

COPYRIGHT PROTECTION FOR IDEAS: AN APPRAISAL OF THE TRADITIONAL VIEW

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A. INTRODUCTION

The issue of whether copyright protects ideas is one central to the whole operation of the copyright law regime. In this article the author will challenge the correctness of the view — the 'traditional view' — that copyright law does not operate to protect ideas from infringement.

A good example of an early statement of the traditional view is given by Lindley L.J.'s pronouncement in *Hollinrake v. Truswell*¹:

"Copyright, however, does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed."

This statement illustrates the two notions inherent in the traditional view:

- (1) copyright cannot subsist in an idea but only in a form of expression; and
- (2) only a form of expression, and not an idea, is protected from infringement by copyright.

Acceptance of the traditional view is now so complete that it is said to be "trite law".²

In appraising the correctness of the traditional view, the author in this article will:

- (1) consider what, if any, is the rationale of the traditional view;
- (2) determine whether the traditional view is consistent with the theoretical basis of copyright protection as illustrated by the courts' interpretations of the conditions necessary for copyright protection; and
- (3) review the practical application of copyright law to the actual cases to determine whether the results attained accord with the traditional view.

In order to be general in nature, this article will be concerned with the theoretical requirements for, and the practical application of, copyright protection in relation to "works" only. In particular, the protection

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¹ [1894] 3 Ch. 420, 427.

² E.g. per Lord Hailsham in *L. B. (Plastics) Ltd v. Swish Products Ltd* (1979) 5 F.S.R. 145, 160; Dworkin G., "Elanco Products — The ideas-expression dichotomy" (1979) 1 *European Intellectual Property Review* 117.

considered will be protection against the infringing act of producing an "unauthorized reproduction" as this is the main, and root, infringing act contemplated by the *Copyright Act 1968*.

B. THE TRADITIONAL VIEW

I. THE RATIONALE

The traditional view of copyright protection enjoys the favour of the courts (and most academic commentators³), and the notions embodied in the view are fundamental to the operation of copyright law. It is therefore worthwhile to consider in some detail whether there exist any reasons that necessitate the adoption of the traditional view.

(a) *The Requirements of the Copyright Act 1968*

Section 32 of the *Copyright Act 1968* sets out the conditions necessary for copyright to subsist in a literary, dramatic, musical or artistic work (a "work"). Basically, there are two requirements: that the work be original and that there be a connecting factor. The latter requirement is concerned with the status of the author of the work and the place of first publication or the place of making of the work, not the actual concept of a work itself, so need not be considered further in this discussion.⁴

(i) Original Work

It is clear from the cases that the requirement that a work be original does not mean that the work must be of high creative quality (e.g. that it be novel in the patent law sense).⁵ All that is required is that the work originate from its author, with the corollary that it not be copied from another work.⁶

"If the work originates from the author in the sense that it is the result of his skill, labour or experience, and is not copied from another, then it may be said to be an original work for purposes of copyright".⁷

It is obvious that this interpretation of the requirement of originality — an interpretation that involves the inter-related concepts of "authorship" and "copying" — is consistent with the traditional view that copyright does not subsist in ideas but only in their form of expression. However, it cannot be claimed that this interpretation of the originality

³ E.g. *Copinger and Skone James on Copyright* (12th ed. Sweet & Maxwell, London, 1980) 175-6; Cornish W. R., *Intellectual Property* (Sweet & Maxwell, London 1981) 319. But contrast with Lahore J. C., *Copyright and the Arts in Australia* (Melbourne, University Press, Melbourne, 1974) 14, 25; and Lahore J. C. *Intellectual Property in Australia: Copyright* (Butterworths, Sydney, 1977) 8, 197, 206, 226.

⁴ Except in so far as the reference in ss. 32(1) (a) and (b) of the Copyright Act 1968 to a work being "made", or the "making" of a work, suggests a further requirement that the work subsists in a "material form". See *infra* B.1(b) (ii).

⁵ E.g., *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch. 601, 608-10; *Sands & McDougall Pty Ltd v. Robinson* (1917) 23 C.L.R. 49, 56; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W.L.R. 273.

⁶ *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch. 601; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W.L.R. 273.

⁷ Lahore J. C., *Intellectual Property In Australia: Copyright* op. cit. p. 80-1.

requirement is the rationale of the traditional view, since this interpretation is based on the assumption that the traditional view is correct.⁸

(ii) Material Form

There seems to be a further condition that needs to be satisfied before copyright can subsist in a work, namely, that the work must exist in a material form. This requirement of material form is not explicitly mentioned in the *Copyright Act* 1968, but results from an analysis of the Act's provisions.⁹ The *Copyright Act* 1968 does not provide an exclusive definition of material form.¹⁰ However, it has been said that there must be something "in the nature of literary composition" which is to be a subject matter of protection.¹¹ Such an interpretation of the requirement of material form is based upon the assumption that the traditional view of copyright protection prevails. Therefore, this interpretation is consistent with the traditional view, but cannot of itself be the rationale for the view.

The author believes that the conditions necessary for copyright to subsist in a work, as required by the *Copyright Act* 1968 (both explicitly and implicitly), do not of themselves justify the adoption by the courts of what has been termed the traditional view of copyright protection. Since the statutory requirements do not justify the traditional view, any rationale of the view must therefore be one of public policy.

(b) *The Reason of Public Policy*

One of the alleged rationales of the traditional view is that any alternative approach would, to the detriment of society, hinder the free flow of "the noblest of human productions — knowledge, truths ascertained, conceptions and ideas".¹² However, as one commentator has noted:

"One has to question the logic underlying the notion that failing to protect ideas somehow increases their availability for society's overall benefit. This assumption, long the basis of copyright law, is strictly adhered to in the face of a total lack of positive evidence or empirical data that it is in fact true."¹³

As that commentator goes on to point out, it is arguable that the very condition of lack of copyright protection for ideas hinders their development and dissemination.

"It is only when people can fully exploit the benefits of their ideas and receive protection in these endeavours that they will donate the product of their work process to the public domain."¹⁴

⁸ E.g. *University of London Press case* [1916] 2 Ch. 601, 610.

⁹ *Copyright Act* 1968 (Cth.) ss. 22(1), 31(1) (a) (i), 31(1) (b) (i), 32(1) (a), 32(1) (b), in particular the concept of making.

