], as the Court held that ticker tapes listing telegraph transmissions of market quotations, sports scores, and race results are not copyrightable.

<sup>7</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *Columbia Law Review*, 81/3 (1981)., p. 515.

<sup>8</sup> *Ibid.* p. 516.

<sup>9</sup> *Ibid.* p. 518-519

<sup>10</sup> *Ibid.* p. 516.

Note here that the use of the qualitative and quantitative terms here refers to the difference between the mental effort, measured by qualitative tests, and manual work, which is measured by quantitative tests. This is not the same qualitative/quantitative test used in deciding on substantial copying in infringement cases, as in the case of Ladbroke Ltd. v. William Hill Ltd., when the House of Lords confirmed “reproduction means copying, ... And, if he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken.”<sup>11</sup>

Accordingly, the interpretations of originality shown in the third chapter should be divided into two types. One measuring the qualitative personality features in the works that contend to be authorship works, and that include the selection and arrangement criterion and creativity criterion, which will be applied through the elements of authorship. The other type of originality should be used to measure the quantity of financial and effort expenditure used to create non-authorship works, and that will include the sweat of the brow doctrine, and the skill, labour and judgment criterion, as the latter has already been used in many instances to justify protection to non-authorship works that depend on manual skill and manual labour.<sup>12</sup>

The thesis’s proposal runs against the argument that equates the quantitative and qualitative requirements in intellectual works, as there is a difference between them depending on the nature of the work. For instance, in British Horse Racing Board v. William Hill Organization Ltd.<sup>13</sup> it was mentioned that: “for copyright to subsist, it must be shown not only that there is a relevant collection of information, but that it is also original. Although there is no requirement to demonstrate aesthetic or qualitative criteria, there must be a quantitative baseline for originality before protection is acquired.”<sup>14</sup> [Underlining added]. This argument is based on the idea that industrious collection in all works is sufficient, and that cannot be applied to high authorship works, such as novels or musical works, where the quantum of the work can never adequately reflect the creativity it may include.

Regarding the qualitative interpretation of originality, the thesis will resort to the ‘selection and arrangement’ test. As for the quantitative interpretation of originality, it should adopt the ‘skill, labour and judgment’ test, or the ‘sweat of the brow’ doctrine. Such a criterion is important to prove that there is some effort and labour that has been expended to create them, to prove that they are independently created. The only

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<sup>11</sup> Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., 1964, 1 W.L.R. 273, House of Lords at 276.

<sup>12</sup> See Chapter 3 at 3.6.

<sup>13</sup> British Horse Racing Board v. William Hill Organization Ltd., 2005, EWCA Civ 863; RPC 35 Court of Appeal

<sup>14</sup> *Ibid.* Para. 28.

limitation here is that ‘skill, labour and judgment’ is limited to measuring manual efforts, which is why it is applied to compilation works that are devoid of mental authorship.<sup>15</sup>

### 8.3 Factors of Authorship:

Having decided, above, on the elements of authorship which must exist in any work to be considered a product of authorship or a work of intellect, there are also ‘factors’ that express or show these elements, which are the selection, arrangement and expressive form. These three factors work together to reflect the author’s personality and mind work, as the author chooses the ideas, words, lines and symbols, which are the raw material of any intellectual works and mix them together in a specific selection and arrangement, or what we might call a structure. This structure is the expressive form that with which copyright law should be concerned. The author does not convey his thoughts only through the choice of words, for this is the last stage after many stages of thinking and investigation in choosing the proper arrangement of his very detailed ideas and facts in a specific sequence. This sequence is what constitutes the vehicle of his thoughts and sensations which the audience receives.

As an example, in literary works, the elements of the work are the ideas included, not the general idea, but the detailed ideas in a specific selection and arrangement which the author found to be the most appropriate to convey his thoughts. This selection and arrangement is what distinguishes the work from previous works, and which is thought to make the work original. For instance, the CJEU in *Infopaq v. Danske*<sup>16</sup> established the factors of authorship with which we can consider the work an intellectual creation: “As regards newspaper articles, their author's own intellectual creation, ... is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression.”<sup>17</sup> The ‘linguistic expression’ is the expressive form, or the selection of words and expressions, chosen by the author to express his ideas. ‘The form’ and ‘the manner in which the subject is presented’ represent the arrangement of the ideas of the author in a specific order.

The raw material of artistic works are lines, circles, figures and graphical elements, selected and arranged by the author. For instance, in the case of *Designers Guild Ltd. v. Russell Williams*<sup>18</sup> the raw materials of the disputed artwork ‘Ixia’ are (as described by the court) as follows - drawing flowers on a striped background (this is the general idea). Whereas, the detailed ideas are the vertical stripes, the petals (in the form of a comma), ‘the centres of the flower heads are represented by a strong blob, rather than

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<sup>15</sup> See Chapter 6 at 6.7 & 6.8.

<sup>16</sup> *Infopaq International a/S v. Danske Dagblades Forening*, 2009, E.C.D.R. 16, C-5/08, Court of Justice of the European Communities (Fourth Chamber).

<sup>17</sup> *Ibid.* at 272.

<sup>18</sup> *Designers Guild Ltd. v. Russell Williams*, 2000, 1 W.L.R. 2416, House of Lords.

by a realistic representation', the chosen colours of the petals and background, and 'the leaves [that] are painted in two distinct shades of green, with similar brush strokes, and are scattered over the design'. These are the detailed elements that were selected specifically, expressed in a special form and arranged by the authors of *Ixia*. The District Court<sup>19</sup> found that the defendant's work included all the elements in the same, or a largely similar, selection and arrangement of the plaintiff's work and thus it decided on the infringement. This way to apply the factors of authorship to the raw material is called, in the *Designers' Guild* Case, "dissecting the Ixia design into its component elements."<sup>20</sup> [Underlining added], and that is what the thesis calls for in its generalization of its system to all works.

Regarding musical works: the factors of authorship appear in the selection of a specific tune or melody in a chosen rhythm with the harmony or composition that expresses the author's subject or feeling. In dramatic works they appear in the plot -the main story of the work-, themes, sequence of events, dialogue, mood, setting, pace,<sup>21</sup> the accompanying music, characters, although dramatic characters themselves are not afforded copyright protection.<sup>22</sup> Accordingly, the selection of the specific elements of any work in the arrangement in which the author put them, constitutes the structure that defines the originality of the authorship work.

The raw material of authorship is normally abstract pieces of information in common that, *per se*, have no value or substance. As Mr Justice Story explained in 1845, "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which is well known and used before."<sup>23</sup> The author picks some of them and arranges them in a special way so as to make a form that can express or convey his thoughts and sensations. This research believes that works of culture are a complicated type of speech as a communication means.

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<sup>19</sup> *Designers Guild Ltd V. Russell Williams (Textiles) Ltd (T/a Washington Dc)*, 1997, F.S.R. 275, The High Court of Justice—Chancery Division

<sup>20</sup> *Designers Guild Ltd. V. Russell Williams*, 1 W.L.R. 2416, *supra* note 18, at 2419.

<sup>21</sup> *Kouf V. Walt Disney Pictures & Television*, 1994, 16 F.3d 1042, United States Court of Appeals, Ninth Circuit.at 1045.

<sup>22</sup> As, the Ninth Circuit confirmed that: "even if the Owners assigned their complete rights in the copyright ... such assignment did not prevent the author from using the characters used therein, in other stories.", see *Warner Bros. Pictures V. Columbia Broadcasting System*, 1954, 216 F.2d 945, United States Court of Appeals Ninth Circuit. at 950.

<sup>23</sup> *Emerson V. Davies Et Al.*, 1845, 8 F.Cas. 626; 3 Story 768; 8 F.Cas. 615, Circuit Court, D. Massachusetts.

When applying the proposed criteria through the use of the raw materials of intellectual works that will be the subject of the selection and arrangement – factors of authorship - we should settle on a criterion that can be technically used to decide on the originality of works. However, it was argued in Designers Guild Ltd. v. Russell Williams<sup>24</sup> that the visual comparison between works as a whole is a good criterion for deciding whether there is a similarity between works or not.<sup>25</sup> On the other hand, the dissection of the elements of the work was criticised as: “it dealt with the copied features piecemeal instead of considering, as the Judge had done, their cumulative effect.”<sup>26</sup> The selection and arrangement criterion fulfil the two requirements, as the elements of the work can be compared in detail, and then the selection and arrangement of these elements will show whether works are, in totality, similar or not.

#### **8.4 First Stage Categorisation, Authorship and Non-Authorship Works:**

The conflict in copyright subsistence decisions that was demonstrated in Chapter Two, and the ensuing discussions on the different natures of cultural works in Chapters Six and Seven urged the thesis to adopt the separation solution of works to two categories. Authorship works, to which we can apply orthodox theories of authorship, personality and originality, and non-authorship works that are excluded from these theories, but could be protected under a *sui generis* system.

The call for a binary system in copyright law has been advocated by Tarolli, who supports the thesis’s argument: “[t]he copyright system, which only protects works demonstrating a subjective authorial presence, or high amounts of creative authorship, neither consistently serves copyright's original purposes nor adequately protects many utilitarian works that facilitate the dissemination of valuable information. Rather than continuing to require utilitarian works to evidence authorial personality, copyright law would better fulfil its purposes with the adoption of a binary system of protection.”<sup>27</sup> [Underlining added]. However he did not take the further step in detailing the foundations of this system, its substance and application, which this thesis has showed. Ginsburg also argues that modern copyright law only protects factual works through applying a threshold relying on personality, besides, she contends that copyright law had to protect the works that have commercial value, such as directories, calendars, etc. which are increasingly demanded by the public.<sup>28</sup> The tenor of her

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<sup>24</sup> Designers Guild Ltd. v. Russell Williams, 1 W.L.R. 2416, *supra* note 18.

<sup>25</sup> *Ibid.* at 119, 123.

<sup>26</sup> *Ibid.* at 2421

<sup>27</sup> Stephen P. Tarolli, 'Comment, the Future of Information Commerce under Contemporary Contract and Copyright Principles', American University Law Review, 1639 (1997)., p. 1664.

<sup>28</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', Columbia Law Review, 90 (1990)., p. 1869.

speech refers to that copyright law recourses to two separate systems to deal with intellectual works, one that take in consideration personality characteristic and another that considers commercial value.

Copyright law is still the relevant sphere of competence for factual works as a kind of intellectual works, or, to be more accurate, intangible works, even if those works do not include authorship as such, Tarolli agreed that “[a]lthough present in early court decisions as well, the high authorship rationale for copyright did not prevent protection of low authorship works. The presence of commercial value in utilitarian works coexisted with high authorship as a justification for securing the privileges of copyright even into this century. It is within copyright's traditional prerogative, therefore, to protect both the subjective expressions of an author's personality and the objective elements of commercially valuable works that manifest authorial industriousness.”<sup>29</sup> However, due to the inconsistencies explained throughout this thesis that result from treating both by the same principles, it can be argued that protecting factual works cannot be done unless through following one of three options. Firstly, through suspending authorship completely for all intellectual works, and which many scholars who advocated the ‘death of authorship’ doctrine have argued directly.<sup>30</sup> Secondly, through lowering authorship to require just a spark of creativity, or a very low level of originality, and then a lower level of authorship. The third option to allow factual works to be protected by copyright law through the invention of a ‘new route to these works’, wherein authorship is suspended for such works only, and also the protection offered is proposed to be less than other authorship works. The latter proposal is the one that we think it is the most important amendment to copyright law in order to maintain its theoretical foundations and functionality. Through this proposition we can be assured of the constant flow of the ingenuity of traditional authorship works through preserving their traditional criteria, and, at the same time, providing protection and assuring the maintenance of marketability circumstances for the production of utilitarian informational works.<sup>31</sup>

Imposing authorship and originality requirements on factual works regardless of their nature to gain protection is considered as if the originality condition is a bureaucratic procedure that should in any case be fulfilled to comply with the law, throwing out all logical and legal meanings ‘authorship’ or even ‘intellectual works’ terminology bear,

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<sup>29</sup> Stephen P. Tarolli, 'Comment, the Future of Information Commerce under Contemporary Contract and Copyright Principles', *supra* note 27, p. 1665.

<sup>30</sup> Such views have been discussed and investigated, and we have shown the disadvantages and effects that may result from such arguments. See, Chapter 4 at 4.2 & 4.5.

<sup>31</sup> See, Chapter 7 at 7.7 & 7.8.

and the theoretical foundations of copyright law.<sup>32</sup> This trend is criticised for its overstatement of authorship in all works, even those that lack any mental contribution,<sup>33</sup> for instance, Ginsburg questioned how, in West Publishing v. Mead Data,<sup>34</sup> the Court's finding that arrangement of judicial decisions in reports is copyrightable despite, no evidence being presented that the arrangement of decisions was anything other than random.<sup>35</sup> Also, in Southern Bell v. Associated Tel. Directory case,<sup>36</sup> the Court stated that Atlanta Yellow Pages telephone directory met the standard of original selection and arrangement without explaining how an alphabetically arranged directory satisfies such a standard.<sup>37</sup> It is also criticised from another angle as this approach constitutes an obstacle to the protection of factual works produced, as it imposes something that is not required by these works to perform their basic role, "[t]hese notions of original authorship and of copyright scope provide little hospitality for works essentially manifesting not creative individuality but 'sweat of the brow,' or its modern technological equivalents."<sup>38</sup>

To confirm, if the work produced has the same selection and arrangement of elements as a previous work, and the same form of expression and even physical form, as, for instance, by making larger copies of a painting or sculpture, or a better quality copy of a painting. Although it may include skill and labour, it is devoid of any authorship and should be called a 'non-authorship work'. The only case in which copyright protection might be available to it is when the imitated work is in the public domain, as then the protection can be justified by a *sui generis* system through non-authorship justifications such as for protecting investment and labour expended. Here, the work will be treated not as an authorship work, but as a new performance of an authorship work. What is sold is not the authorship included but the craftsmanship with which it is made, the perfection of execution, with no authorial intervention. In addition to factual works that do not include any creation or authorship, but merely collection.<sup>39</sup>

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<sup>32</sup> As explained in chapters 6 and 7, this argument was advocated by Ginsburg, see Chapter 7 at footnote 9.

<sup>33</sup> As discussed above, see Chapter 7 at 7.4.3.

<sup>34</sup> West Publishing Company v. Mead Data Central, Inc., 1986, 799 F.2d 1219, United States Court of Appeals, Eighth Circuit.

