Reforming Copyright Law to Encourage Creativity in Kenya:
A Comparative Study of Kenya, the United Kingdom and the United States

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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

(Signature) ……

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THESIS ABSTRACT

This thesis proposes reform to Kenyan copyright law for the encouragement of creativity. It is argued that the encouragement of creativity is the key objective of copyright law. Creativity is a highly derivative process drawing on existing ideas and concepts. Kenyan creativity draws heavily on its culture, particularly its traditional cultural expressions. Kenya's traditional cultural expressions are currently protected under a *sui generis* regime that restricts the creative re-use of ideas. It is therefore urged that the tried and true edifice of copyright law is a more appropriate regime for the regulation of traditional cultural expressions, in order to encourage creativity. However, as will emerge, copyright law is not free from its own inadequacies.

As its methodology this thesis employs legal and theoretical perspectives. Regarding legal perspectives, an examination, review and comparison of the copyright laws of Kenya, the United Kingdom and the United States demonstrates that the structure of copyright law has led to a failure in it adequately encouraging creativity. Instead of understanding and providing for the true nature of creativity, as a derivative process, copyright law valorises the Romantic "author-genius". Theoretical perspectives reveal that this position has arisen due to copyright law being dominated by economic concerns.

The domination of law as well as culture by economic concerns is cautioned in the theory of social three-folding put forward by the economist Rudolf Steiner. Social three-folding calls for a freeing of law and culture from economic dictates. This research draws on Steiner's theory of social three-folding as a framework through which Kenyan copyright law can be reformed and conceptualises creativity, primarily, with regard to John Locke's "theory of knowledge".

On this backdrop an online database for traditional cultural expressions in Kenya is proposed. The unique aspect of this database would be that it would contain a guiding statement on what may be deemed as ideas, the building blocks of creativity, in a particular traditional cultural expression.

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CHAPTER ONE

INTRODUCTION

1.1 Introduction to the thesis

This chapter acts as the foundation of the thesis. In the first part of this chapter an introduction to the thesis is made. This part encapsulates the main arguments and perspectives of the thesis. This is followed by the research questions; the research methodology; the relevance of the research; an introductory discussion of key concepts and terminology; a general overview and background discussion on the legal system and judicial structure of Kenya; and a brief discussion on the structure of the thesis highlighting the arrangement of the other chapters, detailed in that order.

This research examines how copyright law, specifically, Kenyan copyright law, may be reformed so as to enable it to attain its principal objective, the encouragement of creativity.[1] A characteristic aspect of creativity in Kenya is

[1] It is important to note from the outset that this preposition has not been unreservedly endorsed by scholars. A consideration of early UK and US copyright laws appears to endorse this position. The UK Statute of Anne 1710 was formally titled, 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned' (emphasis added). Part of its stated aim was '…the Encouragement of Learned Men to Compose and Write useful Books'; On its part the US Constitution's Intellectual Property Clause, also termed the Copyright Clause or the Creativity Clause (Daniel Gervais and Dashiell Renaud, 'The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It' (2013) 28(3) Berkeley Technology Law Journal 1459, 1460), article I, section 8, clause 8, provides that the US Congress shall have power 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries' (emphasis added). See also, Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) 14 – 16; Julie E. Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40(3) UC Davis Law Review 1151; Omri Rachum-Twaig, 'Recreating Copyright: The Cognitive Process of Creation and Copyright Law' (2017) 27(2) Fordham Intellectual Property, Media and Entertainment Law Journal 287, 288. It is appreciated that an opposing view argues that copyright is not required to facilitate creativity, rather it is an impediment to the free and open exchanges of knowledge, culture and technology that form the core of creative modalities. Lawrence Lessig, *Free Culture: How Big Media uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press, 2004) 199. Further, others argue

that it strongly reflects the country's traditional culture.[2] Kenya boasts of its rich and diverse culture(s).[3] The country's Constitution emphatically makes this point, 'This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation'.[4] Additionally, it is explicitly noted in the Constitution that there's a freedom of culture and the State shall not discriminate against any person based on their culture.[5]

Towards the aim of the thesis proposing reforms to Kenyan copyright law for the encouragement of creativity an examination and review of the copyright laws of Kenya, the United Kingdom ("UK") and the United States ("US") is undertaken.[6] It is argued that as currently structured, the copyright laws of Kenya, the UK and the US are not able to adequately meet their primary objective; which as noted above is the encouragement of creativity. This is because copyright law is dominated and guided by economic considerations[7] instead of focusing on the creative process itself.[8]

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that copyright law exists for different purposes such as being a just reward for labour. For an in-depth consideration of these viewpoints see Chapter 5, part 5.3.

[2] This contention is best evidenced by the discussion on Kenya's contemporary creative industries in Chapter 2, part 2.2.4. See also Michael Shally-Jensen, *Countries, Peoples and Cultures: Eastern and Southern Africa* (Salem Press 2015) 120 – 124; Kathire Kiiru and Maina wa Mutonya, 'Music, Dance and Social Change in Eastern Africa' in Kathire Kiiru and Maina wa Mutonya (eds), Music and Dance in Eastern Africa (Twaweza Communications 2018) 8 – 9.

[3] As is highlighted in part 1.5.3 below, which offers an introductory discussion on the term culture, culture is a wide concept incorporating various considerations. The "culture of Kenya" referenced here and throughout the thesis refers to the composite culture of the various peoples and communities in Kenya. It is to be noted however, that each of these peoples and communities have their own "cultures" with unique and characteristic aspects. Neal Sobania, *Culture and Customs of Kenya* (Greenwood Press 2003).

[4] Constitution of Kenya 2010, article 11(1).

[5] ibid, articles 27(4) and 44(1), (2)(a) and (b).

[6] The jurisdictions are listed and examined in alphabetical order throughout the thesis.