¹⁰ *Copyright Act* 1968 (Cth.) ss. 22(1) and 22(2) provides a limited inclusive definition — this includes "writing" and "sounds embodied in an article or thing".

¹¹ *Chilton v. Progress Printing & Publishing Co.* [1895] 2 Ch. 29, 33 per Lord Halsbury; Lahore J. C. *Copyright and the Arts in Australia* op. cit. p. 14.

¹² *International News Service v. Associated Press* (1918) 248 U.S. 215, 250 (per Brandeis J. dissenting)

¹³ Hopkins D. B., "Ideas, their time has come: an argument and a proposal for copyrighting ideas" (1982) 14 *Intellectual Property Law Review* 385, 388.

¹⁴ *Ibid.*

The author agrees with this statement of principle and cites, in support, the fact that it is just this very principle which is generally accepted as the public policy rationale of the patent law regime.

The other alleged rationale of the traditional view is that it is the proper role of patent law, not copyright law, to provide for the protection of ideas.¹⁵ However, the author can see no merit in this argument. It seems fair to say that, in general, both copyright law and patent law seek to give effect to the public policy principle that an individual should be protected from unfair exploitation by others of his skill, labour or experience. Since copyright law and patent law generally seek to give effect to the same principle it is reasonable to require that, in relation to the issue of protection of ideas, the two regimes complement rather than conflict with each other.

If the nature of protection afforded by copyright were identical to that afforded by patent law, then there would be conflict between the two regimes if copyright protected the ideas expressed in works. This is because the courts have decided that the requirement that a work be original does not mean that the idea contained in the work must be novel. In contrast, patent law requires novelty of idea.

However, the nature of protection afforded by the two regimes is not identical. In patent law, protection is given against an infringing object even though that object may have been arrived at as a result of independent investigation. But copyright does not protect against reproductions of works that are the result of independent effort; it protects only against reproductions of works that result from "copying".¹⁶ Therefore, if copyright protection extended to ideas, there would not necessarily be a conflict between the copyright and patent regimes. Patent law could give monopoly protection, but only to novel ideas; copyright could protect non-novel ideas, but only from copying. Rather than being conflicting, the two regimes could be regarded as complementing each other in the pursuit of giving effect to the public policy referred to earlier.

In summary, the author submits that there is no good public policy justification for the traditional view of refusing copyright protection for ideas. Rather, there appears to be good public policy reasons for extending copyright protection to ideas in a manner complementary to the principles of the patent law regime.

2. COPYRIGHT PROTECTION THEORY AND THE TRADITIONAL VIEW

The author in this part of the article will determine the degree to which the traditional view on copyright protection is consistent with the indi-

¹⁵ E.g., *Baker v. Selden* (1880) 101 U.S. 99.

¹⁶ This requirement of "copying" (in the sense of a causal connection between the two works) is not expressly stated in the *Copyright Act* 1968, but is well established by the case law — see e.g. *L. B. (Plastics) Ltd v. Swish Products Ltd* (1979) 5 F.S.R. 145; *Francis Day & Hunter Ltd v. Bron* [1963] Ch. 587. See also *infra*. B.2(b) (i).

vidual legal elements disclosed (explicitly and implicitly) by the *Copyright Act* 1968 as necessary conditions for the availability of copyright protection. The concept of the aggregate of these legal pre-conditions is referred to herein as the "theoretical basis" of copyright protection.

As was noted earlier, there are two notions inherent in what is termed the traditional view on copyright protection, namely that:

- (1) copyright cannot subsist in an idea but only in a form of expression; and
- (2) only a form of expression and not an idea is protected from infringement by copyright.

Thus in determining the consistency of the traditional view with the theoretical basis of copyright protection, consideration must be given to both the issue of copyright subsistence and the issue of copyright infringement.

(a) *Subsistence of Copyright*

(i) A Work

The *Copyright Act* 1968 defines a work to mean a "literary, dramatic, musical or artistic work".¹⁷ A "literary work" and a "dramatic work" are defined inclusively by the *Copyright Act* 1968, whereas "artistic work" is defined exclusively, and "musical work" is not defined at all. Where the different types of work are defined by the *Copyright Act* 1968, there is nothing in those definitions which is particularly relevant to a consideration of the traditional view of copyright subsistence. However, a couple of the cases in which these definitions have been interpreted are worth noting.

In a recent English case,¹⁸ the question arose whether a few straight lines, drawn on a human face with greasepaint, could constitute an artistic work. Lawton L.J. answered that question in the following way:

"The surface upon which the startling make-up was put was Mr. Goddard's face and, if there were a painting, it must be the marks plus Mr. Goddard's face. If the marks are taken off the face there cannot be a painting. A painting is not an idea; it is an object; and paint without a surface is not a painting. Make-up, as such, however idiosyncratic it may be as an idea, cannot possibly be a painting for the purposes of the *Copyright Act* 1956."¹⁹

The first comment in this extract that is worth considering is Lawton L.J.'s proposition that a painting is not an idea but an object. It is not denied that a painting is an object but it can be disputed that a painting is not an idea. A painting, indeed any work, must, in part, be an idea. This matter is considered in greater detail later.²⁰ However, it seems that Lawton L.J. is compelled to state that a painting is not an idea as a result of the traditional view that copyright cannot subsist in an idea.

¹⁷ *Copyright Act* 1968 (Cth.) s. 10(1).

¹⁸ *Merchandising Corporation of America Inc. v. Harpbond Ltd* (1983) 9 F.S.R. 32.

¹⁹ *Id.* 46.

²⁰ *Infra*, C., C.1(b).

A second proposition of Lawton L.J. is that paint without a surface is not a painting. Again this is not disputed. In this case the paint was attached to a surface — Mr. Goddard's face — and therefore should constitute a painting. But Lawton L.J. held that it did not. It seems that his Lordship felt the paint on the face could not be a painting because it was liable to suffer removal at a later date. This fact of temporary existence should not mean that the paint on the face could not constitute a painting as what happens to a painting once it has come into existence should not detract from its ability to attract copyright while it is in existence.²¹ However, Lawton L.J. obviously believed otherwise, with the result that it appears that one condition for an object to qualify as a work, or at least as an artistic work, under the *Copyright Acts* is that it must have a certain assured lifespan.