<sup>35</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 28 p. 1868, note 13.

<sup>36</sup> Southern Bell Telephone and Telegraph Company v. Associated Telephone Directory Publishers; C.A., 1985, 756 F.2d 801, United States Court of Appeals, Eleventh Circuit.

<sup>37</sup> Jane C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *supra* note 28, p. 1868.

<sup>38</sup> *Ibid.* p. 1868.

<sup>39</sup> See Chapter 6 at 6.7 & 6.8.

### **Practical example:**

The main obvious example of the non-authorship of imitation works is the case of *Rogers v. Koons*,<sup>40</sup> wherein Jeff Koons created a sculpture called 'string of puppies' based on a copyrighted photograph, Koons claimed that his a sculpture is a parody because it meant to comment critically on the incorporated object and the political and economic system.<sup>41</sup> The Second Circuit refused his claim and decided that his work is not a parody of the original work, and only parody that allows for the appropriation from the original work.<sup>42</sup>

However, applying the selection and arrangement criteria would be more efficient in this case and others, as the existence of the same selection of elements of the work in the same arrangement that the original author has put them through refer to that both works bear the same thoughts, and as long as no change happened so no authorship incorporated, so the work is deemed a non-authorship work. And if protection of non-authorship works adopted by the copyright legislation for the sake of protecting investment and labour, then the 'sweat of the brow' or the 'skill labour and judgment' criteria can be adopted to decide whether such works deserve protection or not depending on the quantum of investment or labour involved under a *sui generis* system.

#### **8.4.1 The Proposed *Sui Generis* Protection for Non-Authorship Works:**

This thesis proposes that a *sui generis* system should be specified to protect non-authorship works under copyright law, so they are not subject to the authorship and originality concepts. Under this system factual works can be protected for the investment, labour, effort and time expended in creating them, without protecting the facts themselves.

Any objection to the protection of factual works according to the labour and time expended due to the fear that this: "will hinder creators of new compilations... [due to] creating monopolies . . . over . . . facts and ideas themselves",<sup>43</sup> will thus not be justified, as protecting investments cannot hinder the use of facts. Accordingly, facts are not protected as long as their use does not conflict with the investments through using them to produce competing works and save the effort and investment that was expended to produce the original works. So, using the internal facts for any other use - educational, research, or anything outside commercial use - cannot be prohibited.

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<sup>40</sup> *Art Rogers V. Jeff Koons*, 1992, 960 F.2d 301, United States Court of Appeals, Second Circuit.

<sup>41</sup> *Ibid.* at 309, 310.

<sup>42</sup> *Ibid.* at 310.

<sup>43</sup> Michael J. Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment', *Columbia Journal of Law & Social Problems*, 23 (1989). p. 349

Additionally, if anybody else wanted to create a similar compilation of facts, he has to obtain them from the source, not using the same investment and time expended in creating works. We thus support the use of 'the sweat of the brow' doctrine in regard to non-authorship works under the proposed *sui generis* system.

#### **8.4.2 Supporting the 'Sweat of the Brow' Doctrine for the *Sui Generis* System:**

Selection and arrangement in compilations of facts fails to protect compilers of facts adequately, as for instance "[i]f a compiler decides to use one of two equally effective arrangements, a second comer may use the second method after the first compilation is put on the market. In so doing, the second compiler reaps the benefits of the original author's work without having to expend much effort."<sup>44</sup> The first compiler's effort and investment in creating the first compilation should be protected, otherwise "the original compiler has little incentive to gather the information in the first place."<sup>45</sup>

Accordingly, the use of the 'sweat of the brow' doctrine should be adopted regarding factual works. Although, this may seem to go against the personality approach in copyright law, this thesis confirms it is not, as this will save the authorship and originality in other works from claims to reduce their interpretation to allow for the protection of works already devoid of authorship, which will result in distorting those concepts and spread uncertainty in copyrightability of all works.

In the opinion of the Economic and Social Committee in drafting the EC Database Directive 96/9, "'sweat of the brow' databases were not intellectual creations and therefore not within copyright protection but that they were within the proposed *sui generis* right."<sup>46</sup> So, there is no subject to be measured by originality and creativity. The *sui generis* system in the EU Database Directive has been codified as a revival of the 'sweat of the bow' doctrine as it measures only the investments and the labour incurred in the process of the collection of databases, in order to fulfil the requirements of the *sui generis* system. This is also confirmed by Laddie *et al.*<sup>47</sup>

Non-authorship works can be copyrighted because of the labour and expense invested in its creation, so no originality or authorship is required for its protection, thus, if a newer work is similar to a precedent work then the creator should prove if there is separate labour or expense invested in creating the new work. Also relevant will be whether s/he relied on the previous work as a guide through the collection process or

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<sup>44</sup> Jack B Hicks, 'Copyright and Computer Databases: Is Traditional Compilation Law Adequate', *Texas Law Review*, 65 (1986). p. 1003

<sup>45</sup> *Ibid.* p. 1003

<sup>46</sup> The *travaux préparatoires* (preparatory works) of the Database Directive 96/9, cited in Hugh Laddie, Peter Prescott, and Mary Vitoria, *The Modern Law of Copyright and Designs*, 2 vols. (Fourth edn., 1: LexisNexis, 2011). at 32. 28.

<sup>47</sup> *Ibid.* at 32. 28.

revision, and so forth, otherwise the exact copying or substantial similarity will be considered an infringement.

The interpretations of the originality criterion as an industrious collection, or skill and labour (meaning mechanical skill and manual labour) can still be the only criterion to be used in deciding the copyrightability of non-authorship works, like maps, directories and catalogues. The other interpretations used in authorship works should not be used here, for instance, the selection and arrangement, as explained above,<sup>48</sup> cannot be applied to non-authorship works, as long as the 'selection and arrangement' is not something that is related to its constituent elements, and the work without it is still beneficial. The audience can still choose the more utilitarian work, but copyright law is not concerned with the utility of works.

In addition, recent technological developments provide constantly more sophisticated ways to facilitate doing such a job, namely 'selection and arrangement', in little time.<sup>49</sup> 'Selection and arrangement' cannot measure the quantum of effort or capital expended in creating the work, so it cannot cooperate or cope with other interpretations that employ the labour, skill or effort expended, but applying it on such works will ease the conferral of protection to non-authorship works that might infringe pre-existent non-authorship works, which might have been created by skill, labour and capital, but missing authorial or creative addition and even expenditure of separate labour and investment. Applying 'selection and arrangement' criteria will undoubtedly harm those pre-existent works.

### **8.5 Second Stage Categorisation, High Authorship and Low Authorship Works:**

Deciding on the originality or infringement of authorship works requires the recourse to the common factors of authorship: selection, arrangement, and form. The research argues that a difference in one of these factors can change the level of authorship in the work. For instance, if the selection of the raw material of authorship in the work is different from previous works, then this work has authorship, and may even be considered a high authorship work. If the arrangement of previously selected elements from a previous work is different, then the work also should be considered a high authorship work. However, if the form is only different because the same selection and arrangement of the work was used in precedent work, then the work is a non-authorship work.

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<sup>48</sup> See Chapter 7 at 7.4.

<sup>49</sup> As explained in Chapter 7 at 7.4.4.

Here, the thesis differentiates between the 'expression form' and the 'physical form', the first is the form that the author chooses to express his ideas through, like choosing specific words in writing or specific figures or graphics in drawing with which to express his thoughts. The physical form is the material that the author chooses to bear his ideas, whether writing, painting or making a sculpture.

### **The change in the 'type' of physical form:**

In regard to the physical form, howse should differentiate between written, audio and visual forms, as the transfer of a written description of a situation (words in a novel, etc.) to a painting or sculpture makes the painter or sculptor an original author. The written work is a source from which every painter or sculptor can derive an original work, and here the transfer is made from the written physical form to a visual physical form. On the other hand, with regard to the sculptor who transfers a painting to sculpture, this process should be considered a non-authorship one, since the imagination and visualization of senses and thoughts has already been embodied. What he or she did is just transferring this material that bears that visualization from paper to bronze, stone or wood. Despite the change in the physical form, the same selection and arrangement and the expression form are there as the first author has made or described them. The resulting work, that relies on the same selection and arrangement of the original work is devoid of any authorial contribution and should be called a 'non-authorship work'.

The change in expression form was a source of conflict between cases, as in the case of *Alfred Bell & Co. Ltd. v. Catalda Fine Arts* the second circuit considered the faithful reproduction of painting into mezzotint engravings as original work, due to the alteration of material and the tedious job associated.<sup>50</sup> The research maintains that if mere differentiation between humans is the basis of protection, then no point of the copyright law, unless the exact copies made by printers or sound recorder, as any duplication by other humans will certainly include some differences. However, the second circuit in the case of *L. Batlin & Son, Inc. v. Jeffrey Snyder* refused to consider the change of the physical form of the mechanical toy 'Uncle Sam' Banks as sufficient to meet originality requirement though there are some alterations, as the court stated that "[i]n any event, however, the articles should be judged on their own merits, ... Here as elsewhere in the copyright law there are lines that must be drawn even though reasonable men may differ where."<sup>51</sup> The dependence on the existence of any

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<sup>50</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et Al.*, 1951, 90 U.S.P.Q. 153, 191 F.2d 99, United States Court of Appeals, Second Circuit. at 975

<sup>51</sup> *L. Batlin & Son, Inc., V. Jeffrey Snyder and Etna Products Co.*, 1976, 536 F.2d 486, United States Court of Appeals, Second Circuit. at 492.

alteration is not a logic requirement to consider a work as an intellectual, otherwise, “an accidental bump experienced while making a copy would result in enough originality to warrant copyright protection to the secondary artist.”<sup>52</sup>

This argument can justify why films, for instance, get lower protection than the novels that they have been extracted from or have relied upon. The thesis answers that this is because the selection and arrangement of the events and characters and plots is the same, so the structure of the work, which is the expression of the thoughts, is copied. The film makers have changed the physical form from the written to audio-visual form, although using the mental and personal capabilities of the director and script, they relied on the structured authorship that have been put by the author of the novel. However, this thesis questions: what if the film did not copy the selection and arrangement of any previous novel? We think that then this film has authorship elements that are higher than that in the film mentioned in the latter example, as the selection and arrangement made here are original, so this film should be considered a ‘high authorship work’.

#### **Benefits of the proposed categorisation of works:**

The existence of a categorisation of works into high/low and non-authorship works will be a motivation for creativity, especially under the technological system proposed, as authors will be required to provide information about the source of their inspiration, the works they have read to prepare for their creation, and the works that they derived from their work.

On the other hand, this categorisation will serve the interests of non-authorship works’ right holders by providing them with stable protection that depends on concepts that take into account their works’ nature and constituent elements. Thus, Curtis’s opinion should be still advocated: “[t]he laws which protect literary property are designed for every species of composition, from the great productions of genius, that are to delight and instruct mankind for ages, to the most humble compilation that is to teach children the art of numbers for a few years, and then to disappear forever.”<sup>53</sup> Even Curtis has proposed the reliance on labour as a justification of conferral of copyright protection: “[i]n whatever way he claims the exclusive privilege accorded by these laws, he must show something which the law can fix upon as the product of his and not another’s

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<sup>52</sup> Judith M Nelson, 'Art Forgery and Copyright Law: Modifying the Originality Requirement to Prevent the Forging of Artworks', *Cardozo Arts & Ent. LJ*, 8 (1989). p. 707

<sup>53</sup> George Ticknor Curtis, *Treatise on the Law of Copyright* (London; Boston: A. Maxwell and Son; Charles C. Little and James Brown, 1847)., p. 171.

labors.”<sup>54</sup> This thesis calls for the use of the criterion that Curtis adopted, ‘the labour’, but in relation to specific works in a *sui generis* system, which are non-authorship works.

The categorisation of works will achieve a degree of consistency between copyright law’s several applications on the ground depending on the stable treatment of works with the same nature. For instance, the selection and arrangement criteria can be used to apply in the pre-emptive checks used in academic article publication: “[t]oday, law review editors search the field of literature to see whether the article submitted adds anything to those articles already available to readers. This pre-emption check is designed to eliminate some duplicative material from the legal literature”<sup>55</sup> Accordingly, the plagiarism check can be integrated in the copyright system through the selection and arrangement criteria.

### **8.5.1 Selection and Arrangement as a Criterion for Second Division (High/Low Authorship):**

#### **Selection and arrangement’s main function is materializing thoughts:**

Selection and arrangement is ‘a universal criterion’ that distinguishes any original authorship work from non-authorship works. If two novels are similar but the arrangement of events is different in the newer work and it has a different form of expression, then this will refer to that the newer work has a different arrangement of the detailed ideas and different expression, so it can be original, depending, of course, on the Judge’s evaluation of the substantiality of such changes. If two paintings have similar elements –raw materials- (say; lady, sun, trees, sea, flower, etc) the arrangement of the elements of the painting on the layers of that painting<sup>56</sup> has an essential role in deciding the originality or infringement of the newer work. In music also, the selection and arrangement (of melody, chorus, etc.) is the thing that decides the originality, or infringement, of the newer work.

The role of selection and arrangement in showing the originality of the work appeared in the US case *Burrow-Giles Lithographic Co. v. Sarony*,<sup>57</sup> as after Judge Miller stipulated that the author should show the: “originality, of intellectual production, of

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<sup>54</sup> *Ibid.*

<sup>55</sup> Howard Denmark, ‘How Valid Is the Often-Repeated Accusation That There Are Too Many Legal Articles and Too Many Law Reviews’, *Akron Law Review*, 30 (1996). p. 224.

<sup>56</sup> About the layers of painting see, Robert P Taylor et al., ‘Authenticating Pollock Paintings Using Fractal Geometry’, *Pattern Recognition Letters*, 28/6 (2007). and also: Andrea Kirsh and Rustin S Levenson, *Seeing through Paintings: Physical Examination in Art Historical Studies* (1: Yale University Press, 2000).

