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Original' under the law of copyright is distinct from the ordinary meaning of 'original': A discourse

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Abstract
At the centre of copyright and protection of creative works is the issue of the work being original, otherwise referred to the concept of originality. Though originality is stipulated as a major condition for the subsistence of copyright under the Nigerian Copyright Act, its import and scope was not defined by the Act thereby creating some sort of ambiguity within the context of the said Act. Using the doctrinal methodology with a comparative approach, this paper examined the import and scope of originality in copyright law. To be effective, the paper briefly highlights the literal connotation of the term before focusing on the legal perspectives to the concept. Specifically, this paper analyzed the position under the common law vis-à-vis the civil law and European Union approaches. This paper found that the prevalent conception of the term 'originality' under the common law approach is quite adequate for the purposes of determining whether a creative output is copyrightable. However, in the application of the common law conception to factual exigencies, it may be necessary to have theoretical developments of the concept in civil law jurisdictions as well as under international law in perspective so as to make the law ever-responsive to changing situations.

Keywords: original, originality, copyright, copyright act

Introduction

Copyright is the branch of intellectual property law which is used for the protection of literary, artistic, and dramatic achievements. It is an old but bourgeoning area of law that has enjoyed global acceptance but is not as widely explored in Nigeria because some persons are still not aware of the rights that they can exercise over their intellectual works, while a vast majority of others who are aware of the existence of this area of law do not know the vastness of the scope and that it also accommodates their own class of creative effort, while the rest are simply reluctant to deal with the law.

Eligibility to copyright protection rests mainly on the requirement of originality which arguably is the main force in the creative process of all arts [1]. A person does not become an author merely by copying another person's work [2]. To be an author and thus entitled to copyright in a work, a person must show that the work is original to him [3]. Where this is lacking, such person cannot exercise the limited exclusive rights, which copyright law affords, over the work. According to Craig, "originality is the foundational concept that defines the relationship between an "author" and her "work", for copyright in a work comes into existence at the moment when an author produces a fixed original expression" [4]. Ginsburg seems to concur with this statement when she opines that "originality is the overarching standard of authorship" [5].

Indeed, section 1(2) (a) of the Copyright Act provides that for copyright to subsist in a literary, musical or artistic work, sufficient effort must have been expended to make the work possess an original character. The import and scope of the term 'original' or better put, 'originality' under the Nigerian Copyright Act appears unclear. This is based on the fact that the technical connotation of "originality" is not consistent with ordinary thinking whereby creativity or innovation is an integral part of an original work [6]. The issue then becomes, what does the term 'original' mean and when can a work be said to be 'original', seeing that originality is a fundamental criteria for copyright protection under the law. In the circumstance, it becomes imperative to interrogate the true import of the term 'original' or 'originality' vis-à-vis the nature and scope of copyright law towards elucidating the actual criteria or qualification for the subsistence of copyright in a creative work.

Nature and Scope of the Law of Copyright

Simply put, copyright is a legal term describing rights given to creators for their literary and artistic works. They are rights of literary property as recognized and sanctioned by positive law [7]. Thus, copyright is an intangible incorporeal right granted by statute to the author or originator of certain literary or artistic production, whereby he is invested a limited period, with sole and exclusive privilege of multiplying copies of the same and publishing or selling them [8].

Copyright serves to control the copying of the intellectual materials existing in the field of literature and arts by protecting the writer or artist from unauthorized copying of his materials [9]. The Nigerian Copyright Act provides for the category of what is eligible for copyrights to include literary works; musical works; artistic works; cinematograph films; sound recordings and broadcast [10]. Any work that is created which does not fall under the foregoing categorization cannot vest copyright in its creator [11]. Thus, the subject matter of copyright includes every production in literary, scientific and artistic domain,

whatever the form or mode of expression [12].

For a work to enjoy copyright protection, however, it must be an original creation of the author [13]. The term 'original' is now regarded as a fundamental concept and principle underlying the law of copyright. In fact it is regarded as the basis of the protection given by the law of copyright to particular forms of expression [14]. And while quality of a work is important as relate to creation, protection is independent of that or the value attached to the work. It will be protected whether it is considered a good literary or musical work or not and also notwithstanding the purpose of which it is intended, this is because the use for which a work may be put has nothing to do with its protection [15].