[7] The economic-oriented structure of copyright law became settled following the merging of intellectual property with the global trade agenda subsequent to the entering into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") on 1 January 1995 under the auspices of the World Trade Organisation ("WTO"). However, even before TRIPS there were clear signs of the influence of economic concerns over copyright law; with some arguing that this influence began as early as 1710 with the Statute of Anne. See, John Feather, 'The Book Trade in Politics: The Making of the Copyright Act of 1710' (1980) 8 Publishing History 37; Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 42 – 43. Deazley rejects Feather's and Patterson's view and maintains that the Statute of Anne was primarily concerned with the continued production of books. Ronan

Copyright law valorises the Romantic "author-genius"[9], a rhetoric which has been a stalking horse for the furtherance of economic considerations.[10] Martha Woodmansee contends that the dominant structures of British and American copyright law emerged around the same time as the Romantic conception of authorship at the end of the eighteenth century.[11] Peter Jaszi endorses Woodmansee's contention and asserts that it was not by coincidence that the Romantic period saw the emergence of many doctrinal structures that dominate copyright today.[12]

The author was a creation of writers who sought to establish the economic viability of their "profession" in an era where there were no safeguards for their labour which are today codified in copyright laws.[13]According to the Romantic author-genius ethic, an author creates works extemporaneously using his creative genius thus, leading to the production of utterly new and unique

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Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Hart Publishing 2004) 45. All in all, it is accepted that before the enactment of the Statute of Anne and the protection for authors that it offered copyright was purely a right for entrepreneurs – book binders, printers and publishers, as was the case with the printing patent, the "common law copyright" and the "stationer's copyright" of the Stationers' Company.

[8] Katarzyna Gracz, 'Regulatory Failure of Copyright Law Through the Lenses of Autopoietic Systems Theory' (2014) 22(4) International Journal of Law and Information Technology 334, 341; Feather (n7).

[9] The phrase "author-genius" was developed by the scholarship that challenged the Romantic aesthetics propounded by copyright law. See for example: Martha Woodmansee, 'The Genius and the Copyright : Economic and Legal Conditions of the Emergence of the "Author" (1984) 17 Eighteenth Century Studies 425; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455; Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 Representations 51; David Saunders, *Authorship and Copyright* (Routledge 1992); Mark Rose, *Authors and Owners* (Harvard University Press 1993). However, the validity of associating the figure of the author-genius with Romanticism has been critiqued as being too circumscribed. See for instance, Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 156 -159.

[10] Woodmansee (n9) 426; Jaszi (n9) 500.

[11] Woodmansee (n9).

[12] Jaszi (n9), 456. Jaszi however clarifies that by the mid-seventeenth century, well before the enactment of the Statute of Anne, writers had begun to assert claims to special status by designating themselves as "authors". It was during the eighteenth century that "authorship" became intimately associated with the Romantic movement in literature and art, and this influence carried on in the enactment, development, and interpretation of copyright laws.

[13] Woodmansee (n9) 426.

expressions.[14] Creativity, however, is a more equivocal process than what the Romantic conceptualisation admits. Creativity is a derivative process, drawing on existing ideas and concepts.[15]

The arguments presented in this thesis are considered through the lens of the theory of social three-folding which was put forward by the Austrian economist Rudolf Steiner[16] This theory posits the autonomous development of what it recognises as society's three domains - the economic, political and cultural domains.[17] Social three-folding falls under a wider field known as critical theory, which is a school of thought which offers a reflective assessment and critique of society and culture.[18]

Pertinently, critical theory offers solutions to the societal problems that it highlights.[19] According to social three-folding an undesirable social state has been caused by the economic domain's dominance over the political domain and cultural domain.[20] Key in resolving this "social problem" is enabling the

[14] Jessica Litman, 'The Public Domain' (1990) 39(4) Emory Law Journal 965, 966; Naomi Abe Voegtli, 'Rethinking Derivative Rights '(1997) 63(4) Brooklyn Law Review 1213, 1254.
[15] This contention is gleaned from John Locke's "theory of knowledge" highlighted below. See also: Andrea Reckwitz, *The Invention of Creativity: Modern Society and the Culture of the New* (Steven Black tr, Polity 2017) 102 – 103; Daniel Dennet, 'Collision, Detection, Muselot, and Scribble: Some Reflections on Creativity' in David Cope (ed), *Virtual Music: Computer Synthesis of Musical Style* (MIT Press 2001) 283; Karl Popper and John C. Eccles, *The Self and Its Brain: An Argument for Interactionism* (Routledge 1983) 14; Keith Sawyer, 'Creativity, Innovation and Obviousness' (2008) 12(2) Lewis & Clark Law Review 461, 464; Roland Barthes, 'The Death of the Author' in *Image Music Text* (Stephen Heath tr, Fontana Press 1977) 160.
[16] Rudolf Steiner, *Basic Issues of the Social Question: Towards Social Renewal* (Frank Thomas Smith tr, Rudolf Steiner Press 1977). Available at the *Institut Für Soziale Dreigliederung* (Institute of Social Threefolding) website <http://www.threefolding.org/archiv/800.html> accessed 18th November, 2019.
[17] ibid 10 – 13.
[18] Stephen Eric Bronner, *Critical Theory: A Very Short Introduction* (Oxford University Press 2011) 2. See the discussion on critical theory in part 1.5.1 below.
[19] Bronner (n18).
[20] Steiner (n16) 58 – 66.

cultural domain, wherein the artefacts of creativity arise, to develop independently without domination by economic and political considerations.[21]

This framework offers an opportune perspective for the consideration of reform to copyright law, whose key objective is the encouragement of creativity but owing to its domination by economic considerations has failed to adequately accomplish this goal.

Kenya like most societies exhibits the three domains of Steiner's tri-formation. The cultural domain in Kenya can be categorised as traditional. As noted, A characteristic aspect of creativity in Kenya is that it draws heavily on its traditional culture, specifically, its traditional cultural expressions ("TCEs"). TCEs may be loosely described as traditional art.[22] The country's contemporary creative industries such as music, fashion and film derive from its TCEs.[23]

The social problem that Steiner identified, the economic domain's dominance over the cultural domain, is apparent in Kenya. TCEs in Kenya are protected under a *sui generis* law, the Protection of Traditional Knowledge and Cultural Expressions Act 2016 ("TCEs Act"). The TCEs Act emphasises existing property rights and constrains further creativity. The Act does so by "locking-in" ideas, the building blocks of creativity, in two ways. First it denotes that TCEs shall not be used for the creation of derivative works without the prior informed

