

## REFLECTIONS ON AUTHORSHIP AND THE MEANING OF A “WORK” IN AUSTRALIAN AND SINGAPORE COPYRIGHT LAW\*

While other articles in this special issue discuss changing standards of originality in copyright law, this article deals with a number of further issues that are closely related, and which have great practical implications in both the traditional print and online environments. It begins with a consideration of the concept of authorship and the meaning of a “work”, and how these matters affect one’s understanding of the standard that is to be applied when considering the question of copyright subsistence. National and international approaches are considered, particularly with reference to the provisions of the Berne Convention for the Protection of Literary and Artistic Works and recent Australian decisions in which the link between authors and their works has been stressed. The following issues are then discussed: whether there is a quantum requirement for the purposes of determining that something is a “work” in the first place; the activities that are to be included within the scope of the term “authorship”; whether there are meaningful boundaries to be drawn between different species of works, in particular, literary and artistic works; the degree to which human involvement is necessary for the purposes of showing that a work is one of authorship; and the problems of multiple authors, particularly in the online environment.

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### I. Introduction

1 Several of the articles in this special issue deal with, in different ways, the meaning of “originality” in copyright law and the way in which

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\* This article has its origins in several seminars that were given by the author, together with Jane Ginsburg of Columbia Law School, at the Universities of Cambridge and Oxford in October 2012. It was developed further in a more extended lecture conducted by the author at the University of Amsterdam on 6 July 2011, and was refined yet further in a lecture given at the Centre for Transnational Legal Studies in London on 17 March 2012.

this concept appears to be bringing US, Australian and Singapore laws to something closer to the civil law concept of “intellectual creation”. It is not the purpose of the present article to canvass this territory again in any detail.<sup>1</sup> Rather, the intention is to investigate some further issues that are closely related, if not fundamental to, any proper consideration of standards of originality, and which have great practical implications in both the traditional print and online environments: the concept of authorship and the meaning of a “work”, and how these matters play into the standard that we should apply when considering the question of copyright subsistence. Various consequential issues then arise for consideration, including the following: whether there is a quantum requirement for the purposes of determining that something is a “work” in the first place; what activities are to be included within the scope of the term “authorship”; whether there are meaningful boundaries to be drawn between different species of works, in particular, literary and artistic works; the degree to which human involvement is necessary for the purposes of showing that a work is one of authorship; and the problems of multiple authors, particularly in the online environment.

2 This article begins, then, by considering what is meant by the terms “author” and “work”.

## II. The starting point – National laws

3 In Australian and Singapore national laws, the link between works and authorship (and originality) is clearly articulated. Thus, both the Australian and Singapore Copyright Acts distinguish between “original literary, dramatic, musical and artistic works” (protected under Part III) and “subject-matter other than works” (Part IV).<sup>2</sup> Some of these terms are then defined further in inclusive terms (in the case of literary works, specifically dealing with status of computer programs and compilations, as well as in the case of dramatic works, so as to apply to works of choreography and mime), exhaustive terms (in the case of artistic works) or not at all (in the case of musical works).<sup>3</sup> However, the link between the “work” and the “author” is a prerequisite for protection under both Acts, a condition that is stated explicitly in the case of

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1 See further Sam Ricketson, “Common Law Approaches to the Requirement of Originality” in *The Common Law of Intellectual Property: Essays in Honour of Prof David Vaver* (Lionel Bently, Catherine W Ng & Giuseppina D’Agostino eds) (Hart Publishing, 2010) at pp 221–253.

2 Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust); Copyright Act 1987 (Act 2 of 1987).

3 See generally the definitions of these terms that appear in s 10(1) of the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust) and s 7 of the Copyright Act 1987 (Act 2 of 1987).

unpublished works<sup>4</sup> while being implicit for published works, in that these must be “original” and therefore the product of an act of authorship.<sup>5</sup> In this regard, the statement of Isaacs J in an early Australian case arising under the Copyright Act 1911,<sup>6</sup> where the same language was used, remains apposite:<sup>7</sup>

[I]n copyright law the two expressions ‘author’ and ‘original work’ have always been correlative; the one connotes the other.

4 Nonetheless, neither the Australian nor Singapore Copyright Acts provides any guidance as to the meaning of “author” or what authorial attributes must be present, with the limited exception that, in the case of photographs, the reference to “author” means the “person who took the photograph”.<sup>8</sup> While strictly confined in its application, this definition at least has some utility when compared with the more general definition of “author” that now appears in UK legislation, to the effect that “author”, in relation to a work, means “the person who creates it”.<sup>9</sup> It might be said that the latter definition appears to beg the question as to what is meant by “creates”; on the other hand, it provides courts with some useful flexibility in determining just what constitutes authorship in any given case, as well as underlining that authorship is concerned with the act of making (creating) a work or bringing it into existence. In the absence of such a definition, Australian and Singapore courts may have even greater room for manoeuvre in deciding new cases of claimed authorship as they arise, but the lack of statutory guidance means that this is a journey through uncharted waters with no markers of where authorship fades into non-authorship (and no protection). This, in turn, invites a number of further inquiries:

(a) What guidance is there to be found in the international obligations that apply to Australia and Singapore with respect to the protection of works of authorship? The obvious point of reference here is the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) 1886, as revised, and as incorporated in our respective World Trade Organization commitments under the annexed Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”). As will be seen below, the Berne Convention

4 Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust) s 32(1); Copyright Act 1987 (Act 2 of 1987) s 27(1).

5 Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust) s 32(2); Copyright Act 1987 (Act 2 of 1987) s 27(2).

6 c 46 (UK); this Imperial Act was applied in Australia by the Copyright Act 1912 (Cth) (Aust).

7 *Sands and McDougall Pty Ltd v Robinson* (1917) 23 CLR 49, per Isaacs J.

8 Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust) s 10(1) and Copyright Act 1987 (Act 2 of 1987) s 7.

9 Copyright, Designs and Patents Act 1988 (c 48) (UK) s 9(1).

provides some boundaries, but is quite open-ended on a number of other areas; furthermore, while it supplies some outer limits, it says relatively little as to what falls within those limits.

(b) Given the space for national solutions within these international parameters, how have the Australian and Singapore courts and legislators approached these questions? The central issue here, of course, is the threshold standard of originality that is to be applied in order to gain protection, and which has primarily been a matter for judicial consideration at the national level.

(c) What further issues remain unresolved or, perhaps, as yet untested?

5 The first of these questions has been addressed at some length by the present author elsewhere,<sup>10</sup> and therefore needs only to be touched on lightly here. The second question, too, has been the subject of detailed consideration by several of the other contributors to this special issue and it will therefore not be covered here again, other than to make some more general observations touching on recent developments in Australia. The third question, however, gives rise to a series of further intriguing inquiries that will form the major part of this contribution, and which also provides some of the larger “back story” that underlies discussion of standards of originality. As noted above, these further questions have practical implications for contemporary copyright law and practice.

### III. Guidance from above – The Berne Convention for the Protection of Literary and Artistic Works

6 One searches in vain for precise guidance on any of these matters in the Berne Convention, although it is obviously a convention about authors and their works, as the opening words of the preamble make clear: “The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works”. However, while authors and their rights are the subject of the Berne Convention, the term “author” itself is undefined. Nonetheless, it is clear that there is a direct link between authors and their “works”, and there is a series of quite detailed provisions specifying what subject matter are to be protected as “literary and artistic works”. These begin with Article 2(1),

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10 See, in particular, Sam Ricketson, “Threshold Requirements for Copyright Protection under the International Conventions” (2009) 1 *WIPO Journal* 51.

which contains the following general definition that has remained relatively unchanged since the revision by the Berlin Act of 1908:

The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

7 The boundaries set out here as to what is to be protected are broad but appear distinct at the outer limits, namely, that literary and artistic works are "productions in the literary, scientific and artistic domain". While the adjective "scientific" is somewhat mysterious, it seems that it was not intended by the initial drafters of the Berne Convention to extend to such things as inventions and discoveries – the province of patents – but was used rather as a description to capture works relating to scientific matters or of a scientific character (as in the listed examples of "illustrations, geographical charts, plans, sketches and plastic works relative to geography, topography, architecture or science").<sup>11</sup> More generally, the word "scientific" (if this is ever in doubt) indicates that there is no particular limitation implied here as to works belonging to the fine, rather than the useful, arts. Indeed, the long list of examples that follows the general opening definition underlines that the adjectives "literary and artistic" are to be interpreted broadly indeed. In crude terms, these seem to refer to the mode of production rather than anything else, that is, they refer generally to all productions of a textual, visual or aural kind. In this regard, it will be noted that the term "production" is also undefined, but it seems only to have been intended to indicate the obvious point that the work must have come into existence before protection can be claimed<sup>12</sup> – a reference, perhaps, to the need for a work to have assumed some definite shape or "form of expression" and to be something more than just a simple idea or thought in the author's head.<sup>13</sup>

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11 See further Sam Ricketson & Jane Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond* (Oxford University Press, 2006) at para 8.06.

12 Sam Ricketson & Jane Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond* (Oxford University Press, 2006) at p 403.

13 Note, however, that Art 2(2) of the Berne Convention for the Protection of Literary and Artistic Works provides that it is "a matter for legislation in the countries of  
(cont'd on the next page)

8 Article 2(1) of the Berne Convention makes no direct reference to the need for “productions in the literary, scientific or artistic domain” to be “original”, “creative”, “intellectual creations” or, indeed, anything else, in order to gain protection under the Convention. However, the word “original” appears several times in Article 2(3), which is concerned with “derivative works”, that is, works that are based on, or are derived from, existing works (the examples given in Article (2) are translations, adaptations, arrangements of music and other alterations of a literary or artistic work). Similar usages are to be found in Article 14*bis*(1), which is concerned with cinematographic works. There is room for dispute here about the precise meaning of “original” as used in these provisions – whether it is simply a temporal reference to a work that is first in time, as in the case of a work that is the subject of an adaptation or whether it is a qualitative reference to a more general threshold standard required for protection, meaning that such works are to be protected only if they are “original”. Recourse to the Berne Convention records and other extrinsic sources suggests that it is the latter meaning that is to be adopted, and the steps in this analysis have been rehearsed at some length elsewhere by the present author.<sup>14</sup> Supporting this argument is a further reference in Article 2(5) to the protection to be given to collections of literary or artistic works where, by virtue of their selection or arrangement, they constitute “intellectual creations”. This, again, indicates that “intellectual creation” is an implicit requirement for the protection of literary and artistic works protected generally under Article 2(1) – why else would it be necessary to specify this in the case of collections of literary and artistic works under Article 2(3)?