Practically, all national copyright laws provide for literary works which comprises among other novels, poems, short story, dramatic works, and other writings irrespective of their content (fiction or non-fiction) length or purpose [16]. It is also worthy of repeating that the main basic right of the owner of copyright is to prevent others from making copies of one's works and as such, recording rights, motion picture rights, broadcasting rights, translation and adaptation rights are all granted to authors and requires authorization by the owners [17]. This is understood to refer to rights of performing artist in their performance, rights of producers of phonograms in their phonograms, and the rights of broadcasting organisations in their television and radio programs. Since the author of a work in which copyright subsist has perpetual, inalienable and imprescriptible right to claim ownership of his work [18], it follows that any person who without license or authorisation does or causes any act to be done against the copyright of the owner would be said to have infringed on the owner right [19] which is actionable in court [20].

'Original' as a General/Ordinary Grammatical Term

The Oxford Advanced Learner's Dictionary of Current English defines the term 'original' as:

(1)…existing at the beginning of a particular period, process or activity... (2) New and interesting in a way that is different from anything that has existed before; able to produce new and interesting ideas… (3) painted, written, etc. by the artist rather than copied… (4) a document, work of art, etc. produced for the first time, from which copies are later made… (5) a person who thinks, behaves, dresses, etc. in an unusual way…. [21]

Similarly, the Cambridge Advanced Learner's Dictionary and Thesaurus defines the word 'original' as:

(1) the first one made and not a copy; (2) in the earliest form of something, or in the form that existed at the beginning; (3) … different from anything or anyone else and therefore new and interesting [22].

In the Cambridge Business English Dictionary, the word 'original' is defined as: "(1) spoken, written, or existing first; (2) not the same as anything or anyone else and for that reason special and interesting; (3) the first one made and not a copy." [23] Also, the Merriam-Webster Dictionary defines the word 'original' as:

(1) happening or existing first or at the beginning; (2) made or produced first**:** not a copy, translation, etc; (3) not like others**:** new, different, and appealing; (4) of, relating to, or constituting an origin or beginning; (5) being the first instance or source from which a copy, reproduction, or translation is or can be made; (6) independent and creative in thought or action; (7) that from which a copy, reproduction, or translation is made; (8) a work composed firsthand; (9) a person of fresh initiative or inventive capacity [24].

Juxtaposing the various dictionary definitions of the word 'original' as reproduced above, it is clear that a work can only be described as original if it possesses the following characteristics:

a. It is new, i.e. it is being created, happening or coming into existence for the very first time;
b. It is totally different from anything that has existed before it;
c. It constitutes the origin, source, first instance or earliest form of the work from which subsequent copies or reproductions can be made;
d. It is appealing and interesting in an unusual way.

Going by the above postulation, any work which constitutes an improvement, adaptation, re-creation, reproduction, translation, copy or which in any way was derived from another work is not an original work and is not susceptible to protection under the copyright law. For instance, the very first design or building plan of a bungalow house that was ever made is protected by copyright, but all subsequent designs or building plans of bungalow houses may not be protected by copyright, because such designs or building plans are not the first instance of a design or building plan of a bungalow house. The very first dictionary of English language ever published is protected by copyright, but all subsequent publications of English language dictionaries may not be protected by copyright, because they are not totally different or unusual from the very first ever published.

Of course, the above situation will invariably produce very alarming and absurd legal consequences. In the first example, an unauthorized use of the very first design or building plan of a bungalow house may be considered an infringement, whereas in the case of any subsequent designs or building plans of a bungalow house, no infringement may be considered as having occurred. In the second example, an unauthorized reproduction of the very first English language dictionary may be considered an infringement, whereas an unauthorized reproduction of any subsequent publications of English language dictionaries may not be considered an infringement.

Adam and Yusuf, while commenting on the undesirability of the literal cum dictionary meaning of 'original' for the purposes of the law on copyright protection opined thus:

Literally, originality is defined as "the ability to think independently and creatively" or "the quality of being novel or unusual", which suggests a connection between originality and the concept of "creativity". The terms "creativity" and "unusualness" are both abstract for a legal definition and subjective for determining the scope of copyright protection [25].