[21] Steiner (n16) 11, 47.
[22] Andreas Rahmatian, 'Universalist Norms for a Globalised Diversity: On the Protection of Traditional Cultural Expressions' in Fiona Macmillan (ed), *New Directions in Copyright Law*, vol 6 (Edward Elgar 2007) 200. A full definition and description of TCEs is made in Chapter 2, part 2.2.1.
[23] Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring and Innovative Lawyering 2016) 12 – 13; Kennedy Manyala, 'Business Environment Reform Facility: Creative Economy Business Environment Reform, Kenya, (Main Report)' (UK Department for International Development 2016) 20 - 26.

consent of the owners of the relevant TCE.[24] Here the problem arises with the definition of a derivative work provided by the Act. The Act offers a wide and equivocal definition of a derivative work as, '<u>any</u> intellectual creation or innovation <u>based upon or derived from</u> traditional knowledge or cultural expressions'.[25]

All artistic works inherently have two elements to them, their expressed form and what copyright law terms an idea.[26] Copyright law regulates between ideas and expressions through the doctrine of the idea/expression dichotomy.[27] According to which, ideas do not receive protection, only their expressed forms do.[28] This preposition is settled in copyright law and theory and it is argued that the same is true of TCEs, many, if not all, of which take the same expressed form as copyright works.[29]

Making a distinction between the expressed form of an artistic work and the idea latent therein supports the cultural domain, because creativity derives from existing concepts and ideas.[30] Therefore, the ready and easy access to and use of ideas is necessary for creative activities to arise.

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[24] TCEs Act, section 18(2)(h).
[25] ibid, section 20(2) (emphasis added).
[26] Paul Goldstein, Goldstein on Copyright, vol 1 (Wolters Kluwer 2006) § 2.3.1.
[27] The doctrine has also been termed the "idea-expression divide" and the "idea-expression distinction". Patricia Loughlan, 'The Market Place of Ideas and the Idea-Expression Distinction of Copyright Law' (2002) 23(1) Adelaide Law Review 29.
[28] Mary Vitoria and others, *Laddie, Prescott & Vitoria: The Modern Law of Copyright and Designs* (4th edn, LexisNexis Butterworths, London 2011) [3.74]; Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (17th Ed. Sweet and Maxwell 2016) [2-09].
[29] For instance, traditional drawings, paintings, and sculptures have the same form as artistic works; folk songs as musical works; and folk tales as literary works. Paul Kuruk, 'Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States' (1999) 48(4) American University Law Review 769, 792. Chapter three, part 3.4 offers a discussion on why, despite this fact, it has been advanced by copyright law scholars that TCEs do not fit within the framework of copyright works.
[30] An introductory discussion on this argument follows below in the discussion on John Locke's "theory of knowledge" and is explicated in Chapter 4, parts 4.3 and 4.4.

A law that regulates the cultural domain ought to have consideration of this fact. It should on one hand provide for the protection of outputs of creativity and on the other hand it should continue to facilitate further creativity.[31] It is argued that the "all-encompassing" definition of derivative works in the TCEs Act goes beyond protecting expressions of TCEs and protects ideas therein as well. Indeed, by preventing the use of ideas within TCEs, the TCEs Act is effectively propagating the author-genius construct.

Second, the TCEs Act precludes creative activity by creating a property right in TCEs in perpetuity thus, curtailing the emergence of a public domain for TCEs from which subsequent creators may benefit.[32] In its general categorisation the public domain refers to works that are free from copyright specifically, works for which the term of copyright has expired.[33] Edward Samuels notes that no concrete "theory of the public domain" has emerged owing to the diverse public policy objectives that underlie the doctrine.[34] This has led to the doctrine being conceptualised and defined in various ways.[35]

Jessica Litman has conceptualised the public domain as including ideas.[36] It is argued that there is merit in creating a public domain for TCEs from which creators may further borrow as the public domain works together with the

[31] The need for the balance between these two aspects is elaborated in Chapter 3, Part 3.2.1.
[32] TCEs Act, section 17.
[33] Edward Samuels, 'The Public Domain in Copyright Law' (1993) 41(2) Journal of the Copyright Society of the USA 137, 151.
[34] ibid.
[35] ibid.
[36] Litman (n14) 968, 992 – 993. Litman defines the public domain as a 'commons that includes those aspects of copyrighted works which copyright does not protect'. These include, 'ideas, methods, systems, facts, utilitarian objects, titles, themes, plots, scènes à faire, words, short phrases and idioms, literary characters, style, or works of the federal government'.

idea/expression dichotomy for the encouragement of creativity.[37] In this regard the expressed form of a TCE, in addition to the idea(s) latent therein, becomes a basis for subsequent creativity.[38]

It is therefore argued that the TCES Act is guided by the dictates of the economic domain by accentuating existing property rights and inhibiting further creativity. Thus, it is proposed that the legal regulation of TCEs in Kenya ought to fall under a reformed copyright law for the encouragement of creativity. Whereas copyright law is not bereft of inadequacies it is maintained that, with focused reforms, it is an appropriate regime for the encouragement of creativity.

Copyright law has a tried and tested edifice which has developed over centuries.[39] As will be seen, whilst copyright law's doctrine on the non-protection of ideas is still in need of development to proffer clarity, it is a good starting point regarding the encouragement of creativity. It is maintained that with focused reforms copyright law can appropriately play the role of encouraging creativity in Kenya.

The reforms required to be made to copyright law to enable it to obtain its key objective of encouraging creativity are centred on freeing creativity and the cultural domain from the domination of the economic domain and advocating for the focus of copyright law to be on encouraging creativity to arise

[37] Wendy J Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102(7) Yale Law Journal 1533, 1559.
[38] Chapter three, part 3.4.4 explicates on how the public domain for TCEs would arise, arguing for a period of protection of fifty years. The concerns of traditional communities in having their TCEs "fall" (or "rise", as the case may be) into the public domain are also discussed.
[39] The first copyright statute, the Statute of Anne, came into force in 1710.

autonomously. To this end, it is urged that ideas ought to be readily and freely availed for use by potential creators.

Ideally, the idea/expression dichotomy, copyright law's "fundamental axiom"[40] should play the role of regulating the use of ideas. An examination and comparative review of the doctrine in the copyright laws of Kenya, the UK and the US reveals that the current formulation and interpretation of the doctrine is unprincipled, and this has led to a chilling effect on creativity.[41] The problem in this regard has been how ideas have been interpreted. Copyright law chooses what an idea is almost whimsically.[42]

Towards the end of reforming Kenyan copyright law for the encouragement of creativity it is maintained that the country would benefit from an express statutory provision of the doctrine, akin to the position in the US in section 102(b) of the US Copyright Act of 1976 ("US Copyright Act"), stating explicitly what copyright does not protect under the rubric of "ideas"; and taking into consideration the important and characteristic fact that creativity in Kenya is highly derivative of its TCEs.