9 If these arguments from the text of the Berne Convention, and its supporting materials or *travaux préparatoires*, are accepted, the following general propositions about the requirements for protection of literary and artistic works under the Berne Convention can be advanced:

(a) The Convention is concerned with the protection of the rights of authors in literary and artistic works (an obvious point, but worth restating);

(b) This means the expression of those works, and not the ideas, concepts or facts embodied therein (a matter of inference only, but again unexceptional and a principle that is now confirmed by provisions in the TRIPS Agreement<sup>15</sup> and the

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the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form”.

14 See further Sam Ricketson, “Threshold Requirements for Copyright Protection under the International Conventions” [2009] 1 *WIPO Journal* 51.

15 Agreement on Trade-Related Aspects of Intellectual Property Rights Art 9.2.

World Intellectual Property Organization Copyright Treaty<sup>16</sup> (“WCT”));

(c) This expression must emanate from an author or authors (a matter for inference also, but reasonably clear in view of the title, preamble and general structure of the Berne Convention);

(d) The authorial contribution to this expression must have some element of originality or intellectual creation about it (on the basis that the interpretation outlined above is accepted);

(e) The form of this contribution must be “literary or artistic” in a generic sense (textual, aural or visual, as indicated by the examples given in Article 2(1)); and

(f) It is clear from Article 2(1) that the expression “literary and artistic” does not imply any limitation to works of the fine arts: productions of a scientific, technical or utilitarian character generally are encompassed, although obviously this does not extend to the ideas, inventive concepts or functional elements that may be contained in such works, the proper province of patents or registered designs laws.

10 These propositions only take us so far (although the importance of the first should not be overlooked, as will become clear in the following section). In particular, even though they indicate that some standard or level of originality or intellectual creation is required, there is no further guidance as to how this is to be determined, leaving this essentially as a matter for member states to do for themselves. Thus, it would be open for State A to opt for a “minimum degree of creativity” (as in the US), “creative character” (as in Article 2 of the Italian Law for Protection of Copyright and Neighbouring Rights<sup>17</sup> enacted in 1941) or “personal intellectual creation” (as in Article 2(1) of the German Law on Copyright and Neighbouring Rights enacted in 1965), and for States B and C to apply a more prosaic and lower level of originality (as traditionally occurred in common law jurisdictions such as Australia, the UK and Singapore). So far as the Berne Convention is concerned, the requirements of originality or intellectual creation at the national level are flexible and will be satisfied, so long as there is *some* intellectual skill and judgment or intellectual creation (remembering, though, that obligations under the Berne Convention will only arise with respect to non-domestic works). Having said this, it is worth noting that the Berne Convention’s concern with authors and their works suggests that national laws, in defining their standards of

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16 World Intellectual Property Organization Copyright Treaty Art 2.

17 No 633 of 1941.

originality and intellectual creation, should limit these to a consideration of what it is that the author claiming protection has done in giving expression to his work, and should not extend protection beyond this. This might form a salutary warning against extending protection too liberally on the basis of considerations of fairness or by reference alone to the commercial value of what the claimant has done.

11 Accordingly, while the Berne Convention provides certain broad parameters for national laws to operate within, considerable latitude is still left to these as to how they will approach issues of authorship and originality. These questions will be dealt with presently.

#### IV. Level of originality or intellectual creation required – Recent developments in Australia

12 Historically, even though both kinds of legal systems fit comfortably within the broader Berne Convention framework, the threshold level of originality or intellectual creation has been the principal point of departure between “authors’ rights” countries (usually those with civil law traditions) and “copyright” or common law countries. Until recently, at least, levels in “copyright” countries, such as Australia, Singapore, the UK and the US, were set very low, allowing protection on what was essentially an unfair competition basis, that is, granting this where it was clear that the plaintiff had devoted time, effort (“sweat of the brow”) as well as resources to the making of the work in question.<sup>18</sup> This was on the basis that it was unfair that third parties should be allowed to appropriate the results of this work for their own benefit or to have a “free ride”. Highly moralistic sentiments can be seen at play here: not “reaping where one has not sown”<sup>19</sup> or the oft-repeated nostrum that what is “worth copying is worth protecting”,<sup>20</sup> or rather more opaquely so far as the specification of a standard of originality was concerned, that it sufficed if a work had not been copied from elsewhere – that it should “originate from the author”,<sup>21</sup> a formula

18 See further Sam Ricketson, “Common Law Approaches to the Requirement of Originality” in *The Common Law of Intellectual Property: Essays in Honour of Prof David Vaver* (Lionel Bently, Catherine W Ng & Giuseppina D’Agostino eds) (Hart Publishing, 2010) at pp 221–253.

19 *Millar v Taylor* (1769) 35 ER 205ff at 218 (Willes J). See also Lord Mansfield CJ at 252–253. “It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man’s work” (Willes J).

20 *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 609–610: “[A]fter all, there remains the rough practical test that what is worth copying is *prima facie* worth protecting” (Peterson J).

21 *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 609 (Peterson J). See further the speeches of the various members of the House of Lords in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273; [1964] 1 All ER 465.

elastic enough to embrace the products of both highly intellectual and more mundane and mechanical efforts. “Sweat of the brow” standards were most readily seen at play in cases involving compilations of information, such as catalogues, directories and the like, exemplified in the UK by cases such as *Football League Ltd v Littlewoods Pools Ltd*<sup>22</sup> (involving the construction of football fixtures) and *Waterlow Publishers Ltd v Rose*<sup>23</sup> (a solicitors directory), and in Australia by *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd*<sup>24</sup> (“Desktop”) (white and yellow pages telephone directories). While some of these compilations may have involved considerable intellectual contributions, at least in their preparatory and design stages, the ultimate compilations produced were frequently the result of exhaustive and painstaking collection and verification (as in the case of the telephone directories), involving little, if any, independent intellectual judgment by way of choice and selection, together with the almost rote application of rigid and ancient modes of arrangement, for example, the alphabetical and/or chronological ordering of entries.

13 As is well known, this is no longer the approach in at least one prominent common law jurisdiction, the US, where protection was denied to “common” or “garden-variety”, that is, alphabetically arranged, collections of data lacking any spark of creativity in *Feist Publications Inc v Rural Telephone Service Co Inc* (“Feist”) in 1991.<sup>25</sup> Even though both English and Australian intermediate appellate courts appeared content, post-*Feist*, to retain their traditional lower standard of originality for a period,<sup>26</sup> it now appears likely that higher threshold standards will henceforth apply in both countries. This development and its implications for Singapore are discussed in considerable detail by Tan Tee Jim in his article in this special issue. The following comments therefore are simply intended to amplify Tan’s analysis, with particular reference to the contributions of the Australian courts.

14 In Australia, the harbinger of change is to be found in the decision of the High Court in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*<sup>27</sup> (“IceTV”). This case involved television programme guides and was not directly concerned with the question of subsistence of copyright at all, but with that of infringement. Thus, it was not contested that

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22 [1959] Ch 637.

23 (1989) 17 IPR 493.

24 (2002) 55 IPR 1.

25 [1991] USSC 49; 499 US 340; 111 S Ct 1282; 113 L Ed 2d 358 (1991); see, to similar effect in Canada, *Tele-Direct (Publications) Inc v American Business Information Inc* [1998] 2 FC 22 (1997); 154 DLR (4th) 328 (1997); 37 BLR (2d) 101 (1997); 76 CPR (3d) 296 (1997); 134 FTR 80.

26 *Waterlow Publishers Ltd v Rose* (1989) 17 IPR 493 and *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd* (2002) 55 IPR 1.

27 (2009) 239 CLR 458 (HC).

there was overall a protectable compilation comprising programme listings and times, together with commentary added by the compilers. However, the infringement issue was not concerned with a copying by the defendant of the whole of the plaintiff’s compilation, but rather with its taking of “slices” of the listings information in order to fill gaps in its independently compiled programme guide, verify listings and update programme information. It is sufficient for the purposes of infringement under Australian (and Singapore) copyright laws<sup>28</sup> – indeed, in many national copyright laws, including that of the UK<sup>29</sup> – for an infringing act to have been done in relation to a “substantial part” of a work as much as in relation to the whole of it. In assessing this question, common law courts have traditionally treated this as a qualitative, rather than a purely quantitative, inquiry. However, the reference to “qualitative” inevitably raises the question of how this is to be judged: is it a reference to the commercial value or essentiality of the part taken (otherwise, why would it have been copied?) or must that part also reflect something of the overall original authorial expression of the work? While these considerations will often overlap, this will not always be the case, and an emphasis on the first (commercial value) clearly points to the unfair competition rationale of copyright protection where the element protected is the investment of resources, time and labour of the plaintiff (including preparatory efforts) rather than the results of authorial endeavour, however defined. This tendency was clearly brought to the fore in the decision of the Full Federal Court, the intermediate appellate court in *Nine Network Australia Pty Ltd v IceTV Pty Ltd*:<sup>30</sup> it concluded that a substantial part of the plaintiff’s work had been taken because these “slices” of information enabled the defendant to ensure the accuracy and currency of its competing compilation, thereby undercutting the commercial (and competitive) value of the plaintiff’s listings. On the other hand, the “slices” themselves were no more than bare statements of fact (times and programme titles) and reflected little, if anything, of the elements of selection and arrangement embodied in the plaintiff’s overall compilation of television programmes. Additionally, in truth, what was the element of authorship for which protection was claimed in this case other than selection and/or arrangement? The Full Court’s decision therefore, in effect, accorded protection to facts or data, rather than the expressive presentation of those facts or data in the form of a compilation.

15 This was the point on which the High Court, on appeal, found that insufficient material had been taken from the plaintiff’s

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28 Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust) s 14(1); Copyright Act 1987 (Act 2 of 1987) s 10(1).

