

Reformulating the Idea/Expression Dichotomy to Encourage Creativity: A Comparative Review of the Law in the United States of America, the United Kingdom and Kenya

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1. Introduction

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 central doctrine of copyright law would act as a stimulus to creativity. The aim of this paper is to determine the best interpretation of the doctrine to encourage creativity in Kenya.

Creative activity is central to mankind's welfare. Indeed, creativity is necessary for a society's existence and propagation.¹ Specifically, artistic creativity generates ideas and artefacts that are both new and positively valuable.²

As currently constituted copyright law has a predominantly economic-oriented structure. This framework prominently protects the market value of works and subsequently the market's key players, the owners of copyright, who many times are intermediaries such as corporations and businesses and not creators or authors

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¹ R. Keith Sawyer, *Explaining Creativity: The Science of Human Innovation* (2nd Edn, Oxford University Press 2012) 3. This paper focuses on creativity and does not offer comment on the related concept of innovation. It has been noted that context is important for the distinction between creativity and innovation. (Andy C. Pratt and Paul Jeffcutt, 'Creativity, Innovation and the Cultural Economy: Snake Oil for the Twenty-first Century' in Andy C. Pratt and Paul Jeffcutt (eds), *Creativity, Innovation and the Cultural Economy* (Routledge 2011) 4). In this regard as the focus of this work is copyright law and concomitantly the copyright industries, it is proposed that creativity is the appropriate concept for this paper and its proper prescription is explored. This paper is a work-in-progress which is part of the author's PhD thesis which explores the distinction between innovation and creativity in detail in its introductory chapter.

² Margaret Boden, 'Creativity' in Berys Gaut and Dominic McIver Lopes (eds), *The Routledge Companion to Aesthetics* (2nd Edition, Routledge 2005) 477.

themselves.³ All the while it is assumed that this edifice is sufficient to incentivise authors to create more works. However, it is argued that this has not been the case; in seeking to promote creativity, copyright law ought to shift its focus to creativity itself and how it occurs. The true nature of creativity is that, it is an incremental process that relies on pre-existing ideas and works;⁴ 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"!⁵ 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 key 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.

The idea/expression dichotomy is the fundamental axiom of copyright law.⁶ Under this doctrine, only expressions of ideas and not ideas themselves receive copyright protection.⁷ Ideas are the building blocks of creativity.⁸ Ideally, the idea/expression dichotomy ought to regulate the public domain by seeking to ensure that ideas are available for use by potential creators.⁹ However, the lack of a principled interpretation of the doctrine has negatively influenced the creation of new works.¹⁰

³ Peter S. Menell, 'Envisioning Copyright Law's Digital Future' (2002) 46(1) New York Law School Law Review 63, 163.

⁴ Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 199.

⁵ See Roland Barthes, 'The Death of the Author', *Image - Music - Text* (Fontana Press 1977) and Michel Foucault, 'What Is an Author?' in James Faubion (ed), *Aesthetics, Method, and Epistemology* (Essential, The New Press 1998).

⁶ *Feist Publications v Rural Telephone Services Company* 499 U.S. 340, 344 (1991) (Justice O'Connor). For UK copyright law it has been argued that aphorisms such as "there is no copyright in an idea" ought to be avoided, see *IBCOS Computers Ltd. and Another v Barclays Mercantile Highland Finance Ltd. and Others* [1994] FSR 275 (Ch) 289 (Jacob J). Some have even gone to the extent of stating that there is no such rule as the idea/expression dichotomy in UK copyright law, see Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs* (4th edn, LexisNexis Butterworths, London 2011) para 3.80. These arguments are canvassed in detail below.

⁷ Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (17th Ed. Sweet and Maxwell 2016) para 3-179.

⁸ Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 184.

⁹ Leslie A. Kurtz, 'Speaking to the Ghost: Idea and Expression in Copyright' (1992-1993) 47(5) University of Miami Law Review 1221, 1224.

¹⁰ Khanuengnit Khaosaeng, 'Wands, Sandals and the Wind: Creativity as a Copyright Exception' (2014) 36(4) European Intellectual Property Review 238, 239.

Ultimately, 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 contended, 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.

The next part of this paper offers a discussion on and justification for the contention that copyright law's key objective is the encouragement of creativity. After this a disquisition on the nature of creativity is tendered, highlighting the point that creativity is an incremental process that is influenced by pre-existing ideas and works. Here, also, a note is made on creativity in Kenya. The fourth part is a background discussion of the idea/expression dichotomy, noting the doctrine's general formulation, justifications, and the key rights and benefits that it promotes, laying emphasis on the doctrine's role in the encouragement of creativity. Here it is argued that the lack of clarity and exactness in the interpretation of the doctrine produces the chilling effect of a decrease in creativity. The overriding problem, it emerges, is how ideas have been construed. Accordingly, the fifth part of this paper offers a discussion on the etymological and philosophical origins of the word "idea". What emerges from this discussion is that what ideas are construed as in ordinary language and philosophy is markedly different from how they are interpreted in law. This deliberation lays the foundation for the comparative analysis of how ideas, within the context of the idea/expression dichotomy, have been construed in the US, the UK and Kenya which is undertaken in the sixth part. Finally, a summary is tendered of the positive lessons that Kenya can learn from the comparative review. In this regard it is contended that Kenyan lawmakers ought to enact a statutory provision of the doctrine, drawing on the position in the US which is congruous with international copyright law.

2. Copyright law as a stimulus for creativity

It is argued that the key objective of copyright law is to encourage creativity. As very well encapsulated by the US Supreme Court in *Twentieth Century Music Corp. v. Aiken*,¹¹ 'The immediate effect of our copyright law is to secure a fair return for an

¹¹ 422 U.S. 151 (1975).

'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.¹² It is appreciated that others are of the opposing view. They argue that copyright is not required to facilitate creativity rather it is an impediment to the free and open exchanges of knowledge, culture and technology that form the core of creative modalities.¹³

Furthermore, in addition to acting as a stimulus for creativity, there are other significant underlying principles governing copyright legislation. These principles can be described under three main headings, the natural rights of the author, just reward for labour (as can be deduced from Justice Stewart's quote above, copyright as a just reward for labour and as a stimulus for creativity are inextricably linked) and social requirements.¹⁴

Moreover, the history of the development of copyright law cannot be gainsaid. In this regard it is noted that the conditions necessary for the birth of copyright were brought about by the introduction of printing, but it was the grant of printing monopolies by the Crown in the UK, engendered by a desire to censor the material made available to the reading public through the print medium, that brought about the idea of exclusive rights to issue copies of particular works to the public thereby introducing the idea of literary property which later came to be known as copyright.¹⁵ On this backdrop it is often argued that copyright law only seeks to answer to the economic and political policies of governments, often due to the lobbying power of wealthy parties.¹⁶

Be that as it may, a fair and unbiased consideration of the foundations of UK and US copyright law leads one to conclude that they both laid emphasis on the role of copyright protection in the stimulation of creativity. Any examination of copyright legislation, must begin with the UK Statute of Anne 1710, the first statute to provide for copyright regulated by the government and courts. The Statute of Anne is the

¹² *ibid* 156 (Justice Stewart).

¹³ Lawrence Lessig, *Free Culture: How Big Media uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press, 2004) 199.

¹⁴ Caddick, Davies and Harbottle (n7) para 2-28.

¹⁵ See, as a good example of this discussion example, Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Hart Publishing 2004).

¹⁶ See, Susan Sell and Christopher May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property' (2001) 8(3) *Review of International Political Economy* 467.

foundation upon which the modern concept of copyright in the Western World was built.¹⁷ The Act was formally titled "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned" [emphasis added]. Part of its stated aim was "...the Encouragement of Learned Men to Compose and Write useful Books."¹⁸ On its part, the US Constitution Intellectual Property (IP) Clause provides that the US Congress shall have power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁹ [emphasis added].

Therefore, a literal interpretation of these early and highly influential regimes (there's no convincing argument not to apply a literal interpretation in this regard) persuasively demonstrates that copyright law's key objective is the stimulation of creativity.

3. The nature of creativity: creativity as an incremental process

3.1 What is creativity?

Creative activity is central to mankind's welfare. Politicians, business leaders and educators have noted that creativity is central to economic success.²⁰ Additionally, creativity is also needed to solve pressing social problems.²¹ Leading economies such as the US, the UK, the European Union (EU), Singapore and China have all transformed from industrial economies to creative knowledge economies, where economic activity focuses on producing ideas rather than things.²²

The term 'creativity' is used in very diverse contexts, including in art; in psychology; in philosophy; in education; in business; and in marketing and advertising; among others. Therefore, already it is apparent why the question, what is creativity? Is a very difficult question to answer. Relevant for a discussion on copyright are descriptions of artistic creativity specifically, not general psychological models of creativity which may, but do not necessarily, encompass artistic creativity.²³ In this regard, Professor Margaret

¹⁷ Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) 9.

¹⁸ Preamble.

¹⁹ Article I, Section 8, Clause 8.

²⁰ Sawyer (n1) 3.

²¹ *ibid.*

²² *ibid.*

²³ Rahmatian (n4) 182.

Boden (Research Professor of Cognitive Science) has offered an attractive working definition from the angle of the philosophy of art, 'creativity is the capacity to generate ideas or artefacts that are both new and positively valuable.'²⁴

With this acceptable definition at the back of our minds then we can proceed to inquire into the nature of creativity, that is, how does it occur? Specifically, how does one generate new and valuable ideas?

Within copyright law, a creator is termed an author. Authorship is the most resonant of the foundational concepts associated with Anglo-American copyright doctrine.²⁵ American copyright law scholar Professor Peter Jaszi argues that the dominant doctrinal structures of US and UK Copyright law arose around the same time as the "Romantic" conception of authorship at the end of the eighteenth century.²⁶ Under the so-called Romantic model of authorship, an author created works "magically" using his creative genius thus, leading to the production of utterly new and unique expressions.²⁷ Thus, authorship or creation was viewed as occurring *ex nihilo* (out of nothing). Lord Camden appeared to have had the same conceptualisation of authorship when he stated in *Donaldson v Becket*²⁸:

Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. ²⁹ [emphasis added]

Today, it is difficult to continue to conceive of a creator as an "author-genius" or of creativity as occurring *ex nihilo*.³⁰ Most works are, at least, partially derivative.³¹ The

²⁴ Boden (n2).

²⁵ Peter Jaszi, 'Toward A Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455.

²⁶ *ibid* 456. Professor Jaszi draws on Martha Woodmansee's path-breaking work on the "author-genius". See, Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'' (1984) 17(4) Eighteenth-Century Studies 425.

²⁷ Jessica Litman, 'The Public Domain' (1990) 39(4) Emory Law Journal 965, 966 and Naomi Abe Voegtli, 'Rethinking Derivative Rights '(1997) 63(4) Brooklyn Law Review 1213, 1254.

²⁸ [1774] 4Burr 2407.

²⁹ *ibid*.

³⁰ See Woodmansee (n26) 428-30 (detailing the Romantic conviction that the "author-genius" was someone who created something entirely new and unprecedented).

³¹ Jaszi (n25).

process of authorship is more equivocal than what the Romantic model admits.³² Digital technologies and the internet have greatly enhanced the ability to appropriate or rewrite cultural works. Acts such as the sampling of music find a newly prominent role in today's postmodern society.³³ This has led to the creation of new works often termed "derivative" or "transformative".³⁴ In actual fact, most cultural works identified as postmodern such as appropriation art are by their very definition derivative works.³⁵ Other examples of expressions of postmodernism, which are largely derivative, are parody and pastiche in the film industry.³⁶

3.2 Creativity in Kenya

Whereas Kenyan society may not typically be termed "postmodern" within the definition and description offered above, contemporary creativity in the Kenyan context is highly derivative. In Kenya, modern creativity is best seen in the country's copyright industries. The copyright industries may be defined as economic activities closely related to the substantive rights of authors and other creative artists that are carried out as an independent industry or within a conventional industry.³⁷ Kenya's copyright

³² Litman (n27) 966.