Such a condition appears repugnant to common sense. A better way to justify the finding that the paint on the face was not a painting would have been to hold that it was not substantial enough to constitute a work. Indeed Lawton L.J. did advert to the question of substantiality later in his judgment when he considered whether a reproduction of the marks alone could have amounted to a substantial reproduction. He felt that it could not. It is submitted that it would have been more logical for Lawton L.J. to have held that the marks on the face did not constitute a painting for the reason that the thing alleged to be a painting was not substantial enough to so qualify. His Lordship could have found authority for an interpretation that a thing must have a certain quantum of substantiality before it can constitute a work under the *Copyright Act* in the decision of Graham J. in *Exxon Corporation v Exxon Insurance Consultants International Ltd.*²² In that case Graham J. held that the single word "Exxon", though original, did not qualify as an original literary work because it was not a work. It seems that his Honour held it was not a work because the word did not on its own have any meaning or significance. The Court of Appeal²³ approved the reasoning of Graham J. The court felt that a literary work needed to convey something in the nature of "information" or "instruction"²⁴ — in this case "Exxon" did not.

²¹ On this, and other related issues, see the interesting discussion in: Infarinato, J., "Copyright Protection for Short-Lived Works of Art" (1982) 51 *Fordham Law Review* 90.

²² (1982) Ch. 119.

²³ *Id.* p. 143.

²⁴ Contrast this with the view of Marais A.J. expressed recently in the Supreme Court of South Africa in *Northern Office Micro Computers (Pty) Ltd v. Rosenstein* (1982) 8 F.S.R. 124, 133-4:

"It has long been held that, to qualify for copyright protection, it is not necessary that what is written or recorded should express a meaning in language."

In Australia, Beaumont J. has recently endorsed and applied the view taken by the Court of Appeal in the *Exxon* case, in preference to the *Rosenstein* view: *Apple Computer Inc. v. Computer Edge Pty Ltd* (1983) 1 I.P.R. 353. This decision was overturned on appeal to the Full Court of the Federal Court. It is believed that the case is on appeal to the High Court.

As stated earlier, the above decision could be regarded as authority for the proposition that a thing must have a certain quantum of substantiality before it can constitute a work. What is important for the purposes of this essay is what constitutes this substantiality. The court talks in terms of "meaning" and "information". This seems undeniably to be a reference to ideas. What the court seems to be saying is that a thing cannot constitute a work unless that thing contains and conveys an idea. It is submitted that this conflicts with the traditional view that copyright cannot subsist in an idea, but only in a form of expression. The court's reasoning does however support an alternative view which will be considered later.

(ii) An Original Work

As has been noted earlier, it is an express requirement of the *Copyright Act* 1968 that for copyright to subsist in a work it must be an original work.²⁵ The courts have interpreted this requirement to mean that there must be originality of expression, but not necessarily originality of thought. It can be seen that such an application of the originality requirement is consistent with the traditional view that copyright can subsist only in expression and not ideas.

(iii) Material Form

It is implicit in the *Copyright Act* 1968²⁶ that for copyright to subsist in a thing, that thing must be an original work that has been reduced to a material form. The application of this requirement of material form means that copyright could not subsist in an idea where that idea has not been expressed in a suitable form. Such an application is also consistent with the traditional view of subsistence of copyright.

(b) *Infringement of Copyright*

Where copyright subsists in a work it will, subject to the *Copyright Act* 1968, be an infringement of the copyright in that work for a person other than the owner of the copyright to do, without the owner's licence, any act comprised in the copyright of that work.²⁷ The specific exceptions stated in the *Copyright Act* are generally referred to as the statutory defences, and need not be included in this discussion.²⁸

This article considers the particular infringement of doing the act of reproducing the work in a material form.²⁹ Before considering what constitutes a reproduction of a work in a material form, it is worth noting a few of the preliminary requirements in relation to infringement generally.

²⁵ *Copyright Act* 1968 (Cth) s. 32.

²⁶ See fn. 9 *supra*.

²⁷ *Copyright Act* 1968 (Cth) s. 36(1).

²⁸ However the s. 71 defence is considered later in relation to reproductions of artistic works in different dimensions — *infra* B.3(b) (ii).

²⁹ *Copyright Act* 1968 (Cth) s. 36(1), s 13(1) and ss. 31(a) (i) and 31(b) (i).

(i) Copying

As was briefly noted earlier, if there is no causal connection³⁰ between the work in which copyright subsists and the alleged infringing work there is no act of infringement. Although this does not appear to be precisely stated in the *Copyright Act 1968*, this principle has been clearly established by the cases.³¹ The copying requirement may be satisfied even though the defendant states that he did not consciously copy;³² and even though what is copied is not the copyright work but a copy of that work.³³ The important aspect is the interpretation that has been given by the courts to the causal connection requirement.

According to Copinger and Skone James:

“there is no infringement unless it is established that the defendant has produced a work . . . by a direct or indirect use of *those features of the plaintiff's work in which copyright subsists*.”³⁴

Given that the traditional view is that copyright subsists only in expression and not ideas, it can be seen that Copinger and Skone James' opinion is that the copying requirement is one of a causal connection between the defendant's work and the plaintiff's form of expression. The consequence of an application of this opinion is that there can be no infringement where the defendant's form of expression has not derived from the plaintiff's form of expression, even though the idea in the defendant's work has been undeniably copied from the plaintiff's work. This will be so even though the defendant's resulting work may be a replica³⁵ of the plaintiff's work.

The desirability or otherwise of adopting the Copinger and Skone James view on the copying requirement is discussed later. However, it is submitted that the Copinger and Skone James view has not been universally accepted by the courts or other academic commentators. In *Francis Day & Hunter Ltd. v Bron*³⁶, Diplock L. J. said that the causal connection requirement meant that:

“the copyright work must be the *source* from which the infringing work is derived.”³⁷

Diplock L.J. did not distinguish a causal connection between the plaintiff's and the defendant's form of expression, from a causal connection between the plaintiff's and the defendant's ideas. Indeed, his use of the

³⁰ The phrase “causal connection” was expressly used by the court in *Francis Day & Hunter Ltd v. Bron* (1963) Ch. 587, 614 per Wilmer L.J., 618 per Upjohn L.J., 624 per Diplock L.J.

³¹ See fn. 16 supra.