29 Copyright, Designs and Patents Act 1988 (c 48) (UK) s 16(3)(a).

30 (2008) 76 IPR 31 (Full Fed Ct) at [108]–[121] (Black CJ, Lindgren and Sackville JJ).

compilation for this to constitute a substantial part of the overall compilation for the purposes of infringement.<sup>31</sup> In other words, not enough had been taken of the compilers' original contribution. Although strictly only *obiter* with respect to the standard of originality required for purposes of subsistence of copyright, it seems clear that the High Court was quite deliberately indicating that henceforth such a higher level will be required, at least in the case of compilations and other fact-based productions, thereby casting doubt on the authority of earlier decisions that had accorded protection to such works. Indeed, in a subsequent case, *Telstra Corp Ltd v Phone Directories Co Pty Ltd*<sup>32</sup> ("*Telstra*"), which came hot on the heels of *IceTV*, copyright was denied to both white and yellow pages telephone directories, thereby reversing the result that had been obtained in similar litigation nearly a decade previously (the *Desktop* case). As in *IceTV*, however, this last-mentioned case was not directly concerned with determining the appropriate test for originality for the purposes of subsistence, as it was decided on the basis that, on the facts of the case, the whole process of production of the directories was so automated and systematised that it was impossible to identify any meaningful human authorial contribution in the first place. At the same time, in reaching this conclusion both the court at first instance and on appeal paid particular attention to the content and quality of the human authorial contribution that would need to be present for this purpose: in the case of a compilation, these were clearly the elements of selection and arrangement of data, which had been performed almost solely by highly sophisticated computer programs; gathering and collection of the data, some of which had admittedly been done by human operators, was too remote from the directories as finally produced to be relevant for the purposes of originality (and showing the presence of authorship). The implication from these decisions, however, must be that simple alphabetical ordering of the directory entries would not have been enough for the purposes of originality, even if this had been done by humans.

16 Accordingly, it can be said that, in Australia at least, originality standards appear to be moving upwards and closer to those in the US and in "authors' rights" (civil law) countries – a standard that might be broadly described as one of "intellectual creation" that excludes reliance alone on the results of time and labour ("sweat of the brow").

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31 For an earlier decision in which the High Court had indicated that the level of originality was critical to the question of determining substantiality, see *Data Access Corp v Powerflex Services Pty Ltd* (1999) 202 CLR 1 at [77]–[87], and to similar effect see *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 293; [1964] 1 All ER 465 at 481 (Lord Pearce).

32 [2010] FCAFC 149; (2010) 90 IPR 1 (Full Fed Ct).

17 Tan discusses in some detail the implications of a similar shift in Singapore law, in particular, the gap that might now arise with respect to the protection of preparatory efforts. This is a significant challenge for policy makers in striking the oft-lauded “balance” that copyright laws have traditionally sought to make. However, so far as Australia is concerned, it is worth noting the following aspects or consequences of the *IceTV* and *Telstra* decisions, even if they cannot be regarded as laying down binding statements of the standard of originality required for purposes of subsistence.

(a) Both decisions emphasise the direct link between the “work” and the “author(s)” of that work. This is based directly on the statutory language, which is, of course, in similar terms to that in the Singapore Copyright Act and is, likewise, in harmony with the provisions of the Berne Convention discussed above. Both cases also reflect a marked judicial shift from, and even disapproval of, the decisions of past courts that have too readily swept all kinds of productions under the umbrella of Part III without considering first what the “work” was, and second, who its author(s) was/were. This point was emphasised by French CJ, Crennan and Kiefel JJ in *IceTV*:<sup>33</sup>

The ‘author’ of a literary work and the concept of ‘authorship’ are central to the statutory protection given by copyright legislation, including the Act.

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In assessing the centrality of an author and authorship to the overall scheme of the Act, it is worth recollecting the longstanding theoretical underpinnings of copyright legislation. Copyright legislation strikes a balance of competing interests and competing policy considerations. Relevantly, it is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public.

Likewise, in their joint judgment in the same case, Gummow, Hayne and Heydon JJ emphasised the importance of “authorship” as the first of two “fundamental principles of copyright law”:<sup>34</sup>

The subject matter of the Act now extends well beyond the traditional categories of original works of authorship, but the essential source of original works remains the activities of authors.

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33 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 (HC) at [22] and [24].

34 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at [96].

In the *Telstra* case, Gordon J at first instance put these requirements in two pithy sentences:<sup>35</sup> “Start with the work. Find its authors.”

(b) This renewed judicial emphasis on identifying the work and its author(s) has a number of important consequences for litigation:

(i) It refocuses attention on the specific form of expression for which protection is claimed: it is the contribution of the alleged author(s) to this form of expression that is to be protected and nothing else;

(ii) If this is done, preparatory efforts will be much less likely to receive protection unless they are proximate or otherwise closely connected to the final form of expression that the work takes. This is clearly a matter of degree and judgment, but was taken very seriously by the High Court in *IceTV*, where the possible candidates for protection were defined in quite uncertain terms even up to the hearing before the High Court itself. Likewise, it was a problem in *Telstra*, where the real focus of the plaintiff’s investment and resources (which were very considerable) had been on the construction and maintenance of a massive centralised database, from which names, addresses and telephone numbers for specific regions could be extracted on an annual basis at the press of a button through the use of highly sophisticated computer programs. In truth, the claims for protection for the directories in that case were simply proxies for what the plaintiff was really concerned to protect: its huge investment in its general database (called, appropriately enough, “Genesis”);

(iii) In the case of productions resulting from many inputs, care will be needed to identify those that are directly related to the form of expression that finally results, that is, the authorial contributions, rather than those that simply consist of the provision of the raw materials or ingredients such as data. It may not be necessary, or even possible, to identify every person who has made such a contribution, but it must be possible to show that such contributions have been made (on the basis that if no human contribution can be identified, there can be no original work of any kind that has been created); and

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35 *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCAFC 149 at [344].

(iv) In the same way, and in keeping with another nostrum of copyright law, the idea-expression dichotomy, it will clearly not suffice if the contribution consists purely of an idea or concept: authorship involves contribution to the making of the actual expression of the work.

(c) Finally, in emphasising the centrality of works and authorship, the High Court has clearly indicated a move away from the traditional unfair competition rationale for copyright protection as enshrined in the older “sweat of the brow” approach to originality, and has refocused attention on the activities of authors. Various consequences flow from this, and are the subject of the balance of this contribution.

## V. Some consequential issues relating to authorship and works

18 This renewed emphasis on works and authors in Australia and, perhaps now, also in Singapore, raises a number of related or consequential issues that remain relatively unsettled and/or tested at the national level, and in relation to which, the Berne Convention likewise provides little, if any, assistance other than that of the most general kind. These include the following:

(a) the quantum required for subsistence of protection – the Berne Convention says nothing about how much is required in terms of volume or length before protection can be given, an issue of some importance in an age where headlines, slogans, bar codes and logos form a significant part of the way in which information, entertainment and other communications are transmitted;

(b) the kinds of “expressive” activities that will satisfy the requirement of authorship – as seen above, the Berne Convention refers specifically only to selection or arrangement, but clearly there are many other kinds of activities that are “authorial”. For example, to what extent are restorative or recreational activities to be protected, and what is the “originality status” of successive versions of a work?;

(c) boundary issues – is it necessary to distinguish between certain categories of works in order to determine the form of protection they should receive? In this regard, the most significant “boundary” may be that between literary and artistic works;

(d) automated authorship – to what extent can human authorship be replaced or supplemented by machines, that is, computers?; and

- (e) joint works and multiple authorship – of particular significance in the digital environment.

These matters are addressed in turn below.

## VI. Issues of quantum

19 In crude terms, how “big” or “small” must a work be before it can be protected? Is there a quantum limit on works of authorship? Consider here such items as single words, short phrases, headlines and titles, slogans, simple devices, bar codes, logos and ring tones. The Berne Convention says nothing about these kinds of subject matter: on its face, “literary and artistic works” are to be protected without specification as to amount. These questions, however, may be of considerable commercial significance, and it is left to national laws to determine whether protection should be given. In the UK and Australia, it is difficult to see a clear rule that has been applied. In the case of single words, a leading UK authority is *Exxon v Exxon Insurance Consultants International Ltd*<sup>36</sup> (“Exxon”), where the word “Exxon”, which was really devised for trade mark usage, was denied protection under copyright as a literary work because it essentially conveyed no information or pleasure on its own; a similar and more recent Australian case is *Brodell v Telstra Corp Ltd*,<sup>37</sup> where the claim was for the word “SmartFax”. Short sentences, slogans and headlines have been more problematic, and the following list illustrates that claimants, more usually than not, have been unsuccessful:

- (a) *Sinanide v La Maison Kosmeo*<sup>38</sup> – “Beauty is a social necessity, not a luxury” was considered by the Court of Appeal (in *obiter* observations) to be insufficient for copyright protection.
- (b) *Kirk v Fleming*<sup>39</sup> – In issue here was the following series of short sentences used in the plaintiff’s advertising: “Good sight is your most valued asset. Avoid the predicament of being without your glasses. Let us make you a spare pair. Broken lenses promptly and accurately repaired.” No protection was accorded to this as an original literary work, on the basis that it was “nothing more than the stringing together of four ordinary and commonplace sentences, three of which were admitted to have been in common use at the material date”.<sup>40</sup>

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36 [1982] RPC 69.

37 [2004] FCA 505

38 (1928) 139 LT 365.

39 (1928–1935) MacG Cop Cas 44.

40 *Kirk v Fleming* (1928–1935) MacG Cop Cas 44 at 50 (Luxmoore J).