<sup>57</sup> *Burrow-Giles Lithographic Co. V. Sarony*, 1884, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, Supreme Court of the United States.

thought, and conception”<sup>58</sup> in the work in order that it be copyrighted. He detailed that the selection and arrangement of elements of the photograph was the reason to consider it original, as follows, though this mentioned in other place,<sup>59</sup> it serves the argument here also, “ [the plaintiff] ... gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit. ”<sup>60</sup> [Underlining added] Judge Miller depended on this selection and arrangement in deciding originality of the work, as he stated, “[t]hese findings, we think, show this photograph to be an original work of art, the product of plaintiff’s intellectual invention, of which plaintiff is the author.”<sup>61</sup> [Underlining added]

Curtis argued that finding originality in works is something impossible, because: “There are ... large classes of works, the materials of which are common to all writers, existing in nature, art, science, philology, history, statistics, &c. , where there must be considerable resemblances.” <sup>62</sup> [Underlining added]. However, extracting the specific selection and arrangement the author used will facilitate the search for original works. Although the same raw materials (ideas, and expressive forms) may be copied, putting specific selected material in the same order is something that does not happen every day, it has rarely been repeated, even if there are some similarities, there cannot be a duplicate. So, selection and arrangement can always works as evidence that the work is original if selection and arrangement of theses raw materials is different and there is any indication that the work bears any thought or sensation.

This thesis supports the argument of the Appellee in the Eckes v. Card Prices<sup>63</sup> Case, who confirmed that: “copyright protection does not extend either to the idea of a baseball card compilation, ... or to facts and information contained in the compilation, [and that] once the idea of a baseball card compilation and the facts contained in it are removed from the Guide, there is simply nothing left to protect, especially where the format is required by the nature of the subject matter.”<sup>64</sup> [Underlining added]. This thesis confirms that it is difficult to balance the rule that facts are not protected, and then afterwards giving protection to facts for the originality of their compilation.

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<sup>58</sup> *Ibid.* at 60.

<sup>59</sup> See Chapter 7 at 7.6.

<sup>60</sup> Burrow-Giles Lithographic Co. V. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349, *supra* note 57, at 282.

<sup>61</sup> *Ibid.*

<sup>62</sup> George Ticknor Curtis, *Treatise on the Law of Copyright*, *supra* note 53, p. 171.

<sup>63</sup> W. Eckes V. Card Prices Update, 736 F.2d 859, *supra* note 3.

<sup>64</sup> *Ibid.* at 862.

### **Selection and arrangement of words does not count towards authorship:**

In literary works, we find that the CJEU in *Infopaq v. Danske*,<sup>65</sup> confirmed that the selection and arrangement of words are the only things that can show the originality of the work and prove the existence of authorship and that it is a result of intellectual effort: “Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.”<sup>66</sup> [Underlining added].

However, words are the raw material that is used to express the background selection and arrangement of ideas and thoughts. Words are just the superficial appearance of the thoughts and do not even express the structure of the work. They are the weakest element to rely on into deciding on the authorship of works. There are other more substantial elements in the work than words, and that their selection and arrangement can show authorship more clearly than words, for example, facts, detailed ideas, plots, etc. although all are public domain elements – like words - but their choice and how they are put in order is more reliable in establishing the originality of the work as this reflects the personality of the author. As, this order and that choice signifie that the work bears thoughts and sensation. In brief, the thesis calls the CJEU to look at the order of meanings, not the order of words, as the thesis opposes its opinion stated above. As confirmed in *Campbell v. Acuff-Rose Music, Inc.*<sup>67</sup> in order to decide on the copyrightability of fair use whether through appropriation or parody the secondary or subsequent work should “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”<sup>68</sup>

For instance, in cases where facts or events are organised in a specific way – not only historically or chronologically - with focus on specific events *per se* in order to reach a result different from that known to the public, then the author wanted to convey his thoughts and ideas, not just facts without any processing. This appears specifically in the case of *Hoehling v. Universal City Studios*<sup>69</sup>, here, the work had to be considered an original authorship work, as although it contains facts and events, the selection of specific events and the arrangement of them in a special way to show some sides to

<sup>65</sup> *Infopaq International a/S v. Danske Dagblades Forening*, E.C.D.R. 16, C-5/08, *supra* note 16.

<sup>66</sup> *Ibid.* at 272.

<sup>67</sup> *Campbell v. Acuff-Rose Music, Inc.*, 1994, 510 U.S. 569, Supreme Court of the United States

<sup>68</sup> *Ibid.* at 579

<sup>69</sup> *Hoehling v. Universal City Studios*, 1980, 618 F.2d 972, United States Court of Appeals, Second Circuit.

the events that are not apparent to the average individual, is a processing of facts that reflects original thinking and mind processing, not just mechanical collection or presentation of abstract facts. However, the work in this case was denied protection.<sup>70</sup> This case raises the question: if the mere collection of facts gets protection in copyright law like databases or compilation of facts, why do works that include further stages of mind processing, thinking, selection and arrangement that have been followed to put such facts in a consistent order and to achieve meaningful aims, do not get even the same level of protection, if not higher?

The selection and arrangement of facts in any way, even in a new or unprecedented form of arrangement, is not a creative thing, as no authorship is involved in doing it. Although it may be new or novel in form, it is not creative in terms of the authorship and thought, and it is that latter side which the copyright law meant, due to the absence of 'elements of authorship' that are extracted in the last Chapter, and, most importantly, the absence of 'inner meaning' or thoughts or ideas to be conveyed to the audience. Besides, the arrangement is done, not for the purpose of authorship, but to help users to reach the specific facts they want. So it was made for utility purposes, not for literary or artistic authorship purposes.

#### **The work 'as a whole':**

The selection and arrangement of raw material in authorship works, whether literary, artistic, etc. , aims to reach a point of completeness. For instance, in authoring a literary work, the facts, pieces of information, the detailed ideas of the author, and personal expressions, etc. , are all gathered and organised in a specific order that the author finds is the most suitable selection and arrangement (of these raw materials) to deliver to the audience his own thoughts or sensations. When the author arrives at this point, we can say that the work, 'as a whole', operates as a one unit to deliver these thoughts, and if any of the constituent materials, fact, idea or pieces of information are taken away, the whole work will not do its job as intended by the author. This is because the resulting thought will be changed, distorted or just disappears. This concept works in regard to all authorship works of art, music and drama.

This concept is not so relevant in relation to compilations of facts, as they aim to collect facts in whatever way and to present them without intellectual aim that justify the correlation between these specific facts. Even if the selection and arrangement was creative, this does not affect the facts but their appearance. In one work –for instance– facts are ordered according to geographical criteria, in another, in chronological order, and so on, but there is no point of completeness that the work should reach. In

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<sup>70</sup> *Ibid.* at 979.

addition, the work is never stable, but is continually changeable, due to the fact that most collections of facts are in need for updating from time to time. This is different from all other literary, artistic or musical works, which do not need this update and that they express their integrity and completeness at any time, as long as they were not distorted by external circumstances.

It is worth noting that, in the definition given by the US Copyright Act 1976 to compilations, that they are works “formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>71</sup> [Underlining added] The legislator mentioned that the work ‘as a whole’ should constitute an original work. Whether there is subjective selection or not, the important issue is not how the author chose or selected the information, but why he chose it. Is it merely to present it, or to use it to convey something behind it, an inner idea or thought? Some courts have refused protection due to the lack of such ‘subjective selection’, like the District Court decision in *FII v. Moody*,<sup>72</sup> after the case was remanded by the Second Circuit of Court of Appeal. The District Court commented: “[s]he used no subjective analysis, but ‘just took the information from what I saw in the tombstones and the articles in the paper.’”<sup>73</sup> The ‘work as a whole’ is a key element that justifies the thesis’s refusal to consider compilation as authorship works, because the work does not operate as a one whole unit.

To confirm, this external or superficial selection and arrangement<sup>74</sup> does not make every fact participate in the whole work, because removing any of them will not affect the wholeness of the work, or the integrity or the coherence in its wholeness status. Take a telephone directory as an example, the facts are selected and arranged according to the standard chosen by the maker, but selecting every detail does not take part in reaching a degree or a level of perfection that makes the ‘whole collection’ a single interconnected unit. In other words, selection and arrangement of these facts is not made to serve a specific relation between those specific facts. The statement: ‘as a whole constitutes an original work of authorship’, was not mentioned for no reason, but refers to the integrity between the details of the work. Otherwise, it would be easier for the law makers to stipulate the originality in the selection and arrangement of all of

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<sup>71</sup> §. 101 of the 'Copyright Act of the United States', Ch8-10; 12-17 of Title 17 of the US code (US, 1976)..

<sup>72</sup> *Financial Information, Inc. V. Moody's Investors Service, Inc.*, 808 F.2d 204, *supra* note 1.

<sup>73</sup> *Financial Information, Inc. V. Moody's Investors Service, Inc.*, 1986a, 1986 WL 7791, United States District Court, S.D. New York. at 2.

<sup>74</sup> We mean here the selection and arrangement of the shape of the work that does not aim *per se* to put contents in a specific order, as that is applied in collections of facts.

the compilations, not the originality of the work, if they intended to stipulate only a superficial requirement.

This interpretation of the text and a general understanding of when compilations are protected is found also in the *Financial Information v. Moody* Case<sup>75</sup> in the US Second Circuit. Through discussing the copyrightability of the daily published index cards, including information of municipal bonds and the annual compilation of these cards, the Court made a clear point only when it excluded the desire to just protect the cards against copying, as Judge Oakes stated: “I doubt that protection of each card may arise simply because denial of protection would impair the value of the copyright in the annual volume. That argument seems to be boot-strapping.”<sup>76</sup> His following argument supports this thesis’s understanding, as he confirmed that the daily components of a serial publication (the daily published cards) might be copyrightable: “because of their relationship to each other as issued, as distinguished from their relationship to each other as collected in an annual volume.”<sup>77</sup> [Underlining added]. This argument reinforces the thesis’s view that necessitates a relationship between the work’s contents, not only as a collection but to reinforce the ‘whole’ work principle found in the US Copyright Act to be the original authorship of the person, and to prove that the work really conveys his thoughts and ideas.

This understanding was confirmed by Judge Oakes when he gave a general example to broaden the scope of this concept: “[f]or example, a mystery story published in the form of daily clues might secure protection for each clue because of its relationship to what has previously appeared and perhaps even to what will appear.”<sup>78</sup> The judge then confirmed that this theory could not apply to the work in dispute, which was compilation of facts, as every separate component has its significance separately, and there is nothing common between them that, if they are collected, will make a different thing.<sup>79</sup> The Court, in this case, refused to give copyright protection to the disputed compilation works due to the lack of this relationship between its parts.<sup>80</sup>

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<sup>75</sup> *Financial Information, Inc. V. Moody’s Investors Service*, 1984, 751 F.2d 501, United States Court of Appeals, Second Circuit.

<sup>76</sup> *Ibid.* at 511.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.* at 511.

<sup>79</sup> This was confirmed by the judge, when he confirmed: “The application of that approach to reported facts like those appearing on FII’s cards is arguable, though doubtful since these facts appear to have primary significance as issued each day.” See, *ibid.* at 511.

<sup>80</sup> *Ibid.* at 511. However, the Court allowed for the protection of works that are void of authorship under the ‘unfair competition’ doctrine. Eventually the Court held to remand the case for further inquiry. *Ibid.*

### **The *Modus operandi* of selection and arrangement in authorship works:**

Firstly, we emphasize the exclusion of any attempt to measure the level of artistic value, as nobody can measure this, otherwise the result will prohibit the emergence of many new works that may not be appreciated on their emergence, and hence this will impede the creativity and progress of art.<sup>81</sup> In employing the selection and arrangement criterion to categorise works, this thesis still follows Judge Frank's statement in Alfred Bell & Co. v. Catalda Fine Arts.<sup>82</sup> "no matter how poor artistically the author's addition, it is enough if it be his own."<sup>83</sup> Also, the 'selection and arrangement' criterion cannot work when independent creation is missing, so independent creation first should be set in the beginning. If then the selection and arrangement was similar to other work and no evidence of copying, the work should still obtain copyright protection. Nimmer confirmed and the Second Circuit approved that: "a work is original and may command copyright protection even if it is completely identical with a prior work provided it was not copied from such prior work but is rather a product of the independent efforts of its author."<sup>84</sup>

The first question is whether the elements of authorship are present in the work or not. So, we investigate whether the author has expressed his personality and mental work in the work or not, and this can be known through several steps. We should first know what the thoughts or sensations that the author wanted to express through his work are, and how the selection and arrangement of the work's raw materials – as the author sees them - will operate to convey these thoughts to the audience. Secondly, how did the author reach this selection and arrangement? The answer will be decided by assessing whether the author used his or her mental labour to reach the final work, and what circumstances or even previous works inspired him or her with these ideas.

These questions are believed to show us whether the personal and mental aspects of the work are available or not. If not, then the work is considered a non-authorship work, and so exits outside of copyright law, and it should enter under the *sui generis* protection, which depends on the copyright law in the country and the policy followed. As whether a country will adopt the proposed *sui generis* protection to protect the non-authorship works or just suffices with protecting the authorship works, depends on

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<sup>81</sup> This is confirmed in Bleistein v. Donaldson Lithographing Co., 1903, 188 U.S. 239, 23 S.Ct. 298, Supreme Court of the United States at 252.

<sup>82</sup> Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc. Et Al., 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 50.

<sup>83</sup> *Ibid.* at 103.

<sup>84</sup> Melville B Nimmer, *Nimmer on Copyright* (1976).at 34. Approved by Novelty Textile Mills, Inc., v. Joan Fabrics Corporation, 1977, 558 F.2d 1090, No. 998, Docket 77-7067., United States Court of Appeals, Second Circuit. at 1093.

other economic policies and whether it wants to benefit the right holders and producers of such works. If the personal aspects are available in the work, then this work is considered an authorship work. And then the second question that will follow is to decide whether the authorship work belongs to high or low authorship categories.

In the second stage, investigation should be made of the contents of the work itself, and the main question is whether the work as a whole has the same selection and arrangement in its raw materials as was used in a previous work. This question is not similar to the one that the Supreme Court in *Feist* case asked the plaintiff and the defendant, because in this thesis it is applied only to authorship works, and is preceded by a filter for that purpose. Besides, selection and arrangement in authorship works has a functional character, but in collections of facts it is required for its mere existence, that the selection or the arrangement itself be different, and Hawse have discussed this issue and concluded that it cannot be applied in relation to collections of facts.<sup>85</sup>

If it is commonly argued that the best way to decide on the originality of works is to measure the similarity between the work and previous works,<sup>86</sup> this similarity should not rely on overall perception of the work by a lay person or by the Judge, but should depend on analysing the elements of the work, and using the 'selection and arrangement' criterion on these elements. This research argues that the similarity between works and the opinion of the lay person can be used regarding the intellectual rights related to commercial products, like trademarks, but literary, artistic and musical works cannot be compared through the external shape or appearance. There are inner details that can make a huge difference but the lay person may not notice. The thesis's discussion does not dive into the specific details of every kind of authorship works, yet it argues that the selection and arrangement of the details of the work can determine this differentiation.