³³ Giancarlo F. Frosio, 'A History of Aesthetics from Homer to Digital Mash-ups: Cumulative Creativity and the Demise of Copyright Exclusivity' (2015) 9(2) *Law and Humanities* 262, 293. Postmodernism is a difficult concept to define and has been associated with a wide range of different meanings. In essence, postmodernism is a style and aesthetic tendency found in some contemporary and cultural works such as painting, literature, architecture, photography, film, video, dance and music among others which developed in the mid to late twentieth century. Whereas encompassing a broad range of notions, postmodernism is typically defined by an attitude of "incredulity toward metanarratives". Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trs, University of Minnesota Press 1993) xxiv. See also Jürgen Habermas, 'Modernity – An Incomplete Concept' in Hal Foster (ed) *The Anti-Aesthetic: Essays on Postmodern Culture* (Bay Press 1983) 3 - 15 and Jochen Schulte-Sasse, 'Modernity and Modernism, Postmodernity and Postmodernism: Framing the Issue' (1986-1987) 5 *Cultural Critique* 5, for an in-depth discussion on postmodernism and the related concepts of modernism, modernity and postmodernity. Additionally, whereas postmodern theory is today recognised as an integral part of the academic community, since the turn of the 21st Century there has been a growing feeling that postmodernism is in decline and has gone out of fashion and is being replaced by a post postmodernism, as it were. However, there have been few formal attempts to define and name the era succeeding postmodernism, and none of the proposed designations has yet become part of mainstream usage. Some suggested terms for this epoch are post-postmodernism (in relation to design and planning), trans-postmodernism (in relation to poetry). See Garry Potter and Jose Lopez, 'After Postmodernism: The New Millennium' in Garry Potter and Jose Lopez (eds) *After Postmodernism: An introduction to Critical Realism* (The Athlone Press 2001) 4.

³⁴ Jacqueline D. Lipton & John Tehranian, 'Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation' (2014-15) 109(2) *Northwestern University Law Review* 383.

³⁵ William Hamilton, *Discussions on Philosophy and Literature, Education and University Reform* (Harper & Brothers Publishers 1861) 75.

³⁶ Sotiris Petridis, 'Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche' (2015) 32(8) *Quarterly Review of Film and Video* 728, 733.

³⁷ Anne Kalvi, 'The Impact of the Copyright Industries on Copyright Law' (2005) 10 *Juridica International* 95, 96. The terms "cultural industries" and "creative industries" have been used coterminously with the

industries include, among others – radio, music, book publishing, cinema and cultural artefacts.³⁸ An important aspect of contemporary art in Kenya is that it draws heavily from the country’s culture and derives to a substantial extent from its Traditional Cultural Expressions (TCEs).³⁹ TCEs also termed “expressions of folklore” (“EoF”) may be defined as “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.”⁴⁰ Whereas in Kenya TCEs are governed by a *sui generis* (unique or special) law, the Protection of Traditional Knowledge and Cultural Expressions Act 2016, this Act enables creators who utilise aspects of TCEs for the creation of derivative works to obtain intellectual property rights (IPRs), including copyrights, in their creations.⁴¹ Thus, it is doctrinally appropriate and in fact necessary to conceptualise Kenyan creativity within copyright doctrine and law and to advocate for how it can be encouraged within the framework of copyright doctrine and law.

3.3 Derivative works

A derivative work is a creative expression that is based on an earlier copyright work in some way.⁴² It is a second, separate work independent in form from the first.⁴³ In such cases whether a new copyright work is created will depend on whether sufficient skill, labour and judgment was expended in its creation; if it was, the person who was responsible for that skill, labour and judgment will be the author of the new work.⁴⁴

term copyright industries. Others have argued that there are some subtle differences between these three terms. The connecting thread, however, between these terms is that in all of them there is a conception of producers relying on copyright law to establish property rights and protect revenues. This paper does not dwell on the similarities or subtle differences between these terms and has adopted the term copyright industries as the most direct and appropriate term for the discussion herein.

³⁸ Ben Sihanya, ‘Intellectual Property for Innovation and Industrialisation in Kenya’ (2008) 4 *Convergence* 185, 197.

³⁹ Michael Shally-Jensen, *Countries, Peoples and Cultures: Eastern and Southern Africa* (Salem Press 2015) 122.

⁴⁰ WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1982, section 2.

⁴¹ Section 20(1).

⁴² Peter Groves, *A Dictionary of Intellectual Property Law* (Edward Elgar 2011) 91.

⁴³ *ibid.*

⁴⁴ Caddick, Davies and Harbottle (n8) para 4-24.

The right to create a derivative work is generally reserved for the owner of the copyright.⁴⁵ This right is known as the “derivative right”.⁴⁶ The author of the derivative work must have the permission of the owner of the copyright in the underlying work, usually in the form of a licence or some other contractual or legal arrangement.⁴⁷ It is an infringement of copyright to make or sell a work without such permission.⁴⁸ Evidently, if the derivative right were not controlled by the copyright holder, other people could use the copyright holder’s work to the copyright holder’s economic and moral detriment.⁴⁹ Technically, any person intent on transforming or adapting this work in any way ought to seek the copyright holder’s permission.⁵⁰ However, the idea/expression dichotomy ought to play the role of allowing potential creators to borrow ideas from existing works and create their own new works without having to seek the permission of the owner of the underlying work.

Yet copyright holders continue to benefit from the whims of copyright law to the detriment of the general public.⁵¹ There is a lack of clear principles to determine whether any new work will infringe a copyright work.⁵² The reprieve which ought to be given by the idea/expression dichotomy is wanting due to the lack of clarity in the interpretation and application of the doctrine. For instance, since the creation of new works can easily be argued as having borrowed from expressions rather than ideas, subsequent creators may be deterred from making such new works, particularly when they realise that they might be sued for infringement.⁵³ This produces the chilling effect that creativity will decrease, or will be considered unlawful, if indeed not deterred completely.⁵⁴ Similarly, potential authors may incur high transaction costs if they have

⁴⁵ Lipton and Tehranian (n34) 385.

⁴⁶ Michael Abramowicz, ‘A Theory of Copyright’s Derivative Right and Related Doctrines’ (2005-2006) 90(2) *Minnesota Law Review* 317, 318

⁴⁷ Craig Joyce and others, *Copyright Law* (10th edn, Carolina Academic Press) 229. This is subject to the fair use or fair dealing defences as discussed below.

⁴⁸ *ibid.* Fair use and fair dealing doctrines offer a defence from infringement liability arising in this regard.

⁴⁹ An author’s “moral detriment” is in reference to “moral rights”, particularly the right to integrity which is recognized in almost all jurisdictions with copyright laws. For a comprehensive exposition on the right to integrity and other moral rights see Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011).

⁵⁰ Joyce (n47).

⁵¹ Lipton and Tehranian (n34).

⁵² *ibid.*

⁵³ Khaosaeng (n10).

⁵⁴ *ibid.*

to seek legal advice or litigate issues on the idea/expression dichotomy.⁵⁵ To avoid such high transaction costs arising from the uncertainties flowing from the idea/expression dichotomy authors may seek to unnecessarily obtain licences from copyright owners;⁵⁶ whereas this may not be necessary as what they intend to borrow falls on the idea side of the divide.

It is argued that a principled interpretation of the doctrine must be strived for so as to reasonably allow and indeed promote the existence and emergence of new creativity.

Concerning the idea/expression dichotomy, the real problem is the interpretation of ideas.⁵⁷ This paper now turns to a background discussion on the idea/expression dichotomy noting how the doctrine has misconstrued ideas.

4. Background to the idea/expression dichotomy

4.1 The general conceptualisation of the doctrine

Copyright law regulates the creation and use that is made of a wide range of cultural goods including songs, books and films among others.⁵⁸ In this regard, copyright protects original expressions which are embodied in some material form.⁵⁹ However, in most cases the scope of a work extends beyond its literal appearance⁶⁰ and may include its plot, story line, incidents and themes, depending on the nature of work in question.⁶¹ As US Intellectual Property Law scholar Professor Oren Bracha has noted, the copyright work is in actual fact an abstract “intellectual essence” that can be manifested in numerous concrete ways.⁶² From the above statement, that copyright law protects original forms of expression, flows two important tenets. First, copyright

⁵⁵ Patrick Masiyakurima, ‘The Futility of the Idea/Expression Dichotomy in UK Copyright Law’ (2007) 38(5) *International Review of Intellectual Property and Competition Law* 548, 564.

⁵⁶ Timothy Endicott and Michael Spence, ‘Vagueness in the Scope of Copyright’ (2005) 121(4) *Law Quarterly Review* 657, 665.

⁵⁷ As summarised aptly by Lord Hailsham in *L.B. (Plastics) Ltd v Swish Products Limited* [1979] RPC 551 (HL) 629: the distinction between ideas and their expressions “all depends on what you mean by “ideas””. Others have also considered the meaning of “expression” and issues surrounding its interpretation see Steven Ang, ‘The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the U.S. and the U.K.’ (1994) 2(2) *International Journal of Law and Information Technology* 111.

⁵⁸ Bently and Sherman (n8) 32.

⁵⁹ Caddick, Davies and Harbottle (n7).

⁶⁰ Bently and Sherman (n8) 179.

⁶¹ Bently and Sherman (n8) 178.

⁶² Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909* (Cambridge University Press 2016) 158.

does not protect those elements of a work that are not original.⁶³ Second, and more relevant to the present discourse, is the tenet that copyright only subsists in expressions and not in ideas.⁶⁴ This latter principle, ‘the fundamental axiom of copyright law’,⁶⁵ is often termed the “idea/expression dichotomy”.⁶⁶

There are a considerable number of statements on this doctrine stretching back over 100 years.⁶⁷ Today, most nations have expressed this principle in their national laws in various ways with the aim of achieving the same goal – to provide for the non-protection of ideas.⁶⁸ The non-protection of ideas has also been explicitly provided for in international treaties. For instance, the Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS) at article 9(2) states that: ‘Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such’. An almost verbatim reproduction of the TRIPS provision is made in the WIPO Copyright Treaty (WCT).⁶⁹

There is little debate that the distinction between protected expressions and unprotected ideas ‘is at the essence of copyright’.⁷⁰ However, whereas the pervasiveness of the doctrine is generally accepted, what has not been expressed as lucidly is where the distinction between an idea and an expression lies.

⁶³ Bently and Sherman (n8) 180.

⁶⁴ Catherine Colston and Jonathan Galloway, *Modern Intellectual Property Law* (3rd edn, Routledge 2010) 287.

⁶⁵ *Feist* (n6).

⁶⁶ Caddick, Davies and Harbottle (n7), para 2-09. Others have referred to the doctrine as the “idea-expression divide” or the “idea-expression distinction” see Patricia Loughlan, ‘The Market Place of Ideas and the Idea-Expression Distinction of Copyright Law’ (2002) 23(1) *Adelaide Law Review* 29.

⁶⁷ Laddie, Prescott & Vitoria (n6) para 3.74.

⁶⁸ Mark Van Hoorebeek, *Law, Libraries and Technology* (Chandos Publishing 2005) 43. It should be noted that whereas copyright law does not protect ideas, other areas of law such as contract law may provide protection for ideas. See *Nimmer on Copyright*, vol 5, chapter 19D.02 (loose-leaf 2015).

⁶⁹ Article 2.

⁷⁰ *Harper & Row Publishers v Nation Enterprises* 471 U.S. 539, 589 (1985) (Brennan, J., dissenting). However, some commentators have strongly criticized the dichotomy arguing that its continued recognition is neither justified nor helpful in deciding cases. See, for instance, Robert Yale Libott, ‘Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World’ (1966-1967) 14(3) *UCLA Law Review* 735. Nevertheless, it has been noted that this sort of criticism often relates to the application of the dichotomy and not to the existence and relevance of the dichotomy itself. As was put forward in *Sid & Marty Krofft Television Productions Inc. v McDonald's Corporation* 562 F.2d 1157, 1163 (9th Cir. 1977).

It has been noted there is a very thin line between an “idea” and an “expression”⁷¹ and classifying something as one or the other may often be a very difficult endeavour indeed.⁷² The arduousness in distinguishing between ideas and expressions has led some to term the idea/expression dichotomy ‘confusing’,⁷³ ‘obscure’,⁷⁴ ‘suspect’,⁷⁵ ‘strange’,⁷⁶ ‘amorphous’,⁷⁷ ‘a semantic and historic fallacy’,⁷⁸ ‘manifestly unclear’,⁷⁹ ‘mysterious’⁸⁰ among other such terms.

In the US, Justice Learned Hand in *Nichols v Universal Picture Corporation*⁸¹ went as far as proclaiming that nobody will be able to distinguish between ideas and expressions.⁸²

What has been noted as being the key issue with regard to the doctrine is how ideas are interpreted. As stated aptly by Lord Hailsham, ‘it all depends on what you mean by “ideas”’.⁸³

The aim of this paper is to consider how the idea/expression dichotomy has been interpreted in the US and the UK and what positive lessons Kenya may learn for a better interpretation of the doctrine in furtherance of the overriding objective of copyright law – the creation of new works.⁸⁴

⁷¹ Colston and Galloway (n64) 288.