Undoubtedly, the issues associated with 'creativity' and 'unusualness' as abstract and subjective constructs necessary to confer 'originality' on a work have pushed the courts to seek a more objective approach in determining the scope of copyright protection.

'Original' as a Legal Concept in Copyright

The Abridged 8th Edition of the Black's Law Dictionary, while presenting the term 'original' as being synonymous with 'originality', defines same in the following words:

(1) The quality or state of being the product of independent creation and having a minimum degree of creativity. (2) The degree to which a product claimed for copyright is the result of an author's independent efforts [26].

Going by this definition, originality as a requirement for copyright protection possesses a lesser standard than novelty under patent law, such that to be original, a work does not have to be novel or unique [27]. Put differently, 'originality' under copyright law does not have its ordinary meaning which may be summarized as "being novel or unique".

Still in tandem with the views expressed in the law dictionaries, two main judicial approaches have evolved globally in the conception and application of the doctrine of "originality" in copyright context, namely the common law approach and the civil law approach. However, the approach of the European Court of Justice as well as the understanding of the concept in copyright diplomatic circles also deserves to be mentioned [28].

Originality: The Common Law Approach

The common law conception of the originality, otherwise known as the 'objective' or "sweat of the brow" or "industrious collection" approach [29], derives basically from the utilitarian theory of incentivizing productions to add to the store of information, enrich cultural life and the fabric of the society. For instance, article 1(8) (8) of the Constitution of the United States of America justifies the protection of copyright on the basis of promotion of science and useful arts.

Under the traditional common law approach, for a work to be original it is necessary to show that sufficient skill and labour or industry was expended in making the work. It is not necessary to show creative input in making the work [30]. Hence, originality under this approach is conceived more by reference to the skill, efforts and labour of the creator than his personal ingenuity [31]. The same philosophy underlies the United Kingdom's copyright policy as could be seen in the long title to Copyright Act of 1709: "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." [32] This approach was otherwise expressed in the celebrated dictum of J. Peterson in the case of *University of London Press Ltd v. University Tutorial Press Ltd* that:

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 thought. 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 and that it must originate from the author [33].

The social and economic considerations of the British-American model has a great influence on its conception of "originality" in the context of skill, labour and judgment expended in the production of a work. The basic principle of common law jurisdictions is that anything which has involved labour is worth protecting, and the amount of labour involved needs not be great. Perhaps, the dictum of Megarry, J in *British Northrop Ltd v. Texteam Blackburn Ltd* in relation to drawings will offer a useful illustration in this regard, thus:

Copyright is concerned not with any originality of ideas but with their form of expression, and it is in that expression that originality is requisite. That expression need not be original or novel in form, but it must originate with the author and not be copied from another work… A drawing which is simply traced from another drawing is not an original artistic work: a drawing which is made without any copying from anything originates with the artist [34].

In the same case, the learned law lord also held as follows:

It may indeed be that something may be drawn which cannot fairly be called... a drawing of any kind: a single straight line drawn with the aid of a ruler would not seem to me a very promising subject for copyright. But apart from cases of such barren and naked simplicity as that, I should be slow to exclude drawings from copyright on the mere score of simplicity [35].

The threshold of originality for copyright protection at common law is that low. Thus, in *Waterlow Directories Ltd v Reed Information services Ltd* [36], both the plaintiff and the defendant published legal directories containing the names and addresses of solicitors and barristers. In 1990, the defendant decided to update its directory. It did by comparing it with the plaintiff's, highlighting those names which appeared in the plaintiff's directory but not the defendant's. It also decided to include, as did the plaintiff's, a section listing solicitors and barristers in public authorities and industry. For the purpose of updating the defendant's directory, the names and addresses not appearing in the defendant's directory were loaded onto a word processor, so that the relevant solicitors and barristers could be written to, inviting them to appear in the defendant's directory. Aldous, J. however held that it was clear that a person could not copy entries from the plaintiff's directory and use them to compile its own directory. The defendant did not deny that the plaintiff had copyright in the plaintiff's directory, but denied infringement. The judge, however, had little difficulty in deciding that what was taken was a substantial part. The quality of what is taken is usually more important than the quantity, but in the present case the parts reproduced were important in that they enabled the defendant to carry out a comprehensive mailing.