One of the major concerns that selection and arrangement can help with is the rewriting practice, as this criterion is not confined to the expressive form itself, but to the elements of authorship which the rewriting cannot change. Unfortunately varied works that are rewritten cannot be discovered easily, as this practice is becoming very

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<sup>85</sup> See Chapter 7 at 7.4.3.

<sup>86</sup> For instance it was argued in the *Suntrust bank v. Houghton Mifflin co.* case that "[i]n order to prove copying, the plaintiff was required to show a 'substantial similarity' between the two works." See *Suntrust Bank V. Houghton Mifflin Company*, 2001, 268 F.3d 1257, United States Court of Appeals, Eleventh Circuit. at 1266. Also, it was confirmed in *Ideal Toy Corp. v. Fab-Lu Limited Inc.* case that "a factual question and the appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." See *Ideal Toy Corp. V. Fab-Lu Limited Inc.*, 1966, 360 F.2d 1021, United States Court of Appeals, Second Circuit.at 1022

common, as confirmed by Suk: "[r]ewriting has become a more distinctive, self-conscious genre in which the ideas of copying, pastiche, quotation, and citation are themselves developed, played with, and rewritten."<sup>87</sup> He added that: "[r]ecent years have seen a proliferation of literary works --novels, poems, plays, and films -- that self-consciously repeat and refashion material from our common literary heritage. These works draw, to various degrees, on pre-existing plots, characters, scenes, and text. Rewritings of canonical texts have become a popular, well-recognized genre, a standard subject of study in academic literature departments, and a technique employed by the brightest of literary luminaries."<sup>88</sup>

Regarding the change in the selection of 'elements of authorship' in authorship works, we argue that the change in selection is a matter of changing the basis of the work, and proves *per se* the making of original work, without the need to investigate the arrangement or form, as it will already be different as long as the underlying ideas arranged or registered are differently selected.

In regard to the change in the arrangement of 'elements of authorship' that exist in the antecedent work, it is argued that changing the arrangement of the same selection used in a previous work can be considered an authorship if the change in arrangement has the aim of expressing thoughts or ideas, and not carried out merely to differentiate the work, and this is left to the Judge's discretion. Most works in the same category (novels, paintings, etc.) share the same selection of raw materials, facts, and may be ideas, although they differently arrange them to produce different intellectual work that is needed to convey the thoughts of the author.

In literary works (novel, book, song, etc. ), changing the arrangement of the detailed ideas to make another intellectual and thoughtful literary work, using different expressions, even with the same physical form (the same kind of work, e. g. , making another novel, song, etc. ) makes the subsequent work a high authorship work. Changing the arrangement of elements of the artistic work, even with the same physical form (painting, sculpture, photograph, etc. ) can produce an original work, provided that expression form is changed too. However, the change in the form of expression, while keeping the selection and arrangement the same, such as drawing

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<sup>87</sup> J. Suk, 'Originality', (2008)., p. 1990.

<sup>88</sup> Jeannie Suk, 'Originality', *Harvard Law Review*, 115 HVL (2002). p. 1989, Suk mentions myriad instances of rewriting, and these are some of them: (with the works they rewrote indicated in parentheses): Kathy Acker, *Great Expectations* (Charles Dickens, *Great Expectations*); the film *Apocalypse Now* (Joseph Conrad, *Heart of Darkness*); Margaret Atwood, *Alias Grace* (Charlotte Bronte, *Jane Eyre*); Robert Calasso, *Marriage of Cadmus and Harmony* (Greek myths); Peter Carey, *Jack Maggs* (Dickens, *Great Expectations*); Francois Ceresa, *Cosette, ou le temps des illusions* (Victor Hugo, *Les Misérables*); Aimé Cosaire, *A Tempest* (Shakespeare, *The Tempest*); the film *Clueless* (Jane Austen, *Emma*);... etc.

the same elements (e. g. , flowers, lady and boat), but drawing them without copying in order to make a superficial differentiation, makes the work a non-authorship work, even if it was in different physical form.

In regard to musical works, change in the arrangement of the melody, rhythm and harmony is not enough to make an original work, but it has to be accompanied by a change in the expression of that melody or harmony. In dramatic works, change in the plot and the dialogue is required to prove the originality of the work. However, if the same selection and arrangement is similar or identical to an antecedent work, this cannot preclude the conferral of copyright protection, unless fraud or cheating is proven, and these are issues of fact that courts should investigate.

It is worth referring to Denicola's statement, wherein he describes this complicated relationship between selection and arrangement and the form: "isolated incidents or scenes may be appropriated provided the literal expression is not lifted, but the taking must not be so extensive as to duplicate the overall structure of the work."<sup>89</sup> [Underlining added] It is worth noting that Denicola may here have expressed the same issues that the thesis has detailed, as he talked about the structure of the work which the thesis finds that its main aspects are the selection and arrangement, also raw materials, words, lines, facts, or events etc., were mentioned by Denicola in his expression 'isolated incidents or scenes'. He even separated that from the form of expression. Accordingly, Denicola has reached the factors of authorship this thesis is relying on, though he did not build on his analysis.

In relation to artistic works, excluding the copying and duplication that is already considered an infringement of copyrighted work, if the original works are in public domain; if the selection and arrangement of the elements of the painting or sculpture are similar to a previous work, with some variations that do not add any ideas or thoughts to the resulting work, then the resulting work is considered a low-authorship work, provided that no copying happens. It can thus get protection, but lower level than that conferred for the original work. The reason for this is that, in artistic works, convergence or similarity between works is likely to occur, besides, the nature of artistic works make the possibilities of variations in the expression of the same thoughts very limited. If the selection of the same elements as are present in a previous work, but the arrangement is different, the resulting work is also considered low authorship. However, if the selection and arrangement of the elements of the work did not exist in previous works, the resulting work can be a high authorship work.

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<sup>89</sup> Robert C Denicola, 'Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works', *supra* note 7, p. 531-532.

### 8.5.2 Practical implementation:

The categorisation to high and low authorship works can find application in the case of *Roth Greeting Cards v. United Card*<sup>90</sup>, wherein the plaintiff made greetings cards that included public domain phrases (like, 'I Love You') with his own illustrations. The defendant made greetings cards that also contained the same public domain phrases and his own illustrations, but which were similar to the precedent work. The Court decided that the defendant had infringed the copyright of the plaintiff. In this case, the defendant should get the protection of low authorship works, as considering similarities in artistic works as infringement is a kind of evaluation of these variations, and artistic works cannot be evaluated. Inventing the in-between category, namely 'low-authorship', will be useful especially for artistic works. It helps original authors to keep their works at a different level of evaluation and draws the singularity they need, so they can be considered real creative authors of original works, and the works that extract some of their elements will be considered authorship works also if not infringement but will be considered semi original works, or as the thesis called them 'low authorship works'. This also will reduce the influence of the arbitrary decisions of Judges when artists do similar works, as if judges were in doubt they can confer the author low authorship protection if there are similarities instead of hesitating between authorship and infringement, especially in cases when subconscious copying happens.

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It worth referring also here to two conflicting decisions regarding the same issue, and how the thesis's proposal can provide mitigation in such conflict. In the US case of *Alfred Bell & Co. v. Catalda Fine Arts*,<sup>92</sup> the plaintiff (Bell) made 'mezzotint' copies of public domain paintings and the defendant (Catalda) reprinted some of Bell's mezzotints. The Judge, in order to protect the 'mezzotint', argued that originality means that the work "owes its origin" to the author, and gave copyright protection to the plaintiff's work, considering the defendant to be an infringer, and the Judge referred to the extensive effort and skills expended in creating these 'mezzotints'.

On the other hand, in the *Bridgeman Art Library v. Corel Corp.* Case,<sup>93</sup> the plaintiff (Bridgeman) made reproductions of art works found in museums, which were in the public domain, and he started selling them on CDs. The defendant (Corel) started to sell his own CDs, which contained some of the reproductions (Bridgman) had made.

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<sup>90</sup> *Roth Greeting Cards V. United Card Company*, 1970, 429 F.2d 1106, United States Court of Appeals, Ninth Circuit

<sup>91</sup> This view on artistic works may be what led the UK CDPA to exclude the adaptation of artistic works from infringement, according to §. 21.

<sup>92</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et Al.*, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 50.

<sup>93</sup> *Bridgeman Art Library, Ltd. V. Corel Corp.*, 1999, 25 F. Supp. 2d 421, United States District Court, S.D. New York.

The Court decided that originality means that the work should include “a distinguishable variation” from previous works to be considered an original work, and accordingly it did not copyright the plaintiff’s works.

Since both works in the two cases are artistic works, and there is no variation at all, and since the resulting work is a ‘duplication’ of the original work, and thus the selection and arrangement of elements is the same, so there is no addition of an authorial contribution. The resulting works are thus non-authorship works. The originality and authorship concepts should thus not be discussed in this regard, and the personality theory cannot be applied here either, but the criterion that should be applied is that applied in a *sui generis* system, which is the sweat of the brow, to measure the efforts expended in making the work to get protection for it against copying.

With applying the categorisation proposed, it is not required that the Judge in the *Alfred Bell & Co. v. Catalda Fine Arts* Case<sup>94</sup> claims that originality means that the work originated from the author, as this harmed the authorship and originality concepts for the sake of providing protection to the efforts expended in the disputed work, as the research discussed.<sup>95</sup> As, the judge can still give protection to low authorship works depending on less authorship elements, and even if there is no authorship. As, if the court wanted to protect the efforts expended, it can do so under the proposed *sui generis* protection of non-authorship works.

### **Parody:**

Parody is one of the main examples of low authorship works, and it will be apparent through the case study in next paragraphs that grading works to high and low authorship is important to solve the dilemma that some types of works should be allowed to enrich the knowledge and the culture although including extensive appropriation and substantial similarity to antecedent works.

This is apparent in the example of the *Suntrust bank v. Houghton Mifflin Co.*<sup>96</sup> case, as although the District Court found that the defendant’s novel ‘*The Wind Done Gone*’ (TWDG) is a ‘clear cut’ and ‘unabated piracy’<sup>97</sup> of the plaintiff’s work ‘*Gone With The Wind*’ (GWTW) and the US Court of Appeals confirmed approximately the same argument, as Judge Birch argued that: “[o]ur own review of the two works reveals substantial use of GWTW. TWDG appropriates numerous characters, settings, and plot twists from GWTW. ... all characters in GWTW, appear in TWDG. ... TWDG copies,

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<sup>94</sup> *Alfred Bell & Co. Ltd. V. Catalda Fine Arts, Inc. Et AL*, 90 U.S.P.Q. 153, 191 F.2d 99, *supra* note 50.

<sup>95</sup> See this chapter at 8.1.

<sup>96</sup> *Suntrust Bank V. Houghton Mifflin Company*, 268 F.3d 1257, *supra* note 86.

<sup>97</sup> *Suntrust Bank V. Houghton Mifflin Co.*, 2001, 136 F.Supp.2d 1357, United States District Court, N.D. Georgia, at 1369

often in wholesale fashion, the descriptions and histories of these fictional characters and places from GWTW, as well as their relationships and interactions with one another.”<sup>98</sup> [Underlining added] Finally, Judge Birch agreed with the District Court’s argument that granted an injunction relief to the plaintiff when he wrote that: “we agree with the district court that, particularly in its first half, TWDG is largely ‘an encapsulation of [GWTW ] [that] exploit[s] its copyrighted characters, story lines, and settings as the palette for the new story.’”<sup>99</sup>

This case proves to be a thorny one in that in order for the judge to reach his final decision he had to read in depth the two novels in order to search for the substance of authorship. In regard to substantial similarity between the two cases, the Court of Appeal decided that there is a substantial similarity: “As we have already indicated in our discussion of substantial similarity, TWDG appropriates a substantial portion of the protected elements of GWTW.”<sup>100</sup> However, it rebutted that this has any importance in deciding the case as the issue is deeper than just the view of the lay person. This was clear in the Judge Birch’s discussion of the GWTW as he finds in this novel “[f]ree blacks are described as ‘creatures of small intelligence ... [!]like monkeys or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild—either from perverse pleasure in destruction or simply because of their ignorance.’”<sup>101</sup> However, Judge Birch argues that TWDG “flips GWTW’s traditional race roles, portrays powerful whites as stupid or feckless, and generally sets out to demystify GWTW and strip the romanticism from Mitchell’s specific account of this period of our history.”<sup>102</sup> The judge’s discussion reached a conclusion that the two novels are complementing each other “further fact finding may well reveal that these two books will act as complements rather than substitutes,”<sup>103</sup> and that the TWDG is a parody of the GWTW as “[a] parody is a work that seeks to comment upon or criticize another work by appropriating elements of the original”<sup>104</sup> so ‘just’ appropriations are justified.

The facts of this case reveals that TWDG’s author has relied on the same selection of the GWTW of the events and characters and scenes as confirmed by Judge Birch<sup>105</sup> but has arranged them differently in a different treatment of the same elements in order to convey different thoughts that bear his personality and opinion. That was clear in

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<sup>98</sup> *Suntrust Bank V. Houghton Mifflin Company*, 268 F.3d 1257, *supra* note 86, at 1267

<sup>99</sup> *Ibid.* at 1267

<sup>100</sup> *Ibid.* at 1272

<sup>101</sup> *Ibid.* at 1270

<sup>102</sup> *Ibid.* at 1270

<sup>103</sup> *Ibid.* at 1277

<sup>104</sup> *Ibid.* at 1271

<sup>105</sup> When he confirmed that “[o]ur own review of the two works reveals substantial use of GWTW. TWDG appropriates numerous characters, settings, and plot twists from GWTW.” See *ibid.* at 1267

Judge Birch's description of the TWDG novel as "the last half of TWDG tells a completely new story that, although involving characters based on GWTW characters, features plot elements found nowhere within the covers of GWTW."<sup>106</sup> Depending on the orthodox principles of authorship TWDG's author should not do an arrangement of specific selected elements unless after an authorisation from the GWTW's author. However, the existence of the fair use exception and inclusion of the parody exception by the Supreme Court in the Campbell v. Acuff-Rose Music, Inc.<sup>107</sup> case has allowed for considering this work as an authorship work, and Judge Birch has depended upon that.<sup>108</sup>

Accordingly, parody works should be considered low authorship works, as they are basically depending on specific antecedent works and not the common knowledge; they are reworkings of previous works. For instance, in this case the 'The Wind Done Gone' novel obtained its substance and popularity from the popularity of the 'Gone with the Wind' novel. This research's proposition of classifying works to different grades can solve this dilemma, as according to the proposition, classifying the TWDG in a lesser grade category with less protection as a 'low authorship work' than GWTW is a fair recognition by the law of the different levels of authorship found in both novels. Also, the recognition by the law that the TWDG has been inspired and taken from an original work can have a financial return to the original works, as readers of the TWDG if they have not read the GWTW before, they are 'psychologically' pushed, through this categorisation, to buy the original work that this novel has depended upon.