⁷² William McGinty, ‘First Amendment Rights to Protected Expression: What Are the Traditional Contours of Copyright Law?’ (2008) 23(3) Berkley Technology Law Journal 1099, 1113.

⁷³ Laddie, Prescott & Vitoria (n6) para 3.74.

⁷⁴ *ibid* para 3.76.

⁷⁵ *ibid*.

⁷⁶ Libott (n70) 736.

⁷⁷ *Chuck Blore & Don Richman Inc v 20/20 Advertising Inc* 674 F Supp 671, 676 (D. Minn. 1987).

⁷⁸ Libott (n70) 736.

⁷⁹ Allen Rosen ‘Reconsidering the Idea/Expression Dichotomy (1992) 26(2) University of British Columbia Law Review 263.

⁸⁰ Cheng Lim Saw, ‘Protecting the Sound of Silence in 4’33” - A Timely Revisit of Basic Principles in Copyright Law’ (2005) 27(12) European Intellectual Property Review 467, 470.

⁸¹ 45 F. 2d 119 (2d Cir. 1930).

⁸² *ibid* 121.

⁸³ *L.B. (Plastics)* (n57).

⁸⁴ Bently and Sherman (n8) 32.

4.2 Justifications and benefits of the idea/expression dichotomy

Despite the widespread disconcertion on the application of the idea/expression dichotomy, there are solid justifications for the principle's existence as well as benefits derived from it.

The doctrine may be considered through the lenses of the theories that are often employed in the justification of copyright law. One such view contends that the idea/expression dichotomy can be reflected with reference to Locke's labour theory.⁸⁵ It is commonly maintained that Locke's labour theory underpins English copyright law.⁸⁶ In his eminent essay, *Two Treatises of Government (The Second Treatise)* Locke argued that a person's labour is his, such that 'when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property'.⁸⁷ In other words, 'Each person enjoys the natural right of self-ownership. One's labour is a part of one's self and so one owns one's labour. Because one owns one's labour, one owns the products of one's labour'.⁸⁸ Although there is an assertion that the labour theory is premised on physical labour,⁸⁹ it can as well be applied to mental labour, justifying copyright as property over the production of the mental labour.⁹⁰ As Justin Hughes notes -

Indeed, the Lockean explanation of intellectual property has immediate, intuitive appeal: it seems as though people *do* work to produce ideas and that the value of these ideas-especially since there is no physical component-depends solely upon the individual's mental "work".⁹¹

⁸⁵ Deming Liu, 'Reflections on the Idea/Expression Dichotomy in English Copyright Law' (2017) 1 *Journal of Business Law* 71, 73-75.

⁸⁶ *ibid* 94.

⁸⁷ John Locke, *Two Treatises of Government: The Second Treatise* (P. Laslett ed, 2nd edn, Cambridge University Press, 1967) 287.

⁸⁸ Seana Valentine Shiffrin, 'Lockean Arguments for Private Intellectual Property' in Stephen R. Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 148.

⁸⁹ Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate 1996) 47.

⁹⁰ Liu (n85) 73. Locke himself did not expressly rule out mental labour from his conceptualization of labour.

⁹¹ Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77(2) *Georgetown Law Journal* 287, 300.

Similarly, Lior Zemer argues that under Locke's theory, labour may be physical, creative or mental.⁹² Others have even argued that Locke's labour theory appears to apply more readily to IP than to real property.⁹³

Locke, however, provides a proviso to his theory in noting that 'Nothing was made by God for man to spoil or destroy'.⁹⁴ - the "no spoilage" proviso.⁹⁵ It is argued that this proviso leaves ideas outside the scope of property as the ownership of ideas would harm later creators by denying them an opportunity to draw "upon the pre-existing cultural matrix and scientific heritage"⁹⁶ for further creative endeavours.

Whereas Locke's labour theory is most widely cited in discussions on justifications for IP, it has been noted that he also developed a "knowledge theory".⁹⁷ This theory, derived from Locke's *An Essay Concerning Human Understanding*,⁹⁸ provides that by combining certain ideas together, society can gain new knowledge which ought to then be disseminated to others.⁹⁹ Such knowledge is best achieved by being able to access original works for creative re-use.¹⁰⁰

Similarly, Lord Camden's decision in *Donaldson v Becket*¹⁰¹ adds onto Locke's notion.¹⁰² In this famed case, the House of Lords (effectively) held that there was no perpetual copyright in published works and instead they were subject to statutory limits.¹⁰³ Lord Camden, the first of the Law Lords to speak, delivered a long and

⁹² Lior Zemer, 'The Making of a New Copyright Lockean' (2006) 29(3) Harvard Journal of Law and Public Policy 891, 916.

⁹³ Shiffrin (n88) 139 – 140. However, in this article Professor Shiffrin challenges these arguments and the traditional Lockean views on IP that emphasise a natural right to IP. Instead she argues that the conditions of effective use of common property together with the appeal to the right of subsistence, not labour, initially justify some appropriation out of the stock.

⁹⁴ Locke (n87) 290.

⁹⁵ Liu (n85) 73.

⁹⁶ Wendy Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102(7) Yale Law Journal 1533, 1563–1564.

⁹⁷ James Griffin, 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' (Doctorate, University of Bristol 2008) 93.

⁹⁸ John Locke, *An Essay Concerning Human Understanding* (T. Tegg and Son 1836). See a further exposition of this work noting Locke's definition of ideas below.

⁹⁹ Griffin (n97).

¹⁰⁰ *ibid* 94.

¹⁰¹ (1774) 4 Burr. 2408.

¹⁰² Griffin (n97) 92.

¹⁰³ Generally (1774) 4 Burr. 2408. There's however, some discontent as to whether *Donaldson* in fact repudiated common law copyright; see, for instance, Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 173 – 174

passionate speech that had a considerable effect on the final vote.¹⁰⁴ Lord Camden went through the principal legal issues, arguing that there was no precedent for an interminable property and that ideas could not be treated as such.¹⁰⁵ According to him if there was anything in the world that ought to be free and general it was science and learning.¹⁰⁶ Men of genius did not write for money: 'Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. 'Scire tuum nihil est, nisi te scire hoc sciat alter.' Glory is the reward of science, and those who deserve it, scorn all meaner views'.¹⁰⁷ Lord Camden viewed that the justification for copyright was the propagation of knowledge 'for the common welfare of the species'.¹⁰⁸ To elaborate Lord Camden noted:

but what says the common law about the incorporeal ideas, and where does it prescribe a remedy for the recovery of them, independent of the materials to which they are affixed? I see nothing about the matter in all my books; nor were I to admit ideas to be ever so distinguishable and definable, should I infer they must be matters of private property, and objects of the common law?¹⁰⁹ [emphasis added].

Thus, to enable the creation and dissemination of knowledge (which is done for the good of society) according to Locke and Lord Camden, ideas ought not to be matters of private property but instead free for use. Men were not allowed to 'be niggards to the world, or hoard up for themselves the common stock'.¹¹⁰

One can also reflect on the dichotomy through the "personality theory" or what may be termed as the "Hegelian justification".¹¹¹ The personality theory is best put forward in Hegel's theory of property.¹¹² Under this theory property is described as an expression

¹⁰⁴ Mark Rose, 'The Author as Proprietor: Donaldson v Becket and the Genealogy of Modern Authorship' (1988) 23 Representations 51, 68.

¹⁰⁵ (1774) 4 Burr. 2408.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ Hughes (n91) 288.

¹¹² See G W F Hegel, *Philosophy of Right* (T M Knox tr, Clarendon 1952). Kant's ideas on personhood have also been drawn on together with Hegel's in this regard. See Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (Thomas Abbot tr, 1949). For an in-depth exposition of both Kant's and Hegel's theories within the personality/personhood justification see William Fisher, 'Theories of Intellectual Property' in Stephen R. Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 168 – 199.

of the self.¹¹³ In order for this theory to be valid, it is averred that a differentiation must be made between the aspects of a work which embody an author's personality and those which do not.¹¹⁴ One way of doing so, it has been suggested, is to divide the creation of a work into phases.¹¹⁵ First, is the phase of selecting relevant ideas from the existing pool of ideas (the *inventio* of classical rhetoric); second is the arranging of those ideas (*dispositio*); and third is wording them (*electio*).¹¹⁶ As the pool of ideas is pre-given in the first stage, no imprint of the author's personality occurs here but may arise at the *dispositio* or *electio* stages and thus, an author cannot have property of these ideas.¹¹⁷

In addition to these theoretical justifications of the doctrine it has been argued that the idea/expression dichotomy promotes key social, legal and economic rights and benefits. These rights and benefits are – the promotion of free speech,¹¹⁸ determining copyright infringement,¹¹⁹ enhancing competition,¹²⁰ and promoting creativity.¹²¹

This paper emphasizes how the idea/expression dichotomy may be interpreted for enhanced creativity. This aspect of the doctrine is highlighted below.

4.3 The idea/expression dichotomy for encouraging creativity

Ideas are the basic building blocks of creativity.¹²² When properly used, the idea/expression dichotomy makes these building blocks available to authors who have

¹¹³ Hughes (n91) 288.

¹¹⁴ Daniel Burkitt 'Copyrighting Culture - The History and Cultural Specificity of the Western Model of Copyright' (2001) 2 Intellectual Property Quarterly 146, 167.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ Loughlan (n66) 33. See also for instance, the judgement of the US Court of Appeals for the Second Circuit, in *Harper & Row Publishers v. Nation Enterprises* (723 F2d 195, 203 (2nd Cir, 1985) (Judge Irving R. Kaufman)) where it was noted that copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression'. a position which was upheld by the Supreme Court (471 U.S. 539, 556 (1985)).

¹¹⁹ Masiyakurima (n55) 563.

¹²⁰ Kurtz (n9); William M. Landes and Richard A. Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) Journal of Legal Studies 325, 350.

¹²¹ Masiyakurima (n55) 558.

¹²² Graham M. Duffield and Uma Suthersanen, 'The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) 8(4) Intellectual Property Quarterly 379, 398. It should be pointed out that an enquiry into whether what has been borrowed from a work is an idea or an expression can only really arise with regard to literary works, dramatic works, musical works, artistic works, films and typographical arrangements of published editions. The "idea" behind a broadcast or

encountered them in another work.¹²³ This is because, copyright law recognises the derivative nature of most copyright works.¹²⁴ It is in fact argued by some that all works are derived to some extent from pre-existing works.¹²⁵ Authors live and work within their cultures, they draw from what surrounds them including the creative works of others.¹²⁶ Cultural works are influenced by and in fact influence the external world.¹²⁷

The idea/expression dichotomy helps copyright strike a productive balance between providing incentives for creation and protecting the public domain from being stripped of the raw materials needed for new creations.¹²⁸ The lack of precision regarding the distinction between ideas and their expressions has led to a negation of the transformative and derivative uses of existing cultural works and thus, a reduction of creative activity.¹²⁹

As noted above, it is a widely held contention that all authors draw on the works of their predecessors.¹³⁰

It is argued that a principled interpretation of the doctrine must be strived for so as to encourage the emergence of new creativity.

As has been shown above, the real problem is the interpretation of ideas. This paper now turns to the philosophical and etymological origins of the word “idea” and thereafter considers in detail how each of the three jurisdictions being considered have themselves interpreted “idea” within the dichotomy. This discussion highlights the fundamental differences in the ordinary language and philosophical conceptualisation

sound recording cannot be borrowed, more so, because it can be said that there really is no idea in these two instances in terms of the idea/expression dichotomy.

¹²³ Kurtz (n9).

¹²⁴ Masiyakurima (n55) 558.

¹²⁵ Kurtz (n9).

¹²⁶ *ibid.*

¹²⁷ James Griffin, ‘Exploding Regulation of Culture: What the Memetic Canon offers Regulators’ (2015) 20(4) Communications Law 120.

¹²⁸ In this paper the public domain refers to the realm of raw material of authorship reserved in “the commons” and available for other authors to use. Litman (n27) 1023. See also Edward Samuels, ‘The Public Domain in Copyright Law’ (1993) 41(2) Emory Law Journal 137 for an in-depth discussion of the public domain.