The above approach has consistently enjoyed the favour of common law courts as far as conception of originality is concerned. Thus in *Schroeder v. William Morrow & Co* [37], the defendant had copied 27 out of 63 pages of the plaintiff's catalogue of gardening suppliers. The United States Court of Appeal for the 7th Circuit held that this constituted an infringement of copyright. Similarly, in *Adventures in Good Eating v. Best Places to Eat* [38], the United States Court of Appeal for the 7th Circuit also held that the defendant had infringed the copyright in the plaintiff's restaurant guide by copying entries from it. In *Engineering Dynamics Inc. v. Structured Software Inc* [39]. it was held that a compilation of facts for a user interface such as a guide to state tariffs charged on operating pay telephone companies was copyrightable. And in *CCC Info. Servs. Inc. v. Maclean Hunter Market Reports* [40] a red book listing of used car values based on the professional judgment and expertise of the author was held to be copyrightable.

From the above, it follows that the conception of originality under the common law interprets the concept in the light that the work does not have to be unique or particularly meritorious while emphasizing that 'originality' in law is more concerned with the manner in which the work was

created and that the work in question derives from the author [41]. While it is correct to state that the foregoing represents the dominant common law approach, it is by no means the only judicial interpretation of originality. The threshold has been raised in a number of cases [42] especially in the United States of America. For instance, some Federal Courts in the United States included the element of creativity in the definition of originality [43].Thus, in the case of *Alfred Bell & Co. v. Catalda Fine Arts Inc* [44], the United States Court of Appeal for the 2nd Circuit opined as follows: "'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author'. No large measure of novelty is necessary." This dictum logically presupposes that some measure of novelty is required to confer originality and concomitantly copyright, on a work. This approach eventually received the approval of the United States Supreme Court in the case of *Feist Publications Inc. v. Rural Telephone Services* [45]. In that case, the US Supreme Court, per Justice O'Connor, stated that in order for a work to be considered "original" it must not only be an independent creation and must also show "a modicum of creativity". According to that court:

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author… to be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.

From the foregoing, it follows that 'originality' for the purposes of copyright protection under the common law, does not mean that the work must be necessarily novel or new, or that the author must be the first person to have said or written the words, even though some level of creativity or exertion of skill, labour, ingenuity or expense, albeit tangential or negligible, may be required. The decision of the English House of Lords in the case of *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [46] contains an exhaustive exposition on the issue of 'originality' for the purposes of copyright protection at common law. Most poignant is the view expressed by Lord Pearce when he held as follows:

My Lords, the question whether the plaintiffs are entitled to copyright in their coupon depends on whether it is an original literary work. The words "literary work" include a compilation. They are used to describe work which is expressed in print or writing irrespective of whether it has any excellence of quality or style of writing (per Peterson J in *University of London Press Ltd v. University Tutorial Press Ltd ([1916] 2 Ch at p 608)*). The word "original" does not demand original or inventive thought, but only that the work should not be copied and should originate from the author. In deciding therefore whether a work in the nature of a compilation is original, it is wrong to start by considering individual parts of it apart from the whole, as the appellants in their argument sought to do. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original. (See, for instance, the case of *Palgrave's Golden Treasury* referred to by the Privy Council in *Macmillan & Co v Cooper*). In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense. If it did, it is entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. So the protection given by such copyright is in no sense a monopoly, for it is open to a rival to produce the same result if he chooses to evolve it by his own labours (See *Kelly v Morris (1866) LR 1 Eq. 697 at p 701)*). In *Lamb v Evans ([1893] 1 Ch at p 224)* Lindley LJ said with regard to a trades directory,

"It appears to me that the plaintiff has an exclusive right to the publication of those headings with the translations - not that he can restrain other people from publishing the same sort of thing if they go about it in the right way, but he has a right to restrain other people from copying his book. There is so much common to his book and to other books of the same sort that they very likely will contain the same information. It is just like the case of a man who publishes a map of a particular country; another may publish a map of the same country exactly like it, if he makes his map from original materials; but the first can restrain the other from copying his map, which is a totally different thing."