### **Appropriation:**

Appropriation as another example of fair use has caused disruption to principles of authorship, we suggest that appropriated works ought to be classified as low authorship works, and elements of authorship should be used to differentiate between appropriation and derivation –or adaptation- as will be explained in the following example.

What we understand from the US legislator regarding fair use - although the provision is vague in this regard - which can be discerned from the examples that the legislator gave 'comment, criticise, teaching, reporting', that the work allowed to appropriate expression from previous original work should not be made for commercial use.

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<sup>106</sup> *Ibid.* at 1270

<sup>107</sup> Campbell V. Acuff-Rose Music, Inc., 510 U.S. 569, *supra* note 67.

<sup>108</sup> As the Supreme Court has confirmed that although parody not specifically listed in §107-120 of the copyright act, "We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107." See *ibid.* at 1171

However, Judge Parker in *Cariou v. Prince*<sup>109</sup> case argued that “[a]lthough there is no question that Prince's artworks are commercial, we do not place much significance on that fact due to the transformative nature of the work.”<sup>110</sup> And he cited the statement by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* That Congress “could not have intended such a rule”<sup>111</sup> which is “that commercial uses are presumptively unfair.”<sup>112</sup> This raises this thesis’s suspicions about the effect that fair use has made to authorship, as it is argued that fair use interpretation substantially exceeded the effect of just an exception to an amendment of the whole concept. This is one of the purposes of this thesis, as the interpretation of concepts like originality, and here fair use, need to be disciplined to comply with each other, and that cannot be done unless through complying with only one principle which is authorship.

As, although the Second circuit in the case *Suntrust bank v. Houghton Mifflin Co.*<sup>113</sup> tried to extrapolate from the fair use provision that the legislator’s intention was that any act that include commenting on or criticising of an antecedent work can be considered fair use under parody, and appropriation then can be justified.<sup>114</sup> In the *Cariou* case even this understanding was abandoned, as although Cariou published a book entitled ‘Yes Rasta’ that included classical portraits and landscape photographs that he took over six years he spent living among Rastafarians in Jamaica.<sup>115</sup> Judge Parker argued that the Prince work that “included a collage, titled Canal Zone (2007), comprising 35 photographs torn out of Yes Rasta and pinned to a piece of plywood,”<sup>116</sup> “could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so.”<sup>117</sup> [Underlining added]

Judge Park although he discussed the differentiation between derivative and appropriated work regarding the commercial influence on the original work, he confused regarding prince works between derivation and appropriation. The research claims that Prince’s works are derivative works not fair use works and could not have been allowed without an authorisation from the original author because they missed the requirements of fair use doctrine. And since “Prince never sought or received

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<sup>109</sup> *Cariou V. Prince*, 2013, 714 F.3d 694, United States Court of Appeals, Second Circuit.

<sup>110</sup> *Ibid.* at 708.

<sup>111</sup> *Campbell V. Acuff-Rose Music, Inc.*, 510 U.S. 569, *supra* note 67 at 584.

<sup>112</sup> *Ibid.*67, at 584. Also it was stated in this case that “nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research ... are generally conducted for profit.” See *ibid.* at 584

<sup>113</sup> *Suntrust Bank V. Houghton Mifflin Company*, 268 F.3d 1257, *supra* note 86.

<sup>114</sup> *Ibid.* at 1271

<sup>115</sup> *Cariou V. Prince*, 714 F.3d 694, *supra* note 109. at 699.

<sup>116</sup> *Ibid.* at 699

<sup>117</sup> *Ibid.*

permission from Cariou to use his photographs”,<sup>118</sup> so, his works are considered an infringement of Cariou’s works. Prince can be considered an author of low authorship work, depending on firstly considering his works derivative works, and if he took permission from Cariou. Otherwise, his works are infringement of copyright law.

This case is one of the examples that needed a clear view of authorship, and classification of works would give the judge other options to choose from, not just to consider the works as a low authorship work, but also, to conclude that the elements of authorship do not exist in works of Prince. Because he did not use raw materials that are ideas, words or even works in public domain, but he used copyrighted parts from other work, so he depended on previous work, something like what films do regarding a novel. So the work is in fact a derivation not a fair use appropriation.

Making a separate work depending on previous work that does not care with its contents<sup>119</sup> is a derivation not appropriation for fair use. Even Judge Parker quoted prince’s description of his work, “he ‘completely tr[ies] to change [another artist’s work] into something that’s completely different.’”<sup>120</sup> Fair use doctrine has been expanded out of its intended borders in a way that distorted authorship and copyright law.<sup>121</sup> In fact, copyright law is in need for such distinction between works to save the logical substances of authorship and originality from the pressure for protecting works even on the detriment of pushing these concepts to the edge.

### **Translations:**

The research argues that translations, although they bear the thoughts of another person in previous works in the same selection and arrangement, and the same structure is followed, with just a change in the words (literally) used, they require some judgment and sensible linguistic skills. Here, the process is different from imitation, as the personality of the author (translator) appears in choosing the proper expression, although he keeps the same selection and arrangement and structure that the original author chose to convey his thoughts.

Though translation does not have the same level of authorship as original books, there is a degree of authorial and technical skill, and this hinders considering them as non-authorship works. For that reason, it may be argued that authorship works can be divided into high and low authorship works, and, accordingly, works of translation may

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<sup>118</sup> *Ibid.* at 703

<sup>119</sup> That is a claim that confirmed by Prince himself, see *ibid.* at 707.

<sup>120</sup> *Ibid.* at 699

<sup>121</sup> Shane Ferro, 'Authorship Is Quickly Dying, and Artist Richard Prince Is in Legal Trouble Again', *Technology* <<http://uk.businessinsider.com/authorship-is-dead-and-richard-prince-is-in-legal-trouble-again-2015-2?r=US>>, last accessed 17/02/2015.

be considered low authorship works. Such confusion was even expressed by Kant, when he stated: “translation into a foreign language cannot be taken as unauthorized publication; for it is not the same speech of the author, even though the thoughts might be precisely the same.”<sup>122</sup>

The translated work does not bear the personality of the translator, as it may be argued. Philosophers of personality, as explained above,<sup>123</sup> correlate the thoughts, sensations included, the mind work and free will in order to consider the work a product of personality. All of these are missed here, as the translator does not have personal thoughts or sensations to be expressed, besides he adheres to the same structure and same expression of the original author, and he only does a professional job through finding the most similar words in other language that can convey the same expression or meaning that the original author wanted to express. His job is similar to performers in the music band that tries to find the best performing of the note put by the composer, like what happened in the case of *Hadley v. Kemp*. Herein Judge Park’s expression will be useful, as this supports this research’s contention that translator’s job is a matter of performing the work in another language, not creation. The thesis has the same belief of Judge Park when he stated: “When each song was presented by the first defendant to the group it was a musical work and the first defendant was the sole author of it. The songs in their recorded form were the same musical works which the first defendant had composed, not new and different works. Although it was true that the members of the group played and sang the songs in their own ways, these were matters of performance and not of creation of a musical work.” [Underlining added] Accordingly: “Contributions by the plaintiffs, however significant and skilful, to the performance of the musical works were not the right kind of contributions to give them shares in the copyrights.” Finally, the thesis adopts and insists on the elements that Judge Park proposed for considering a work as an authorship: “There are four elements. (1) The claimant must have made a contribution of some sort. (2) It must have been significant. (3) It must have been original. (4) It must have been a contribution to the creation of the musical work. The last point is particularly important.” [Underling added] To conclude, we confirm that as long as translator did not create something original that is considered a contribution to the original work, which differs from what has been already presented, so he cannot be an author of original work.

Although the process of creating the translation is similar to the imitation made when changing from painting to sculpture, as the author follows the steps of the original

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<sup>122</sup> Immanuel Kant, *Practical Philosophy*, eds Mary J. Gregor and Allen Wood (The Cambridge Edition of the Works of Immanuel Kant; Cambridge: Cambridge University Press, 1992). at 8. 87.

<sup>123</sup> See Chapter 6 at titles from 6.2 to 6.7.

author and adheres to his structure; the translator goes behind the literal words used and investigates the meaning the original author wanted to convey, trying to express it again but using the expressions of another language, which requires operations of the mind such as 'thinking, doubting, believing, reasoning, knowing, willing',<sup>124</sup> according to Locke's argument. It is this that raises this type of creation so that they are authorship works. However, since the selection and arrangement is still there within the same structure that the original author chose and used, the translator's work is thus somehow like the making of a film based on a novel,<sup>125</sup> and may be the film goes far from the exact detailed structure and ideas of the original work than translation which sticks to it. However, although the mental contribution of the translator does not qualify to authorship, he may get a protection of low authorship.

The proposition of categorising translation as a low authorship work is consistent with considering it as a derivative work or adaptation in US<sup>126</sup> and UK<sup>127</sup> copyright laws, which entails considering it as subsidiary to the original work's author. Also the reliance on the personality and mental authorship will solve the inconsistency in these laws, as, as long as the current principle is that it is expression only that is protected, it can be argued that translation is a different expression from the original work as "the translator uses another language for the foreign text and therefore can be understood as creating an original work."<sup>128</sup> This led Venuti to argue that "in copyright law, the translator is and is not an author."<sup>129</sup>

To conclude, translation includes mind operations and mental labour, but does not include personal authorship because the translator did not mean to convey something of his thoughts or ideas to the audience, or, to be brief, he did not add another structure for the thoughts he read and translated. There are two things that express the personality of the author, first: the thoughts, ideas and sensations; second: the structure these thoughts are expressed through, and both are missing here.

## **8.6 Technological Implementation of the Thesis's Proposition:**

### **8.6.1 Introduction:**

This thesis, in its attempt to find a solution to the conflict in copyright subsistence decisions, has resorted to analysing the interpretations of originality by Judges or scholars that are used to confer copyright protection to a given work, and it has

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<sup>124</sup> John Locke, *An Essay Concerning Human Understanding* (1700), p. 88.

<sup>125</sup> That explained above, see Chapter 8 at 8.5.

<sup>126</sup> In § 101 of the US Copyright Act, translation is included in the definition of derivative works.

<sup>127</sup> In s.21 (3) (a)(i) of the UK CDPA translation is included within the kinds of adaptation.

<sup>128</sup> Lawrence Venuti, *The Translator's Invisibility: A History of Translation* (Routledge, 2008). p. 8.

<sup>129</sup> *Ibid.*

investigated the confusion around the nature of works and the influence of this on authorship concept.

Thus a categorisation of works to 'high/low/non authorship works' was proposed depending on the differentiation between the mental and manual skills used in the authorship process of the work. A different theoretical justification to each category was allocated, and a different level of protection proposed to be granted to each category. However, the application of this proposed system is complicated if put through the legislation's amendment only, and that is why this thesis proposes that there should be a technological mechanism to facilitate the allocation of works in the corresponding category that depends on their constituent elements. this technological proposition has many benefits, as will be elaborated below.

### **8.6.2 Substance of the Proposed System:**

Having discussed the confusion that happened to the authorship concept and originality and the influence this had on copyright protection in general, the thesis proposed a different categorisation of works in the last Chapter. The proposed categorisation is suggested to be applied through several questionnaires that right holders answer to recognise the category their works belong to, however, the process if done through paper application will be complicated and time consuming.

Thus, we propose a digital website that can implement this categorisation, and proposed to be called the 'Digital Cultural National Gate' (DCNG). This Gate's main aim is reducing confusion within copyright subsistence decisions, it is also is proposed to do several functions. Its main job is identifying originality of works, and this will allow it to have a great database of works and copyright identification information. This can qualify it to work as a licensing portal wherein the data of the owners and publishers of works can be preserved, which has been tried to be done through the Global Repertoire Database (GRD) but unfortunately failed, and a similar project is undergone which is called the Copyright Hub. However, the Copyright Hub still follows the same philosophy of the GRD. The proposed Gate can do this job as a secondary one beside its main job which is applying copyright law in the online environment through the proposed categorisation of works, and this will increase the success chances for the identification copyright information to succeed in licensing issues as will be explained in next paragraphs.

The proposed DCNG can be considered as an online database which gathers the entire cultural, educational, artistic, dramatic, etc. heritage of the nation, wherein authors can register their works and obtain a license for their registration in the category of protection for which their work is eligible. Anybody can access these works

if the law, legal exceptions, fair dealing, contracts, or licenses have been held under the umbrella of the law or concerned parties have allowed that access. In the meantime, it is considered a Gate for distributing works or accomplishing transactions and, in this case, publishers and producers can take the marketing role.

Ginsburg also underlined the necessity of involving individual authors in using technologies and not leaving the space to the producers to manage everything, as she said that: “[w]here technological protection measures and copyright management systems can prove very relevant to authors, while producers today may be the principal users of DRM, the technology involved need not be beyond the reach of individual authors, much less of authors’ collectives. The hopeful prospects of new business models built around access protections, such as the many streaming music services, or around limited download, such as iTunes, and around a variety of watermarking technologies, are not confined to large producers.”<sup>130</sup> This opinion supports the thesis’s proposal for authors to use a technological solution, not only to distribute their works, but primarily to protect and authenticate their works for their own benefit and that is for the users’ and publishers’ interests as well.

Castanaro expressed the desire to use technology as a means for applying originality in copyright law, proposing that copyright law needs to: “rework the existing originality requirement for musical copyright,”<sup>131</sup> and to resort to technological facilities as “the access of the entire music catalogue made possible by the Internet could be used to prevent potential infringement disputes.”<sup>132</sup>

The Gate will follow a process similar to the system followed regarding registration in the US Copyright Office. The gate will also contribute in privileging the more creative works by putting them in a ‘higher’ position of protection, and by recognising the works that are mostly depending upon, both through the different levels of protection and the proposed licensing system. In addition, it will achieve a level of stabilisation in copyright law through spreading the knowledge of the elements that the law recognises as authorship, and those which are recognised as non-authorship. Ultimately, this system

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<sup>130</sup> Jane C. Ginsburg, 'The Author's Place in Copyright after Trips and the Wipo Treaties', *International Review of Intellectual Property and Competition Law*, 39/1 (2008/03/06 2008), p. 3.