¹²⁹ Masiyakurima (n55) 559

¹³⁰ Litman (n27) 966.

of the word and its legal formulations, which it is argued has exacerbated the problem of finding its proper interpretation.

5. Ideas

5.1 Origins of the word “idea”

The word “idea” although commonplace is rarely used with a clear sense of its meaning.¹³¹ Idea is a transliteration of the Greek word *idein*, the root meaning of which is “see”.¹³² The word is said to have entered the English language in the seventeenth century,¹³³ and possessed two meanings.¹³⁴ The first was, as discussed below, the Platonic conception of an idea as a perfect exemplar or paradigm.¹³⁵ The second meaning, which probably has its origin with Descartes, viewed an idea as a mental concept or image.¹³⁶ Oxford’s unabridged dictionary offers thirteen main acceptations and many subcategories for the definition of idea.¹³⁷ The principal acceptations are divided into three classes, these are; first, senses relating to or derived from the Platonic concept of general or ideal form as distinguished from its realization in individual instances; second, senses denoting a perceptible form or figure; and third, senses relating to the mind without necessarily implying an external manifestation.¹³⁸ The general definition of the word in the Oxford dictionary is – ‘any product of mental apprehension or activity, existing in the mind as an object of knowledge or thought; an item of knowledge or belief; a thought, a theory; a way of thinking’.¹³⁹

Plato was one of the earliest commentators to provide a detailed discussion of ideas.¹⁴⁰ A central claim of Plato’s philosophy is that man’s knowledge is innate.¹⁴¹ Descartes as well propounded innatism. Locke, an empiricist, rejected this view

¹³¹ Amaury Cruz, ‘What’s the Big Idea Behind the Idea-Expression Dichotomy? Modern Ramifications of the Tree of Porphyry in Copyright Law’ (1990-1991)18(1) Florida State University Law Review 221.

¹³² Paul Edwards (ed), *Encyclopedia of Philosophy*, vol 4 (Macmillan 1967) 118.

¹³³ *ibid* 118 -119.

¹³⁴ Cruz (n131) 223.

¹³⁵ *ibid*.

¹³⁶ Kurtz (n9) 1242.

¹³⁷ Oxford English Dictionary Online

<http://www.oed.com/search?searchType=dictionary&q=idea&_searchBtn=Search> accessed 15 January 2019.

¹³⁸ *ibid*.

¹³⁹ *ibid*.

¹⁴⁰ David Ross, *Plato’s Theory of Ideas* (Oxford Clarendon Press 1951) 12.

¹⁴¹ G.A.J. Rogers, ‘Locke, Plato and Platonism’ in Douglas Hedley and Sarah Hutton (eds), *Platonism at the Origins of Modernity: Studies on Platonism and Early Modern Philosophy* (Springer 2010) 193.

arguing instead that knowledge derives solely from experience.¹⁴² Innatism and empiricism, thus, being the key schools of thought on ideas, are highlighted in the discussion below. As Plato, Descartes and Locke are the principal thinkers in respect of these viewpoints their thoughts are underscored. Additionally, recent views from the History of Ideas are also discussed so as to offer a contemporary consideration of ideas. What emerges from this discussion is that what ideas are construed as in ordinary language and philosophy is markedly different from how they are interpreted in law. Under the law ideas appear to be not about ideas at all, but rather represent a metaphor for what the law deems ought not to be protected by copyright law at a particular instance.¹⁴³ Such revelations demonstrate the lack of clarity with which the doctrine is fraught, the effect of which has been a chilling of creativity in the copyright industries, a problem which this paper seeks to proscribe a cure to.

5.2 Innatism

5.2.1 The Platonic concept of ideas

As noted above, one of the first thinkers to offer an in-depth exposition on ideas was Plato.¹⁴⁴ The Ancient Greek thinker's philosophy centres on the theory of ideas.¹⁴⁵ Plato's discussions on the word occurred mostly in his "dialogues" including the *Euthyphro*, the *Phaedo*, the *Republic* and later in the *Timaeus*.¹⁴⁶ It is in the dialogue *Euthyphro* that the word ἰδέα (*idea*) probably first appears.¹⁴⁷

The Platonic idea is metaphysical, it is a model or archetype of created things which dwell eternally in the "divine mind".¹⁴⁸ Therefore, for Plato one's subjective understanding of say a chair is not the same as the idea of a chair because the idea is an objective reality that is not the property of the individual mind.¹⁴⁹ The Platonist

¹⁴² Locke (n52) 51.

¹⁴³ Pamela Samuelson, 'Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection' (2005-2006) 85(7) *Texas Law Review* 1921, 1922.

¹⁴⁴ Ross (n140).

¹⁴⁵ Friedrich Ueberweg, *History of Philosophy: From Thales to the Present Time* (George S. Morris tr, Charles Scribner's Sons 1889).

¹⁴⁶ See Ross (n140).

¹⁴⁷ *ibid*.

¹⁴⁸ Alexander H. Everett, 'History of Intellectual Philosophy' 29(64) *The North American Review* (1829) 67, 110.

¹⁴⁹ Anthony Kenny, *A New History of Western Philosophy* (Clarendon Press, Oxford 2007) 46.

Plutarch in his collection of essays, *The Moralia*, offers a summary of this school of thought, noting -

Idea is a bodilesse substance, which of it selfe hath no subsistence, but giveth figure and forme unto shapelesse matters, and becommeth the very cause that bringeth them into shew and evidence. Socrates and Plato suppose, that these Ideaee bee substances separate and distinct from Matter, howbeit, subsisting in the thoughts and imaginations of God, that is to say, of Minde and Understanding. Aristotle admitteth verily these formes and Ideæ, howbeit, not separate from matter, as being the patterns of all that which God hath made. The Stoicks such as were the scholars of Zeno, have delivered, that our thoughts and conceits were the Ideæ.¹⁵⁰

5.2.2 The Cartesian concept of ideas

Thus, under the Platonic conception, the word is used to express the real forms of the intelligible world, in contrast to the unreal images of the sensible. The term was “lowered” by Descartes, who extended it to the objects of our consciousness in general.¹⁵¹ The Cartesian conception of an idea is one whereby ideas in the mind represent objects outside the mind by resembling them. Descartes notes ‘Some of my thoughts are as it were the images of things, and it is only in these cases that the term “idea” is strictly appropriate - for example, when I think of a man, or a chimera, or the sky, or an angel, or God’.¹⁵² Descartes affirms three sorts of ideas in one’s mind, first, adventitious ideas which come to a person from without through the agency of the senses; second, there are factitious ideas which one constructs out of the materials furnished by sense; and last are innate ideas which one is born with.¹⁵³

5.3 Empiricism

On their part, the primary empiricist of the seventeenth century Locke, and his eighteenth-century counterparts Hume and Berkeley aver that ideas refer to any of the

¹⁵⁰ Plutarch of Chæronea, *The Philosophie, Commonlie Called, The Morals* (Philemon Holland tr, Arnold Hatfield 1603) 813.

¹⁵¹ Hamilton (n35). For a discussion on Aristotle’s views on ideas within the context of the idea/expression dichotomy see Amy B. Cohen, ‘Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements’ (1990) 66 (1) *Indiana Law Journal* 175, 198-199.

¹⁵² Rene Descartes, ‘Meditations on First Philosophy: Third Meditation’ in John Cottingham (ed), *Descartes: Selected Philosophical Writings* (John Cottingham and others trs, Cambridge University Press, 1988) 74.

¹⁵³ Francis Bowen, *Modern Philosophy: From Descartes to Schopenhauer and Hartmann* (Scribner, Armstrong & Company 1877) 28.

contents of the mind. Precisely, Hume's conception of ideas was that they are 'the faint images of these [impressions] in thinking and reasoning'.¹⁵⁴ While for Berkeley ideas are whatever one is directly conscious of, be it a real or a mental representation of a sensation, a passion or operation of the mind.¹⁵⁵

5.3.1 The Lockean concept of ideas

Of the three, Locke offered the most elaborate disquisition on the subject, he defines an idea as:

that term which, I think, serves best to stand for whatsoever is the object of the understanding when a man thinks, I have used it to express whatever is meant by phantasm, notion, species, or whatever it is which the mind can be employed about in thinking; and I could not avoid frequently using it.¹⁵⁶

For Locke an idea therefore, represents the most basic unit of human thought, incorporating under this term every kind of mental content. He argues that every idea is derived from experience, through either one of two sources - sensation or reflection.¹⁵⁷ Thus, propagating his famous *tabula rasa* ("blank slate") argument according to which at birth the mind is a *tabula rasa*, a perfectly blank surface, on to which sensations are projected.¹⁵⁸ In this regard Locke's approach is divergent to that of Descartes and other proponents of innatism (such as Gottfried Wilhelm Leibniz).¹⁵⁹ who argue in favour of innate ideas which are inborn, belonging to the mind from its birth.¹⁶⁰

Locke continues, distinguishing between two sub-sets of ideas that he calls "simple" and "complex".¹⁶¹ A simple idea is one that 'contains in it nothing but one uniform appearance, or conception in the mind, and is not distinguishable into different

¹⁵⁴ David Hume, *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects* (London, John Noon 1739) 7.

¹⁵⁵ Alexander Campbell Fraser, *Selections from Berkeley* (Clarendon Press Oxford 1899) 30.

¹⁵⁶ Locke (n52) 4.

¹⁵⁷ *ibid* 51.

¹⁵⁸ Frederick Ryland, *A Students Handbook of Psychology and Ethics* (W. Swan Sonnenchein Allen 1880) 98.

¹⁵⁹ See Leibniz's rebuttal of Locke's Essay. G.W. Leibniz, *New Essays on Human Understanding* (Peter Remnant and Jonathan Bennet eds, 2nd edn, Cambridge University Press 1996) (Book I and Book II) 20 – 184.

¹⁶⁰ J. Radford Thomson, *A Dictionary of Philosophy: In the Words of Philosophers* (R.D. Dickinson 1887) 102.

¹⁶¹ Locke (n52) 61.

ideas'.¹⁶² The mind is passive in the reception of these ideas and can neither make one on its own nor have any idea which does not consist of a simple idea.¹⁶³ Locke states –

The mind can neither make nor destroy them. The simple ideas, the materials of all our knowledge, are suggested and furnished to the mind only by those two ways above mentioned, viz. sensation and reflection. When the understanding is once stored with these simple ideas, it has the power to repeat, compare, and unite them, even to an almost infinite variety, and so can make at pleasure new complex ideas.¹⁶⁴

Accordingly, simple ideas are the “building blocks” from which complex ideas are derived from.¹⁶⁵ The mind is wholly passive in the reception of simple ideas, it then “exerts its powers” over them to create complex ideas.¹⁶⁶ This, per Locke, is done in three ways. First, combining – this refers to the joining of several simple ideas together in the formation of a new whole.¹⁶⁷ Second, comparing – this involves bringing two distinct ideas, simple or complex, together without uniting them, giving rise to the idea of a relation between them.¹⁶⁸ Third, abstracting - this is the separation of some aspect of an idea from its specific circumstances in order to form a new general idea.¹⁶⁹ Hume reiterated Locke’s argument noting on his part:

There is another division of our perceptions, which it will be convenient to observe, and which extends itself both to our impressions and ideas. This division is into Simple and Complex. Simple perceptions or impressions and ideas are such as admit of no distinction nor separation. The complex are the contrary to these, and may be distinguished into parts.¹⁷⁰

5.4 The History of Ideas

There has been further consideration of ideas within the discipline termed “The History of Ideas”. The History of Ideas is concerned with excavating and understanding the reality of received truths by critically exploring ideas in their geographical, social,

¹⁶² *ibid* 62.

¹⁶³ *ibid*.

¹⁶⁴ *ibid* 62-63.

¹⁶⁵ Dabney Townsend, ‘Hutcheson and Complex Ideas: A Reply to Peter Kivy’ (1993) 51(1) *The Journal of Aesthetics and Art Criticism* 72, 73.

¹⁶⁶ Locke (n52) 96.

¹⁶⁷ *ibid*.

¹⁶⁸ *ibid*.

¹⁶⁹ *ibid*.