(c) *Francis, Day & Hunter Ltd v 20th Century Fox Corp Ltd*<sup>41</sup> – Protection was refused for the song title “The Man Who Broke the Bank of Monte Carlo”. In the words of the Judicial Committee of the Privy Council:<sup>42</sup>

The appellants’ contention was put as high as that copyright in a title is infringed by the application of that title to a work of a different character from that of the work to which it was originally applied. In the present case the title was originally applied to a musical composition, whereas it has been applied by the respondents to a motion picture or a film. The argument of the appellant company would be the same, it seems, if the application of the title complained of had been to a picture or a statue. On this reasoning it would be said that the title ‘Adam’ applied to a work of statuary would be infringed if that title were used as that of a novel. These and other anomalous consequences justify the broad principle that in general a title is not by itself a proper subject matter of copyright. As a rule a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale, and of so important a character, as to be a proper subject of protection against being copied. As Jessel MR said in *Dicks v Yates*, there might be copyright in a title ‘as, for instance, in a whole page of title or something of that kind requiring invention’. But this could not be said of the facts in the present case. There may have been a certain amount, though not a high degree, of originality in thinking of the theme of the song, and even in choosing the title, though it is of the most obvious. To ‘break the bank’ is a hackneyed expression, and Monte Carlo is, or was, the most obvious place at which that achievement or accident might take place. The theme of the film is different from that of the song, and their Lordships see no ground in copyright law to justify the appellants’ claim to prevent the use by the respondents of these few obvious words, which are too unsubstantial to constitute an infringement, especially when used in so different a connection.

(d) *Green v Broadcasting Corp of New Zealand*<sup>43</sup> – It was held that copyright did not subsist in the words “Opportunity Knocks” as the title of a talent quest show.

(e) *Sullivan v FNH Investments Pty Ltd*<sup>44</sup> – The claims here were to the slogans “Somewhere in the Whitsundays” and “The

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41 [1940] AC 112.

42 *Francis, Day & Hunter Ltd v 20th Century Fox Corp Ltd* [1940] AC 112 at 123.

43 (1983) 2 IPR 191.

44 (2003) 57 IPR 63.

Resort that Offers Precious Little”. Jacobsen J of the Federal Court of Australia found that the plaintiff was the author of the slogans, but that authorship did not require the requisite degree of judgment, effort and skill to make it an original literary work in which copyright could subsist.

(f) *Victoria v Pacific Technologies (Australia) Pty Ltd*<sup>45</sup> – Protection was denied for the phrase “Help-Help-Driver-in-Danger-Call-Police-Ph.000”.

(g) *Sunlec International Pty Ltd v Electropur Ltd*<sup>46</sup> – Protection was granted for the slogan “‘Field Friendly’ – The best choice for fieldwork”, on the ground that although the language used came from the common stock of the English language, it used this in a “succinct and relatively memorable way” and could not be said to be hackneyed, while conveying information about the plaintiff’s product.<sup>47</sup>

(h) *Budget Eyewear Australia Pty Ltd v Specsavers Pty Ltd*<sup>48</sup> – Protection was given, on an interlocutory application, to an advertisement with short sentences such as: “If your glasses are not all they are cracked up to be, don’t worry, we’ll come to the rescue.”

(i) *Primary Health Care Ltd v Commissioner of Taxation*<sup>49</sup> (“*Primary Health Care*”) – The line entries in doctors’ medical records in relation to individual patients, who were seen at different intervals over time and often by different practitioners, were held to be insufficient for protection. While these individual entries had a clear meaning, at least to the medical reader, as Stone J noted at [127], quoting French CJ, Crennan and Kiefel JJ in *IceTV*:<sup>50</sup> “Not every piece of printing or writing which conveys information will be subject to copyright.” The possibility of merger between ideas and facts and their expression, as well as the further issue of lack of originality of expression, both came into play here, as her Honour went on to say:<sup>51</sup>

Entries in medical records even where they are limited to clinical data and names of medications have a greater

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45 (2009) 81 IPR 525.

46 (2009) 79 IPR 411.

47 *Sunlec International Pty Ltd v Electropur Ltd* (2009) 79 IPR 411 at [64].

48 (2010) 86 IPR 479.

49 (2010) 86 IPR 259.

50 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at [45] and [127].

51 *Primary Health Care Ltd v Commissioner of Taxation* (2010) 86 IPR 259 at [131]–[133].

capacity to inform and instruct (if not to entertain) than the expressions in these examples. This, however, is not sufficient to support a claim for copyright in those entries. The clinical data and names of medications are not expressions that originate with the doctor who has recorded them.

Even entries that contain some comment are not sufficiently substantial to qualify as works the product of independent intellectual effort directed to expression. The following examples taken from the records of Dr Tang, Dr Panwar and Dr Lyons, respectively, illustrate the point:

- 7kg – growing well. On fresh milk and vitamins
- Now c/o diarrhoea – possibly antibiotic induced ...
- Last 2/12 notices wheezy breathing if lies flat – associated with dry irritant cough – says doesn’t feel SOB

None of this denies the intellectual effort and professional skill needed to form the diagnoses, to select methods of treatment or to understand the significance of clinical data that is recorded, however, copyright protects a form of expression not this underlying expertise.

(j) *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd*<sup>52</sup> (“Fairfax”) – This is perhaps the most detailed judicial examination of this issue to date in Australia, post-*IceTV*, this time in relation to newspaper headlines. After careful discussion of the prior authorities, Bennett J of the Federal Court of Australia held that the headlines in suit were not sufficiently “substantial” for the purposes of receiving separate copyright protection:<sup>53</sup>

Headlines generally are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works. The function of the headline is as a title to the article as well as a brief statement of its subject, in a compressed form comparable in length to a book title or the like. It is, generally, too trivial to be a literary work, much as a logo was held to be too trivial to be an artistic work ... even if skill and labour has been expended on creation.

(k) There is, of course, a contrary holding in the earlier Scottish case of *Shetland Times Ltd v Wills*,<sup>54</sup> which was, however, only an interlocutory hearing. More relevant in this context is the recent English decision in *The Newspaper*

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52 (2010) 88 IPR 11.

53 *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 88 IPR 11 at [44].

54 [1997] FSR 604.

*Licensing Agency Ltd v Meltwater Holding BV*<sup>55</sup> (“Meltwater”), where Proudman J of the Chancery Division saw no reason as to why specific headlines should not be capable of protection as single literary works in their own right if they displayed sufficient originality or intellectual creation on the part of their authors. This was upheld on appeal by the Court of Appeal<sup>56</sup> and more needs to be said below about the particular surrounding circumstances of this proceeding and the impact of European Commission (“EC”) law.

20 By contrast, both British and Australian courts have generally been more generous in according protection to “insubstantial” visual works, for example:

- (a) *Roland Corp v Lorenzo & Sons Pty Ltd*<sup>57</sup> – stylised letters, used as logos, were protected as artistic works;
- (b) *Australian Chinese Newspapers Pty Ltd v Melbourne Chinese Press Pty Ltd*<sup>58</sup> – a logo in Chinese calligraphy, used as the masthead of a Chinese language newspaper, was protected, upheld on appeal;<sup>59</sup>
- (c) *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd*<sup>60</sup> (“Elwood Clothing”) – design consisting of an arrangement of numbers and words on a T-shirt was protected as an original artistic work; and
- (d) to the contrary, *Merchandising Corp of America Inc v Harpbond Ltd*<sup>61</sup> (simple face paint marks) and *Cortis Exhaust Systems Pty Ltd v Kitten Software Pty Ltd*<sup>62</sup> (simple logo).

21 It is difficult to formulate any consistent basis for the refusal of protection in those cases where this has occurred: although some courts have referred to ordinary hackneyed phrases as being unprotectable *per se*, others have said that there must be a minimum (*de minimis*) level of original expression present, and others again have said that single words and the like are incapable of fulfilling the proper function of a literary work, namely, to inform, entertain engage or otherwise, to convey some meaningful message to the reader. However, as the

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55 [2010] EWHC 3099 (Ch).

56 *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890.

57 (1992) 22 IPR 245.

58 (2003) 58 IPR 1 at 44–45; [2003] FCA 878.

59 (2004) 63 IPR 38; [2004] FCAFC 201.

60 [2008] FCAFC 197; (2008) 80 IPR 566.

61 [1983] FSR 32.

62 (2001) ATPR 41-837.

headlines cases indicate (also those of advertising slogans), there can be a great deal of intellectual creativity devoted to making up these things; likewise, there may be a great deal of meaningful information wrapped up in a short phrase or even single word or two. The headlines in *Fairfax*, for instance, involved a great deal of attention (so it was asserted) to the content of the article to which they were affixed, as well as to the position in the newspaper in which they appeared – serious on the first page, and less serious, even light-hearted or corny, on later pages. In short form, such headlines were intended to attract the attention of readers and to alert them to the subject of the article. Accordingly, authorship, in the sense of original expression was present but, notwithstanding this, no “works” had been brought into existence.

22 Perhaps the real reason, then, for denial of protection in these cases is a simple quantitative one: some things are just too small to be protected as “works” even if they are otherwise “literary”, “artistic” or even highly “original”. Although such things are clearly valuable in economic terms (why else would a claimant seek to rely on copyright protection?), there is a strong argument that the real value to be protected here is of a trade mark kind, where the more appropriate protection is through the registered trade mark system or the common law of passing off (*Exxon* is an obvious example). However, while this might form a rough dividing line between single words, short phrases and devices (to be protected under the laws of trade marks and unfair competition), does this mean that everything falling outside these limits should automatically be treated as a “work”? Alternative or complementary explanations for denying protection in these non-trade mark cases may be:

(a) It is difficult to distinguish ideas or facts from the form in which they are expressed – as happened in the case of the short, single or two-line clinical notes for which protection was claimed in *Primary Health Care*. In the case of a headline, there may be no other way to describe or summarise the content of the article that it heads (although this will not obviously be true of the “clever” headline, which sums up the content of an article in some pun or skilful parody); and/or

(b) There may be a strong public policy override that operates, as in the case of headlines and titles – to accord protection would be to inhibit bibliographic and indexing activities by third parties. This was certainly a factor at play in the decision of Bennett J in *Fairfax*.

23 In addition, it should be noted that the contrary *Meltwater* decisions in the UK were, in turn, strongly influenced by emerging

European Court of Justice jurisprudence on originality, particularly the decision in *Infopaq International A/S v Danske Dagblades Forening*<sup>63</sup> (“*Infopaq*”), which held that parts of works, including headings, can be protected separately so long as they express the “intellectual creation” of the author. The latter case arose under the EC Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society,<sup>64</sup> and must be taken as embracing both civil law and common law approaches to authorship (but probably with more emphasis on the former, given that the case came from Denmark and all the members of the fourth chamber who heard the case were from civil law backgrounds). While no doubt such findings would not have been made if the claim for protection did lead to the incidental protection of facts or ideas, the presence of some element of intellectual creation on the part of the headline maker was otherwise sufficient here to pre-empt any public policy argument of the kind suggested in point (b) in para 22 above – a consideration that was clearly brought to the fore in the decision of Bennett J in *Fairfax*. Under the EC jurisprudence, therefore, it may be that there is no role for a *de minimis* public policy-oriented exclusion for insubstantial works that may not gain protection in more truly common law systems such as Australia or Singapore.