³² On the possibility of “subconsciously copying” see *Francis Day & Hunter Ltd v. Bron*, (1963) Ch. 587

³³ On “indirect copying” see *Ex parte Beal* (1868) L. R. 3 Q.B. 387, 394; *Purefoy Engineering Co. Ltd v. Sykes Boxall & Co. Ltd* (1955) 72 R.P.C. 89, 99; *Solar Thompson Engineering Co. Ltd v. Barton* [1977] R.P.C. 537.

³⁴ *Copinger and Skone James on Copyright*, op. cit. 177, emphasis added.

³⁵ I.e., a duplicate, or facsimile.

³⁶ [1963] Ch. 587.

³⁷ *Id* 623, emphasis added.

word “source” tends to imply that there must be a causal connection in relation to both the expression and idea. This seems confirmed by his reference to the “work” since a work is a combination of the idea and its expression.³⁸ Diplock L.J.’s interpretation of the copying requirement has been adopted by at least one academic commentator.³⁹ The consequence of an application of Diplock L.J.’s interpretation of the copying requirement is that a replica of the plaintiff’s work will only be an infringement if the defendant derived both the idea and the expression contained in his work from the plaintiff’s work. A replica will not be an infringement if the defendant derived only the idea but not the form of expression from the plaintiff’s work, or if the defendant derived the expression but not the idea from the plaintiff’s work. The consequence that there can be no infringement where only the idea but not the expression is copied is the same as that obtained by an application of Copinger and Skone James’ interpretation of the copying requirement. However, the consequence that there is also no infringement where only the expression but not the idea is copied is in total conflict with an application of Copinger and Skone James’ interpretation. And it is also in conflict with the traditional view that copyright protects against infringement of expression only and not infringement of idea because, under the traditional view, a copied expression should be an infringement regardless of whether the idea was also copied.

The courts, however, in applying Diplock L.J.’s interpretation of the copying requirement, do not seem to have been aware of this apparent conflict. The question whether there is in fact a causal connection between the two works is of course a question of fact to be determined by reference to the circumstances of each case.⁴⁰ In a recent English case,⁴¹ the House of Lords was of the opinion that the fact that the defendant intended in his work to adopt the “principle” (i.e. idea) of the plaintiff’s work was clear evidence of a causal connection between the two works.⁴² Thus, the House of Lords regarded a causal connection between the plaintiff’s and defendant’s idea as relevant and necessary for establishing a causal connection between the two works, and therefore the copying requirement. However, the House of Lords did not perceive the conflict this approach has with the traditional view on copyright protection. Curiously, the House of Lords even expressly endorsed the traditional view.⁴³

(ii) Substantial Part

A second general requirement before there can be infringement of copyright in a work is that the infringing act must be done in relation to the

³⁸ This concept is discussed more fully infra C., C.1 (b)

³⁹ Lahore J.C., *Intellectual Property in Australia: Copyright* op. cit. 202-3.

⁴⁰ E.g., *Sutton Vane v. Famous Players Film Co. Ltd* [1928-35] MacG. Cop. Cas. 6; *Francis Day & Hunter Ltd v. Bron* [1963] Ch. 587.

⁴¹ *L. B. (Plastics) Ltd v. Swish Products Ltd* (1979) 5 F.S.R. 145.

⁴² *Id.* 150 per Lord Wilberforce, *Id.* 157-8, 160, per Lord Hailsham.

⁴³ *Id.* 149 per Lord Wilberforce, *Id.* 160, per Lord Hailsham.

work.⁴⁴ The *Copyright Act* 1968 inclusively defines the doing of an act in relation to a work to include the doing of that act in relation to "a substantial part of the work".⁴⁵ Thus the infringing act of reproducing the work includes the act of reproducing a substantial part of the work.⁴⁶ The important question for the purposes of this article is how have the courts interpreted this requirement and definition?

It is clear that what is substantial is a question of fact to be determined by the court having regard to all the circumstances of any particular case.⁴⁷ According to the English Court of Appeal, one important factor in determining if the alleged infringing work has reproduced a substantial part of the copyright work is the ease of recognition of similarity between the two works.⁴⁸ Another factor (and, it is submitted, a more decisive one) is whether what has been taken is the "principal air" or "essential air" of the copyright work.⁴⁹ This approach has been restated in the following way:

"One has really to look to a large extent — I will not say at the primary "idea", because idea cannot be the subject of copyright — but at the essential feature of the work which is alleged to have been subject to copyright."⁵⁰

From this extract, and from other cases,⁵¹ it is clear that the courts regard that a "substantial part" must be determined by reference to the quality, rather than the mere quantity, of what is taken. But the concept of quality is, as shown by the above quote, very closely related to the concept of the "idea" contained in the work. Indeed, although the courts have strived hard to not refer to "idea" when discussing the relationship between substantiality and the quality of what has been taken, it is submitted that it is undeniable that in reality the courts are considering the degree to which the essential idea in the copyright work has been taken in determining if what has been taken is substantial. In fact, Lord Reid seems to have expressly admitted as much when he said:

"One test may be whether the part which [the defendant] has taken is novel or striking, or merely . . . commonplace . . ."⁵²

Surely a reference to the novelty or commonplaceness of a part of a work contemplates that at least some consideration must be given to the idea contained in that part of the work? If this is the case then it can be seen

⁴⁴ From a reading together of *Copyright Act* 1968 ss. 36(1), 13(1) and 31(1).

⁴⁵ *Copyright Act* 1968 (Cth) s. 14(1) (a).

⁴⁶ *Copyright Act* 1968 (Cth) ss. 31(1) and 14(1) (b).

⁴⁷ See e. g., *Blackie & Sons Ltd v. Lothian Book Publishing Co. Pty Ltd* (1921) 29 C.L.R. 396, 403; *King Features Syndicate v. Kleeman Ltd* [1941] A.C. 417, 424, 435.

⁴⁸ *Hawkes & Son Ltd v. Paramount Ltd* [1934] Ch. 593, 604, 606.

⁴⁹ *Id.* 609 per Romer L. J. (in relation to musical works).

⁵⁰ *Joy Music Ltd v. Sunday Pictorial Newspapers Ltd* [1960] 2 W.L.R. 645, 649 per McNair J.

⁵¹ E.g. *Ladbroke (Football) Ltd v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273.

⁵² *Id.* 276.

that the courts' interpretation of the "substantiality" requirement is in conflict with the traditional view on copyright protection.