¹⁷⁰ Hume (n154) 8.

cultural and historical contexts.¹⁷¹ The discipline can be dated to the work of Professor Arthur O. Lovejoy and his colleagues at Johns Hopkins University.¹⁷² For Lovejoy, the History of Ideas involves the identification of “unit-ideas”, which are the component elements on which other ideas are built.¹⁷³ Lovejoy's study of the History of Ideas was an essential part of his philosophical effort to create a rational and intelligible account of the world.¹⁷⁴ Towards this end, he conceptualized the notion of the *Great Chain of Being*, by which the universe is seen as a rational place where all organisms are linked in a great chain extending from God through the angels to humans down to the least-complicated life-forms.¹⁷⁵ Lovejoy stopped short of defining or providing an explicit characterization of what he meant by an idea or unit-idea.¹⁷⁶

Nevertheless, a former editor of *The Dictionary of the History of Ideas*, Professor Philip Wiener, offers a rather comprehensive discussion of what he views an idea as. He notes that the word idea has many meanings and each of these has its own history.¹⁷⁷ He offers four such meanings of the word. First, ideas mean whatever is seen by the mind in the original Greek sense of *idein*.¹⁷⁸ Second, whatever confronts the mind when it perceives or thinks.¹⁷⁹ Wiener noted that this included sensations of qualities, feelings, impressions, memory images, or compounds of these.¹⁸⁰ It has been argued that this category is the largest in meaning and stretches from the tangible such as ‘table’ to the abstract such as ‘beauty’.¹⁸¹ Third, is what Wiener terms “ideals”, by this he means ideas in the Platonic mode of an archetype of a created thing.¹⁸² Last, is beliefs or judgments for instance, ‘the idea of the primitive goodness of man before he

¹⁷¹ See Mark Bevir, *The Logic of the History of Ideas* (Cambridge University Press 1999).

¹⁷² Richard Macksey, ‘The History of Ideas at 80’ (2002) 117(5) *Modern Language Notes* 1083.

¹⁷³ Arthur O. Lovejoy, *The Great Chain of Being: A Study of the History of An Idea* (Harvard University Press 1936) 3.

¹⁷⁴ Daniel J Wilson, ‘Arthur O. Lovejoy and the Moral of The Great Chain of Being’ (1980) 41(2) *Journal of the History of Ideas* 249, 250.

¹⁷⁵ Peter Watson, *Ideas: A History of Thought and Invention, From Fire to Freud* (HarperCollins 2005) 78.

¹⁷⁶ Louis O. Mink, ‘Change and Causality in the History of Ideas’ (1968) 2(1) *Eighteenth-Century Studies* 9.

¹⁷⁷ Philip Wiener, ‘Some Problems and Methods in the History of Ideas’ (1961) 22(4) *Journal of the History Ideas* 531, 532.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid* 533.

¹⁸¹ Thomas Bredsdorff, ‘Lovejoy's Idea of "Idea"’ 8(2) *New Literary History* 195, 197.

¹⁸² Wiener (n177) 532.

was spoiled by civilization, the idea that progress is inevitable, or that all history is class struggle'.¹⁸³

Wiener went on to explain his categorization in further detail noting that the third and fourth conception of idea above as ideal and as belief respectively, are opposed to senses one and two of ideas epistemologically, because one and two, intuitions and images respectively, refer to immediate experience whereas three and four, the desired ideal and the hypothetical belief, are more mediated by abstract symbols or concepts.¹⁸⁴

Wiener's four-pronged typology has been termed useful in determining what an idea is.¹⁸⁵

5.5 Other views

Additionally, other scholars and commentators have extended their views on ideas. Some consider ideas as products of forms of discourse or languages conceived as social constructs.¹⁸⁶ Others take the view that ideas express desires conceived as the properties of individuals.¹⁸⁷

Courts on their part have traditionally shied away from offering a precise definition of idea.¹⁸⁸ It is argued in this paper that this is in fact one of the difficulties with the idea/expression dichotomy. Despite this general reluctance, one court in the US has eruditely defined an idea as "any conception existing in the mind as a result of mental understanding, awareness, or activity."¹⁸⁹

The following part exposes how ideas have been construed, within the context of the doctrine, in the US, UK and Kenya. It will be noted that "idea" as construed by the law is markedly different from the ordinary English and philosophical meaning of idea as

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ Bredsdorff (n181).

¹⁸⁶ Mark Bevir, 'Mind and Method in the History of Ideas' (1997) 36(2) *History and Theory* 167.

¹⁸⁷ *ibid.*

¹⁸⁸ K.P. Abinava Sankar and Nikhil L.R. Chary, 'The Idea-Expression Dichotomy: Indianizing an International Debate' (2008) 3(2) *Journal of International Commercial Law and Technology* 129.

¹⁸⁹ *Gund, Inc. v Smile International, Inc.* 691 F. Supp. 642, 644 (E.D.N.Y. 1988).

discussed in the foregoing part. This, it is argued, has aggravated the problem of finding a proper interpretation of the word and accordingly the *bona fide* divide between ideas and expressions in the context of the idea/expression dichotomy. As a cure to these problems it is argued that Kenya would benefit from a statutory provision, similar to that of the US, clearly demarcating those elements of a work that do not receive copyright protection under the rubric of “ideas”. This would proffer simplicity and clarity in the interpretation of the doctrine and protect the “field of ideas” for the use of creators.

6. National approaches to the idea/expression dichotomy

6.1 United States

As noted above the notion that ideas are part of the public domain is one of considerable antiquity.¹⁹⁰ Professor Nimmer suggests as a minimum, a tracing of the notion to the First Century A.D., when the Roman philosopher Seneca stated that ‘ideas are common property’.¹⁹¹ The concept appears to have entered the common law in the late Eighteenth Century by virtue of Yates J's famed dissent in *Millar v. Taylor*.¹⁹² In the US, the idea-expression dichotomy is said to have originated in the leading Supreme Court case of *Baker v Selden*.¹⁹³ Here, in ruling for a defendant accused of reproducing from the plaintiff's book, forms necessary for the use of a bookkeeping system, J Bradley stated that:

Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way....Now whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein.¹⁹⁴

Since *Baker* numerous other courts have upheld copyright's non-protection of ideas.¹⁹⁵

¹⁹⁰ Libott (n70) 737.

¹⁹¹ *Nimmer on Copyright* (loose-leaf 2015) quoting *Epistles* 12:11.

¹⁹² [1769] 4 Burrow 2303.

¹⁹³ 101 U.S. 99 (1879).

¹⁹⁴ *ibid* 100-101

¹⁹⁵ *Holmes v Hurst* 174 U.S. 82 (1899); *Nichols v Universal Pictures Corporation* 45 F.2d 119 (2d Cir. 1930); *Harper & Row v Nation Enterprises* 471 U.S. 539 (1985); *Feist Publications v Rural Telephone Services Company* 499 U.S. 340 (1991); *Mazer v Stein*; *Golan v Holder* 565 U.S. 302 (2012) and recently *Folkens v Wylands Worldwide* (9th Cir. 2018).

Today, the idea/expression dichotomy is codified in section 102 (b) of the US Copyright Act which provides that –

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.¹⁹⁶

On the whole, it has been argued that the situation of the idea/expression dichotomy in section 102 (b) of US Copyright Act has aided in its interpretation.¹⁹⁷ However, it is clear from commentators and courts alike that the codification of the doctrine has not been a panacea for the controversies surrounding it.¹⁹⁸ The courts have been criticised for not clearly interpreting the terms “ideas” and “expressions” thus, facing difficulties in the application of the doctrine.¹⁹⁹ Such criticism notwithstanding the courts in the US have devised noteworthy devices for the application of the doctrine, key of which are, the merger doctrine, *scènes à faire* and the abstractions test.

The merger doctrine notes that where an idea can only reasonably be expressed in one or very few ways, such an expression will not be protected by copyright.²⁰⁰ The reasoning behind this rule is that where the idea and expression cannot be separated, protecting the expression amounts to protecting the idea, an unacceptable outcome.²⁰¹ In other words, in such situations, the idea and its expression will merge, leaving behind no protectable expression in copyright.²⁰²

Scène à faire is a French phrase which literally means “scene for action”.²⁰³ As a concept in copyright law it refers to ‘standard or general themes that are common to a wide variety of works and are therefore not copyrightable’.²⁰⁴ The Court of Appeals for

¹⁹⁶ It has been argued that this provision actually goes beyond the “idea/expression dichotomy” see Samuelson (n143) 1922.

¹⁹⁷ Masiyakurima (n55) 570.

¹⁹⁸ *ibid.*

¹⁹⁹ Richard H. Jones, ‘The Myth of The Idea/Expression Dichotomy in Copyright Law’ (1990) 10(3) Pace Law Review 551, 569.

²⁰⁰ Joyce (n47) 122.

²⁰¹ Stephen M McJohn, *Copyright: Examples and Explanations* (4th edn, Wolters Kluwer 2015) 116.

²⁰² Saw (n80).

²⁰³ Jennifer Speake and Mark LaFlaur, *The Oxford Essential Dictionary of Foreign Terms in English* (Oxford University Press 2002) <<http://www.oxfordreference.com>> accessed 15 January 2019.

²⁰⁴ Bryan A. Garner (ed), *Black’s Law Dictionary* (Thomson Reuters 2009) 1462.

the Ninth Circuit in *Ets-Hokin v Skyy Spirits*²⁰⁵ declared that under the doctrine of *scènes à faire* 'courts will not protect a copyrighted work from infringement if the expression embodied in the work necessarily flows from a common place idea; like merger the rationale is that there should be no monopoly of the underlying unprotectable idea.'²⁰⁶

Justice Learned Hand proposed the "abstraction" test²⁰⁷ in the case of *Nichols v Universal Picture Corporation*.²⁰⁸ The learned judge declared

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended."²⁰⁹

Evidently the debate on the idea/expression dichotomy and particularly how ideas may be differentiated from expressions is a robust one.²¹⁰ As seen above judges and commentators alike have offered their views in the hope of clarifying issues. In spite of such erstwhile efforts no principled approach of delineating ideas vis-à-vis expressions has emerged.

This general lack of clarity has led to the presumption that courts often distinguish between ideas and expressions intuitively as they seek the most fruitful competitive balance.²¹¹ This paper argues that the lack of clarity and exactness in the interpretation of the dichotomy produces the chilling effect of a decrease in creativity. It has also been noted that the lack of predictability and uniformity raises transaction costs for

²⁰⁵ 225 F. 3d 1068 (9th Cir. 2000).

²⁰⁶ *ibid* 1075 (Circuit Judge McKeown).

²⁰⁷ Liu (n85) 77.

²⁰⁸ 45 F. 2d 119 (2d Cir. 1930).

²⁰⁹ *ibid* 121.

²¹⁰ For instance, one commentator, Allen Rosen, has offered a four-pronged typology for assessing different ways of interpreting this dichotomy. These four approaches are (i) The Style/Content Contrast (ii) Fixed/Unfixed Ideas (iii) Ideas and Language (iv) General and Specific Ideas. Rosen (n79).

²¹¹ Alan L. Durham, 'Speaking of the World: Fact, Opinion and the Originality Standard of Copyright' in Robert F. Brauneis (ed), *Intellectual Property Protection of Fact-based Works* (Edward Elgar 2009) 155.

potential authors by for instance, forcing them to seek legal advice.²¹² A principled approach towards making the distinction between ideas and expressions is therefore expedient.

6.2 United Kingdom

The long-established principle that copyright protection is not granted to the ideas which are embodied in or which may have inspired a work has never received explicit expression within the legislative framework in the UK.²¹³ Instead, it is noted that the doctrine emerged from the eighteenth-century discussions on common law property.²¹⁴ As noted above, this was seen in particular in *Millar v Taylor*²¹⁵ where the court infamously held that there is a perpetual common law copyright. In this case Yates J., dissenting, noted that ‘Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion’.²¹⁶ Judge Yates argued that once the author has set his “birds” (ideas) at liberty, he cannot prevent another from claiming them.²¹⁷ Five years later the court (effectively) reversed the *Millar* decision in *Donaldson v Beckett*²¹⁸, with regard to ideas. Lord Camden agreed with Yates J. noting that the common law provided no remedy for the recovery of incorporeal ideas independent of the material to which they are affixed.²¹⁹ Similarly, one commentator of this period noted that:

[H]e who obtaineth my copy may appropriate my stock of ideas, and by opposing my sentiments, may give birth to a new doctrine; or he may coincide with my notions, and by employing different illustrations, may place my doctrine in another point of view: and in either case he acquireth an exclusive title to his copy, without invading my property: for though he may be said to build on my foundation, yet he rears a different superstructure.²²⁰

²¹² Masiyakurima (n55) 566.

²¹³ Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006) 112. However, as the non-protection of ideas is specifically provided for under Article 1(2) of the Software Directive, it is arguable that the principle does in fact have direct statutory application in the UK, at least for the time being.