24 None of this, however, provides us with any clear guidance as to where, in our respective systems, the dividing line as to what is a “work” should be drawn, in circumstances where authorial expression and originality are otherwise present. Furthermore, the suggestion above that copyright protection should be refused in those cases where the real value for which protection is sought is of a trade mark kind may prove an unwieldy criterion to apply in practice. Many trade marks consist of more than just one or two words or a simple device, and often include quite elaborate literary and artistic material (this was certainly true with older trade marks):<sup>65</sup> stripped of their trade mark context, there is probably no doubt that such marks would receive protection as literary or artistic works.<sup>66</sup> Furthermore, why should an applicant be precluded from seeking copyright protection if he otherwise meets the prerequisites for this, simply because of the availability of protection under the registered trade marks system or the common law of passing off? The real issue is whether the subject matter in question is capable of

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63 Case C-5/08 (16 July 2009).

64 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ([2001] OJ L 167/10).

65 See, for example, the representations of various “old” trade marks in World Intellectual Property Organization (“WIPO”), *Madrid Agreement Concerning the International Registration of Trade Marks from 1891 to 1991* (WIPO, 1991) (WIPO Publication No 880 (E)) at pp 16–21.

66 For example, Sir John Edward Millais’ painting of “Bubbles”, which was used for many years as an advertisement for Pears’ Soap.

being a literary or artistic work in the first place. No guidance on this is to be found in the relevant international agreements, such as the Berne Convention, the WCT or the TRIPS Agreement, and it therefore remains squarely a matter for each national law to determine. Ultimately, the assertion that “insubstantial works” are not to be protected remains nothing more than that: if the “work” is otherwise original and capable of conveying meaning, the real reason for refusing protection will be one of public policy, as in the *Fairfax* case.

## VII. Types of expressive activity required

25 At the level of principle, it may be readily accepted that acts of authorship are those that contribute to the form in which a work is expressed. This general proposition presents little difficulty in the case of mainstream or “traditional” works, such as books, plays, musical compositions, paintings and so on, as these terms readily indicate the relevant expressive activities required for the purposes of authorship: the choice and arrangement of words, symbols, lines, shapes and sounds in an overall form of expression. There is no real need for national laws to define or prescribe these matters in any detail, if at all (this is generally the case), and there is generally sufficient flexibility under national laws to adjust to changing technologies, for example, where pen and paper are exchanged for mouse and keyboard and electronic forms of storage.

26 However, it is the categories at the margins that can give rise to problems, as highlighted by the provisions of the Berne Convention referred to above in relation to collections of works and adaptations: therefore the acts of selecting and arranging other persons’ works can be a work of authorship in its own right, as can the transformative activities involved in translation and other adaptations of a work. Provisions in the TRIPS Agreement<sup>67</sup> and the WCT<sup>68</sup> also extend the Berne Convention protection to the writers of computer programs. Nonetheless, the boundaries of the Berne Convention here are both modest and open-ended, and national laws are free to go beyond. In the case of common law countries, this can be seen in two extensions of these Berne-sanctioned parameters:

- (a) The recognition that selection and arrangement can extend to non-literary and/or artistic elements, that is, to simple facts and data, as in the protection of databases more generally<sup>69</sup>

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<sup>67</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights Art 10(1).

<sup>68</sup> World Intellectual Property Organization Copyright Treaty Art 4.

<sup>69</sup> See, for example, *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465.

(this now recognised at the international level in the collateral obligations to protect such compilations as literary works under the Berne Convention that are contained in Article 10(2) of the TRIPS Agreement and Article 5 of the WCT, respectively). A further, and more controversial, issue relating to compilations and databases has been whether the initial acts of gathering and collecting material are relevant authorial acts, whether on their own or together with the further elements of selection and arrangement.<sup>70</sup>

(b) The recognition that the acts of restoration and recreation of a pre-existing work may be sufficient in themselves to make the resultant restored or recreated material a work in its own right. A striking example of this is to be seen in the performing editions of the musical works of Lalande by Dr Sawkins in *Hyperion Records Ltd v Sawkins*;<sup>71</sup> an older one is the journalists' reports in *Walter v Lane*;<sup>72</sup> yet another is to be found in the retraced drawings of Lego blocks in *Interlego AG v Croner Trading Pty Ltd*.<sup>73</sup>

27 The decision to characterise these forms of expressive contributions as "authorial" is a significant one, particularly in the case of restorations, where the resultant work may ultimately revive or recapture the first author's expression with nothing of the restorer's personality expressed in the restored work. This may well not be possible under some authors' rights laws, where specific mention is made to the need for original contributions to be the "personal intellectual creation" of the author<sup>74</sup> or to reflect the "personal stamp of the author".<sup>75</sup> It may also be uncertain whether it would come within the "intellectual creation" requirement now generally to be applied by EC countries under the *Infopaq* approach, which would seem to require that the adaptation be an expression of the authors' – that is, the restorer's – contribution. Additionally, given the link between "authorship" and

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70 In this regard, it is clear that, in Australia, gathering and collection are not enough: see *IceTV Pty Ltd v Nine Network Australia Pty Ltd* ("IceTV") (2009) 239 CLR 458 and *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCAFC 149. Thus, in *IceTV*, at [99], Gummow, Hayne and Heydon JJ said: "If the work be protected as a 'compilation', the author or authors will be those who gather or organise the collection of material and who select, order or arrange its fixation in material form."

71 [2005] 3 All ER 636.

72 [1900] AC 539.

73 (1992) 39 FCR 348; 111 ALR 577; 25 IPR 65 at 97 (Gummow J) (*cf Interlego AG v Tyco Industries Inc* (1988) 12 IPR 97 (Hong Kong, PC) at 124.

74 Law on Copyright and Neighbouring Rights (1965) (Germany) Art 2(1).

75 This appears to be the approach taken by the Dutch courts: see Dutch ALAI Group, *ALAI 2011 – Dublin Congress* (June 2011) <<http://www.alaidublin2011.org/wp-content/uploads/2011/05/Netherlands.pdf>> (accessed 9 December 2012).

“original works” emphasised by the High Court of Australia in *IceTV*, a question may arise as to whether this allows for the merging or equation of authorial activity (the contribution of the skilful restorer in the process of restoring) with the result of that authorial contribution (which looks just like the work restored). Considerations of justice, though not necessarily logic, would suggest that such a merging should occur.

28 A further, related issue is that of originality or intellectual creation where there are successive drafts of a work. In many instances, the work for which protection is claimed may have been preceded by a series of earlier versions as the author(s) refine their written or artistic production. Is each version to be treated as an original work in its own right or is this only the case with the last version that is to be regarded as the culmination of the creator’s authorial efforts? Various and sometimes conflicting currents can be discerned here:

(a) As a work “develops” – good examples being design drawings for a house or successive manuscripts of a novel or play – there may only be small differences or variations between the successive drafts: if the corpus of the work remains the same, are such differences sufficient to constitute the next draft of an original work in its own right (and so on, with each further iteration)? If we take too literally the recent Australian emphasis on identification of the work and the author(s) thereof, this may involve a somewhat arbitrary process of seeking to identify the version of the work that most embodies the author’s original contribution.

(b) In some cases, of course, production of a sizeable “design file” may be strong evidence of the overall originality of the author’s contribution, as it will show the development and refinement of the work and will also underline that the author has done this without drawing unduly on other sources – in crude terms, that he has not copied other persons’ works. In several Australian cases involving house plans and manufacturing drawings, evidence of a design file was crucial in showing the independence of the authors’ work<sup>76</sup> and, in one instance, to defeat a claim of infringement when both parties’ plans were close to each other.<sup>77</sup>

(c) In other instances, the differences – or lack thereof – between successive versions may raise real problems. Consider,

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<sup>76</sup> See, for example, *Meticon Homes Pty Ltd v Barrett Property Group Pty Ltd* (2008) 75 IPR 455 (Full Fed Ct).

<sup>77</sup> *Inform Design and Construction Pty Ltd v Boutique Homes Melbourne Pty Ltd* (2008) 77 IPR 523.

for example, successive annual editions of a business directory for the same area or region. Assuming that a case for originality might otherwise be made for the classifications of entries adopted by the publisher (as a compilation of headings), these classifications will generally be repeated each year as readers do not like many changes in such matters. While there may well be some changes, with new headings and subheadings coming in and older ones being deleted as they become outdated or superseded, the changes from year to year may be still be minute overall. This, in turn, means that each successive edition of the directory will lack sufficient originality, even if the original selection and arrangement of headings would have met this requirement. This issue did not arise for consideration in the *Telstra* litigation referred to above, but it is interesting to note that there was an initial claim in that case to a “headings book”, which was apparently the compilation of headings and subheadings that had been first adopted for Telstra Corp Ltd’s (“Telstra”) yellow pages directories. This claim was dropped during the proceedings, presumably because it was not possible or easy to identify the authors of the headings book (this had been created some years before and the relevant witnesses may no longer have been available). However, if this evidence had been forthcoming, it is possible that the respondents’ directories would have infringed the headings book as an original work, even if the Telstra directories themselves lacked originality because they simply repeated the classifications in the headings book from year to year. Such a result would have been consistent with the High Court’s direction in *IceTV* to identify the “work”, in this instance, the headings book.

(d) Successive editions of a book, such as a legal text or a dictionary, will probably not pose great difficulties, even if the differences may be fairly slight. It may be assumed that the author(s) has/have carefully reviewed and considered the preceding text and that any alterations or insertions are intended to be consistent with, and enhancements of, what has gone before. In other words, there has been a revision of the text as a whole and the application of sufficient skill and judgment to make each new edition an original work in its own right. The same reasoning can be applied to differences in successive versions of such things as house plans, computer programs and clothing designs. In many instances, of course, the differences will also be quantitatively as well as qualitatively significant.

