

Identifying Information

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Paper Information

Title:	Reformulating the Idea/Expression Dichotomy for the Better Encouragement of Creativity: A Comparative Review of the Law in the United States of America, the United Kingdom and Kenya
Abstract:	<p>This paper offers a comparative review of the idea/expression dichotomy in the United States of America (US), the United Kingdom (UK) and Kenya. It argues that a proper formulation and interpretation of this fundamental axiom of copyright law would act as a stimulus to creativity. Accordingly, the aim of this paper is to determine the best interpretation of the doctrine to encourage creativity in Kenya. Creativity is central to mankind's welfare. Indeed, creativity is necessary for a society's existence and propagation. Specifically, artistic creativity generates ideas and artefacts that are both new and positively valuable. The true nature of creativity is that it is an incremental process that relies on pre-existing ideas and works; more so, in today's postmodern culture, propelled by digital technologies and the internet, derivative works are the norm and copyright law's "author-genius" is indeed "dead"! As encouraging creativity is the key objective of copyright law, copyright law, ought to conceive of and respond to creativity in line with its true nature as an incremental process. Copyright law's internal mechanism to promote creativity, the idea/expression dichotomy, which ought to play the role of readily availing ideas for further creation has failed owing to its unprincipled formulation and interpretation which, it is contended, has led to a chilling effect on creativity. According to the idea/expression dichotomy only expressions of ideas and not ideas themselves receive copyright protection. Whereas the idea/expression dichotomy is accepted and applied in most jurisdictions, it has been extensively castigated for the lack of clarity regarding its interpretation. Courts and commentators alike have failed to offer useful guidance that may provide a principled approach towards making the distinction between ideas and expressions. "Idea" as construed by the law is markedly different from the ordinary English and philosophical meaning of the word. The law appears to define idea on a whim to encompass all those elements of a work that judges at a particular instance deem ought not to be protected. It is contended that the lack of clarity and exactness in the interpretation of the dichotomy produces the chilling effect of a decrease in creativity. It is contended that Kenyan copyright law, through a proper interpretation of the idea/expression dichotomy, can enhance creativity and the production of cultural works. In this regard, the paper argues for an adoption of a statutory based provision of the doctrine by Kenya akin to the position in the US and consistent with international copyright law. This, it is maintained, would lead to a more principled interpretation of the idea/expression dichotomy and a negation of the chilling of creativity which has arisen due to uncertainty around this principle.</p>