²¹⁴ Bently and Sherman (n8) 181.

²¹⁵ [1769] 4 Burrow 2303.

²¹⁶ *ibid* 2378-9.

²¹⁷ Libott (n70) 737.

²¹⁸ *Cobbett's Parliamentary History of England* (1774) XVII 954.

²¹⁹ *ibid* 954,997.

²²⁰ Anon., *A Vindication of the Exclusive Right of Authors, to their own works: A subject now under consideration before the 12 judges of England* (London, Griffiths 1762).

These observations were made in essence as a response to complaints that copyright, and in particular common law copyright, creates a monopoly in knowledge.²²¹

In 1735, some years before *Millar* and *Donaldson* a small group of artists and engravers put a petition before the House of Commons concerning '[t]he case of designers, engravers, etchers &c'.²²² Their lobbying efforts were a response to the enactment of the Statute of Anne in 1710 which offered copyright protection only to literary works.²²³ The outcome of their labours was the Engravers' Act 1735.²²⁴ In their petition, the engravers sought to make a case as to why they should be offered protection for their designs.²²⁵ They argued that it was the artists' skill and labour that gave value to a work of art.²²⁶ Central to their argument was the significant concession that everyone undoubtedly had an equal right to every right.²²⁷ However, as a foreshadowing of the idea/expression dichotomy, they noted that whereas two different artists may take the same subject, they would produce different works wherein the form in which each was rendered would vary so greatly as to easily denote each work as original.²²⁸ It was self-evident to the engravers that one person's design, though he may take the same subject (that is idea) as another, would be just as unique and original as his handwriting.²²⁹

Today, the principle has been recognised at the highest level, with the House of Lords describing it as 'trite law'²³⁰ and subsequently with the Court of Appeal upholding the doctrine as a 'a cliché of copyright law'.²³¹ It has also been expressly provided for in

²²¹ Bracha (n62) 170.

²²² The artists and engravers responsible for the petition were a small group led by William Hogarth.

²²³ Ronan Deazley 'Commentary on the Engravers' Act (1735)', in L. Bently & M. Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* <<http://www.copyrighthistory.org>> accessed 15 January, 2019.

²²⁴ The full title of the Engravers' Act is "An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein mentioned" 1735, 8 Geo.II, c.13.

²²⁵ Deazley (n223).

²²⁶ *ibid.*

²²⁷ *ibid.*

²²⁸ *ibid.*

²²⁹ *ibid.*

²³⁰ *L.B. (Plastics)* (n57) 160 (Lord Halisham).

²³¹ *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482, [2015] E.C.D.R. 17, [20] (Lewison LJ).

international and regional instruments which the UK applies including TRIPS,²³² WCT²³³ and the Software Directive,²³⁴ therefore providing a further argument for the doctrine's application in the UK. However, to be sure, some have argued that in UK copyright law, aphorisms such as "there is no copyright in an idea" ought to be avoided.²³⁵ Others have even gone to the extent of stating that there is no such rule as the idea/expression dichotomy in UK copyright law.²³⁶ The general contention of these commentators is that an idea is not the subject of copyright, not because there is any special rule to that effect – the UK Copyright, Designs and Patents Act 1988 mentions no such rule – but because a mere concept in someone's head is not a "work" at all;²³⁷ or that they are not original and the task for courts in the UK is to protect original works.²³⁸ All the same, it is submitted that the numerous statements propounding the doctrine including by the House of Lords and the Court of Appeal; in international and regional treaties and conventions that the UK is a party to; and by leading UK copyright law scholars all persuasively demonstrate an existence and a general acceptance of the doctrine in UK copyright law.

Whereas the principle's existence and applicability is now commonly accepted, what has proven to be rather difficult is its actual application.²³⁹ The difficulty has been in classifying a thing as either an idea or as an expression of an idea.²⁴⁰ It has been argued that there is a very thin line between an idea and an expression and that indeed nobody will ever be able to distinguish between the two.²⁴¹ Others note that no clear principle can be laid down in drawing the line between idea and expression.²⁴² The House of Lords has on its part declared that the distinction lies in what is meant by ideas.²⁴³

²³² Article 9(2).

²³³ Article 2.

²³⁴ Article 1(2).

²³⁵ *IBCOS Computers Ltd. and Another v Barclays Mercantile Highland Finance Ltd. and Others* [1994] FSR 275 (Ch) 289 (Jacob J).

²³⁶ See, Laddie, Prescott & Vitoria (n6) para 3.80.

²³⁷ *ibid* para 4.52.

²³⁸ *ibid* para 3.74.

²³⁹ McGinty (n72) 1113.

²⁴⁰ *ibid*.

²⁴¹ 45 F. 2d [119], [121] (2d Cir. 1930) (Justice Hand).

²⁴² Liu (n85) 96.

²⁴³ *L.B. (Plastics)* (n57).

Courts have construed the doctrine in a number of ways, dating back to more than a hundred years.²⁴⁴ In *McCrum v Eisner*²⁴⁵ the court noted that ‘Copyright, however, does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression’.²⁴⁶ This conceptualisation of the doctrine was offered almost verbatim in *Harman Pictures v Osborne*²⁴⁷ where the court noted that ‘there is no copyright in ideas or schemes or systems or methods: it is confined to their expression’.²⁴⁸ In *Baigent v The Random House Group*²⁴⁹ it was held that it was not an infringement to ‘replicate or use items of information, facts, ideas, theories, arguments, themes and so on derived from the original copyright work’.²⁵⁰

In *Norowzian v Arks*²⁵¹ the Court of Appeal held that there is no copyright in filming and editing styles and techniques. The High Court on its part held in *IPC Media v Highbury-Leisure Publishing*²⁵² noted that ‘The law of copyright has never gone as far as to protect general themes, styles or ideas’.²⁵³ Similarly, in *Sawkins v Hyperion Records*²⁵⁴ the Court of Appeal stated that copyright ‘does not prevent use of the information, thoughts or emotions expressed in the copyright work’.²⁵⁵ In *Ravenscroft v Herbert and New English Library Limited*²⁵⁶ the court noted that there was no copyright in historical facts whereas in *Springfield v Thame*²⁵⁷ Joyce J noted *obiter* that ‘...there is no copyright in news, only in the manner of expressing it’.²⁵⁸ Thus, courts have viewed the non-protected aspect of the dichotomy as including – ideas, schemes, systems, methods, information, facts (including historical facts), theories, arguments, themes, styles, news of the day, thoughts and emotions among others.

²⁴⁴ Laddie, Prescott & Vitoria (n6) para 3.74.

²⁴⁵ [1917] 87 LJ 99 (Ch).

²⁴⁶ *ibid* 102 (Peterson J).

²⁴⁷ [1967] 1 WLR 723 (Ch).

²⁴⁸ *ibid* 728 (Goff J).

²⁴⁹ [2006] EWHC 719 (Ch).

²⁵⁰ *ibid* [146] (Mummery LJ).

²⁵¹ [1999] EWCA Civ 3018, [2000] FSR 363.

²⁵² [2004] EWHC 2985 (Ch), [2005] FSR 20.

²⁵³ *ibid* [14] (Laddie J).

²⁵⁴ [2005] EWCA Civ 565, [2005] 1 WLR 3281.

²⁵⁵ *ibid* [29] (Mummery LJ)

²⁵⁶ [1980] RPC 193 (Ch).

²⁵⁷ [1903] 89 LT 242 (Ch).

²⁵⁸ *ibid*.

The doctrine received elaborate consideration in the House of Lords decision in *Designers Guild Limited v Russell Williams (Textiles) Limited*.²⁵⁹ Here, Lord Scott recognised the principle by stating that ‘It is not a breach of copyright to borrow an idea, whether of an artistic, literary or musical nature, and to translate that idea into a new work’.²⁶⁰ However, Lord Scott did not offer more commentary with regard to the principle’s application; this task was taken up eruditely by Lord Hoffmann who offered what is arguably the leading UK pronouncement on the idea/expression dichotomy. Lord Hoffmann began his premise by agreeing that indeed there is no copyright in ideas which are merely in one’s head and have not been expressed in copyrightable form, however, he noted, the distinction between ideas and expression cannot be as trivial as this.²⁶¹

To elaborate on where the distinction lies he put forward two prepositions. First, certain ideas in a copyright work may not be protected because they do not have any connection with the literary, dramatic, musical or artistic nature of the work.²⁶² For instance, Lord Hoffman noted, there would be no copyright protection for a system or invention arising out of a literary work which describes such system or invention.²⁶³ The same is true, he went on, of an artistic work that expressed an inventive concept – others would be free to express it in works of their own in the absence of patent protection.²⁶⁴ On this point he gave the specific example of the case of *Kleeneze Ltd. v D.R.G. (U.K.) Ltd.*²⁶⁵ where the court had found no copyright infringement in a drawing of a letterbox draught excluder as the defendant had merely taken the concept of the draught excluder.

Second, ‘certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work’.²⁶⁶ For this preposition Lord Hoffmann offered the example of the case of *Kenrick v Lawrence*,²⁶⁷ where the

²⁵⁹ [2000] UKHL 58, [2000] 1 WLR 2416.

²⁶⁰ *ibid* 2432.

²⁶¹ *ibid* 2422.

²⁶² *ibid* 2423.

²⁶³ *ibid*.

²⁶⁴ *ibid*.

²⁶⁵ [1984] FSR 399 (Ch).

²⁶⁶ *Designers Guild Limited* (n259) 2423.

²⁶⁷ [1890] 25 QBD 99.

court held that the owner's copyright in the drawing of a hand holding a pencil, and drawing a cross into a square could not prevent others from making similar drawings.²⁶⁸ Lord Hoffmann closed this argument with the parable 'Copyright law protects foxes better than hedgehogs'.²⁶⁹ In other words, the more abstract and simple an idea is the less likely it is to represent a substantial part of the allegedly copied work.²⁷⁰

Lord Hoffmann's two prepositions can be criticised on close scrutiny. With regard to his first preposition, Lord Hoffmann's exposition seems to be incomplete in that it disregards other aspects of a work, which as noted above are not protected including – techniques, styles and methods among others.²⁷¹ On the second preposition it has been argued that Lord Hoffmann apparently meshes the distinction between ideas and expressions with the test of originality.²⁷² This is unwarranted as originality in copyright law is only related to the expression of ideas rather than to ideas themselves.²⁷³ This was the holding of the court in *University of London Press Ltd v University Tutorial Press Ltd*²⁷⁴ where Peterson J observed that 'Copyright Acts are not concerned with the originality of ideas, but with the expression of thought.... The originality which is required relates to the expression of the thought'.²⁷⁵

Overall, Lord Hoffmann's articulation of the doctrine has been viewed as being helpful particularly as it recognises that the vagueness of the concept of "ideas" is likely to lead to misinterpretation of the nature and scope of the exclusion.²⁷⁶ Indeed the exclusion is quite narrow and does not encompass everything that might be referred to, in everyday speech, as an idea.²⁷⁷ Subsequent cases indicate that lower courts

²⁶⁸ *ibid* 106.

²⁶⁹ *Designers Guild Limited* (n259) 2423. It is generally assumed that Lord Hoffmann had in mind the essay by Isaiah Berlin, entitled *The Hedgehog and the Fox* (1953) in stating this parable. Meaning, in effect, that it is easier to recognise originality in detail than in a basic concept. See L.T.C. Harms, 'The Hedgehog, the Fox and Copyright - A Diversion' (2013) (35) (1) *European Intellectual Property Review* for an analysis of the history of the parable of the fox and the hedgehog through literature, science and philosophy.

²⁷⁰ *Designers Guild Limited* (n259) 2423.

²⁷¹ *Bently and Sherman* (n8) 181.

²⁷² *Liu* (n85) 80.

²⁷³ *ibid* 79.

²⁷⁴ [1916] 2 Ch. 601.

²⁷⁵ *ibid* 608.

²⁷⁶ *Bently and Sherman* (n8) 183.