(iii) Reproduction

For reasons mentioned earlier, the particular infringing act considered in this article is the act of reproducing the work in a material form. The concept of material form has been considered previously in relation to the requirements for subsistence of copyright. Although there do not seem to be any cases on this point, it seems obvious that the courts will interpret the requirement of material form in relation to copyright infringement in the same way as they interpret that requirement in relation to copyright subsistence. The more important question is, how do the courts determine what constitutes a "reproduction" of a copyright work?

The courts often use the words "copy" (as a noun) and "reproduction" interchangeably.⁵³ But it is clear that the concept of reproducing is broader than the concept of strict copying (in the sense of making a replica). The word "reproduce" in the *Copyright Act 1968* encompasses the making of representations of a work in the different media and forms included within the concept in the Act.⁵⁴ The requirement of "copying" (in the sense of there being a "causal connection" between the two works) is a distinct and separate requirement from the requirement that the infringing work be a reproduction of the copyright work.

What actually constitutes a reproduction of the copyright work in any particular case may well be a difficult question to decide. A much-cited definition of reproduction is that given by Kekewich J. in *Hanfstaengl v. W. H. Smith & Sons*⁵⁵:

"a copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it."

According to this definition, the test for determining what is a reproduction is one of degree of similarity between the two works. But this definition is rather obvious, and does not help much in practice. In an earlier case it had been said by Bayley J. that:

"A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original."⁵⁶

The use of the phrase "idea created by the original" in this latter definition implies that the similarity required is similarity in the overall impressions given by the two works. This definition was cited with approval by the House of Lords in *King Features Syndicate v. Kleeman Ltd*⁵⁷; but had been criticised by Lord Watson in *Hanfstaengl v. H. R. Baines & Co. Ltd*⁵⁸ on the basis that the idea created by a work does not necessarily form an

⁵³ E.g. *Purefoy Engineering Co. Ltd v. Sykes Boxall & Co. Ltd* (1955) 72 R.P.C. 89.

⁵⁴ Lahore J.C., *Intellectual Property in Australia: Copyright* op. cit 205.

⁵⁵ [1905] 1 Ch. 519, 524.

⁵⁶ *West v. Francis* [1822] 5 Barn and Ald. 737, 743; 106 E.R. 1361, 1363.

⁵⁷ [1941] A.C. 417, 424.

⁵⁸ [1895] A.C. 20, 27.

element in the original work which is protected by copyright. It seems that Lord Watson regarded Bayley J.'s definition as unsuitable on the ground that it was in conflict with the traditional view that copyright does not protect ideas from infringement. However, even assuming the traditional view is correct, it is submitted that Lord Watson's criticism is unfounded because he has confused "idea created by the work" with "idea contained in the work", which are two different things: the "idea contained in the work" is a necessary element of the work⁵⁹ whereas the "idea created by the work" is the overall impression of the work as such. The impression of a work is a concept that is hard to define but can perhaps best be regarded as the remembered emotional reactions caused by subjective perception of the work.

Lord Watson seems to have interpreted "idea created by the work" to mean "idea contained in the work". If these are two different things, his criticism of Bayley J.'s definition of a reproduction is unfounded because a test based on similarity of impression of the two works is not necessarily inconsistent with the traditional view of copyright protection.

However, the question still remains: what is the test for what constitutes a reproduction? It seems that the courts theoretically adopt a test that is itself an amalgam of the broad definitions of a reproduction given by Kekewich J. and Bayley J. Thus, Lord Shand has said:

"The inquiry involves a comparison between two works. The idea of the original the subject and the treatment of it in all its details . . . must be taken into account in the comparison to be made."⁶⁰

Unfortunately, the courts have not gone into a deeper analysis of the theory behind determining what constitutes a reproduction. This matter will be discussed later.⁶¹ The courts have only committed themselves to statements of general principle. As Lord Shand continued:

"All that can I think be said is that the question of infringement of the right depends on the degree of resemblance."⁶²

Given that the theory behind the process adopted by the courts for determining what constitutes a reproduction has been expressed so vaguely, it is not possible to state if the theory is in conflict with the traditional view on copyright protection.

3. COPYRIGHT PROTECTION IN PRACTICE AND THE TRADITIONAL VIEW

In this part of the article, the author will consider some⁶³ decisions on copyright protection to see if the results attained were consistent with the

⁵⁹ [Infra C., C.1(b).]

⁶⁰ *Hanfstaengl v. H.R. Baines & Co. Ltd* [1895] A.C. 20, 30-1.

⁶¹ *Infra. C., C.2(b) (iii).*

⁶² *Hanfstaengl v. H.R. Baines & Co. Ltd* [1895] A.C. 20, 31.

⁶³ The number of cases considered is small because of obvious constraints on length. The cases considered were chosen because the author believes that they highlight interesting and relevant points.

traditional view that copyright does not protect ideas but only forms of expression.

(a) *Reproduction of Artistic Works*

An interesting decision to consider first is the old case of *Kenrick v. Lawrence*.⁶⁴ The artistic work was a simple drawing designed to inform illiterate people of how to vote and consisted of a sketch of a hand holding a pencil placing a cross in a square on a ballot paper. The alleged infringing object was a drawing very similar to that of the plaintiff but with the hand represented slightly differently. Wills J. was of the opinion that the defendant's drawing did not infringe the plaintiff's copyright. This was because a contrary decision would have had the effect of giving the plaintiff a monopoly over the treatment of this subject.

"In the present instance, what the plaintiffs claim is really a right to prevent anyone else from drawing the same subject as that of his drawing But it is clear that there is no copyright in the subject. As for the manner of treating the subject, there can be no copyright in that, for if the thing to be represented be represented at all, it is impossible to treat it in any other way."⁶⁵

Wills J.'s first point is that there is no copyright in the subject. If by "subject" Wills J. means "idea" (as it seems clear he does), then this is simply a restatement of the traditional view of copyright protection. Wills J.'s second point is that, in this case, there can be no copyright in "the manner of treating the subject". Clearly, the "manner of treating the subject" is the same concept as the "form of expression" of the work. Despite his choice of words, Wills J. does not mean that the work was entitled to no copyright protection for the work must have been entitled to copyright protection as it was registered under the then relevant Act.⁶⁶ Rather, Wills J.'s point was that:

"the degree and kind of protection given must vary greatly with the character of the drawing, and that with such a drawing as we are dealing with the copyright must be confined"⁶⁷

In this case, because the subject ("idea") could only be represented in the one manner:

"Nothing short of an exact literal reproduction of the drawing registered can constitute infringement, for there seems to me to be in such a case nothing else that is not the common property of all the world."⁶⁸

Quite obviously this approach of Wills J. is consistent with the traditional view of copyright protection of ideas. However the result achieved by this approach was that the plaintiff was not protected against an appropriation of the "skill, labour or experience" he expended to reduce the

⁶⁴ (1890) 25 Q.B. 99.