<sup>131</sup> Valeria M. Castanaro, 'It's the Same Old Song: The Failure of the Originality Requirement in Musical Copyright', *Fordham Intellectual Property, Media & Entertainment Law Journal* 18 (2007). p. 1287.

<sup>132</sup> *Ibid.*, p. 1287, as she believes specifically that original works are rare in the age of technology. His full argument was: “[i]n the midst of a culture marked by copycat artists and technological advancements that encourage infringing activity, one may wonder what, if anything, can be done to bring original and creative music back from the dead. One possibility is to rework the existing originality requirement for musical copyright. By raising the standard for originality, the access of the entire music catalogue made possible by the Internet could be used to prevent potential infringement disputes.” Castanaro proposes that “A hybrid of copyright originality and patent novelty would best serve the interests of promoting the creation of new works without stifling the creative process in music.” See, *ibid.* p. 1287.

will achieve the interests of all parties and different kinds of efforts and also people's interests in finding useful works.

### **Functionality of the DCNG:**

Regarding the *modus operandi* of the DCNG, it can allocate works in the corresponding category and determine the corresponding protection depending on the information that authors provide the DCNG with. Accordingly, if an author has created a novel, scientific research, a painting, drawing, musical or dramatic work, he or she will be required to provide the DCNG with information about the elements and factors of authorship in his work. The information that will be provided is about: the reason as to why he or she selected specific elements and arranged them in a specific way? What are the general and detailed ideas or thoughts he or she wanted to express? Where he or she got these thoughts from? What is the relation between his or her thoughts and the raw material of authorship used? Whether the author has derived these thoughts or elements of authorship from antecedent works? Whether he or she was inspired by antecedent works or relied on any other work, and what these works are? The percentage of the parts he quoted and the percentage of the part that he did not quote or derive directly from previous works, will also be mentioned.

According to the answers to this questionnaire, the system should provide the applicant with a second questionnaire relating to the criterion suitable for his work. For instance, if the applicant's answers in the first questionnaire show that the work is a compilation of facts or precedent works, without any addition from him unless in selecting and arranging these facts or works, the system will ask him questions relating to the criteria applied for non-authorship works, which is 'skill (manual skill), labour and judgment' or 'sweat of the brow', to ensure that s/he exerted enough effort, time or funds in creating this work, and, according to his answers, he might or might not get protection. On the other hand, if the answers to the first questionnaire show that the author has added his mental effort, through adding his own thoughts or analysis, criticism of previous works or inventive thoughts, then the system will provide him with a questionnaire that will decide whether his work includes high or low authorship, according to the table mentioned above.<sup>133</sup>

Ultimately, in regard to the registration of works on the Gate, this should be free of charge; registration can be done by uploading digitalized works, or registering hard

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<sup>133</sup> See Chapter 1 at 1.3.1.

copy works at the Gate's terrestrial address, such as in the countries' intellectual property or copyright offices.<sup>134</sup>

Such a system would provide an easy, quick, and efficient way to recognise whether the work is a high, low or non-authorship one, according to the theoretical discussion<sup>135</sup> and the dichotomy proposed above.<sup>136</sup> The author will thus know the level of protection for which his/her work is eligible. However, this mechanism will need an appeal council that might then be operated by the 'copyright offices' in the various countries.

### **Digital portals for rights' licensing:**

The main focus of the DCNG is not the licensing but the transfer of copyright law rules from theory to practice and to avoid the distortion that could happen to its principles when applied in courts, through founding a united body that governs the copyright rules, their principles and their interpretations and applies them to works directly through an online user friendly environment.

Despite the continuous evolution of digital technology relating to cultural products, there are enormous numbers of works and authors whose ownership and authorship are completely unidentifiable. This has raised interest in readily available accurate data about the different works for the purposes of attribution and licensing in judicial cases. This registration will have benefits far beyond the ordinary registration of works, as it will help proving the existence of the work and its attribution to a specific author, locating the place or the address of the copyright holder whether the actual or virtual one, and identifying authorship and ownership of the works which combine different types of subject matter (text, photographs, etc.).<sup>137</sup>

Countries cannot compel individuals to register their works to obtain copyright protection due to the Berne convention obligation in this regard.<sup>138</sup> So, voluntary registration is done separately by each country and there are a lot of policies adopted

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<sup>134</sup> It was required by TRIPS agreement that member states establish intellectual property offices, as Art. 67 of TRIPS agreement provided that: "Such cooperation shall include assistance in ... shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters." 'The Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips)', *O.J. 1994 L.* (1994).

<sup>135</sup> That has been articulated in chapter 6.

<sup>136</sup> See this Chapter at 8.4, and Second stage division: High authorship and low authorship works: at 8.5.

<sup>137</sup> WIPO, 'Copyright Registration and Documentation', *Copyright and Related Rights - Current Topics* <[http://www.wipo.int/copyright/en/activities/copyright\\_registration/index.html](http://www.wipo.int/copyright/en/activities/copyright_registration/index.html)>, last accessed 31/12/2011.

<sup>138</sup> As Art. (2) of Berne convention provided that: "The enjoyment and the exercise of these rights shall not be subject to any formality." 'Berne Convention', (Switzerland 1886 (Paris act 1971)).

by each of them,<sup>139</sup> some countries have called for the establishment of a global system for voluntary registration.<sup>140</sup>

Also, though the Copyright Collecting Societies [CCS] are specialised bodies in licensing works, the concern was directed towards founding a united body that can do this job online and cope with the quick creation and reuses of digital content of works online.<sup>141</sup> The attempts started in the UK since 1983 through the Copyright Licensing Agency [CLA] which aims at “obtain fair reward for authors, visual creators and publishers for the copying of their work”<sup>142</sup> and even has a compliance arm which is called Copywatch.<sup>143</sup> Also, in the US we find the Copyright Clearance Centre [CCC] that was established in 1978 which defines itself as responsible for “provid[ing] smart solutions that simplify the licensing of content.”<sup>144</sup> All these attempts are trying to settle the principle that as long as the tools of creation, publication and reuse are democratised it is a fair practice to democratise rights management and licensing.<sup>145</sup>

That notion appeared in the Hargreaves Report in 2011,<sup>146</sup> as he stated: “[w]e need the system, and in particular the mechanics of clearing rights, to adapt to serve the market opportunities which digital speeds and volumes make possible.”<sup>147</sup> Hargreaves gave an example of the iPlayer that BBC spent five years to get licenses of the rights necessary to its launch,<sup>148</sup> ultimately, Hargreaves proposed the establishment of a Digital Copyright Exchange for the aim of “provid[ing] a common platform for licensing

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<sup>139</sup> Voluntary registration is very different from one country to another. There are systems where the work is actually deposited (registration), and others where only declarations are submitted, without deposit of the work (recordation). See WIPO, 'Copyright Registration and Documentation', *supra* note 137.

<sup>140</sup> *Ibid.*

<sup>141</sup> It was stated in the Copyright Hub blueprint that: “[t]he internet has changed the context for copyright, because of the ease with which perfect copies of works can be made and distributed. It has been argued that, when copying is so simple, creators’ rights over what they create can no longer realistically be enforced. The democratisation of the tools of creation, publication and distribution which has come about through increasingly universal access to the internet and the World Wide Web provides a context within which re-use of other peoples’ copyright works has become so commonplace as to be entirely unremarkable.” The Copyright Hub, 'Blueprint Summary and Business Requirements', (Version 1.2 edn., July, 2014). See also Hargreaves referring to the copyright has become a barrier in front of reuses on internet, “IP law must adapt to change. Digital communications technology involves routine copying of text, images and data, meaning that copyright law has started to act as a regulatory barrier to the creation of certain kinds of new, internet based businesses” see, I. Hargreaves, 'Digital Opportunity, a Review of Intellectual Property and Growth', (2011). p. 3

<sup>142</sup> CLA, 'About Cla', <[http://www.cla.co.uk/about/who\\_we\\_are/](http://www.cla.co.uk/about/who_we_are/)>, last accessed 16/01/2015. even the CLA has proved some success through distributing “£20.2m to authors; £34.1m to publishers and £5.4m to visual artists” in the financial year 2012-2013.

<sup>143</sup> Copywatch, <<http://copywatch.cla.co.uk/>>, last accessed 16/01/2015.

<sup>144</sup> Copyright Clearance Center, <<http://www.copyright.com/content/cc3/en.html>>, last accessed 16/01/2015.

<sup>145</sup> The Copyright Hub, 'Blueprint Summary and Business Requirements', *supra* note 141.

<sup>146</sup> I. Hargreaves, 'Digital Opportunity, a Review of Intellectual Property and Growth', *supra* note 141.

<sup>147</sup> *Ibid.* p. 28

<sup>148</sup> *Ibid.* p. 29

transactions.”<sup>149</sup> However, at the time of Hargreaves report and even before there were several attempts towards establishing such digital licensing bodies. For instance, the Global Repertoire Database [GRD] which was mentioned in Hargreaves report within a quotation of WIPO Director General, Francis Gurry, who thought that the world needed the GRD as an important step towards “establishing the infrastructure for global licensing”.<sup>150</sup> It had already begun its foundation steps two years before the report. According to Isherwood “The Global Repertoire Database Working Group (‘WG’) was set up in 2009”<sup>151</sup> and the GRD’s aim was solving the problem of inexistence of “database or data-resource that provides access to authoritative comprehensive multi-territory information about the ownership or control of the global repertoire of musical works.”<sup>152</sup> Though the GRD has been announced to be stopped or aborted by the PRS which is the main participant society,<sup>153</sup> and it was envisaged that this is due to funding problems, this research finds that its successor, the Copyright Hub, will probably face similar challenges due to the establishing or collection process being incomplete and requiring more radical solution than depending on collecting societies,<sup>154</sup> and it is this that the proposed DCNG will bring, as will be explained.

A lot of hopes were attached to the GRD, for instance, ICMP Chair Andrew Jenkins told Music Week: “Everybody knows that the industry needs a Global Repertoire Database, and that the only efficient way to cost-effectively manage data is with a single, reconciled, authoritative database. Anyone who has seen the results of the Deloitte data assessment during the recent GRD process knows that the time for a GRD is now.”<sup>155</sup> That is why when the GRD collapsed it was argued that its collapse means that “searching, finding, and paying for the use of a song worldwide will remain a

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<sup>149</sup> *Ibid.* p. 33

<sup>150</sup> WIPO Director General, Francis Gurry in a speech at a conference held by the Queensland University of Technology (QUT) on the future of copyright, 25 February 2011 cited by *ibid.* p. 31

<sup>151</sup> Mark Isherwood, 'The Global Repertoire Database Project', in Richard Hooper and Ros Lynch (eds.), *Copyright works, Streamlining copyright licensing for the digital age* (2012). p. 41

<sup>152</sup> *Ibid.* p. 41

<sup>153</sup> PRS, 'Statement on the Grd', *Press release* <<http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/statement-on-the-grd.aspx>>, last accessed 15/01/2015. as PRS for Music has issued a public statement on the collapse of the GRD. “We are disappointed the GRD cannot move forward as planned, though we remain committed to the principles of a single point of works registration and reconciliation of ownership shares under broad stakeholder governance ... These principles remain key to the efficient processing of multi-territory licences and accurate distribution of royalties across all usages of creative works. We are actively studying alternative ways of achieving these goals, taking full advantage of the learning gained from the GRD project to date.” See, *ibid.*

<sup>154</sup> Tim Ingham, 'Global Repertoire Database: Future of Crucial Project Hangs in the Balance', <<http://www.musicweek.com/news/read/global-rights-database-future-of-crucial-project-hangs-in-the-balance/058852>>, last accessed 15/01/2015.

<sup>155</sup> Chris Cooke, 'Prs Confirms Global Repertoire Database “Cannot” Move Forward, Pledges to Find “Alternative Ways”', <<http://www.completemusicupdate.com/article/prs-confirms-global-repertoire-database-cannot-move-forward-pledges-to-find-alternative-ways/>>, last accessed 15/01/2015.

hopelessly complicated, nearly-impossible headache.”<sup>156</sup> Having stated that GRD’s failure is attributed to guarantee sufficient funds that is mainly is directed to the collection of data, the proposed DCNG through the connection between originality, protection and licencing is proposed to solve this dilemma.

Media companies before 2012 have already built several voluntary rights exchange databases that enable third parties to search for the ownership of works and get clearance of rights.<sup>157</sup> That is why the Linked Content Coalition (LCC) was established in 2012<sup>158</sup> to “establish seamless communication between these various right registries to support a rights trading infrastructure which is truly cross media in the long term.”<sup>159</sup>

Also, Hooper in his 2012 report (Digital Copyright Exchange (DCE) Feasibility Study: Call for Evidence) has called for the adoption of the Copyright Hub, which is a website (copyrighthub.co.uk) that has two functions: “the provision of copyright information/education to a wide audience; and access for users to simpler licensing, with much lower transaction costs, via websites connected to the Copyright Hub.”<sup>160</sup> It was confirmed in the blueprint of the UK Copyright Hub that it depends on the current “foundations laid by the Linked Content Coalition and uses existing data standards, identifiers and communication protocols - with no wish to reinvent them.”<sup>161</sup>

Accordingly, to guarantee smooth application of the proposed system, it is proposed that it be associated with an identification system, wherein, it is proposed, every right holder and user is represented by a number on the Gate, and he should enter this number for every transaction process or any action. This number can be obtained by sending his details to the authority’s office (e.g., the copyright office in his/her country). This identification system helps to track any transactions made through persons related to the protected products. This policy may be similar to the followed measures on eBay, which is used to reduce scams on bank accounts.

The WIPO Committee on Development and Intellectual Property has approved ‘a Thematic Project on Intellectual Property and The Public Domain’, which provided for the elaboration of ‘a Survey on Voluntary Registration and Deposit Systems under Copyright.’<sup>162</sup> WIPO has proposed the use of Rights Management Information (RMI)

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<sup>156</sup> Paul Resnikoff, 'Global Repertoire Database Declared a Global Failure...', <<http://www.digitalmusicnews.com/permalink/2014/07/10/global-repertoire-database-declared-global-failure>>, last accessed 15/01/2015.