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[40] *Feist Publications v Rural Telephone Services Company* 499 U.S. 340, 344 (1991) (Justice O'Connor). Note the discussion in Chapter , part 6.4.3 on the veracity of this claim in respect of UK copyright law.

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

[42] Deming Liu, 'Reflections on the Idea/Expression Dichotomy in English Copyright Law' (2017) 1 Journal of Business Law 71; Patrick Masiyakurima, 'The Futility of the Idea/Expression Dichotomy in UK Copyright Law' (2007) 38(5) International Review of Intellectual Property and Competition Law 548; Jacqueline D. Lipton & John Tehranian, 'Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation' (2014-15) 109(2) Northwestern University Law Review 383; Richard H. Jones, 'The Myth of The Idea/Expression Dichotomy in Copyright Law' (1990) 10(3) Pace Law Review 551; Edward Samuels, 'The Idea-Expression Dichotomy in Copyright Law' (1988-89) 56(2) Tennessee Law Review 321; Cao Xinglong, 'Facets of the Expression/Idea Dichotomy' (2013) 35(10) European Intellectual Property Review 597.

It may be averred that by protecting TCEs under copyright law, they will lose the strong protection that they currently have under the *sui generis* TCEs Act, to the detriment of the traditional communities from which the TCEs come from.[43] However, in response, copyright law is a well-established property right regime.[44] Moreover, and pertinently, the need to balance the needs and interests of the traditional communities with those of the larger society cannot be gainsaid.

Creativity is central to mankind's welfare. Indeed, creativity is necessary for a society's existence and propagation.[45] Specifically, "artistic creativity" generates ideas and artefacts that are both new and positively valuable.[46] A reformed copyright law would adequately balance the interests of the traditional communities in having their TCEs protected, all the time catering to the wider interests of society by availing ideas for the use of creators.

Moreover, it is urged that subjecting TCEs to copyright law would have a positive economic impact as this would lead to the growth and development of Kenya's creative industries many of which, such as fashion, music, and film, as noted above, draw heavily from TCEs.[47]

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[43] See the discussion on the definition, description and nomenclature of "traditional community" in Chapter 2, part 2.2.1.

[44] The UK Copyright, Designs and Patents Act 1988 ("UK CDPA 1988") at section 1(1) explicitly states that copyright is a property right. Whereas the same has not been expressly stated in the copyright laws of Kenya and the US, copyright law scholars in these two countries have taken this position. See, for instance, Sihanya (n25) 194; Craig Joyce and others, *Copyright Law* (10th edn, Carolina Academic Press) 1.

[45] James Griffin, *The State of Creativity: The Future of 3D Printing, 4D Printing and Augmented Reality* (Edward Elgar 2019) 3; Sawyer (n15) 3; Reckwitz (n15) 11.

[46] Margaret Boden, 'Creativity' in Berys Gaut and Dominic McIver Lopes (eds), *The Routledge Companion to Aesthetics* (2nd Edition, Routledge 2005) 477. See part 1.5.2 below for a discussion on "artistic creativity" as the type of creativity that this thesis researches *vis-à-vis* other types of creativity.

[47] Part 1.3.2.1.1 below sets out the discussion regarding the role of the creative industries in economic growth and development and specifically the Kenyan government's appreciation of the potential for positive economic impact by these industries.

To effect these changes it is argued that reform to the copyright law that is currently in operation in Kenya, the Kenya Copyright Act 2001[48] ("Kenya Copyright Act") ought to be enacted, providing for TCEs as a new and separate category of copyright work. Under the Kenya Copyright Act there are seven categories of works that receive copyright protection – literary works, musical works, artistic works, dramatic works, audio-visual works, sound recordings, and broadcasts.[49]

Many TCEs may already be deemed as falling within one of these categories particularly, the "authorial" works that is, original works, which the Act provides as being literary, musical and artistic works.[50] Many other TCEs owing to their nature or due to particular principles of copyright law do not appropriately fit within copyright's structure. For instance, folk songs, are mostly "created" and passed down from generation to generation in oral form.[51] Owing to the requirement that copyright works be fixed in a material form that is currently in effect in Kenya such songs would not automatically be liable for copyright protection.[52]

[48] There has been a recent amendment to this Act, the Copyright (Amendment) Act 2019, which primarily seeks to provide digital copyright reform and strengthen the collective management of copyright works. The 2001 Act remains the principal law.

[49] Kenya Copyright Act, section 22(1). However, oddly, in section 2 of the Act an author of a "published edition" is included in the definition of author, yet published editions are not a stated subject matter of copyright.

[50] Kenya Copyright Act, section 22(3)(a). In express terms, the Act does not include dramatic works within the scope of original works. Indeed, dramatic works were only included in the list of works receiving copyright protection through the 2019 amendment to the Act. The Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") has been interpreted as providing that authorial works including dramatic works ought to be "intellectual creations" (see, articles 2(1) and (5)) and as such in most jurisdictions including the UK, UK CDPA 1988, section 1(1)(a)), and the US, US Copyright Act, § 102(a)) these works are required to be original.

[51] WIPO, 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore' (WIPO 2003) 42.

[52] A well-known fact of copyright law is that the Berne Convention, article 2(2), makes it clear that national laws need not provide that fixation in some material form is a general condition for protection. Kenya has chosen to include a fixation requirement for copyright protection in its copyright law, Kenya Copyright Act, section 22(5). The same is true of the UK, UK CDPA 1988, section 3(2), and the US, US Copyright Act, § 102(a).