⁶⁵ *Id.* 103.

⁶⁶ *Copyright (Works of Art) Act* (Eng.) 25 & 26 Vict. c. 68.

⁶⁷ (1890) 25 Q.B. 99, 104.

⁶⁸ *Id.* 102.

idea to that one form of expression. This result would therefore have to be justified on the ground that such an appropriation was not "unfair".⁶⁹

(b) *Reproduction of Artistic Works in Different Dimensions*

The *Copyright Act* 1968 expressly deems that a three-dimensional version of a two-dimensional artistic work, and a two-dimensional version of a three-dimensional artistic work, are reproductions of the artistic work.⁷⁰ However, the *Copyright Act* 1968 states that objects in a dimension different to that of the artistic work do not infringe the copyright in the artistic work if those objects would not appear to persons who are not experts in relation to objects of that kind to be a reproduction of the artistic work.⁷¹

(i) *Three-Dimensional Reproduction of a Two-Dimensional Artistic Work.* In *King Features Syndicate v. Kleeman*⁷² the House of Lords held that a three-dimensional figure was an infringing reproduction of drawings (which are two-dimensional artistic works⁷³) which showed only two-dimensional views. The court circumvented the problem of determining whether a single two-dimensional view drawing was reproduced in three-dimensions by having regard to a series of the drawings which showed various two-dimensional views. Once the series was considered, it was possible to say that a three-dimensional object reproduced the two-dimensional view, since a composite of the two-dimensional views effectively showed the three dimensions of any drawing. Later cases have confirmed that it is appropriate to consider a whole series of two-dimensional view drawings in determining if a three-dimensional object is an infringing reproduction.⁷⁴ Further, any accompanying words, figures, legends and notations may be taken into account.⁷⁵ The approach adopted is to use the series of drawings and accompanying words etc. to "visualise"⁷⁶, or "make a mental image of"⁷⁷ the drawn object in a three-dimensional form and then compare this with the alleged infringing three-dimensional object. This approach is both appropriate and necessary if

⁶⁹ This is because, as was noted supra B. 1(b), the public policy sought to be effected by copyright law is to protect an individual from unfair exploitation by others of his skill, labour or experience. See e.g. *Walter v. Lane* [1900] A.C. 539; *Macmillan and Co. Ltd v. Cooper* (1923) 40 T.L.R. 186; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W.L.R. 273.

⁷⁰ *Copyright Act* 1968 (Cth.) s. 21(3).

⁷¹ *Copyright Act* 1968 (Cth.) s. 71.

⁷² [1941] A.C. 417.

⁷³ Recently Toohey J. rejected the argument that a drawing showing the three dimensions of an object (i.e. height, width and depth) was a three-dimensional artistic work (for the purposes of s. 71 Copyright Act 1968 (Cth.)). Toohey J. held that such drawings were properly regarded as two-dimensional artistic works: *Fire Nymph Products Ltd v. Jalco Products (W.A.) Pty Ltd* (1983) 1 I.P.R. 79, 103-4.

⁷⁴ E.g. *Merchant-Adventurers v. Grew* (1972) 1 Ch. 242; *Temple Instruments Ltd v. Hollis Heels Ltd* [1973] R.P.C. 15; *L. B. (Plastics) Ltd v. Swish Products Ltd* (1979) 5 F.S.R. 145.

⁷⁵ *Merchant-Adventurers v. Grew* (1972) 1 Ch. 242; *Temple Instruments v. Hollis Heels*, (1979) 5 F.S.R. 145

⁷⁶ Per Graham J. in *Merchant-Adventurers v. Grew* (1972) 1 Ch. 242.

⁷⁷ Lahore J.C., *Intellectual Property in Australia: Copyright* op. cit. 226.

the public policy behind copyright law is to be effected. However, it can be argued that the practical effect of this approach is not consistent with the traditional view that copyright protects only expression and not ideas. The courts are, in effect, considering if a three-dimensional "mental image" of the two-dimensional artistic work has been reproduced, and not whether the work itself has been. And this "mental image" is created by taking into account the "idea" contained in the work — for example, by having consideration to descriptive words, figures, legends and notations, etc.

Where the artistic work consists of a single drawing only, and is a drawing of a two-dimensional view, a result of holding that the work has been reproduced by a three-dimensional object is also in conflict with the traditional view. For as one commentator has stated:

"Clearly a two-dimensional view cannot be reproduced in three dimensions as it does not supply any information about the third dimension."⁷⁸

In *Sifam v. Sangamo Weston*⁷⁹ the court considered that a three-dimensional object reproduced a drawing which was the front view only of an electric meter. Surely in this and similar cases⁸⁰ the court is not protecting merely the form of expression but, in fact, the idea contained in the work itself.

(ii) The Section 71 Defence

It has been held by the courts that Section 71 of the *Copyright Act 1968* operates as a defence, and only arises after the plaintiff has established that there has been what would otherwise be an infringing reproduction. Since it is a defence it must be pleaded by the defendant, on whom rests the onus of establishing it.⁸¹ The intention of Section 71, by restricting the decision to the non-expert, is to require ordinary visual resemblance between the work and the alleged infringing object.⁸² But as a defence it will be of limited effect since, in practice, a judge who has found the "substantial part" test satisfied will be unlikely to find the Section 71 defence made out.⁸³ However, the Section 71 defence should have the effect of limiting the application of copyright protection to those technologies where drawings represent physical forms.

"The expression of an idea in the electrical field, for example, does not receive full copyright protection because the expression takes the form

⁷⁸ K. R. Moon "Copyright in Artistic Works: The extension to Mechanical Design" (1979) 13 *New Zealand Law Journal* 282, 285.

⁷⁹ [1973] R.P.C. 899.

⁸⁰ See also *Solar Thompson Engineering Co. Ltd v. Barton* [1977] R.P.C. 537, which involved a diametrical cross-section — the side elevation was not relied upon. And also *Gomme v. Relaxateze Upholstery* [1976] R.P.C. 377.