Thus, directories, catalogues, and the like have been held to be original and to acquire copyright if the work that goes to their making has been sufficient (*Collis v Cater, Stoffell and Fortt Ltd; Blacklock (H) & Co Ltd v Pearson (C Arthur), Ltd*). Where, however, the work of compilation was not "substantial" but was "negligible" it was held to have no copyright (*Cramp & Sons Ltd v Frank Smythson Ltd [1944] 2 All ER at p 95; [1944] AC at p 336*). The arrangement of the material is one of the factors to be considered. Viscount Simon LC in that case said:

"There was no evidence that any of these tables was composed specially for the respondents' diary; there was no feature of them which could be pointed out as novel or specially meritorious or ingenious from the point of view of the judgment or skill of the compiler; it was not suggested that there was any element of originality or skill in the order in which the tables were arranged."

So in each case it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim to originality in a compilation [47].The principles espoused in the above decisions appear to have gained acceptance in Nigeria. Thus, in *Yemitan v. Daily Times & Anor* [48] the plaintiff alleged that the copyright in his article titled "The day the Lagoon Caught Fire" was infringed by the defendant. According to the plaintiff, the defendants in their magazine called the "Headlines" reproduced his said article without authorisation. Thus, the plaintiff sued for damages and injunctions against the defendants. The court, while deciding in favour of the plaintiff held that copyright in a work "belongs to the author, who is the one that actually expended the work, labour, knowledge and skill". Also, in *Plateau Publishing v. Adophy* [49], the Supreme Court, per Karibi-Whyte, JSC (as he then) held that, "It is not a defence in an action for copyright that the article published, in the opinion of the defendant, is an original work. The work concerned must be original in the sense that it must not be a verbatim reproduction of a prior work, but not in the sense that it must itself be a product of original or inventive thinking." Thus, simply producing a copy of an existing work, no matter how much skill and labour went into its making, could not give rise to a new original work of copyright. Originality for the purpose of copyright law is not originality of ideas or thought but originality in the execution of the particular form required to express such ideas or thought [50].

Originality: the Civil Law Approach

In civil law jurisdictions, the author's right is founded on the link between the author and the work emanating from his mind. The subjective or creativity school, which has its roots in the civil law tradition led by France, holds that in determining originality, "an approach that requires searching not for evidence of skill and labour but rather for the mark of the author's personality in the work" should be adopted [51]. Put differently, the creativity school "holds that a finding of originality is impossible in the absence of creativity. The standard of originality requires at least minimal creativity" [52]. The form of creativity required here is not the novelty standard required under patent law. It is the creativity, which connotes that the work in question is not merely a copied work but one that involves labour, skill and some independent judgment or intellectual activity on the part of the author [53].

The subjective approach is based on a Hegelian philosophy of requiring that the work expresses or reflects the author's personality [54]. The classic theory is that an original work bears the mark of the personality of its author and confers on the created object a specific aspect of the author's personality. This is probably founded on the notion that an individual's personality caused the work to come into existence [55].

In his explanation of the personality theory as it applies to artists, authors and inventors of original and derivative works, Justin Hughes notes that such a work "comes into the world already an embodiment or reflection of some particular individual" [56]. Thus, Delacroix called paintings "a bridge linking the painter's mind with that of the viewer"; Solzhenitsyn said that literature "transmits incontrovertible condensed experience [57] and Thomas Jefferson called inventions "the fugitive fermentation of an individual brain" [58].

According to Adam and Yusuf, a strict application of the classical test to such works as compilations, computer programmes and databases appears problematic as they could be rendered unprotected on ground of lack of originality [59]. According to them:

It is perhaps the recognition of such limitation that has led several French courts to develop a new test, or more precisely to elevate the classical test to a higher level of abstraction, by answering the following question: what is it that an author does to show her personality through a work? The fairly unanimous answer given by French courts is that creative choices make the difference. In a case involving a bilingual dictionary, the Court of Appeal of Paris found that "the choices and intellectual operations required to create the [bilingual dictionary]" to allow the resulting work to satisfy certain degree of originality. In that case, the court made it clear that the mere sorting of data that was difficult to generate in alphabetical order was not original. Originality can only follow from intellectual creative (as opposed to technical or dictated by the function of format) choices. The approach is approved by the French Supreme Court by holding that labour itself was insufficient and that it is necessary to look at the choice of the method used by the author of the compilation [60].