To overcome these challenges it is submitted that TCEs ought to be a special category of work. A special category is important as it would enable TCEs to maintain their character as TCEs. What differentiates TCEs from regular copyright works is their "traditional" nature, which gives them unique characteristics. For instance, a considerable number of TCEs are forged with sacred and spiritual meaning.[53]

For fullness and the proper functioning of this reform, the TCEs Act would also have to be reformed to reflect this new reality of removing TCEs from its ambit. The TCEs Act regulates both TCEs and traditional knowledge ("TK"). While TCEs may be considered a part of TK, TCEs and TK are conceptually different.[54] TK effectively refers to traditional "know-how". Therefore, it is argued, the nature of TK is far removed from the nature of the types of works that copyright offers protection to. Accordingly, the proposals for reform that this thesis explores are for the copyright protection of TCEs, without further consideration of the protection of TK under the TCEs Act.[55]

In conceptualising creativity this thesis draws primarily on "the theory of knowledge" propounded by the philosopher John Locke. Locke's ideas have remained hugely influential in philosophy, political thought and in many other

[53] Christine Haight Farley, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer' (1997) 30(1) Connecticut Law Review 1, 10 – 11. Chapter 3, parts 3.3 and 3.4 explicate the separate category of copyright work for TCEs including how challenges to the copyright protection of TCEs particularly regarding authorship, ownership, originality, the public domain, tangibility and duration of protection are to be addressed.

[54] Chapter 2, part 2.2.1 details the nomenclature and categorisation of TK and TCEs.

[55] It is argued that the TCEs Act may provide an adequate regime for the regulation of TK. As noted above TK generally refers to know-how which in copyright terms would be considered "ideas" or "concepts" which copyright law does not protect. This contention can be gleaned from the decision of the US Supreme Court in *Baker v Selden* 101 U.S. 99 (1879), which is often cited as the genesis of the idea/expression dichotomy. In this case, the court held that a book describing a system of book-keeping did not give an author the right to exclude others from practising what was described in the book, only the right to exclude reproduction of the material in the book.

spheres.[56] In copyright law, Locke's labour theory is widely cited as a justification for copyright.[57] However, Locke also developed an important theory of knowledge. This theory, derived from Locke's *An Essay Concerning Human Understanding*,[58] provides that by combining what Locke terms as "simple ideas" together into "complex ideas" society can gain new knowledge which then ought to be disseminated to others.[59] It is contended that the process by which new knowledge emerges is equivalent to the process of creativity.

According to Locke simple ideas are ideas that contain only one uniform conception in the mind and are not distinguishable into different ideas.[60] Complex ideas are a combination of simple ideas.[61] Knowledge refers to the connection and agreement or disagreement and repugnancy of simple ideas.[62]

The process of coming up with complex ideas, is the same as that of deriving new knowledge, and these two processes are equivalent to the act of creativity. Locke was an Empiricist,[63] the central claim of Empiricism is that knowledge

[56] E. J. Lowe, *Locke* (Routledge 2005) 1.
[57] Locke's labour theory is put forward as one of the key underpinnings for copyright law. Its basic premise is that a person who labours upon resources that are either unowned or "held in common" has a natural property right to the fruits of his or her efforts; and the state has a duty to respect and enforce that natural right. John Locke, *Two Treatises of Government: The Second Treatise* [1690] (P. Laslett ed, 2nd edn, Cambridge University Press, 1967) 11.
[58] John Locke, *An Essay Concerning Human Understanding* [1690] (T. Tegg and Son 1836).
[59] ibid Book II, Chapter XII §2; Book IV, Chapter I, §1 and §2. Although Locke's formulation of the theory of knowledge is the most prominent and influential and is the focal point in this discussion, other important theorists also advanced theses regarding knowledge. In this regard one may consider: George Berkeley, *The Principles of Human Knowledge* [1710] (Collins 1962); Étienne Condillac, *Essay on the Origin of Human Knowledge* [1746] (Hans Aarsleff tr, Cambridge University Press 2001); David Hume, *An Enquiry Concerning Human Understanding* [1748] (Hackett 1993).
[60] Locke (n58) Book II, Chapter II § 1
[61] Locke (n58) Book IV, Chapter II, § 1. However, it is contended that implicit within Locke's argument is that a complex idea may also arise from combining two other complex ideas. See the development of this contention in Chapter 3, part 3.4.4.
[62] Locke (n58) Book IV, Chapter II, § 1
[63] Locke is normally regarded as the father of British empiricism and was followed in his views by George Berkeley and David Hume. It has been noted that empiricism is a loose term which may mean several things. However, when the term is utilised, particularly with regard to British empiricism, the general disposition is that it refers to the argument that human beings can have

derives solely from experience.[64] Therefore a creator may hold in her mind a simple idea gained from having experienced a particular "work", she may then experience other works gaining further simple ideas. The creator may then combine these simple ideas to create a complex idea, that is a new work.

Locke's premise may be extrapolated into copyright law through the idea/expression dichotomy. In effect, for copyright law, Locke's simple ideas are what are termed generally as ideas, which do not receive copyright protection, whereas complex ideas, that is, new knowledge, that is, creativity, can be equated to expressions which are protected.

This thesis endorses Locke's view on knowledge, that is, creativity, underscoring that creativity arises when simple ideas are combined together. In other words, creativity is an incremental and derivative process. Locke's ideas on creativity are persuasive as one is able to see his arguments rehashed in present-day discourses on the topic.[65] Additionally, and pertinently, Locke's theory of knowledge was latent in the very early landmark UK and US copyright cases, particularly in *Millar v Taylor,*[66] *Donaldson v Beckett*[67] and *Baker v*

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no knowledge of the world other than what they derive from experience. John Dunn, J. O. Urmson and Alfred Jules Ayer, The British Empiricists (Oxford University Press 1992) v. On the other hand, proponents of innatism such as Plato and Descartes generally are of the contention that knowledge is knowledge is inborn, belonging to the mind from its birth. J. Radford Thomson, *A Dictionary of Philosophy: In the Words of Philosophers* (R.D. Dickinson 1887) 102.

[64] John Dunn, J. O. Urmson and Alfred Jules Ayer, The British Empiricists (Oxford University Press 1992) 2.

[65] Such modern discussions on creativity include those within the academic filed known as creativity research, which emphasises that creativity is a derivative process. It bears noting that Locke's theory of knowledge is itself derived from ideas on knowledge first presented in antiquity, particularly, by Plato and Aristotle. Griffin (n45) 137.

[66] (1769) 4 Burrow 2303, 98 ER 201.

[67] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774). Locke's theory of knowledge also influenced the early UK cases concerning translations and abridgements. See for instance, *Burnett* v *Chetwood* (1721) 35 Eng Rep 1008 and *Hawkesworth* v *Newbery* (1774) referenced in Benjamin Kaplan, *An Unhurried View of Copyright* (The Lawbook Exchange 2008*)* 12.