⁸¹ *L. B. (Plastics) v. Swish Products Ltd* (1979) 5 F.S.R. 145; *Edwards Hot Water Systems v. S. W. Hart & Co. Pty Ltd* (1983) 1 I.P.R. 228.

⁸² *Lahore J.C., Intellectual Property in Australia: Copyright op. cit.* 227.

⁸³ *L. B. (Plastics) v. Swish Products Ltd* (1979) 5 F.S.R. 145.; *Copinger and Skone James, op. cit.*, 228-30.

of a circuit diagram which cannot be understood by persons who are not expert in the object represented. The same applies to other technologies where ideas are expressed in symbolic form."⁸⁴

Thus, in some cases where the Section 71 defence does have some effect, it will be consistent with the traditional view that copyright does not protect ideas.

(c) *Reproduction of Literary Works*

A final case, concerning the reproduction of a literary work, is considered because the author believes the result attained in the case is clearly inconsistent with the traditional view that copyright protects expression but not ideas. In *Elanco Products v. Mandorps (Agrochemical Specialists)*⁸⁵ the defendant marketed a chemical with sales literature that it had copied from the plaintiff. The defendant then withdrew that literature and replaced it with literature which had been independently prepared, though based upon the plaintiff's information. The Court of Appeal granted the plaintiff an interlocutory injunction against the defendant on the ground that the defendant's second lot of literature was an infringing reproduction of the plaintiff's literary work. Yet the defendant's second lot of literature had, at most, reproduced the plaintiff's "information" — since the defendant's form of expression was different. The effect of this decision was that the plaintiff was protected against reproduction of his idea (information) even though the form of expression used was different. This seems in total conflict with the traditional view.

4. SUMMARY OF THE ANALYSIS

The analysis undertaken above consisted of two investigations. The first investigation considered how consistent the traditional view of copyright protection is with the theoretical basis of copyright protection as illustrated by the conditions necessary for protection to be gained. In relation to requirements for subsistence of copyright, it was seen that the courts' interpretation of what constitutes a work is inconsistent with the traditional view, in that the certain quantum of substantiality required for a work to exist is substantiality of meaning (i.e. idea). In relation to the requirements for infringement, it was seen that the copying requirement interpretation is inconsistent with the traditional view, in that the courts require a causal connection between the idea contained in the defendant's work and the idea contained in the plaintiff's work. Also the courts' interpretation of the substantiality requirement is inconsistent with the traditional view, in that substantiality of quality is required and quality is determined (at least in part) by reference to the idea contained in the part taken.

The second investigation considered whether the results attained by a practical application of copyright law to the cases are consistent with the traditional view. It was seen that, especially in relation to three-

⁸⁴ Moon K. R., op. cit., 288.

⁸⁵ (1979) 5 F.S.R. 46. See also Dworkin G., op. cit.

dimensional reproductions of two-dimensional artistic works, the courts' decisions have had the effect of protecting the ideas contained in the work. This is so even where the form of expression used by the infringing work is different from (i.e. not a reproduction of) the copyright work's form of expression.

The findings of this two-part analysis show that some of the requirements that form part of the theoretical basis of copyright protection have not been interpreted by the courts in a way consistent with the traditional view. Further the practice of the courts in giving copyright protection has not upheld the traditional view. In these circumstances, the author feels compelled to dismiss as illogical and incorrect the traditional view, and propose in turn an alternative view.

C. THE ALTERNATIVE VIEW

The alternative view can be stated succinctly by three principles:

- (1) Copyright subsists in a "work" and therefore copyright law protects a "work" from infringement.
- (2) A "work" consists, by necessity, of an "idea" and a "form of expression" of that idea.
- (3) The public policy sought to be effected by copyright law is that an individual should be protected against unfair exploitation of the skill, labour or experience that he required for, and expended in, reducing the idea into the form of expression.

As a result of a combination of principles (1) and (2), it is seen that the alternative view is that copyright subsists in an idea and its form of expression, and therefore protects both the idea and the expression from infringement.

1. AUTHORITY FOR THE ALTERNATIVE VIEW

(a) *Principle (1)*

The authority for principle (1) — that copyright subsists in a work and therefore protects a work from infringement — is to be found in the *Copyright Act* 1968. Section 32(1) states quite clearly that "copyright subsists in a . . . work". It is the courts which have, for some reason, introduced the notion (the traditional view) that copyright subsists in a form of expression — yet this is contrary to the plain meaning of the *Copyright Act* 1968. Likewise, Section 36(1) states quite clearly that "the copyright in a . . . work is infringed" by the doing of certain acts. Yet, again, the courts introduced the notion that the form of expression was protected by copyright, rather than the work.

(b) *Principle (2)*

The authority for principle (2) — that a work consists of an idea and its form of expression — is common sense, supported by some case law. Clearly an idea alone (i.e. without a form of expression) is not a work, since an idea alone is merely a thought. A thought cannot be protected

by copyright — as is shown by the reference of commentators to the fact that Albert Einstein could not obtain copyright in either of his theories of relativity. Likewise, a form of expression alone (i.e. without any idea contained in it) is not a work, since it has no meaning (i.e. is meaningless). This proposition is supported by both commonsense and *Exxon Corporation v. Exxon Insurance Consultants International Ltd.*⁸⁶

(c) *Principle (3)*

Authority for the third principle — that the public policy sought to be effected by copyright law is that an individual should be protected against unfair exploitation of the skill, labour or experience that he required for, and expended in, reducing the idea into the form of expression — if it be required, is, as Lord Atkinson said in *Macmillan v. Cooper*,⁸⁷ the Eighth Commandment: "Thou shalt not steal". Clearly other legal regimes are more appropriate than copyright law to protect ideas alone.⁸⁸ Likewise, other legal regimes protect forms of expression alone.⁸⁹ What copyright protects is the reduction of particular ideas into particular forms of expression. Such a reduction requires effort (skill, labour or experience, etc.), and so this effort should be protected against unfair exploitation.

2. COPYRIGHT PROTECTION UNDER THE ALTERNATIVE VIEW

(a) *Subsistence of Copyright*

(i) A work

As stated by principle (2), for an object to be a work it must consist of an idea and a form of expression. An idea alone (a thought), or an expression alone (a meaningless thing), cannot be a work and therefore copyright cannot subsist in it.