²⁷⁷ *ibid*.

have opted for a wider exclusion as a tool for dismissing “speculative claims”.²⁷⁸ This was seen, for instance, in *Baigent v Random House*²⁷⁹ where the Court of Appeal, upheld the decision of the High Court, in ruling that the popular novel *The Da Vinci Code* did not infringe the claimants’ book, *The Holy Blood and the Holy Grail*. Mummery LJ in particular noted that copyright protection does not allow persons to “monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material, theories propounded, general arguments deployed, or general hypotheses suggested (whether they are sound or not) or general themes written about”.²⁸⁰

It has further been opined that Lord Hoffmann as well as other judges have failed to recognise that the idea/expression dichotomy is in fact based on public policy.²⁸¹ Indeed it has been argued that ever since the enactment of the Statute of Anne in 1710 for the “encouragement of learning”²⁸² copyright law has propagated political goals.²⁸³ In this regard, the exclusion of ideas from the realm of copyright protection, is but a judicial technique in the furtherance of these public policy goals that offers a balance between the competing interests of copyright holders and the public.²⁸⁴ The interests of the public, as discussed above, include - the promotion of free speech,²⁸⁵ determining copyright infringement,²⁸⁶ enhancing competition (economic benefits)²⁸⁷ and promoting creativity.²⁸⁸

This paper argues that the lack of clarity, precision and predictability in the interpretation of the dichotomy produces the chilling effect of a decrease in creativity.²⁸⁹

²⁷⁸ *ibid* 184.

²⁷⁹ [2007] EWCA Civ 247.

²⁸⁰ *ibid* [156].

²⁸¹ *Bently and Sherman* (n8) 183.

²⁸² The full title of the Statute of Anne, also known as the Copyright Act 1710, is “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.” The preamble of the Act made a long reference to the goal of the “encouragement of learned men to compose and write useful books.” 8 Ann. c. 19.

²⁸³ *Bracha* (n62) 170.

²⁸⁴ *Bently and Sherman* (n8) 183.

²⁸⁵ *Loughlan* (n66) 33.

²⁸⁶ *Masiyakurima* (n55) 554.

²⁸⁷ *Kurtz* (n9).

²⁸⁸ *Kurtz* (n9).

²⁸⁹ *Khaosaeng* (n10).

6.3 Kenya

As with the UK above, in Kenya, the idea/expression is also not provided for in legislation.²⁹⁰ Commentators on Kenya copyright law have however, argued that for a work to be copyrightable or, in the language of the Kenya Copyright Act, “eligible for copyright”,²⁹¹ it must be original; and it is the expression, not the idea, which ought to be original.²⁹² In neighbouring Uganda the doctrine has received statutory treatment. Section 6 of the Copyright and Neighbouring Rights Act, 2006 provides a wide exclusion in stating ‘ideas, concepts, procedures, methods or other things of a similar nature shall not be protected by copyright under this Act’. (emphasis added). Similarly, in Tanzania the Copyright and Neighbouring Rights Act, 1999, expressly provides for the doctrine at section 7(c) noting that copyright protection shall not extend to ‘any idea, procedure, method of operation, concept principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work’.

IPRs receive explicit mention in Kenya’s Constitution. Under Article 11(2)(c) the State is required to, *inter alia*, ‘promote the intellectual property rights of the people of Kenya’.²⁹³ Kenya’s Constitution contains a rather elaborate Bill of Rights in which the Freedom of Expression is provided for. It notes -

- Every person has the right to freedom of expression, which includes -
- (a) freedom to seek, receive or impart information or ideas;
- (b) freedom of artistic creativity; and
- (c) academic freedom and freedom of scientific research.²⁹⁴

As has been noted one of the benefits of the idea/expression dichotomy is that it promotes freedom of expression.²⁹⁵ Article 33 (1) (a) above explicitly requires the State

²⁹⁰ See generally the Copyright Act, Act No. 11 of 2001 (Hereafter “Kenya Copyright Act”).

²⁹¹ Section 22 (3) (a). In *Sapra Singh v Tip Top Clothing* [1971] EA 489 the Kenyan court rejected the argument that the phrase “eligible for copyright” did not actually confer copyright on works.

²⁹² Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring & Innovative Lawyering 2016) 197 and David Bakibinga and Kakungulu Muyambala, *Intellectual Property Law in East Africa* (Law Africa 2016) 19 and 20.

²⁹³ A similar provision is reiterated at Article 40 which provides for the protection of the right to property as part of the country’s Bill of Rights. Article 40(5) provides that “The State shall support, promote and protect the intellectual property rights of the people of Kenya.” Additionally, intellectual property is included in the definition of property under Article 260.

²⁹⁴ Article 33(1).

²⁹⁵ See, for instance, McGinty (n72) 1113 denoting the argument that although the idea/expression dichotomy is not explicitly required by the U.S Constitution there is a First Amendment right (A right to

to grant to persons the right to seek, receive or impart information or ideas. It has been noted that the idea/expression dichotomy “breathes life into” the right to information, allowing for creative re-use of content.²⁹⁶

Similarly, the freedom of artistic creativity, academic freedom and freedom of scientific research can only be furthered by the non-protection of ideas.²⁹⁷

Additionally, Kenya is a party member of TRIPS²⁹⁸ and has also all signed the WCT.²⁹⁹ Both of these instruments provide for the doctrine explicitly thus providing a further basis for the application of the dichotomy in the country.³⁰⁰

There is a dearth of case-law on the doctrine. One of the reasons for this it seems is that a good number of cases on copyright infringement, wherein the doctrine would have had the opportunity to be deliberated on, have not proceeded to full trial for determination. Reported cases mostly point to interim motions mostly for injunctions and in a few instances for anton pillar orders. This is, for instance, seen in *Parity*

the freedom of speech/expression) to express any particular idea even if someone else has said that idea first.

²⁹⁶ James Griffin, ‘300 Years of Copyright Law: A Not So Modest Proposal for Reform’ (2010) 28(1) The John Marshall Journal of Information Technology and Privacy Law 1, 7.

²⁹⁷ See Bently and Sherman (n8) 183 – 184 wherein it is noted that, ‘The rule on non-protection of ideas is thus primarily directed at leaving free from monopolization the building blocks of culture, communication, innovation, creativity and expression’. See also Henry Nampandu, ‘Using Copyright Law to Enhance Education for Economic Development: An Analysis of International and National Educational Exceptions, With Specific Reference to Uganda (Doctorate, University of London 2015) 179 specifically making the argument that the idea/expression dichotomy is important in the promotion of access and utilisation of education materials especially in resource constrained less developed countries.

²⁹⁸ (WIPO website)

<http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22> accessed 15 January, 2019.

²⁹⁹ (WIPO website) <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16> accessed 15 January 2019.

³⁰⁰ This argument may be supported by the consideration that Kenya is now a “monist” state, with the Constitution 2010 expressly providing at Article 2(5) that ‘the general rules of international law shall form part of the law of Kenya’ and at Article 2(6) that ‘Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’. The argument for the automatic application of intellectual property related treaties in Kenya may be buttressed by Article 21(4) which requires that the State enacts and implements legislation to fulfil its international obligations in respect only of human rights and fundamental freedoms. Implying that in other areas such as intellectual property there is no need for such domesticating legislation. However, it may also be argued that the Constitutional provisions do not act retrospectively, thus only apply to treaties and conventions that the country signed after the promulgation of the Constitution on 27th August 2010. TRIPS came into force in Kenya on January 1st, 1995 and the WCT was signed by the country on December 20th, 1996.

*Information Systems v Vista Solutions Limited & 2 Others*³⁰¹ where the court noted the existence of the doctrine in a case of alleged copyright infringement on computer software but held that the determination of such infringement could only be done at trial.³⁰²

Other infringement cases which appear not to have proceeded to full trial, therefore, not offering an opportunity for the doctrine to be considered include *John Boniface Maina v Safaricom Limited*³⁰³ where breach of copyright in a musical work was alleged and the plaintiff was granted an interim injunction as well as an Anton Pillar order. Similarly, in *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd*³⁰⁴ the plaintiff sought and was granted an interlocutory injunction in a case concerning musical works. There is no record of these cases having proceeded to full trial or having been determined. It is argued that the trial and determination of such cases would have offered the Kenyan courts the opportunity to discuss the doctrine as has happened in cases decided in the US and the UK, discussed above, concerning similar subject matters.

The Supreme Court, which is the highest judicial organ in the country,³⁰⁵ and was established in 2011 after the enactment of the country's new constitution in August 2010, has neither dealt with a case on the idea/expression dichotomy nor made any pronouncement on the doctrine. However, in the only case in which the Supreme Court has substantially considered issues of copyright, the court re-emphasised the relationship between the freedom of expression and the right of information. This was in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*³⁰⁶ where the Supreme Court declared 'The freedom of expression gives boost or impetus to the public right to information'.³⁰⁷

Thus, whereas the High Court has in fact recognized the principle, it has done so in significantly less elaborate terms than its US and UK counterparts. The court appears

³⁰¹ [2012] eKLR, Civil Case 833 of 2010.

³⁰² *ibid* [38] (Havelock J).

³⁰³ [2013] eKLR, Civil Suit 808 of 2010.

³⁰⁴ [2009] eKLR, Civil Case 154 of 2009.

³⁰⁵ Article 163 (7).

³⁰⁶ [2014] eKLR, Petition No. 14 of 2014.

³⁰⁷ *ibid* 2014 [396] (Rawal DCJ).

to merely recognize the principle's existence but does not make any deeper elaborations on it. This is seen, for instance, in *Hoswell Mbugua Njuguna T/A Fischer And Fischer Marketing Concepts v Equity Bank Limited & another*³⁰⁸ where the court declared -

Copyright protects the process in which an idea comes to fruition. It does not protect the idea itself. It is the copying of the process of attaining that idea which is protected.... Indeed, different people have similar ideas in respect of or about similar issues. It would be creating a dangerous precedent if a person who thinks of an idea seeks to restrain others from entertaining a similar idea in their minds where different methods could be utilised to conceptualise that idea.³⁰⁹

Similarly, in *Dedan Maina Warui & Another v Safaricom*,³¹⁰ citing the English decisions of *Baigent v Random House Group Limited*³¹¹ and *Designers Guild Limited v Russell Williams*,³¹² the Kenyan court noted -

That brings me to the point where I should recognize the dichotomy in opinion which exists on the concept of "idea expression"; where the copyright law only seeks to protect the expression of an idea and not the underlying idea itself, method or process. See the case of *Baigent v Random House Group Limited* (2007) FSR 24 and *Designers Guild Limited v Russell Williams (Textiles) Limited* (2001) FSR 11. It could be said that copyright seeks to protect the author's actual expression and not the ideas, and it does not therefore forbid independent creation.³¹³

The doctrine was also recognised in *Alternative Media Limited v Safaricom Limited*³¹⁴ but again without much exposition.

To say that the doctrine is not well developed in Kenya would therefore be an understatement. Whereas the courts acknowledge its existence and have introduced it into Kenyan law through their pronouncements, there are little, if any, discussions on how it ought to be applied. This lack of clarity and principled approach has impacted

³⁰⁸ [2015] eKLR, Civil Suit No 599 of 2010.

³⁰⁹ *ibid* [36], [37] (Kamau J).

³¹⁰ [2014] eKLR, Misc. Civil Application No. 292 of 2013.

³¹¹ [2007] EWCA Civ 247.

³¹² [2000] 1 WLR 2416 (HL)

³¹³ *Dedan Maina Warui* (n335) [19] (Gikonyo J). It is noteworthy that this dictum also derives from an application for interim injunction and there is no record of the matter having proceeded to trial of having been determined.

³¹⁴ [2004] eKLR, Civil Case 263 of 2004.

the determination of cases. For instance, in *Nonny Gathoni Njenga v Catherine Masitsa*³¹⁵ the court allowed a temporary injunction restraining the defendant from infringing the plaintiff's "literary" copyright in the running order of a television show 'Weddings with Nonny Gathoni'. Generally, television formats are not regarded as being protected by copyright law,³¹⁶ and plausibly they fall on the ideas side of the dichotomy.³¹⁷ The leading authority on this is the majority decision of the Privy Council in *Green v Broadcasting Corp of New Zealand*.³¹⁸ Thus, the Kenyan court's ruling, without much justification, has effectively extended copyright protection to television formats as literary works. This decision may have the effect of denying prospective producers of similar television shows an opportunity to produce such shows.

7. A way forward

Whereas the idea/expression dichotomy is indeed a mainstay of copyright law recognised and applied in each of the three jurisdictions discussed above, and in actual fact in almost all jurisdictions with copyright laws,³¹⁹ its interpretation is wanting.³²⁰ The befuddling issue really is how to identify ideas or rather what ideas are. As summarised aptly by Lord Hailsham 'it all depends on what you mean by "ideas"'.³²¹ In light of this disconcertion, it is argued that Kenya would benefit from a statutory provision clearly delineating what copyright law does not protect, under the rubric of "ideas". In this regard, the position in the US appears attractive. It has been contended that the rooting of the doctrine in statute, has enabled the US to be more vigilant than the UK in preserving the dichotomy.³²²

³¹⁵ [2015] eKLR, Civil Case 490 of 2013.