Selden.[68] These cases were highly influential in the formation of copyright law as we now know it.[69]

On the disquisition on creativity further recourse is had to the academic field known as creativity research. In modern times research on creativity has most prominently arisen within creativity research. Creativity research is today an established scholarly area which grew out of the desire to rationally explain creativity. It takes on an interdisciplinary approach incorporating the views of psychologists, neuroscientists, biologists, sociologists and anthropologists among other scholarly opinions.[70] Creativity research therefore offers a thorough and comprehensive perspective on creativity.

The practical implementation of this view of creativity as a derivative process, as propounded in Locke's theory of knowledge and in creativity research, in Kenya, is through a proposed online database of TCEs whereby information regarding TCEs would be available. Pertinently, based on the revamped idea/expression dichotomy, the unique aspect of this database would be a guiding statement on what may be deemed an idea within a particular TCE. Thus, ideas within TCEs would be readily identifiable and available for use by creators.

Whereas this research has notable strengths, particularly, that the recommendations and proposals from this work contribute to the pool of

[68] 101 U.S. 99 (1879). The analysis of this case law is developed in Chapter 5, part 5.5.2.
[69] See, Patterson (n7) 168 -179; Benjamin Kaplan, *An Unhurried View of Copyright* (The Lawbook Exchange 2008*)* 33.
[70] Keith Sawyer, Explaining Creativity: The Science of Human Innovation (2nd edn, Oxford University Press 2012) 4. Sawyer, a leading voice in the field, notes that creativity research also considers the viewpoints of scholars who study specific creative domains including historians of art, musicologists, philosophers of science, scholars of theatrical performances and legal scholars who study intellectual property.

literature in the area of copyright related issues in Kenya, as any academic study it inevitably contains some limitations. It is limited by its scope, it focuses on how copyright law can encourage creativity and does not consider the close discourse on encouraging "innovation" which it is argued is an area of consideration for patent law.[71] Additionally, this research does not put forward empirical data to underscore its premises instead adopting a theoretical approach. Ultimately, however, these limitations, ought to be viewed positively as they present avenues for further research that can be carried out in this area.[72]All in all, it is argued that the reforms to Kenyan copyright law put forward in this research would aid in the encouragement of creativity.

1.2 Research questions

In the furtherance of its thesis, this research explores three key questions:

1. How does the creative process occur? This question focuses on how creativity occurs in Kenya *vis-à-vis* in the Western world, specifically, the UK and the US. What emerges from this discussion is that creativity in Kenya mostly derives from TCEs; the UK and the US do not quite have a conception of TCEs and instead consider such "works" as part of the "public domain".[73] However, in all three countries it is noted that the nature of creativity is that it is an incremental process that relies on pre-existing ideas and the copyright laws of these nations do not fully acknowledge or respond to this fact.

[71] See the discussion on creativity *vis-à-vis* the related concept of innovation in part 1.5.2 below.
[72] Future research that may emerge from this work is discussed in Chapter 8, part 8.4.
[73] The public domain here being defined in accordance with its lay categorisation as containing works free from copyright. Litman (n14) 975.

2. How does copyright law understand and make provision for creativity? As noted above this thesis underscores the fact that creativity is incremental in nature and that there is, 'no new thing under the sun'.[74] More so, today, on the backdrop of digital technologies and the internet derivative works are the norm and copyright law's author-genius is indeed dead![75] However, copyright law continues to protect and reward the type of creativity that is based on the author-genius construct. Instead copyright law ought to conceive and interpret creativity in accordance with its real nature as a derivative process. To this end it is argued that copyright law should make ideas readily and freely available for creators.

3. How may Kenya's copyright law be reformed for it to achieve copyright law's stated objective of encouraging creativity? It is argued that the protection of TCEs in Kenya, through the Protection of Traditional Knowledge and Cultural Expressions Act 2016, a *sui generis* law, locks-in ideas and emphasises existing property rights. This is an exemplar of the economic domain's domination over both the political domain and the cultural domain, through a law that prevents the creative re-use of TCEs and ideas therein.

Ultimately, this thesis seeks to aid Kenyan law makers to create a copyright law regime that encourages creativity by focusing the discussion on how the creative process occurs.

[74] The Holy Bible, Ecclesiastes Chapter 1, Verse 9 (King James Version).
[75] Barthes (n15); Michel Foucault, 'What Is an Author?' in James Faubion (ed), *Aesthetics, Method, and Epistemology* (Essential, The New Press 1998).

1.3 Research methodology

In exploring its questions this research employs theoretical and legal perspectives.

1.3.1 Theoretical perspectives

The arguments presented in this thesis are considered through the lens of the theory of social three-folding and Locke's theory of knowledge. As discussed above, the main proposal of social three-folding is that creativity ought to arise free from the dictates of the economic system.

This thesis's understanding of creativity is based on "the theory of knowledge" put forward by John Locke. Additional recourse is had to the academic field termed creativity research. The upshot of these views is the endorsement of the derivative nature of creativity.

1.3.2 Legal perspectives

In its examination of how copyright law treats ideas this research focuses on the jurisdiction of Kenya, with auxiliary consideration of the UK and the US. The emphasis in this regard is statutes and judicial decisions from these three jurisdictions. International and regional instruments are also considered in so far as they have shaped domestic frameworks.

1.3.2.1 Choice of the jurisdictions

1.3.2.1.1 Kenya

The Government of Kenya has put forward an ambitious plan on how the country can become a middle-income economy by 2030.[76] Towards this end the country's main policy blueprint, *Vision 2030*, recognizes the importance of the creative economy.[77] Under this plan the government intends on implementing several projects within the creative industries.[78] This work is being developed and implemented by the country's Ministry of Sports, Culture and Heritage which has departments dealing specifically with culture and the arts in the

[76] Ben Sihanya, 'Reflections on Open Scholarship Modalities and the Copyright Environment in Kenya' in Jeremy de Beer, Chris Armstrong, Chidi Oguamanam and Tobias Schonwetter (eds), *Innovation & Intellectual Property Collaborative Dynamics in Africa* (UCT Press 2014) 203. According to Todaro and Smith the most common way to define the developing world is by gross national income (GNI) per capita. GNI per capita refers to the total domestic and foreign output claimed by residents of a country, consisting of gross domestic product, plus factor incomes earned by foreign residents, minus income earned in the domestic economy by non-resident. Several international agencies, including the Organization for Economic Cooperation and Development and the United Nations, offer classifications of countries by their economic status, but the best-known system is that of the International Bank for Reconstruction and Development, more commonly known as the World Bank. Michael P. Todaro and Stephen C. Smith, *Economic Development* (12th edn, Pearson 2014) 42. According to the World Bank the middle-income countries are a diverse group by size, population and income level. They are defined as lower middle-income economies - those with a gross national income per capita between $1,006 and $3,955; and upper middle-income economies - those with a gross national income per capita between $3,956 and $12,235 (2018). Kenya's GNI per capita as of 2018 was $ 3430, whereas that of the UK was $ 44,930 and of the US was $63,390. The World Bank website <https://www.worldbank.org/en/country/mic/overview> accessed 7th October, 2019.