29 The issues discussed above have not so far been contentious in Australian (and Singapore) law under our traditional low-level requirements for originality and authorial contribution. As these

requirements are raised, however, it will become much more of a relevant inquiry to determine in each case precisely what is the work in issue and the degree to which it differs from any predecessor. In the case of a work with a lengthy history of development and refinement, the preferable analysis may be similar to that suggested above for successive editions of a textbook, namely, that each successive draft needs to be considered in overall terms as the application of fresh authorial effort in revising, reviewing and "settling" what has gone before. It is suggested that these are all activities that should still meet any raised requirement for originality or intellectual creation.

### VIII. Boundary issues

30 Demarcation disputes are usually a matter for labour law rather than intellectual property law, but they may have some practical significance in the case of works. National laws, as well as the international conventions, discriminate to some extent between literary, dramatic and musical works, on the one hand, and artistic works, on the other. Therefore:

- (a) there is usually no adaptation right recognised in relation to artistic works, as exemplified by Article 8 of the Berne Convention, and likewise under both Australian and Singapore law;
- (b) similarly, there is usually no analogue to the public performance right in the case of artistic works (an equivalent right might that of public exhibition);
- (c) both national laws and the conventions provide for limitations of protection where artistic works are applied industrially, for example, this may be under a designs system with no copyright protection at all (Article 2(7) of the Berne Convention) and, where copyright protection is given, the term of protection may be limited to 25 years from the date of making (Article 7(4) of the Berne Convention); and
- (d) different defences may also apply to artistic works under national laws.

31 At what point is the dividing line between the "artistic" and the "literary" to be drawn? This may be particularly significant in some areas where literary elements are used as design components or are arranged in a particular visual manner. Furthermore, in common law systems, where court pleadings are required to specify precisely the subject matter for which protection is claimed, a wrong initial characterisation may be fatal. The general approach of the Australian courts in this regard has been to consider whether the visual effect or

impact of the work outweighs the semiotic. A good example is provided by the placement of numbers and text on the T-shirts that were in issue in *Elwood Clothing*. Had the works in that case not been characterised as “artistic” (being “drawings” under the definition of “artistic work” in section 10(1) of the Copyright Act 1968),<sup>78</sup> the plaintiff’s suit would have failed completely. The view of the court, both at first instance and on appeal, however, was:<sup>79</sup>

[T]here is a single artistic work of which the words and numbers, including their size, font, placement and spatial relationships with other elements, form a part. Such semiotic meaning as the words and numbers convey (they do convey such meaning to some extent, being well recognised symbols that ‘stand for’ something else) is so insubstantial and vague that they do not constitute literary works.

Like the primary judge, we do not think it an adequate account of the designs to say that they are meant to be read. The expressions ‘Durable By Design’ and ‘Raging Bulls’ and the numerals ‘9’ and ‘6’ are meant to be read but that for which they stand is elusive and unimportant. Their importance is in the support they give to the ‘look and feel’.

32 An alternative approach would be to hold that the choice of category is not critical and that a work may simultaneously be literary and artistic – one does not exclude the other. There is some UK authority to this effect,<sup>80</sup> and there was approval of such an analysis by the Full Federal Court in *Elwood Clothing*.<sup>81</sup>

#### **IX. The need for identification of the author – And for this to be a human being**

33 As the Berne Convention is a convention about the “rights of authors” in their literary and artistic works, it would seem axiomatic that, in each case in which protection is sought for a work in a Berne Convention country, the author of that work should be clearly identified or at least readily identifiable. The need for human authorship is not specifically stated in the Convention but, at the very least, must be

78 Act No 63 of 1968 (Cth) (Aust).

79 *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* [2008] FCAFC 197; (2008) 80 IPR 566.

80 See, for example, *Sandman v Panasonic UK Ltd* [1998] FSR 651, where the work in question was a circuit diagram, and Pumfrey J at 658 gave the example of an E E Cummings poem about a cat in the shape of a cat or a Chinese calligraphic work. See further *Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] FSR 401 at 412–414 (Laddie J) and the discussion of this issue in *Anacon Corp Ltd v Environmental Research Technology Ltd* [1994] FSR 659 at 662 (Jacob J).

81 *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 80 IPR 566 at [56] and [57]; although the court expressed its preference for treating the works in the case as “artistic”.

implied from the requirement that the term of protection is to run until 50 years from the death of the author. In earlier times, the assumption that there should be identifiable human authors was not particularly problematic, leaving aside the cases of anonymous and pseudonymous works, which received special treatment under the Convention in the form of certain evidentiary presumptions.<sup>82</sup> Indeed, in the general run of cases, even today, there may be no great difficulty involved in identifying the person who has supplied the necessary authorial contribution to the expression of a work. Even in the *IceTV* case, where there was some uncertainty about what the “work” was (there being a number of different stages involved in preparing the television programme schedules), the identity of the human authors involved was not really in question.

34 However, the deployment of computerised and automated systems does begin to raise problems of identification, particularly if the human involvement is anterior to their application and/or the automated processes carry out the various authorial acts previously performed by human actors. To take a commonly cited example, a satellite weather image may look indistinguishable from an image created by a human-operated camera, as may a still image from a CTV camera. Yet, just because an image may look like something produced by a human maker does not make it into a work for the purposes of copyright protection. Indeed, it would be a contradiction in the expression “authors’ rights” if there could be protection in the absence of an actual author (this may be the reverse of the saying that if something looks like a duck, quacks like a duck, then it probably is a duck).

35 As already seen above, the High Court of Australia in *IceTV* emphasised the centrality of authorship in the statutory protection given under Australian law.<sup>83</sup> The need to identify authors – and human authors at that – was also vividly illustrated in *Telstra*, where virtually all of the processes that led to the making of the telephone directories were automated, particularly so far as the arrangement of entries in the directories was concerned (ultimately, this was done at the push of a button). Human involvement was largely anterior to all this, and consisted mainly of individual entries of data into a global database called “Genesis” from which directories for particular areas were then extracted by automated processes at a later stage. Furthermore, the individual data entries were carried out in accordance with strict rules, with little scope for the application of individual judgment, while being unconcerned, in any event, with the activities of selection and

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82 Berne Convention for the Protection of Literary and Artistic Works Art 15.

83 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 (HC) at [22].

arrangement, which form the subject of authorial contribution in the case of compilations (see para 17 above). Accordingly, at first instance<sup>84</sup> and on appeal,<sup>85</sup> it was found that copyright did not subsist in the directories as there were no identifiable human authors. As noted above, this seems consistent with the more general (and unexceptional) principle enunciated by the High Court in *IceTV*, under which it is always necessary to identify both the authors and works for which protection is claimed. While special leave to appeal to the High Court in *Telstra* was sought, this was refused on 2 September 2011,<sup>86</sup> and it may be inferred from this refusal that the members of the panel hearing the special leave application did not see any issue of significance arising from the lower courts' decisions. In principle, this must be correct and consistent with the human-centred provisions of both the Berne Convention and Australian copyright legislation.

36 The following remarks, however, may be made here:

(a) It is important to distinguish between works that come into existence with the aid of automated processes and works that are completely or almost wholly produced by such processes, that is, where the computer takes the place of the human operator. Thus, no issue can be taken with the visual artist who works with specialised computer programs to shape and produce specific images (as in *Elwood Clothing*) or the writer who uses a word processing program to produce a written text: here the human actor is controlling the making of the work, but doing it by means other than the traditional paintbrush or quill pen.

(b) An intermediate situation may be envisaged where a work, such as a compilation or table of information, is produced automatically according to specifications and directions specifically programmed by the human operator. While it may be a question of degree, it may be possible to say that the human operator is still affecting in a material way the final shape and form of expression of the work and can therefore be properly regarded as the author of the resultant compilation or table.

(c) The *Telstra* case, on the other hand, went beyond the situations described above, in that the automated processes,

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84 *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 85 IPR 571 (Fed Ct) (Gordon J).

85 *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 90 IPR 1 (Full Fed Ct).

86 *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2011] HCATrans 248 (2 September 2011) <<http://www.austlii.edu.au/au/other/HCATrans/2011/248.html>> (accessed 25 November 2012).

admittedly the result of very skilled programming by humans, were repeated constantly over time with respect to every one of the hundreds of different directories produced annually. They were part of a large production system where the rules and templates laid down had to be consistent throughout. It is impossible here to make out the kind of case for individualised programming and human intervention or direction that might suffice for the purposes of the situations mentioned above in (a) or (b).

(d) The denial of protection to computer-produced works does not mean that they should lack any protection at all, but simply that they cannot be works of authorship. If protection is merited for such enormous expenditures of time and resources, it needs to be provided for elsewhere, for example, through the adoption of a more limited *sui generis* form of protection (although it may be that the EC database model might not be the ideal solution here). A less satisfactory solution is to provide for a fictional “author”, as in section 9(3) of the UK Copyright, Designs and Patents Act 1988;<sup>87</sup> however pragmatic a solution this may be, it contradicts the basic notion of authorship as a human activity.

## X. The problem of multiple authors

37 A final issue, which follows from those already discussed above, is that of multiple authorship, a phenomenon that assumes greater significance in the age of the Internet. Consider here such productions as Wikipedia entries and the like where there may be a never-ending succession of unidentified authors adding to an ever-growing series of entries. However, multiple contributions arise in many other contexts as well, and their treatment under present national laws can be a tricky issue.

38 Little guidance is to be found here in the Berne Convention. While the notion of a “work of joint authorship” is recognised, this is only concerned with the question of duration of protection where one author dies before the other(s).<sup>88</sup> However, there is no definition of the term in the Berne Convention, so this is essentially a matter for national

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87 Section 9(3) of the Copyright, Designs and Patents Act 1988 (c 48) (UK) provides:  
In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

88 Berne Convention for the Protection of Literary and Artistic Works Art 7bis: The rule here is that the 50-year *post mortem auctoris* term of protection for the work is determined from the end of the year of the death of the author who dies last.

law. In the case of Australia and Singapore, it is defined in like terms as meaning:<sup>89</sup>

... a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

39 What is therefore required under this definition is that there should be a work:

- (a) produced by two or more “authors”;
- (b) produced by collaboration between the alleged joint authors; and
- (c) in which there is a lack of distinctiveness between the individual contributions, that is, they cannot be readily severed (non-severability).