Originality: The Approach of the European Court of Justice (ECJ)

In order to harmonise copyright protection in European Union (EU) countries and set a common level of originality requirement in several aspects of copyright law, the EU made some Directives which are mainly based on the "authors' own intellectual creation criteria" [61]. The ECJ manifested its departure from the English minimalist standard of originality when it held in *Infopaq International A/S v. Danske Dagblades Forening* [62] that the EU originality test ("author's own intellectual creation") applies beyond 'works' designated in a series of directives-namely computer programmes, photographs, and databases-so as to encompass all categories of works under the Berne Convention [63] into the European sphere.

Originality in International Instruments

There is no explicit requirement under the international copyright instruments that a work must be original to attract protection, thus none of those instruments contains any definition of "originality" [64]. However, records of diplomatic meetings on intellectual property developments contain confirmations that originality is required for copyright protection [65]. For instance, after defining the literary and artistic works falling under its ambit, the Berne Convention provides that "translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work" [66]. Thus, in so far as the Berne Convention is concerned, the expression "work" is generally considered to be synonymous with intellectual creation which should contain an original structure of ideas and impressions, even though it appears that the definition of the scope of the concept 'original' was reserved for national legislators [67]. Even the Committee of Experts of WIPO on the Convention has noted that originality was "an integral part of the concept of work" [68]. According to the Committee, intellectual creations are evidently an element of the notion of works [69].

Furthermore, the Berne Convention provides some important hints as to what constitutes an original work in relation to collection of information by providing that "collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections" [70].

Conclusion

Attempts at defining the concept of originality has led to the rise of two schools of thoughts. The first school has its roots in common law tradition exemplified by the common law approach. The second school is linked to the civil law jurisdictions exemplified by countries like France, with tacit support from the jurisprudence of the European Union Court of Justice and some international instruments. However, recent developments in some common law countries such as the United States of America, Canada, United Kingdom and Australia shows a tangential shift towards a middle course between the common law objective approach and the civil law subjective approach. Developments in the international sphere also appear to be more favourably disposed towards such middle approach.

It is therefore recommended that in the application of the common law conception of 'originality' to factual exigencies before Nigerian courts, it may be necessary to have theoretical developments of the concept in civil law

jurisdictions as well as under international law in perspective so as to make the law ever-responsive to changing situations.

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11. Oturu D. 'An Overview of Copyright Protection in Nigeria (Part 1)', <https://www.mondaq.com/nigeria/copyright/692416/an-overview-of-copyright-protection-in-nigeria-part-1> Last accessed on 25/10/2021. Although this provision does not mention cinematograph films, sound recordings and broadcasts, it has rightly been argued that its application on those works can be implied. Ekpa, FO. 'The Preconditions for Copyright Protection in Nigeria', (2014) 6(1) *Kogi State University Bi-Annual Journal of Public Law*, 76 - 89. Some scholars, believing that the Nigerian Copyright Act did not define originality, have attempted some definition within the context of the Act. According to Ocheme, it "denotes that which is new, not copied or imitated from another work". See Ocheme, P. *The Law and Practice of Copyright in Nigeria* (Zaria: ABU Press, 2000), p. 31. Nchi sees it as that which "emerges for the first time as opposed to a reproduction". See Nchi, SI. *The Nigerian Law Dictionary* (Kaduna: Tamaza Pub. Co., 2000), p. 382. In Ekpa's view, "originality in this context means that the creator is creative in his work, that the expression of his ideas are fresh or newly created and not copied from pre-existing work... what is paramount in considering the originality of a copyright work is that the work must originate from the author. It definitely must have its origin in the labour of the author, his property and his creation." See Ekpa, FO. *op. cit;* Ugbe, RO. 'Originality and Fixation as Basis for Copyright in Music', (2002)5 University of Maiduguri Law Journal, 23.
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23. 'Original', *Cambridge Business English Dictionary*, available at <https://dictionary.cambridge.org/dictionary/english/original> Last accessed on 25/10/2021.
24. 'Original', *Merriam-Websters Dictionary*, available at <https://www.merriam-webster.com/dictionary/original> Last accessed on 25/10/2021.
25. Adam, KI & Yusuf, IA. *op. cit*, 295.
26. Garner BA. *Black's Law Dictionary* (Abridged 8th edn, St. Paul: Thomsom/West, 2005), p. 929. Also see Garner, BA. *Black's Law Dictionary* (11th edn, St. Paul: Thomson Reuters, 2019), 1327.
27. *Ibid.*
28. Adam, KI & Yusuf, IA. *op. cit*, 295.
29. Oriakhogba, DO. *op. cit*, p. 121. Also see Drassinower, A. 'Sweat of the Brow, Creativity and Authorship: on Originality in Canadian Copyright Law', (2003-2004)1 University of Ottawa Law and Technology Journal, 105-123.
30. Drassinower, A. *op. cit.*
31. Adam KI, Yusuf IA. *op. cit*, p. 295. Art. 3(1) of the Bulgarian Law on Copyright and Neighbouring Rights provides that the "subject matter of copyright shall be any work of literature, art and science, which is a result of creative activities [...]". The Law on Protection of Literary and Artistic Property of Burkina Faso declares in Art. 5 that it protects "works of the mind that are original intellectual creations in literary and artistic areas". The Law goes ahead in Art. 118 to define "original works" to mean "a work which, by its characteristic features and form, or by its original form alone, allows its author to be identified". In Malaysia, s. 7(3)(a) of the 1987 Copyright Act, *Act 332*, Laws of Malaysia stipulates that a work is eligible for copyright protection if, among others, "sufficient effort has been expended to make the work original in character".