[77] Sihanya (n76) 203. The ability of the country to achieve its development goals per *Vision 2030* has been questioned by scholars in economics and the social sciences; the key argument in this regard being the lack of institutional support for the Government's grand plans. See Moses Kindiki and Charles Wambu, 'Challenges of Kenya's Vision 2030 and the Jubilee Manifesto' (2015) 3(3) International Journal of Social Science Studies 176; Dianah Ngui, Jacob Chege and Peter Kimuyu, 'Kenya's Industrial Development: Policies, Performance and Prospects' in Carol Newman and others, *Manufacturing Transformation Comparative Studies of Industrial Development in Africa and Emerging Asia* (Oxford University Press 2016) 72 – 91; Titus M. Kilonzi and Charles Nderitu Ndung'u, 'Challenges Affecting Implementation of Vision 2030 Strategic Decisions in the Public Sector in Laikipia County, Kenya' (2014) 2(2) Public Policy and Administration Review 77. On a wider scale the effectiveness and appropriateness of the role of governments in development planning has been questioned. Indeed, whether economic development is "good" and ought to be pursued by a society at all has been debated. Todaro and Smith (n76) 16 – 28, 541 – 559. The creative economy has been described as emphasising the informational, cultural and technological foundations of economic growth. Barbara Townley, Philip Roscoe and Nicola Searle, *Creating Economy: Enterprise, Intellectual Property and the Valuation of Goods* (Oxford University Press 2019) 1.

[78] Vision 2030 website <http://www.vision2030.go.ke/social-pillar/> accessed 24th June 2019. See the exposition on the term "creative industries" in part 1.5.2 below.

sectors of film, music and television among others.[79] On the whole, the emergence and development of the creative economy has been hailed as one of the most remarkable phenomena of the twenty-first century.[80]

It is contented that by reforming Kenya's copyright law to enable it to adequately encourage creativity, the creative industries would contribute positively and immensely to the country's push for economic growth and development. Additionally, the model of copyright law proposed in this work, may also be adopted by other less developed countries in their pursuit of economic development.[81] Thus, Kenya offers a timely and relevant setting for this thesis's considerations.

1.3.2.1.2 The UK and the US

The UK and the US have the most developed copyright laws in terms of legal argument and therefore allow greater analysis. Furthermore, for some time now, scholars and policy makers in the UK and the US have been engaged in discussions on the creative economy and its potential for supporting overall economic development.[82]

A binding link between Kenya, the UK and the US is that they all follow the common law tradition. Additionally, the UK and Kenya also have historical ties. Owing to its colonial history, much of Kenya's law is the result of the substantive

[79] Kenya Ministry of Sports, Culture and Heritage website <http://www.sportsheritage.go.ke/index.php/2015-03-09-09-34-05> accessed 24th June 2019.
[80] Sihanya (n76).
[81] See proposals in this regard in Chapter 7, part 7.5.
[82] Lisa De Propris, 'Creative Industries in the United Kingdom', in Luciana Lazzeretti (ed), *Creative Industries and Innovation in Europe: Concepts, Measures and Comparative Case-Studies* (Routledge 2013) 103.

transplantation of law derived from the UK.[83] In fact Kenya still applies some UK statutes directly as well as the English common law and principles of equity in numerous situations.[84] Despite Kenya enacting its own copyright laws following its independence in 1963, the influence of the UK has remained pervasive in Kenyan copyright law.[85] English common law carries a wealth of experience for the interpretation of Kenya's statutory copyright law.[86] Moreover, UK copyright law was applicable in Kenya before the enactment of the country's first copyright act, the Kenya Copyright Act 1966.[87] After the declaration of Kenya as a British protectorate on 15 June 1895 and a colony in 1920, Kenya's copyright law evolved from the 1842, through the 1911 and 1956 UK Copyright Acts.[88]

By the same token, the copyright law that is currently in operation in Kenya, the Kenya Copyright Act, which was enacted in 2001 and came into force in 2003, is largely a reproduction of UK, US and transnational copyright law.[89] However, it is clear the UK copyright law, particularly the UK Copyright, Designs and Patents Act 1988 is significantly more developed than the Kenya Copyright Act.

[83] Sandra Fullerton Joireman, 'The Evolution of the Common Law: Legal Development in Kenya and India' (2006) 44(2) The Journal of Commonwealth & Comparative Politics 190, 191. The term "legal transplant" was coined in the 1970s by the Scottish-American legal scholar Alan Watson to indicate the moving of a rule or a system of law from one country to another. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974). For discussions on the implementation of legal transplants see: David M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 (1) Yale Law Journal 1; Lawrence M. Friedman, 'Legal Culture and Social Development' (1969) 4(1) Law & Society Review 29; Lawrence M. Friedman, 'On Legal Development' (1969) 24(1) Rutgers Law Review 11; Marc Galanter, 'The Modernization of Law' in Myron Weiner (ed), *Modernization: The Dynamics of Growth* (Basic Books 1966); Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4(2) Maastricht Journal of European and Comparative Law 111.
[84] Kenya Judicature Act, Chapter 8 of the laws of Kenya, section 3.
[85] Joireman (n83) 201.
[86] Sihanya (n23).
[87] ibid.
[88] John Chege, *Copyright Law and Publishing in Kenya* (Kenya Literature Bureau 1978) 97.
[89] Ben Sihanya, 'Copyright Law in Kenya' (2010) 41(8) International Review of Intellectual Property and Competition Law 926, 930.