(ii) An Original Work

To be an original work, there need not be novelty of the idea contained in the work, nor need there be novelty of the form of expression used. All that is required is that:

"the work originate from the author in the sense that it [the reduction of the idea into the form of expression used] is the result of his skill, labour or experience, and is not copied from another."⁹⁰

⁸⁶ (1981) 7 F.S.R. 238. See supra B.2(a) (i).

⁸⁷ (1923) 40 T.L.R. 186.

⁸⁸ E.g., by way of an action for breach of confidence.

⁸⁹ E.g., by way of Trade Mark registration, etc.

⁹⁰ This is simply an adoption of Lahore's definition of an original work, with an interpolation.

(iii) Material Form

This requirement becomes superfluous, since by definition the work must consist of a form of expression. It is submitted that any form of expression will be sufficient.⁹¹

(b) *Infringement of Copyright*

(i) Copying

There can be no infringement of copyright in a work unless the copyright work has been copied. Thus there must be a causal connection between the alleged infringing work and the copyright work. The public policy is not to protect ideas alone nor expression alone, but to protect the effort of reducing the idea into the form of expression. Thus the causal connection must be between both the plaintiff's and the defendant's idea, and the plaintiff's and the defendant's form of expression.⁹²

(ii) Substantial Part

The infringing act must have been done in relation to at least a substantial part of the copyright work. What is substantial depends on the quality of the part taken. The quality depends on the degree of effort that was required to reduce that part of the idea taken to its form of expression.⁹³

(iii) Reproduction

What must have been reproduced is the copyright work. Thus there must be a reproduction of the idea as it has been reduced to its form of expression. If only the idea has been reproduced but in a different form of expression, or only the form of expression has been reproduced but expressing a different idea, the latter work has not reproduced the copyright work and is therefore not an infringement.

The public policy is to protect the effort the plaintiff expended in reducing the idea into the expression of the work. To give effect to this public policy there should be a flexible interpretation of when that form of expression has been reproduced. The scope of what constitutes a reproduction of the expression should depend upon the degree to which the idea contained in the work is separable from the form of expression used in the copyright work. Where the idea contained in the work could not easily be expressed in a form other than the form used in the copyright work, the scope of what constitutes a reproduction of that form should be construed narrowly. Thus in situations like *Kenrick v. Lawrence*⁹⁴ only a replica should constitute a reproduction of the form of expression and

⁹¹ Thus, the author would consider music as produced by an instrument, and oral speech, to be works in a "material form" since they are ideas reduced to a form of expression. At present, the courts would not agree. However, Lahore concedes that music produced by an instrument should be considered as in a material form: *Copyright and the Arts in Australia* (Melbourne, Melbourne University Press, 1974) 102-5. And in *Estate of Hemingway v. Random House* (1968) 23 N.Y. 2d 341 copyright in oral speech was not considered to be necessarily inconsistent with general public policy.

⁹² As is the present view of the courts. See supra B.2 (b) (i).

⁹³ This is akin to the interpretation presently used by the courts. See supra B.2 (b) (ii).

⁹⁴ (1890) 25 Q.B. 99.

therefore be an infringing reproduction. On the other hand, where the idea is able to be expressed in forms different to that used in the copyright work, the scope of what constitutes a reproduction should be construed widely. In the cases on three-dimensional reproduction of two-dimensional artistic works considered earlier, the ideas contained in the artistic works were not reliant upon expression in one form only. Therefore, the scope of reproduction of the form of expression should be construed broadly so as to include reproductions of the expression in a three-dimensional form. Thus, such a reproduction would constitute an infringement of copyright if the idea contained in the artistic work had also been reproduced.⁹⁵

D. CONCLUSION

The author believes that he has shown in this article that the traditional view on copyright protection (that copyright does not protect ideas) is inconsistent with the theoretical basis of copyright protection, and has not been upheld in practice by the decisions of the courts. Consequently, the traditional view must be regarded as illogical and inaccurate.

An alternative view has been proposed which, it is submitted, is both a logical and accurate statement concerning the issue of copyright protection. Central to this alternative view is the principle that copyright subsists in a work (rather than just in a form of expression) and therefore protects a work from infringement. Once this principle is accepted as being a true proposition (as the clear words of the *Copyright Act 1968* require), intuition and case law lead to the conclusion that a work is the combination of an idea and a form of expression of that idea that has resulted from the skill, labour or experience of the work's author.

A correct understanding of the underlying concept and scope of copyright protection is of more than mere academic importance. When faced with a decision as to whether a previously un contemplated object attracts copyright protection (and, if so, to what extent), the court must resolve the problem by having regard to the basic principles of copyright law.⁹⁶

⁹⁵ This interpretation explains the results attained in those cases on three-dimensional reproduction of two-dimensional artistic works, which were welcome on policy grounds but apparently hard to justify under the traditional view. Applying a broad interpretation of what constitutes a reproduction of the form of expression to the *Elanco Products* case would justify this decision also.

⁹⁶ One relatively contemporary example of such a problem is the issue of copyright protection for the various forms of computer software. The situation at common law in Australia is currently being settled. The Federal Court at first instance in *Apple Computer Inc. v. Computer Edge Pty Ltd* 1983 1 I.P.R. 353 held that copyright did not subsist in computer software. This decision was overturned on appeal by the Full Court of the Federal Court. It is believed that the case is on appeal to the High Court. Under the alternative view proposed by the author, copyright would potentially subsist in a computer program (whether assembly or machine code) as a (literary) "work" — the "idea" being the conceptual consequential procedures needed to be undertaken by the machine to achieve the objective, and the "form of expression" being the representation in one of a number of formats of the instructions for the machine to perform those procedures.

The alternative view as expounded above comprises part of these basic principles:

“You may find it in the fragments of Gregorius and Hermogene’s codes, and in all the codes from Justinian’s down to the codes of Louis and Des Eaux — That the sweat of a man’s brows, and the exsudations of a man’s brains, are as much a man’s own property, as the breeches upon his backside.”⁹⁷

⁹⁷ Sterne L., *Tristram Shandy* Vol. III, Chap. 34; quoted from Gardiner, R. K., “Industrial and Intellectual Property Rights: Their Nature and the Law of the European Communities” (1972) 88 *Law Quarterly Review* 507.