<sup>157</sup> Angela Mills-Wade, 'The Linked Content Coalition (Lcc)', in Richard Hooper and Ros Lynch (eds.), *Copyright works, Streamlining copyright licensing for the digital age* (2012). p. 43.

<sup>158</sup> According to Mills-Wade the LCC started working in April 2012. See *ibid.* p. 44.

<sup>159</sup> *Ibid.* p. 43.

<sup>160</sup> The Copyright Hub, 'Blueprint Summary and Business Requirements', *supra* note 141, p. 9

<sup>161</sup> *Ibid.* p. 19

<sup>162</sup> WIPO, 'Copyright Registration and Documentation', *supra* note 137.

for the application of the newly proposed system of registration, to find the content sought, and to reveal the changes that have occurred in it. Additionally, WIPO suggests that the mission of collecting information about the works can be conferred to private entities, like collective management organizations, which will collect the required data of its members with the objective of 'managing the rights entrusted to them', these functions are considered commercial and may include the provision of a record of transactions and declarations made by third parties.<sup>163</sup>

The proposed Gate is similar to WIPO's proposal, except that this research offers a theoretical basis on which this Digital Gate can rely, and can be used for implementation of law principles and rules on emerging works or practices. The current copyright offices will also fill the gap in the current situation and will work jointly with the proposed Digital Gate (DCNG) in order to provide an open, clear, and transparent system of authorship and ownership that is suitable to current technological developments, and can easily and quickly interact with any changes and employ any legal amendments, as the copyright office is considered the factual arm of the system and the DCNG will be the virtual arm.

### **8.6.3 Providing data and funds:**

The GRD and the Copyright Hub were established to do the same job, which is facilitating the identification of owners of works and facilitate the licensing of works directly between users and creators or through the publishers or collecting societies. For instance it was argued regarding the GRD that: "The scope of the GRD is to provide, for the first time, a single, comprehensive and authoritative representation of the global ownership and control of musical works."<sup>164</sup> In regard to Copyright Hub, "The Copyright Hub Ecosystem is essentially a data communication network. Its purpose is to allow buyers and sellers to communicate – in increasingly automated ways – to negotiate and conclude licensing agreements."<sup>165</sup> However, it is envisaged that the main reason for the failure of the GRD is the funding issue. The ICMP confirmed that "the establishment of the database faced huge challenges since its inception",<sup>166</sup> and that the GRD has been greatly hampered of late by "various collecting societies failing to reach agreement on funding the initiative".<sup>167</sup> Also it is confirmed that "Societies

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<sup>163</sup> *Ibid.*

<sup>164</sup> PRS for Music, 'Global Repertoire Database Makes Strong Progress with Plans for 2013 Well Underway', <<http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/GlobalRepertoireDatabasemakesstrongprogresswithplansfor2013wellunderway.aspx>>, last accessed 15/01/2015.

<sup>165</sup> The Copyright Hub, 'Blueprint Summary and Business Requirements', *supra* note 141, p. 13

<sup>166</sup> Tim Ingham, 'Global Repertoire Database: Future of Crucial Project Hangs in the Balance', *supra* note 154.

<sup>167</sup> *Ibid.*

including ASCAP, SOCAN, PRS for Music, SACEM, SIEA and SGAE pulled their future funding”<sup>168</sup>

It was also argued that societies themselves did not want to complete this venture “in the case of GRD, there is significant evidence that enough stakeholders didn’t want this to succeed.”<sup>169</sup> Likewise it was argued that “having the societies involved in this venture at all, beyond becoming data providers, is counterproductive, because if and when the publishers start licensing digital services directly, an efficient repertoire database would render the societies redundant in that domain. And with the bigger societies all busy expanding their digital and multi-territory operations, they won’t want that.”<sup>170</sup>

This funding is directed mainly for the provision of a database. As it was contended that the main problem facing the current Copyright Hub is “the lack of availability of the consistent and accurate data necessary to extend the automated management of licensing in the ways that are envisaged. This is likely to prove to be the highest barrier to entry in many sectors, particularly those that are poorly served today.”<sup>171</sup>

Accordingly, the collection of data about ownership of works is the main dilemma that faces any system of digital licensing: The proposed DCNG can solve this dilemma through the linkage between originality protection and licensing. For instance, the codification of a rule within the executive regulations of the DCNG that states that failing to register on the database may expose the right holders to the risk of compulsory licensing might help to encourage copyright holders to register their works on the Gate, this could be a legal means of overcoming the requirement in the Berne Convention, which states that copyright protection does not need registration to be conferred, as this did not relate to the granting of protection but to its scope. This proposal is similar to the voluntary registration of works that the United States offers through the US Copyright Office.

Accordingly, although creators may not be encouraged to register their works for licensing purposes as they may already be members of collecting societies; the risk of not protecting their works in case of litigation will encourage them to register with the DCNG. On the other hand, producers of compilation of facts will register to take the protection of the *sui generis* system to spare themselves litigation regarding originality of their works, and this accordingly helps in the licensing side. In addition, the

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<sup>168</sup> Music Ally, 'Prs 'Disappointed' at Global Repertoire Database Collapse', <<http://musically.com/2014/07/11/prs-disappointed-at-global-repertoire-database-collapse/>>, last accessed 15/01/2015.

<sup>169</sup> Paul Resnikoff, 'Global Repertoire Database Declared a Global Failure...', *supra* note 156.

<sup>170</sup> Chris Cooke, 'Prs Confirms Global Repertoire Database “Cannot” Move Forward, Pledges to Find “Alternative Ways” ', *supra* note 155.

<sup>171</sup> The Copyright Hub, 'Blueprint Summary and Business Requirements', *supra* note 141, p. 13

rewarding system for digitalization of works made by users can help enriching the repertoire or database of the DCNG, as will be explained below.

### **Costs of the Application:**

The proposed Digital Gate may cost countries initially, but this expense will soon be recovered, as the costs spent to establish the Digital Gate, the buildings used, the instruments or employees, will be repaid through fees from every transaction, which should be very low, but the number of transactions will guarantee a continuous source for funding for such a system.

Copyright holders will benefit from the registration of their works and nominal fees will be paid. Authors will benefit from the broad dissemination of their works on the global network, and financial gains can be expected from this system in return for a small percentage. Fees can be used later to digitalize works that are in the public domain, or to digitalize works for authors, deducting the costs from remunerations. In addition, countries can encourage their people to register works that are in their hands, which may be orphan works, in return for a specific percentage of the remuneration. The Gate will check whether the works have fallen into the public domain. If not, their right holders, or the right holder's heirs, will be informed of the remuneration they may get through the Gate's system.

#### **8.6.4 Benefits of the DCNG:**

First, this system provides the theories and legislation of copyright law with a tool to enhance their responses to the technological advances and challenges, and a method with which to reflect on judicial decisions quickly, and this allows the possibility to modify rules if they have proved to be unsuitable or ineffective. Avoiding such integration between theory and practice has encouraged right holders to make a parallel protective system to copyright law through the technological restrictions imposed on their works. A fear that is expressed by Adam Thierer, saying that: "[a]s the internet changes how goods and ideas are exchanged and transferred, copyright laws are becoming more difficult to enforce, and some people are wondering whether copyrights have any place in the future, or whether it is serving more as a road block than a protection to creators and inventors."<sup>172</sup>

Second, the combination of the DCNG proposal and 'selection and arrangement' will be a great help in revealing most of the current infringements of copyright works and illegal reproductions, and to reduce such violations in the future. Through this Digital

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<sup>172</sup> Adam Thierer, Will Enforcement of Copyright Fade Because of the Internet?, Cutting Edge Approach To Intellectual Property and Business Matters, Adli Law Group P.C., 2011

Gate many specialists can assist in deciding the grade of originality of many works, and to detect the non-original or infringing works and to report that through the Gate to all related parties.

Third, the proposed system will offer a tool for identifying the owners of works, and facilitate licensing for works. Economically, any regulatory body or system of copyright should be concerned with licensing as without effective incensing system “copyright law would be ineffective in some markets for copyrighted works”.<sup>173</sup> Economically speaking, collecting societies “enable markets to function for the use of copyright works in situations in which the copyright holder cannot contract directly with the user.”<sup>174</sup> However, on the digital environment piracy was proved to be a tough challenge that required more than traditional collecting societies, not just for benefitting publishers or authors but for the benefit of the users themselves.<sup>175</sup>

The creation of a unified database of information about ownership has become an essential issue, as “the number of licensees of music booms, while the per-play royalties paid by some of those licensees are tiny, meaning extra efficient royalty distribution is required.”<sup>176</sup> The DCNG can easily keep an up-to-date database of the locations of owners, publishers or producers, and this will help in reviving old, forgotten or orphan books, music, films. “Orphan works represent a substantial part of the collections of Europe's cultural institutions (e. g. , the British Library estimates that 40 percent of its copyrighted collections, 150 million in total, are orphan works).”<sup>177</sup> The Gate will help in preserving them for research and maintaining creativity, also the heirs will benefit of the dead authors of books, music and films, for the complete term the copyright law has stated. Likewise, the Gate will provide the right holders with a tool through which to disseminate their works for free, or for low fees, all over the world, if they are seeking fame for instance, away from the DRM policies that mostly ignore this desire.

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<sup>173</sup> Christian Handke and Ruth Towse, 'Economics of Copyright Collecting Societies', *International Review of Intellectual Property and Competition Law*, 38/8 (2007).

<sup>174</sup> *Ibid.*

<sup>175</sup> Sobel confirms the importance of fighting piracy to the interests of users when he stated “[i]f every volume that was in the public interest could be pirated away by a competing publisher, publishers would soon stop publishing books that served the public interest. Authors, who usually rely on royalties for payment, would stop writing anything that might be in the public interest and therefore be ineligible for copyright protection. Pirate publishers would then have nothing to steal. But, more important, the public would have nothing worth reading.” Lionel S. Sobel, 'Copyright and the First Amendment: A Gathering Storm', *Copyright L. Symp.* (19: HeinOnline, 1971), 43.p. 78

<sup>176</sup> Chris Cooke, 'Prs Confirms Global Repertoire Database “Cannot” Move Forward, Pledges to Find “Alternative Ways”', *supra* note 155.

<sup>177</sup> European commission, 'Orphan Works – Frequently Asked Questions', *Press Release Database* <[http://europa.eu/rapid/press-release\\_MEMO-11-333\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-333_en.htm?locale=en)>, last accessed, 9/12/2013.

Fourth, this system will help to activate the 'compulsory licensing' scheme for cultural works through providing a tool with which to inform the competent authorities of the need for specific works, due to the direct contact this Gate will provide between public demands and the governmental institution, who will then be conversant with the exact needs and the offered works.

Fifth, it is proposed that the DCNG will reduce the number of intermediaries, as, through the website the right holder can get the remuneration -that the user has paid- transferred directly to him. This will help to provide the author with a clear view of the real quantity of works sold, and will eliminate the ambiguity around the real revenues which publishers or producers have made, increasing revenues to right holders due to the free or low fees of worldwide dissemination, and reducing the final price of works for the end users. Also, the DCNG will eliminate the publishing obstacle that faces aspiring writers and artists, as this publishing mechanism will cost approximately nothing. In the same time this has no impact on the free market, as this Gate firstly will not compel authors to register their works or to only distribute them through it, as, the Gate will principally guarantee right holders relative safety regarding copyright disputes through registering their works and ensuring the level of authorship of their works.

The DCNG is the place where aspiring authors can secure their copyright before seeking publishing whether in analogue form or digital form, as the DCNG will provide them with a tool to register their works and get a certificate of the level of authorship they are qualified to and whether the work is original or not before engaging in any dealing with publishers or producers. The current practice requires such a tool through which an author can secure his attribution to his authorship, in face of other users, following authors or publishers. Hughes referred to one of the fears that plague authors: "Every individual who ever submits a treatment to a studio, a script to a production company, or a manuscript to a publisher has a fear that the company-giant or otherwise- will "steal" his or her ideas."<sup>178</sup>.

Accordingly, DCNG will economically benefit right holders through the broad dissemination of their works in developed and developing countries, without the trouble of seeking publishers in other countries, the costs of shipping and to avoid cross-border litigation, etc. Aspiring authors who have not published in hard copy can publish automatically through this Gate and get the full remuneration of the sales processed, and even the works which were neglected by their right holders, or their heirs can be revived, thus benefitting the right holders and the public. The proposed system will also

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<sup>178</sup> J. Hughes, 'Recoding Intellectual Property and Overlooked Audience Interests', *Texas Law Review*, 77 (1998). p. 934

benefit developing countries and their people economically, culturally and scientifically by providing all the works they need, and there will perhaps be international conventions concerning the provision of works to developing countries for affordable prices and with wide dissemination the benefit will satisfy the right holders.

Competent authorities in several countries can apply copyright rules through this gate and provide works to the public according to the legal regulations of public domain or copyright exceptions (fair use or fair dealing), and compulsory licensing in their legal system, which is difficult to enforce through private websites without resorting to the court in every case. This function will help to reduce the number of litigations concerning copyright law issues and increase the law's efficacy, both theoretically and practically.

Through registering films, for example, those which have been created more than 50 years ago can be displayed for free, and newer films can be displayed in return for a little remuneration, in places where cinemas are unavailable or publishers are beyond reach. Works, in general, can be shown for free if an educational institution has asked for electronically and instantly. And, if somebody wanted specific parts of a work it is suggested that s/he can get a little percent of the work which relates to his research or study for free, through an application to the copyright exceptions guaranteed by the law.

At last, it was argued recently by –the so called- father of the internet Dr Vinton Cerf that people may lose their personal data and reserved culture works in their computers because “operating systems and software become more sophisticated, documents and images stored using older technology will become increasingly inaccessible.”<sup>179</sup> The proposed Gate will help in reserving all the musical, dramatic and literary works and maintaining them to make sure they are accessible even after the reinventing of newer devices abandoning old software.

Cerf referred to Doris Goodwin's book 'Team of rivals: The political genius of Abraham Lincoln'<sup>180</sup> as she confirmed that “there's an awful lot of digital content that either has evaporated because nobody saved it, or its around but it's not interpretable because it was created by software that's 100 years old.”<sup>181</sup> Actually, the speech about saving works and interpreting old ones which use software that was abandoned induces the search for a digital place to reserve the digital content and in the same time to be

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<sup>179</sup> Sarah Griffiths, 'Print out Your Photos or Risk Losing Them, Warns Google Boss', *Science* <<http://www.dailymail.co.uk/sciencetech/article-2952020/Will-21st-century-lost-history-Father-internet-warns-digital-world-lead-black-hole-knowledge.html>>, last accessed 15/February/2015.