³¹⁶ Bart Jan Gorissen, Joao Cunha and Caroline Freire, 'Television Format Protection: Global Issues under the Spotlight in Brazil' (2015) 26(8) Entertainment Law Review 281. However, following the recent decision in *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd & Anor* [2017] EWHC 2600 (Ch) television formats may be eligible for copyright protection as dramatic works under UK law upon the obtaining of certain minimum standards.

³¹⁷ Ute Klement, 'Protecting Television Show Formats under Copyright Law – New Developments in Common Law and Civil Law Countries' (2007) 29(2) European Intellectual Property Review 52, 53.

³¹⁸ [1989] 2 All ER 1056 (PC).

³¹⁹ Eleonora Rosati, *The Idea/Expression Dichotomy at Crossroads: Past and Present of a Concept* (Lambert Academic Publishing) 13.

³²⁰ Colston and Galloway (n64) 288.

³²¹ *L.B. (Plastics)* (n57).

³²² Noam Shemtov, 'Circumventing the Idea/Expression Dichotomy: The use of Copyright, Technology and Contract to Deny Access to Ideas' in Guido Westkamp (ed), *Emerging Issues in Intellectual Property: Trade, Technology and Market Freedom: Essays in Honour of Herchel Smith* (Edward Elgar 2007) 93.

As seen, section 102(b) of the US Copyright Act states:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

While it has been argued that this section goes beyond the “idea/expression dichotomy” strictly,³²³ such a “wide” provision would be a viable and welcome reform to Kenyan copyright law for several reasons put forward as follows.

First, the theoretical underpinnings for such an approach are well developed and advanced. Leading US Intellectual Property law scholar Professor Paul Goldstein, argues that both “idea” and “expression” should be understood as metaphors for aspects of works that are either not protected by copyright or are.³²⁴ That is, idea is a metaphor for that which is unprotectable by copyright law, while expression is a metaphor for that which is within the scope of copyright protection.³²⁵ Therefore, a provision of law expressly denoting elements of a work which are not within the scope of copyright protection would be in line with this theoretical foundation. A question which automatically follows is, what exactly should such a provision entail? This is discussed in detail below.

Second, providing for the doctrine in statute would make judges more acutely aware of the doctrine’s existence. It has been argued that written law as in the case of a statute, for instance, is easier to distinguish.³²⁶ Indeed having such a statutory provision would aid in insulating the doctrine from the idiosyncrasies of individual judges.³²⁷ This argument is even more pertinent in relation to the highly technical and

³²³ Samuelson (n143).

³²⁴ Paul Goldstein, *Goldstein on Copyright*, vol 1 (Wolters Kluwer 2006) § 2.3.1.

³²⁵ Samuelson (n143).

³²⁶ Niklas Luhmann, *Law as a Social System* (Klaus A. Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 241.

³²⁷ This is in line with the argument put forward by American jurist Jerome Frank in his book *Law and the Modern Mind* which argued that judicial decisions were more influenced by psychological factors than by objective legal premises. See also Alfred Yen, ‘A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s ‘Total Concept and Feel’ (1989) 38(1) *Emory Law Journal* 393 for the argument that judges decide cases based on the idea/expression dichotomy solely on instinct.

complex subject that copyright law generally is,³²⁸ and that the idea/expression dichotomy particularly is.³²⁹ For instance, although Kenya has had a Copyright Act since 1966 and recognised copyright laws before independence,³³⁰ it has been noted that in some instances Kenyan judges are not aware of basic features of copyright law.³³¹ The overall effect of a statutory provision would be better judicial decisions, advancing the primary objective of common law copyright – the creation of more works.

Third, in similar vein, a clear statutory provision would make the law more accessible to potential authors as well, thus, lowering their transaction costs and uncertainty over whether they may be possibly infringing another person’s copyright. Potential authors may incur high transaction costs if they have to seek legal advice or litigate issues on the idea/expression dichotomy.³³² To avoid such high transaction costs arising from the uncertainties flowing from the idea/expression dichotomy authors may seek to unnecessarily obtain licences from copyright owners;³³³ whereas this may not be necessary as what they intend to borrow falls on the idea side of the divide.

Fourth, despite having the doctrine explicitly delineated in statute, over time judges would still be able to develop further principles to guide its interpretation. This is a response to the argument that the non-demarcation of the principle in statute offers judges some degree of desirous flexibility in its application to new and unforeseen circumstances.³³⁴ Judges not only interpret statutes created by the legislature they also “create” law.³³⁵ The American position offers a perfect example of this. Despite a delimitation of the doctrine in statute, judges have over time developed principles such as the *scènes à faire*, the merger doctrine and the abstractions test to guide the

³²⁸ Bently and Sherman (n8) 33.

³²⁹ Edward Samuels, ‘The Idea-Expression Dichotomy in Copyright Law’ (1988-89) 56(2) *Tennessee Law Review* 321, 324.

³³⁰ Sihanya (n317) 190. Copyright law began in Kenya with the application of the UK Copyright Acts of 1842, 1911 and 1956 together with the English common law of copyright by virtue of the reception clause under the East African-Order-in-Council 1897, later re-enacted under the Kenya Judicature Act, 1967.

³³¹ Ben Sihanya, ‘Copyright Law in Kenya’ (2010) 41(8) *International Review of Intellectual Property and Competition Law* 926, 944.

³³² Masiyakurima (n55) 564.

³³³ Endicott and Spence (n56) 665.

³³⁴ Masiyakurima (n55) 570.

³³⁵ Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 155.

idea/expression dichotomy's interpretation. A statutory footing for the doctrine would also put paid to arguments that the doctrine does not "exist", as it is not found in any Act of Parliament.³³⁶

Finally, a statutory footing for the doctrine would be consistent with international copyright treaties, particularly TRIPs and the WCT, of which as noted above Kenya is a member party of and a contracting party to respectively. Both of these instruments expressly provide for the non-protection of ideas. Article 9(2) of TRIPs, which sets minimum standards for member parties states that: 'Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'. An almost verbatim reproduction of the TRIPs provision is made in the WIPO Copyright Treaty (WCT).³³⁷ However, the US provision is broader than the TRIPs and WCT provision providing for the non-protection of ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. A wide subject matter exclusion, it has been argued, is recommended for developing countries; allowing them greater access to knowledge which is important for social economic development.³³⁸

Turning back to the question of what such a statutory provision should precisely entail, it is suggested that a return to case law may offer guidance on this point. As noted earlier in this paper "ideas" or rather, the unprotected elements in works, have been deemed to be several things including, *inter alia*, - "ideas", schemes, systems, methods, information, facts, theories, arguments, themes, styles, news of the day, thoughts and emotions. As has been shown these elements of works are not protected for numerous reasons, the most relevant to the present discourse being the promotion of creativity.

It is argued that a statutory provision setting forth such elements of works which are not protected by copyright as indicated above, would be advantageous for a better interpretation of the dichotomy and accordingly enhance the creation of new works.

³³⁶ See Laddie, Prescott & Vitoria (n6).

³³⁷ Article 2.

³³⁸ Jerome H Reichman, 'Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?' (2009) 46(4) *Houston Law Review* 1115, 1154 and 1184.

Evidence of this outcome may be had by considering that the US is one of the world leader's in the copyright industries.³³⁹ The US has developed a "charismatic domination"³⁴⁰ through its copyright industries like Hollywood, and popular fashions in music, clothing and consumer lifestyles.³⁴¹ It has been argued that copyright law has been critical to the development of these dominant copyright industries businesses.³⁴² The US position on the doctrine does not seem to have significantly disadvantaged the growth of its copyright industries and therefore cannot be a bad model for itself or for other countries to adopt. When properly construed, the idea/expression dichotomy makes ideas - the basic building blocks of creation - available to authors who have encountered them in another work.³⁴³ Whilst it is appreciated that the US position is itself not perfect and fraught with inadequacies,³⁴⁴ nonetheless it is argued that an explicit statutory provision, of the US sort, would enhance a principled interpretation of the dichotomy and this would in turn encourage the creation of cultural works and concomitantly improve and advance Kenyan society.

8. Conclusion

In this paper the idea/expression dichotomy within the copyright laws of the US, the UK and Kenya was analysed. What has come to be commonly termed the "idea/expression dichotomy" is the notion that copyright law does not protect ideas and only protects the expression of ideas. As seen this is a concept that is widely accepted and applied in most jurisdictions with copyright laws including those considered in this paper. Of the four jurisdictions discussed in this paper only the US has a statutory provision for the doctrine, provided for in section 102 (b) of the US Copyright Act. All the same, the other two jurisdictions, the UK and Kenya recognise and apply the principle by virtue of judicial decisions and international copyright law such as TRIPS and the WCT wherein the principle is explicitly provided. What emerged from the comparative analysis of the idea/expression dichotomy in the three jurisdictions is that it has been extremely difficult for courts and commentators alike to

³³⁹ John P. Synott, *Global and International Studies: Transdisciplinary Perspectives* (Thomson 2004) 362.

³⁴⁰ See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Ephraim Fischoff and others trs, Guenther Ross and Claus Wittich eds, University of California Press 1978).

³⁴¹ Synott (n339).

³⁴² Ruth Towse, 'Cultural Economics, Copyright and the Cultural Industries' (2000) 22(4) *Society and Economy in Central and Eastern Europe* 107, 123.

³⁴³ Kurtz (n9).

³⁴⁴ Rosen (n79).

provide a principled way of interpreting the doctrine. This is due to the near impossibility, as it has been suggested by some, of distinguishing an idea from its expression. The basis of this real problem, this paper contends, is the lack of clarity regarding what is meant by an idea.

Before, the comparative analysis of the doctrine was undertaken, the etymological and philosophical origins of the word idea were considered. This discussion exposed that “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 such as ideas, schemes, systems, methods, information, facts among others.

The core argument in this paper is that this lack of principled interpretation of the doctrine has chilled creative activity. For instance, rights holders may erroneously albeit successfully sue authors who have only taken from their works what ought to be an idea and thus unprotectable. Similarly, the mere threat of such law suits and the consequent transaction costs that may be incurred by potential authors in seeking legal understanding and mechanisms to avoid infringement may potentially chill much creative activity. To avoid such costs potential authors may seek to pay for licenses of works – itself an unnecessary cost where what an author intends on “copying” from a work is on the ideas side of the divide.

Creativity is central to and social and economic advancement and success.³⁴⁵ A key element of creative works is their derivative nature. A derivative work arises when a new work is created based on an existing work. Today’s postmodern society is exemplified by derivative cultural works such as appropriation art and remixed music. Digital technologies have greatly enhanced the ability of potential authors to create derivative works by making it significantly easier to add, share, edit and mash up content. Copyright law has a key role to play in encouraging creativity, and indeed the encouragement of creativity is copyright law’s key objective. Copyright law’s key

³⁴⁵ Sawyer (n1).

mechanism for encouraging creativity is the idea/expression dichotomy, failing this doctrine appropriately will lead to a chilling of creativity.

It has been argued in this paper that a properly interpreted idea/expression dichotomy ought to allow for “the building blocks of creativity” to be readily available for use by potential creators albeit at the same time offering adequate protection for rights holders. This has not been the case. It is contended that a statutory footing for the doctrine, similar to the US provision in section 102(b) of the US Copyright Act would be a welcome reform in this area of the law particularly for Kenya. Such a statutory provision would clearly denote those elements of a work that are not protected by copyright protection. In essence, this provision would go beyond the idea/expression dichotomy, as what would now be free for use are not merely “ideas”, but a motley of relatable elements including as noted above, ideas, schemes, systems, methods, information, facts among others.

An explicit statutory provision has been argued to have numerous benefits. Judges would be more acutely aware of the law and therefore make better more informed decisions. Likewise, potential artists would also be in a better position of identifying the law regarding the doctrine if it were explicitly stated in statute, thus lowering some of their expenses such as those related to potentially seeking legal advice and defending law infringement law suits. At the same time a statutory footing of the doctrine would not deny courts the flexibility to make principles for the further interpretation of the doctrine as and when the need arises as has been demonstrated in the US with the judge made principles of the merger doctrine, *scènes à faire* and the abstraction test.