**Ideas expression, fixation and originality**

There are a few central concepts in copyright that are really important to know about in order to enable you to understand what copyright seeks to protect. These are:

* The ideas expression dichotomy
* The need for fixation of a work
* Originality

Each of these will be examined in turn below.

**Ideas expression dichotomy**

Copyright protects works and not ideas. These ideas must be expressed in some form before copyright arises. There is however no minimum length or substance to constitute a work: for example, musical copyright was found to exist in the four notes constituting the Channel 4 television theme. More recently, newspaper headlines have been found to be independent literary works. On the other hand, single words, titles, and the catch-phrases of a TV personality have been held to be too insubstantial to be literary works.

On ideas and expression of ideas, Lord Hoffmann said the following on this topic in Designers Guild Ltd v Russell Williams (Textiles) Ltd [2001] FSR 11, paras 24 and 25.

*Plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work, but the distinction between ideas and expression cannot mean anything so trivial as that. On the other hand, every element in the expression of an artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author. It represents her choice to paint stripes rather than polka dots, flowers rather than tadpoles, use one colour and brush technique rather than another, and so on. The expression of these ideas is protected, both as a cumulative whole and also to the extent to which they form a ‘substantial part’ of the work. [para 24] . . . My Lords, if one examines the cases in which the distinction between ideas and the expression of ideas has been given effect, I think it will be found that they support two quite distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. … The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature they are not original, or so commonplace as not to form a substantial part of the work. Kenrick & Co v Lawrence & Co (1890) 25 QBD 99 is a well-known example. It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff’s work. At that level of abstraction, the idea, though expressed in the design, would not have represented sufficient of the author’s skill and labour as to attract copyright protection [para 25].*

The case concerned the question as to whether the design of a wallpaper had been infringed by its inclusion in another wallpaper. If you would like to see picture of the wallpapers, have a look here <https://www.cipil.law.cam.ac.uk/virtual-museum/designers-guild-v-russell-williams-2001-fsr-113>

**Important points:**

• Copyright protects expressions rather than ideas and information as such

• There must be a work of a relevant kind: literary, dramatic, musical, artistic, film, sound recording, broadcast, published edition

**Question**

When thinking of a dance, can you distinguish between ideas, and expression of ideas?

**Fixation**

A work must be ‘fixed’ in some tangible form before it will be protected by copyright. The definition of fixation in the copyright Act is very broad and capable of covering, for example, the use of shorthand. A work may be recorded in digital form on discs and in computer memories. As regards speech, singing, and music, the tape and cassette recorder have been familiar ways of making recordings for a long time, and film, video, and digital recording, including voice recognition software, can now be added to the list of methods of fixation sufficient to confer copyright

***Important point:***

• Copyright does not come into existence unless and until a recording is made

***Question:***

When would copyright arise in a dance work? What sorts of fixation might be used?

**Originality**

Another important test of whether or not a work protected by copyright has been created, is the requirement of originality. The Copyright Designs and Patents Act 1988 (the current UK legislation on copyright) says that to have copyright, literary, dramatic, musical, and artistic works must all be original.

UK case law suggests that for a work to be original, it should originate from the author and must not be a copy of a preceding work. In addition, a common theme found in case law is the test of the skill, labour and judgment which the author has invested in the work. In a case from 1916, this was said about originality for copyright in the UK:

*The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought . . . The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.*

University of London Press v University Tutorial Press [1916] 2 Ch 601 at 608

Recent case law from the European Union – the court where much of our current case law comes from - has suggested that originality refers to the ‘author’s own intellectual creation.’ Here, what is important is the author’s ability to exercise free and creative choices and to express personal creativity, or stamp a personal touch, on the work.

There has been much academic debate as to whether this has changed the UK test for originality – that of skill labour and judgment. Some commentators argue that it has raised the standard, but that this would be relevant for works at the margins – particularly where the author has to follow rules to create the work. For instance, a football match could not be a copyright work as a dramatic work (as some had argued) because rules are followed to play the game. However, do note that copyright could subsist in a painting made of a moment in a game, or in a photograph taken of, say, a goal.

There is no requirement of originality in relation to films and sound recordings, but copyright does not subsist in a sound recording or film which is, or to the extent that it is, a copy taken from a previous sound recording or film.

***Question***

Which kinds of work must be ‘original’ to enjoy copyright protection?

**Derivative works**

Translations, adaptations, and dramatisations attract their own copyright, even though derivative, as do arrangements, orchestrations, and transcriptions of musical works. One legal test is that a derivative artistic work might be original where there was ‘some element of material alteration or embellishment’ in it by comparison with the previous work.

An example can be seen in Baumann v Fussell [1978] RPC 485 (CA)

*A photograph of two cocks fighting each other was used as the basis of a painting. The composition of the subject matter was followed closely but the painter employed different colouring to heighten the dramatic effect of the representation. It was held that there was no infringement. It seems likely, therefore, that the painting would have been held to be original and so qualified for its own copyright.*

***Independent but similar works***

An important point to remember is 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’. Thus, if two works are similar, it does not follow that they both cannot be original in the sense of copyright law. Unless one is derived from the other, a link between them beyond similarity, then both can be considered original. The point may be important in relation to artistic works, particularly paintings and photographs, where certain subjects and themes (eg representations of well-known scenes, landmarks, and buildings) are or become well-worn. Unless there is copying, they can both be considered original – so long as the originality test is met.

**Key points**

• Literary, dramatic, musical, and artistic works must be ‘original’ to attract copyright

• Originality is not a high standard, or a requirement of quality/merit/creativity/novelty

• Although individual facts and circumstances are always significant, the following factors are often cumulatively of use in assessing originality: work not copied; work is a product of author’s own skill, labour, and judgement; author’s own intellectual creation; the stamping of personal touch on the work.

• Derivative works may be original

***Question***

List all the elements to be considered in dealing with issues about originality. Which do you consider the most significant? Can you think of two similar, but independent and original dance works? When is your dance work original for the puposes of copyright?