32. UK Statute of Anne, otherwise titled Copyright Act of 1709, 8 Anne c.21. Named after Anne, Queen of Great Britain, this was the first copyright statute in the Kingdom of Great Britain, and the first full-fledged copyright statute in the world. It was enacted in the regnal year 1709 to 1710, and entered into force on April 10, 1710. See Norman, J. 'The Statute of Anne: The First Copyright Statute', available at <https://www.histor yofinformation.com/detail.php?entryid=3389> Last accessed on 25/10/2021.
33. University of London Press Ltd v. University Tutorial Press Ltd (1916)2 Ch. 601 at 608.
34. [1974] RPC 57.
35. *Ibid*.
36. [1992] FSR 409.
37. 566 F. 2d 3 (7th Cir. 1977).
38. 131 F.2d 809, 815 (7th Cir. 1942).
39. 26 F.3d 1335 (5th Cir. 1994).
40. 44 F.3d 61 (2d Cir. 1994).
41. Agomo, C. *op. cit.*
42. Since Canadian copyright jurisprudence is influenced by the British copyright law being a former colony of Britain, the traditional common law school of thought held sway for a long time in Canada (For instance, *Kelly v. Morris* (1866), L.R. 1 Eq. 69; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R; *CCH Canadian Ltd. v. Law Society of Upper Canada* [2002] FCA 187) before the judgment of the Canadian Supreme Court in the case of *CCH Canadian Ltd v Law Society of Upper Canada* ([2004] 1 SCR 339), wherein it was held that for a work to be held original, its creation must involve some "skill and judgment". Similarly, as a former British colony, the objectivist approach was adopted in Australia (For instance, *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd* [2002] FCAFC 112; *Emerson v Davies* 8 F Cas 615 (Mass CC, 1845); *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49) until the decision of the High Court of Australia in the case of *IceTV Pty Ltd v. Nine Network Australia Pty Ltd* ((2009) 239 CLR 458), which introduced the "independent intellectual effort" or "sufficient effort of a literary nature" in determining the originality question. Thus, it appears that Canada and Australia are moving away from the objectivist stance on the concept of originality.
43. KI Adam & IA Yusuf, *op. cit*, 296.
44. 191 F.2d 99, 102 (2nd Cir. 1951).
45. 499 U.S. 340, 345 (1991).
46. (1964)1 WLR 273 at 291.
47. The dicta expressed in this case tends to suggest that Britain appears to be moving towards the same middle course as Canada and Australia as some cases exist wherein the British courts have used the terms "original artistic skill and labour" or "original skill and labour". See *Newspaper Licensing Agency Ltd v. Marks and Spencer Plc* [2002] RPC 4; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700. Also see DJ Gervais, *op. cit.* This position does not seem unfounded. Indeed, there are authorities suggestive of the fact that the British position is moving away from the middle course adopted in Canada and aligning with the "author's own intellectual creation" test, which is a subjective test. See s. 3A(2) of the 1988 UK Copyright, Designs and Patent Act; *SAS Institute Inc. v. World Programming Ltd* [2013] EWCA Civ. 1482. Also see Savvides, T & Ibbetson, S. 'Brexit and Copyright Law: Will the English Courts Revert to the 'Old' Test for Originality?', available at <http://kluwercopyrightblog.com/2016/12/05/brexit-copyright-law-will-english-courts-revert-old-test-originality/> Last accessed on 25/10/2021.
48. [1977-1989]2 IPLR 141-156.
49. (1986) 4 NWLR (Pt. 34) 205 at 233.