40 The first of these requirements is clear enough: each author must make some authorial contribution, although the degree and extent of this might vary according to the facts of each case. In broad terms, the Australian and UK cases suggest that this must be a material contribution to the final expression of the work.<sup>90</sup> The definition, however, does not necessarily require that the contribution itself should be capable of being an original work in its own right – in other words, a person can do “authorial” acts, without the final expression of these authorial contributions being an original work in its own right. On the other hand, if the terms “author” and “original works” are correlatives (*per* Isaacs J in *Sands and McDougall Pty Ltd v Robinson*),<sup>91</sup> can a person properly be regarded as an “author” if their contribution would be incapable of being protected as an “original work” (as in the case of insubstantial works under current Australian law)? Is it possible to regard a person as an “author” if his efforts alone would not merit protection as a work of authorship? Logic, however, may not always be

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89 Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust) s 10(1); Copyright Act 1987 (Act 2 of 1987) s 7(1).

90 See, for example, *Kenrick v Lawrence* (1890) 25 QB 99; *Cummins v Bond* [1927] 1 Ch 167; *Tate v Thomas* [1921] 1 Ch 503; *Walter v Lane* [1900] AC 539 (HL); *Donoghue v Allied Newspapers Ltd* [1938] 1 Ch 106; *Evans v Hulton & Co Ltd* [1923–1928] MacG Cop Cas 51 (Ch D); *Springfield v Thane* (1903) 89 LT 242 (Ch D); *Levy v Rutley* (1871) LR 6 CP 523; *Wiseman v George Weidenfeld & Nicholson Ltd* [1985] FSR 525 (Ch D); *Ashmore v Douglas-Home* [1987] FSR 553 (Ch D); *CBS Records Australia Pty Ltd v Gross* (1989) 15 IPR 385 (Fed Ct of Aust); *Dixon Projects Pty Ltd v Masterton Homes Pty Ltd* (1996) 36 IPR 136 (Fed Ct of Aust) at 141–142 (Spender J); *Brighton v Jones* [2005] FSR 288 (Ch D); *Brown v Micasso Music Productions Ltd* [2005] FSR 846 (Patents County Court) at 865–866.

91 (1917) 23 CLR 49.

the best guide here, and there is nothing in the decided cases on joint authorship to suggest such a limitation on who a joint author may be.

41 As to the second requirement that there should be collaboration between the authors, what does this require? In *Telstra*, even if it had been possible to show that there were actual “authors” involved, the presence of collaboration would have been difficult to establish because of the compartmentalised way in which the individual human actors operated – generally in a modular, linear fashion, as different cogs in the production line, with little evidence of co-operation or collaboration between them, other than they (mostly) had the same employer (in fact, a number were independent contractors).<sup>92</sup> In truth, this was not an issue in the case as it finally transpired, as both at first instance and on appeal it was held that none of these persons were authors in any event.<sup>93</sup> In another recent case, claims that medical records consisting of a series of single entries made by different medical practitioners at different times over a number of years in respect of individual patients were works of joint authorship failed, on the basis that there was no evidence of collaboration between those making the entries.<sup>94</sup>

42 The opposite appeared to be the case in *Fairfax* (the headlines case), where there was no difficulty in identifying the presence of human contributors (although not all of them were, or could be, individually identified). However, collaboration appeared to be of the essence in applicant’s offices, for example, where possible headlines for articles were thrashed around by reporters, sub-editors and others at production conferences. The only issue then was whether, in relation to a claim that each headline and attached article constituted a work of joint authorship, the contributions were insufficiently distinct from each other for the third part of the definition to be satisfied.<sup>95</sup> On the evidence, however, it was found that each headline was clearly severable from the body of the articles to which they were attached, meaning that the argument that each headline and article together was a work of joint authorship failed at this final hurdle.<sup>96</sup>

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92 *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 85 IPR 571 (Fed Ct) at [337] (Gordon J) and 90 IPR 1 (Full Fed Ct) at [90]–[91] (Keane CJ).

93 See the discussion at paras 21–22 above.

94 *Primary Health Care Ltd v Commissioner of Taxation* [2010] FCA 419; 86 IPR 259 at [121]–[122] (Stone J).

95 This claim related to a further argument that if the article and headline constituted a work of joint authorship, the copying of the headline alone would nonetheless infringe, as this would be a “substantial part” of that work for the purposes of s 14(1) of the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust).

96 *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2011) 88 IPR 11 at [85]–[105] (Bennett J).

43 This third requirement therefore poses difficulties for works where the individual contributions continue to be clearly and/or expressly identifiable in the completed work, although otherwise obviously linked in terms of theme and progression – often the case, for example, in treatises and monographs by academic writers. Severability in such instances is obviously possible, even if aesthetically or scholastically undesirable, meaning that such works will fall outside the definition of work of joint authorship in Singapore and Australian law, even if the co-authors might have contemplated this as a joint undertaking throughout. In this regard, US law provides a possible solution as it does not require lack of distinctiveness of the contributions, provided that there is a common intention that these should be merged into “inseparable or interdependent parts of a unitary whole”.<sup>97</sup> The contributions thus may be capable of existing previously and separately as copyright works, but the final production will be a “joint work”, so long as there is an intention to merge their contributions into a “unitary whole”.

44 The problem of lacunae in statutory definitions of multi-authored works is not confined to common law copyright systems: they also appear to arise in civil law (“authors’ rights” laws), although there are different formulations in some of these laws that may provide assistance. French law, for example, speaks directly of a “work of collaboration” in the following terms:<sup>98</sup>

‘Work of collaboration’ shall mean a work in the creation of which more than one natural person has participated.

45 It then deals with the respective rights of the individual “collaborators” post-creation,<sup>99</sup> but does not appear to deal with the prior issues of what “collaborate” or “participate” mean, the issue of intent or the question of whether non-severability or merger is required. Doubtless, these issues can be resolved contractually between parties in many cases, but the definitional lacunae still remain. On the other hand, French law has a related category of “collective work” that is unfamiliar to our laws but which may deal with many situations that arise:<sup>100</sup>

‘Collective work’ shall mean a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.

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97 Copyrights 17 USC (US) § 101 (definition of “joint work”); Copyright Act of 1976.

98 Intellectual Property Code (France) Art L113-2.

99 Intellectual Property Code (France) Art L113-3.

100 Intellectual Property Code (France) Art L113-2.

46 Italian copyright law, rather differently, approaches the issue of multiple contributions by looking at the resultant production, appearing to require lack of severability but without directly addressing the issues of intent, the need for collaboration or the quantity or quality of the contribution. Thus, Article 10 of the Italian copyright law<sup>101</sup> of 1941 provides:

If the work has been created by the indistinguishable and inseparable contributions of two or more persons, the copyright shall belong to all the joint authors in common.

47 Italian law also provides, in similar terms to the French, for the category of “collective work”, in which authorship is deemed to reside in the person or entity undertaking the organisation and completion of such multi-author undertakings as encyclopedias, dictionaries and the like, although without prejudice to any claims of the contributors in their individual contributions.<sup>102</sup>

48 German law, by contrast, does not appear to deal in detail with multi-authored works, apart from providing for the possibility of joint entitlements and exploitation where a work has been “created ... jointly” and the respective contributions “cannot be separately exploited”.<sup>103</sup> Dutch law appears silent on the question of joint authorship, but contains a “collective work” provision similar to the Italian and French ones where “separate works” are made under the supervision or direction of another person who is then deemed to be the author of the whole work.<sup>104</sup>

49 It will be clear from the above brief survey that issues of multiple authorship are dealt with differently and incompletely under both common law and civil systems, with little regard, one way or the other, to particular philosophical or legal traditions. Indeed, it may be supposed that, in the pre-online world at least, most of the conceptual issues outlined above were handled contractually between the parties and did not really arise as practical issues of great importance.

50 This situation, however, may change as we enter the online environment and consider the way in which many literary and artistic productions may now come into existence. Old verities and assumptions may no longer hold true, as in the case of Wikipedia entries where contributions may be made by a series of different individuals

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101 Law for Protection of Copyright and Neighbouring Rights (No 633 of 1941) (Italy).

102 Law for Protection of Copyright and Neighbouring Rights (No 633 of 1941) (Italy) Arts 3 and 7.

103 Law on Copyright and Neighbouring Rights (Germany) s 8(1).

104 Copyright Act 1912 (Netherlands) Art 5.1.

at different times and from different parts of the globe. Technology now makes possible the creation of new forms of expression online where there may be countless contributors but in which collaboration or even intention to merge can be said to exist at only the most abstract level. The definitional limitations of our present statutory provisions are more starkly revealed in relation to these new kinds of “productions” that may well look like complete literary or artistic works in their own right, but where the elements of collaboration and non-severability are arguably absent and where it may even be argued that the contributions of the individuals are insufficiently “authorial”. Consider, for example, the following hypothetical scenario devised by Jane Ginsburg:<sup>105</sup>

WhySpace operates a website that encourages ‘collaborative creativity’. It invites contributions of small increments of content from online participants in order to create ‘polyvocal’ collages of text, images or music. For example, in WhySpace’s ‘Build your own short story’ section, Stella Jobless, WhySpace’s founding genius and CEO, provides the title and opening sentence of a short story, then invites participants to create the rest of the story, one sentence per participant at a time (for ease of reference, we can call these the ‘stories’). After a given period of time has elapsed, no further contributions can be received, and the ‘story’ is then completed and placed online for the thousands of WhySpace subscribers to read.

51 How is the resultant “story” to be characterised for the purposes of copyright protection: who and what is protected here? In particular, taking Australian and Singapore laws as a starting point, is it a work of joint authorship?