<sup>180</sup> Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* (Penguin UK, 2009).

<sup>181</sup> Sarah Griffiths, 'Print out Your Photos or Risk Losing Them, Warns Google Boss', *supra* note 179.

responsible to develop this digital content to make sure that it is accessible always, even without the intervention of their authors, or after their death, or after the end of the copyright term. This cannot be imagined unless through a government operated 'Digital Cultural National Gate'.

#### **8.6.5 Latest developments:**

During January 2015 PRS, STIM, and GEMA began to involve in a co-operation with the European Commission to launch new hub service that offer a multi-territory licensing service of works.<sup>182</sup> As previous attempts the new venture aims at "creat[ing] easier access for digital music services to clear music rights, and faster and more precise payments of royalties to rights holders."<sup>183</sup> The performing Rights Society (PRS) confirmed that the proposed EC hub will provide two services "[firstly] provide integrated 'back office' data processing services and [secondly] 'front office' digital multi-territory licensing services to authors, publishers, other collective rights management organisations and digital service providers (DSPs)."<sup>184</sup> It is suggested that this venture will achieve some benefits, first, "[e]ncouraging the aggregation of repertoires for pan-European licences resulting in simplified licensing for DSPs, assisting smaller and innovative services in particular to be able to start operating on a pan-European basis more quickly and efficiently."<sup>185</sup> Second, "[s]olving the problem of split-copyright invoicing by integrating back office processing and matching services with front office licensing services ensuring that the systems will record copyrighted works accurately, reducing the possibility of licensees receiving incorrect invoices and eliminating hold ups and disputes."<sup>186</sup> Third, "[p]roviding an unprecedented level of accuracy enabled by the consolidated copyright database that lies at the heart of the hub."<sup>187</sup> Fourth, "[e]nabling partners and rightsholder customers to benefit from the economies of scale offered by the operation, offering them the best systems, processes and operations available."<sup>188</sup> This proposal is similar in services it offers and its benefits to the proposed DCNG.

Finally, the proposed digital system finds a prospect in a recent report, which advised the dependence on online courts system called 'Online Dispute Resolution' (ODR) for

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<sup>182</sup> PRS, 'Prs for Music, Stim, and Gema Prepare for Further Co-Operation with European Commission to Launch New Hub Service', *Press release* <<http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/prs-for-music-stim-gema-prepare-for-ec-hubs.aspx>>, last accessed 15/01/2015.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

small litigations.<sup>189</sup> The advisory group appointed by The Civil Justice Council (CJC) “has set up a website that will grow over time”<sup>190</sup> and through it the case will pass through three stages or tiers. The first one is the ‘online evaluation’ stage that will help users to “evaluate their problems, that is, to categorize their difficulties.”<sup>191</sup> [Underlining added] the report added that this is “a form of information and diagnostic service.”<sup>192</sup> Then, tier two which is called ‘Online Facilitation’ if the problem could not be resolved in tier one ‘facilitators’ who are working online will review the papers and advise the parties and help in mediation. In tier three called ‘Online Judges’ members of judiciary will decide cases online.<sup>193</sup> The advisory group justifies this proposal by arguing that “ODR is not science fiction. We present a series of case studies from around the world that clearly demonstrate its potential.”<sup>194</sup> This all supports the thesis proposal in making a Digital Gate that can categorise works prior to court litigations, through an interactive digital interface, and it seems that this orientation is going to be adopted in several branches in law. It is worth mentioning that the whole system resembles the online litigation already applied in eBay website and others.<sup>195</sup>

## 8.7 Conclusion

This thesis has demonstrated a practical problem and found that its cause is a theoretical dilemma. The practical problem is the conflict in judicial decisions around the conferral of copyright protection to literary, artistic, musical and dramatic works, and although the common reason for this is attributed to originality interpretations and consequent uncertainty. We found that this conflict relates back to the disregard of the authorship concept in favour of granting ownership on works. Accordingly, what needs investigation is the copyright law’s underlying concepts and the normative rationales that call courts to adopt one specific interpretation and leave another.

The thesis’s analysis shows that the priority of copyright law is the protection of authorship or the personal contribution offered by the author that reflects his thoughts and will, where the work functions as a vehicle for the authors’ thoughts, and that is why they are called intellectual works or works of intellect not just intangible works. This research has clarified the elements of authorship that are required in the work for

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<sup>189</sup> Online Dispute Resolution Advisory Group, ‘Online Dispute Resolution for Low Value Civil Claims’, in Civil Justice Council (ed.), (February 2015).

<sup>190</sup> Graham Ross, ‘Odr Advisory Group in the Uk Recommends Online Court’, last accessed 19 February 2015.

<sup>191</sup> Online Dispute Resolution Advisory Group, ‘Online Dispute Resolution for Low Value Civil Claims’, *supra* note 189, p. 19

<sup>192</sup> *Ibid.* p. 19

<sup>193</sup> *Ibid.* p. 19-20

<sup>194</sup> *Ibid.* p. 3

<sup>195</sup> *Ibid.* p. 11. As the advisory group argued that “[a] remarkable 60 million disagreements amongst traders on eBay are resolved every year” see *ibid.*

it to be considered an authorship work, and it has also demonstrated what is meant by their lack in a work which is then considered a non-authorship work. The concentration on the elements of authorship is important in the modern age where technological advancement has blurred the substance of authorship, like the technical developments in music, computer programs and dramatic works as personal authorship is not clear in several instances.<sup>196</sup>

Dealing with both types or natures of works through the same principles and rules is a major reason for the conflict in juridical decisions. The thesis has thus proposed a categorisation of works into 'high, low and non-authorship works', and every category would have a separate originality criterion and this will help to identify those works which deserve a high level of protection by copyright, and give them the exclusive rights they deserve because of their high level of authorship. This will also help the copyright system to remain and to be maintained without fears that it will diminish or fade. On the other hand, this system will help the courts to easily grant to works that originality is not obvious in a lower level of protection, and to avoid the contradictions in rulings between those given protection and others not, although they are similar works.

The proposed distinction between authorship and non-authorship works is expected to lessen the conflict among copyright decisions, and raise the current authorship and originality substances to their historical and legal meanings, which the thesis investigated and proved to be higher and more related to personal and mental values. At the same time, the protection can be conferred to non-authorship works without being distracted by the principles of authorship, which is unsuitable to their nature, through relying on manual labour, investment and time expenditure. This will help the copyright system to remain and to be maintained without fears of diminishing or fading. On the other hand, this system will help the courts to give simply the works in which originality isn't obvious this lower protection, and to avoid the contradiction of rulings between those that gain protection and others that don't, when the criteria for their protection is not clear, as then the existence of intermediate level at a lower grade of protection will reduce the negative effects of conflict of cases. This will help to identify works which deserve a high level of protection under copyright and to give them the exclusive rights they deserve because of their high level of authorship, and also protect the non-authorship works but through a different philosophy.

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<sup>196</sup> This meaning led Towse *et.al.* to confuse between the author's creativity and technical intervention, as she explained that "[i]t is misleading, however, to focus too much on product innovation because there has been enormous process innovation in the cultural industries as well. Indeed, the cultural industries are the product of technical developments of sound recording, film, video, television and computers." See, Ruth Towse, Hafiz Mirza, and Kee Hwee Wee, *Creativity, Incentive, and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Edward Elgar, 2001).p. 2

It is worth stating here how the argument developed from chapter one until this chapter. Chapter One was confined to discussing the argument of the thesis –namely the reduction of conflict in judicial decisions on copyrightability, the difference between works depending on the authorial contribution, what the proposed solution to lessen it is, and a synopsis of the approach or methodology that this research adopted to convince the reader of the proposed solution.

In Chapter Two, there was an analysis of the conflict in courts' decisions and whether this lay in the copyright justifications (protection of works, rewarding the right holder, or benefitting the society), or in judges' interpretations of copyright concepts (originality, authorship, or creativity) and, finally, the conflict in the outcome, according to the adopted justifications and interpretation. We reached an outcome that this conflict is returning to theoretical reasons that have been discussed in following Chapters, however, these interpretations were divided on the categories of works proposed afterwards.

In Chapter Three, the thesis focused on the originality interpretations and investigated how and why it may be considered the reason for such inconsistency. From this study it concluded that it is not originality *per se* that is the reason for the afore-mentioned conflict, but the reasons are briefed in the focus on finding a proper interpretation of the term 'originality' whilst ignoring the theoretical basis on which copyright law was established, and the theories that support the protection it gives, especially 'authorship'. And a discussion around the authorial contribution the author should do was intensified in the investigation of the cases of *Feist v. Rural* in the US and the *Walter v. Lane* in the UK.<sup>197</sup>

Chapter Four focused on discussion the death of the author which is considered as a result of and a reason for the challenging of authorship. This research contended that the 'death of the author' is a literary concept initiated by literary scholars and adopted by legal ones to escape the discussions around the originality interpretations and authorship entirely. This thesis found that, firstly, initiators of this argument did not mean what legal scholars have understood by 'the death of the author' concept for it was a metaphorical expression, by which they meant ignoring the author when interpreting texts in literature. Secondly, if this claim of 'death of the author' were applied in law, it would not be based on proper theoretical and historical foundations.

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<sup>197</sup> In US law the expression 'original work of authorship' was mentioned about four times in defining a compilation work and derivative work in §. 101; in determining the subject matter of copyright law in §. 102, and in §. 104A. In the UK, originality was only required in some works and was ignored in others, indicating the special features in these works that necessitate the requirement for originality in them, as explained in Chapter Three.

Thirdly, that death cannot be contemplated in copyright law unless copyright law itself is dead, due to the authorship and the author concepts being inherent to that law.

The discussion in the fourth Chapter induced the historical investigation in fifth chapter of authorship, originality and the literary property as a reply to the claims that authorship is a modern concept and is strange to English law, and literary property is new concept also. We found that authorship is an inherent concept in the English law and society even before the enactment of any law.

In Chapter Six, the personality theory's role in authorship and the elements of authorship were investigated, and whether it is possible to apply the same rules to works with authorship elements and others without them. This research reached a conclusion that the personality theory is the dominant theory in copyright law, and that copyright law is principally made to protect the personal features in works: the personal thought, ideas and the 'message' that the author want to convey through the work. This was considered to be mental or 'intellectual' work, and that is the primary competence of copyright law. This is differentiated from 'manual' work, which does not include any work of the intellect, like collecting, or combining, performing or handcrafting, as manual skills applied through dictation or imitation. So, the thesis resorted to the inevitable solution, which is the division of works into two separate categories: 'authorship' works and 'non-authorship' works, and it has articulated the theoretical foundation that supports this proposed categorisation.

In Chapter Seven, we clarified how the overstatement of authorship in non-authorship works has contributed to the distortion of copyright principles. This Chapter showed how ownership has prevailed authorship in application, due to its existence in all works, while authorship is confined to some categories only. Selection and arrangement has been discussed and shown how it can only be a criterion for authorship works not non-authorship works, and how its application to latter works has several disadvantages. And why non-authorship works should also be protected but under a separate system with separate criterion that measures the effort, capital and time expended not selection or arrangement of any intangible elements.

Chapter Eight took the works' categorization a step further, and proposed the categorization of authorship works into high and low authorship works, in the belief that elements of authorship can be measured by the selection, arrangement, physical form and expressive form. Using these criteria, we found that changes in the selection or arrangement can make the work one of 'high authorship', and changing the physical form or expressive form can only prove the existence of manual effort with some skills, as the work still bears the thoughts of the original author that are still exposed under

the same arrangement, and those are called the 'non- authorship' works if the change was just in the physical form. The works that include change in expressive form mainly include works of adaptations (in US or derivation in UK), translations, appropriation and parody allowed under fair use (in US or fair dealing in UK) and those are suggested to be the low authorship works.

In addition the thesis proposed a digital system called 'the Digital Cultural National Gate' in order to implement the categorisation of works. The author should, according to this Gate, answer some digital questionnaires regarding the authorship process in his work and, according to his answers, the system will decide the grade of his work (high/low/non authorship work) and the corresponding level of protection. The author will then get a certificate at this level, although an appeals council is also proposed within the copyright office. In the meantime, the proposed system will contribute to lessening the number of orphan works and to reviving the cultural heritage of the nation, as although registering works will be voluntary it will encourage registration. This is because it will guarantee a level of protection initially and prior to any disputes, which can offer some stability and certainty to the culture industry, as it may be used even before the creation of the work to know the level of protection that his work will be qualified to.

### **The ultimate proposals of this thesis:**

The thesis's propositions can be briefed in the following points:

- 1- There is a conflict in decisions regarding the copyright subsistence of works
- 2- This conflict appears in the interpretations judges gave to originality, authorship and fair use (in US, or fair dealing in UK) concepts.
- 3- The interpretations of originality differed regardless of the position of legislation and were mostly governed by the development of cultural works especially the factual and information works. Also, the interests of right holders had the most influence on judges' orientation
- 4- Barthes and Foucault argued the death of authorship in literature, however, Woodmansee and Jaszi applied this concept in copyright law to argue that authorship is not suitable to collective and adaption works. This is proven to be improper application.
- 5- Romanticism and romantic or genius authors were used also as a criticism to authorship historically, and it is claimed that authorship is a foreign concept and more literary than legal. The thesis proved that authorship and literary property were inherent in England as legal concepts before copyright legislations.

- 6- After defending authorship, the thesis showed that copyright law is intermingled with authorship due to the personality attributes of copyright law and that reflects the position of the author in copyright law that defeat any claims of his death. Depending on Hobbes, Locke, Hegel and Kant we extracted the 'elements of authorship' that can be used to test the existence of authorship in any work.
- 7- The thesis used these 'elements of authorship' to differentiate between authorship and non-authorship works. Besides, we focused on the importance of relying on selection and arrangement as an originality criterion for authorship works not non-authorship works. Yet, the thesis argues that non-authorship works can get protection under a *sui generis* system that excludes authorship and originality concepts.
- 8- The thesis then finally argued the categorisation of works into authorship and non-authorship works, and also the categorisation of authorship works into high and low authorship. Additionally, the thesis proposed a Digital Gate that can apply this theoretical proposal online and provide a facility for licensing works.



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