50. See *University of London Press Ltd v. University Tutorial Press Ltd* (1916)2 Ch. 601 at 608. This assertion is confirmed by the more recent case of *Spreevision Ltd & Anor. v Nestle Nigeria Plc & Ors* (Suit No. FHC/IKJ/CS/183/2012, unreported Ruling of 10th September 2013 per Yinusa, J. wherein it was held that "[r]ecognition of copyright is premised on some sufficient effort having been expended on the work to give it an original character [...] for a work to be eligible for copyright protection, it must be original. The essence of originality is that the author of the work must have devoted skill and labour to its creation." Also see the case of *Ifeanyi Okoyo v Prompt and Quality Services & Anor* [2003-2007]5 IPLR 117 – 135; *Yeni Anikulapo-Kuti & Ors. v Iseli & Ors* [2003-2007]5 IPLR 53 - 73. Thus, the determination of whether a work is original under the Nigerian Copyright Act would require an objective test. That is not to say that in determining the amount of "sweat of the brow" the courts are completely precluded from making other value judgments such as determining questions of creative input, intellectual contribution or creative choice, where necessary. Neither is an ordinarily creative work precluded from copyright protection under the Act. The Act merely lays down a low standard in answering the originality question with the effect that works, which may not ordinarily qualify as creative, would be regarded as eligible for copyright if "sufficient effort" were expended in making them. The fact that the NCA protects literary, artistic and musical works irrespective of their literary, artistic or musical quality gives credence to this argument. See Oriakhogba DO. *op. cit*, 127.
51. Gervais DJ. *op. cit.*
52. Drassinower A. *op. cit.*
53. Oriakhogba DO. *op. cit*, 125.
54. Adam KI, Yusuf IA. *op. cit*, 297.
55. *Ibid.* This school of thought is now firmly established in the United States of America following the US Supreme Court decision in the case of *Feist Publication Inc. v Rural Telephone Service (supra)*. See Abrams, HB. 'Originality and Creativity in Copyright Law', (1992) 55(2) *Law and Contemporary Problems*, 3 – 44; Littrell, R. 'Toward a Stricter Originality Standard for Copyright Law', (2002) 43(1) Boston College Law Review, 193-226.
56. Hughes J. 'The Personality Interest of Artists and Inventors in Intellectual Property', (1998) 16(1) *Cardozo Arts & Entertainment Law Journal*, 81 - 181.
57. Adam KI, Yusuf IA. *op. cit*, 297.
58. Jefferson T. 'Letter to Isaac McPherson', cited in Kurland, P & Kenan, WR (eds). 'The Founders' Constitution, Vol. 3, Art. 1, s. 8, cl. 8, Doc. 12, available at <http://press-

pubs.uchicago.edu/founders/docum ents/a1_ 8_8s12.html> Last accessed on 25/10/2021.
59. Adam, KI & Yusuf, IA. *op. cit*, 297.
60. *Ibid*.
61. *Ibid*. These include the EU Directive 91/250/EEC of 14 May1991 on the Legal Protection of Computer Programs, now consolidated in EU Directive 2009/24/EC of 23 April 2009.
62. [2009] ECJ 17.
63. 1886 Berne Convention for the Protection of Literary and Artistic Works.
64. Gervais, DJ. 'Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law' (2002) Journal of the Copyright Society of the USA, 949-981.
65. Adam KI, Yusuf IA. *op. cit*, 297.
66. 1886 Berne Convention for the Protection of Literary and Artistic Works, art. 2(1) & (3).
67. Adam, KI & Yusuf, IA. *op. cit*, p. 297.
68. WIPO, WIPOIGC/GRTKF/1C/5/15(2), paragraphs 60-100.
69. *Ibid*.
70. 1886 Berne Convention for the Protection of Literary and Artistic Works, art. 2.