52 **Who are the authors?** While the individual contributors are certainly engaged in “authorial” kinds of activities, it may be doubted that their individual contributions will be regarded as works of authorship in their own right under Australian law, because of the *de minimis* policy considerations discussed at para 22 above (*Fairfax et al*). Does this matter? If the old nostrum of authorship and original works being correlatives is referred to, it might be said that a person can only become an “author” under the Copyright Acts where what that person does results in the production of a “work” and that the same principle should apply to each co-author as well. However, this goes too far, and as noted above, there is nothing in the case law to support such an extreme application in the case of works of multiple authors. A better way of approaching this would be to say that each alleged co-author must make an “authorial contribution” in the sense of contributing to the final form of expression that the alleged joint work takes. This would obviously

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105 This was devised for a joint seminar on authorship in the digital age that the present author and Jane Ginsburg gave at the Universities of Oxford and Cambridge in October 2010.

exclude those who simply provide ideas, information or, more generally, the inspiration for what is expressed. On the other hand, constructing and writing a single sentence as a contribution to the Whyspace story in the scenario given above might well display sufficient authorial character, in the sense of requiring the application of some level of intellectual skill and judgment, even creativity, although the sentence itself, like the headlines in *Fairfax*, might be incapable of protection as a literary work on its own because of other considerations such as public policy or the application of some kind of *de minimis* rule. There is no reason, then, why each Whyspace contributor should not be considered as an “author” for the purposes of the Australian and Singapore definitions. Query, however, whether this conclusion would so readily follow where the individual contributions consist of just a single word or a couple of words, or a single line or shape, in the case of a collage created online by multiple contributors.

53      **Collaboration?** If the preceding requirement can be satisfied in most instances, it is less likely that the second requirement will be. The online contributors are unknown to each other and/or far removed from each other in time and place. Each contributes a link in the progression of the story but no more, and there is no collaboration between any of them: the ultimate co-ordinator or orchestrator of the production of the story may be Stella, but even she just starts off the whole process and is disengaged thereafter until such time as she brings the activity to an end. Is there a need therefore to rethink what “collaboration” might mean in the digital environment? For example, should the fact that the separate contributions are made according to an overall direction or plan provided by an initiator such as Stella, be enough?

54      **Non-severability of contributions?** This does not appear to be a problem here: each person contributes a sentence and is capable of being readily identified (no difficulties here about identifying the human contributor of each sentence, particularly given the power of digital technology). This is quite unlike the making of the headlines and articles in *Fairfax* where a number of persons (sub-editors, reporters and other participants in production conferences) contributed at different stages to the final headlines and articles, and these individual contributions could not be readily severed. On the other hand, in that case, an argument that each headline and article to which it was attached could be regarded as a work of joint authorship was rejected, as it was possible to sever the different contributions in relation to each of these components. This may seem a curious result dependent on the particular facts of that case, given the general collaborative character of most newspaper offices (traditionally, at least).

55 **Intent to be co-authors, a common design?** A different result to *Fairfax* may follow under the US definition, in that it may well be possible to infer a common intent in this instance, and it is not necessary that the contributions are intended to be inseparable, so long as there is interdependence, which would certainly be the case here.

56 The above analysis therefore suggests that a gap in protection will arise under present Australian and Singapore law, leading to the interesting consequence that there would be no protection at all for the completed Whyspace story, apart from a possible (faint) claim by Stella to be the author of a compilation (but what has she compiled, by way of selection, arrangement or presentation, besides merely having provided the beginning and the end of the story?). So far as civil law authors' rights systems are concerned, Dutch law may provide a solution in the sense of identifying an author (Stella),<sup>106</sup> but again this will depend upon being able to show that the overall work has been produced according to her plan and under her guidance and supervision (not obviously the case here). An examination of the approaches in other authors' rights laws reveals that no clear solution to these issues is to be found either, even under their categories of "collective work".<sup>107</sup>

57 At the end of the day, all that can be said is that there are inadequacies in the way these different issues are approached under both international and national laws, and there is a need for workable rules for dealing with these new modes of creation. At the very least, the requirement of collaboration needs to be rethought, and likewise the removal of the non-severability requirement. More substantively, the introduction of a common intent requirement, as in the US, might provide a suitable mechanism for dealing with many of the situations involving multiple authors that arise in both the traditional print and online environments. Ultimately, of course, copyright law may have a limited role to play here, particularly in the context of online productions, in that many of these will be governed by contractual arrangements between those involved or will be made pursuant to agreed policies and/or according to canons or conventions of behaviour developed between members of the relevant online community.

58 One legal device, however, that is presently unknown in Australian and Singapore copyright law but which may be worth considering, is the concept of "deemed authorship". This is to be found in some other common law as well as civil law systems, and is considered briefly in the next section.

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106 Copyright Act 1912 (Netherlands) Art 5.1.

107 See paras 44–48 above.

## XI. Deemed authorship – The “looks like” issue

59 The concept of deemed authorship has already been touched on above in respect of the provisions for collective works in French and Italian copyright laws. This means simply that in some situations a specific person, or more controversially a legal entity, may be deemed to be the “author” of a particular work. The instances in which this may occur are varied, ranging from the “work for hire” provisions in US law,<sup>108</sup> under which employers and, in some instances, contractors or commissioners, are treated as “authors”, to the collective work provisions of French and Italian laws already noted above that deem the organiser or director of the collective enterprise, such as an encyclopedia or dictionary, as the “author” of the “whole” work that results from this enterprise. Issues of practicality and convenience can be seen at play here, and seem to be unlinked to any specific view on the sanctity or otherwise of authors’ rights (although it must be said that most non-US laws, including those of Australia and Singapore, are more purist in their approach to employment and commissioning relationships, treating the employee or contractor as the “authors” of works created in their employment or under commission, but then vesting the economic rights immediately in the employer or commissioner).<sup>109</sup>

60 Nonetheless, the example of online creation given in the preceding section poses a potentially difficult case for the application of a deemed authorship rule such as these, as the contributors are neither employees nor commissioned to do what they are doing (as in the case of the US), and may also not be part of an overall directed or supervised project in the way contemplated by the traditional collective work provisions of French and Italian law. While the individual contributors may be notionally entitled to claim protection for their individual contributions, at least in some instances, the peculiar result may follow that there is no protection for the work as a whole because the requirements for a work of collaboration or joint authorship are not otherwise satisfied. This is analogous, though not identical, to the situation where a work is wholly produced by computerised processes (for example, the telephone directories in *Telstra* or the satellite weather map): there will be no author and no protection, notwithstanding that the work produced would undoubtedly be protected if it could be directly attributed to a human author. Can one reason from the final result (the final story, in the Stella example – if it looks like a duck, quacks like a duck, then it must be a duck) to find that there is nonetheless an original work of authorship, joint or otherwise here?

108 Copyrights 17 USC (US) § 101; Copyright Act of 1976.

109 See, for example, ss 35(4)–35(6) of the Copyright Act 1968 (Act No 63 of 1968) (Cth) (Aust) and the parallel Singapore provisions in ss 30(4)–30(6) of the Copyright Act 1987 (Act 2 of 1987).

61 A possible solution is to be found in the unique provision in UK law referred to above with respect to computer-generated works:<sup>110</sup>

In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

62 The starting point of this provision is that the work in question is “literary, dramatic, musical or artistic” (that is, it looks like a duck); all that is needed is to identify the person in whom the copyright may be vested. There may, of course, be an argument that, in the case of a computer-generated work, the “arranger” has no claim to authorial status in any event because of his remoteness from the actual expression of the work that has been generated (the very argument that proved fatal for the plaintiff in *Telstra*). Such a claim is not so readily made in the case of an online production such as that initiated by Stella in the example above: she does, after all, conceive the format in which the individual contributions will be made and also determines when they will come to an end. Such decisions are arguably more “authorial” in character than those of a person programming a computer in a satellite to take a series of photographs at particular times in particular places in the orbit of the satellite. However, if these forays into the realm of deemed authorship are thought to be stretching the notion of authorship too far,<sup>111</sup> a compromise would be to accord a neighbouring right to the arranger or initiator (as in the case of Stella) or to the programmer of the computer (it does not appear that this option arises under UK legislation).

## XII. Concluding remarks

63 Enough has been said at the outset to indicate that international standards with respect to the issues of authorship and originality of works are, at best, indeterminate and unsettled. A case might be made

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110 Copyright, Designs and Patents Act 1988 (c 48) (UK) s 9(3).

111 For example, it might be objected that such a solution is contrary to the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) because the latter, as noted in this article, is an instrument concerned with the rights of authors, who are assumed to be humans. Oddly enough, there is no express stipulation to this effect in the Berne Convention, notwithstanding the implication that this should be so: see Art 7(1), which specifies the general term of protection as being the life of the author plus 50 years. On the other hand, as seen above, the Berne Convention does not contain any definition of “author”, which is therefore left to national laws to determine for themselves. In consequence, it should be permissible for national laws to define “author” so as to include certain persons as “deemed authors” in the various circumstances described above.

that “intellectual creation” is required under the Berne Convention, but what does this mean? Much is left to national laws, where traditionally there has been a divide between common law (copyright) and civil law (authors’ rights) systems. However, as we have seen, the gap appears to be diminishing, particularly in Australia and possibly now in Singapore. Significantly, courts in both countries have underlined, indeed re-emphasised, the need for there to be a clear link or nexus between authors and their works before a claim to protection can arise.

64 Having said this, difficult issues still remain as to what is meant by the terms “authorship” and “work”, and how far these terms can extend. These issues remain either unresolved or untested in our present laws and little assistance is provided in the international agreements. Notably, the following issues arise:

(a) There is the question of how far the expressive activities of authors include the processes of restoration and recreation of works; allied to this is the question of what degree of originality is required between successive versions or iterations of a work;

(b) The point at which a “work” becomes a protected work in terms of quantum is unclear: should this just be determined by the presence of authorial activity or should some public policy consideration come into play, where the scope of protection, if accorded, may then become a disproportionate intrusion into the public domain?;

(c) There are “boundary issues”, where there may be a real question as to whether there should be differences in the way in which works of visual art and text-based works are treated legally;

(d) The issue of works created by non-humans remains: if traditional authors’ rights protection is no longer available here, would this be more appropriately provided under a neighbouring right regime, the obverse of which is that there may be no protection at all for productions that are still the result of considerable time, effort and investment of resources?; and

(e) The issue of multiple authorship remains at large, particularly in the online environment.

65 There are more questions than answers here, but these are starting points for a wider agenda for discussion and change as copyright and authors’ rights laws move into the 21st century.