It is therefore apt to consider UK copyright law[90] in this research as a basis for reform of the deficiencies in Kenya's copyright law system. Further, the UK has long recognized the positive impact of the importance of the creative industries and has offered government support to studies on this. For example, in 2010 the government commissioned Professor Ian Hargreaves to chair a review of how the intellectual property ("IP") framework supports economic growth and innovation.[91]

On its part, the US has dominated the entertainment scene and international media for many years.[92] The US is the audio-visual industry's biggest market by sales for movies, television content and radio.[93] The movie and television industry popularly known as "Hollywood", the Recording Industry Association of America and other giant US entities collectively produce and control the world's most valuable forms of creativity.[94] Copyright has been critical to the development of these world leading industries.[95] Copyright has emerged as one

[90] UK copyright law is uniform within four jurisdictions that form the UK that is, England, Scotland, Wales and Northern Ireland and the UK CDPA 1988 is the operative copyright act throughout.

[91] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) available at<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf> accessed 24th June 2019. Previously Andrew Gowers had been commissioned by the then Chancellor of the Exchequer, Gordon Brown, to conduct a similar review of UK intellectual property with a focus on copyright. This review, titled 'The Gowers Review of Intellectual Property', was published in December 2006 as part of the Chancellor's annual pre-budget report.

[92] EY, 'Cultural Times: The First Global Map of Cultural and Creative Industries' (UNESCO 2015) 16 available at UNESCO Website < https://en.unesco.org/creativity/sites/creativity/files/cultural_times._the_first_global_map_of_cultural_and_creative_industries.pdf> accessed 24th June, 2019.

[93] ibid.

[94] Sean A. Pager, 'Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law (2012-13) 28(1) American University International Law Review 223, 227.

[95] Stas Burgiel and Lisa Schipper, 'A Summary Report of the Conference on How Intellectual Property Rights Could Work Better for Developing Countries and Poor People' (2002) 70(1) Sustainable Developments 4.

of the most important means of regulating the international flow of ideas and knowledge based products.[96]

As in the UK, copyright law has a long and rich history in the US, dating back to the late eighteenth century.[97] In the US copyright law is a federal law[98] thus, necessitating a consideration of the country as a whole and not on the basis of individual states. The particular court from where a case emanates is identified, that is, the Supreme Court, the Courts of Appeals, or the District Courts.[99] The protection of copyright is explicitly provided for in the US Constitution. Under the "Intellectual Property Clause" the US Constitution empowers Congress, 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'.[100]

It is appreciated that the UK and the US are much larger and more developed economies than Kenya; it is specifically for this reason, it is argued, that their copyright laws properly lend themselves to this work.[101] In examining and reviewing UK and US copyright law, comparisons will be made between them and Kenyan copyright law. This comparison will particularly arise with regard to

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[96] Wei Shi, 'Intellectual Property, Innovation and the Ladder of Development: Experience of Developed Countries for China' in Ken Shao and Xiaoqing Feng (eds), *Innovation and Intellectual Property in China: Strategies, Contexts and Challenges* (Edward Elgar 2014) 223.
[97] The US enacted its first federal copyright statute in 1790.
[98] Title 17 of the United States Code is the United States Code that outlines US copyright law.
[99] Most cases from the US discussed in this thesis arise from the District Courts and Courts of Appeals with jurisdiction over the states of New York and California. These two states witness the most copyright cases and their respective Courts of Appeals, Second Circuit – New York and Ninth Circuit – California are the most influential in this subject area. California is home to Hollywood's movie industry and Silicon Valley's technology industry and New York to the largest book publishers. Bill Seiter and Ellen Seiter, *Copyright, Trademark and Contracts in Film and Digital Media Production* (Yale University Press 2012) 45.
[100] Article I, section 8, clause 8, "The Intellectual Property Clause". As noted above, the Intellectual Property Clause is also termed the "Copyright Clause" and has also been referred to as the "Creativity Clause". Gervais and Renaud (n5).
[101] See, Friedman (n83) 'On Legal Development' (1969) 24(1) Rutgers Law Review 11.

understanding how the copyright laws of these jurisdictions understand and provide for creativity, their considerations of the idea/expression dichotomy and their implementations of databases similar to the online database of TCEs that is proposed for Kenya.

Ultimately, the goal of the review, examination and comparison of these laws is to analyse the approaches that these nations have taken towards copyright protection within the creative economy and to see any lessons that Kenya can learn and adopt.[102] In this regard the copyright laws of the UK and the US are viewed as "role models" for Kenya. This comparison will adopt a functional approach in which the focus, as noted, will be how each of the chosen jurisdictions' copyright law systems address the question of creativity and the idea/expression dichotomy.[103] However, the different contexts of society, culture and economic backgrounds within which each of the country's copyright laws operate are taken into consideration.[104]

[102] ibid.
[103] The functional method of comparison focuses inquiries on the premise that legal systems face similar problems and for the same problem take different legal measures. See Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 34 - 36.
[104] See, Legrand (n83). As its title suggests, in this article Legrand challenges the practical ability to transplant law from one country to another.

A further, but limited, examination and comparison is made with the copyright laws of other jurisdictions, primarily, Australia and Ghana. These jurisdictions are considered owing to their experience in protecting TCEs under copyright law, thus, proffering fullness to the discussion on the copyright protection of TCEs.[105]

1.4 The relevance of the study

This thesis is timely as it evaluates the age-old structures of copyright law and seeks to inquire whether copyright law is obtaining the objective for which it was formed. It propounds that the main purpose of copyright law is the encouragement of creativity.[106] This research maintains that under its current structure copyright law fails in this role. Particularly, following the coming into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") on 1 January 1995 copyright has answered to the dictates of market forces.[107] Even before TRIPS there were clear signs of the influence of economic concerns over copyright law. Indeed, even as early as with the Statute of Anne,[108] it has been argued that copyright law was largely a device of entrepreneurs.[109]

It is contended that the domination of economic concerns over copyright law and concomitantly creative endeavours has prevented copyright law from

[105] Whereas these jurisdictions offer some relevant considerations for this thesis, they are not considered in detail primarily as their protection of TCEs under copyright law is not very well developed beyond a few cases and statutory provisions as emerges in Chapter 2, part 2.3.4.3 (Australia) and Chapter 3, part 3.4 (Ghana). Additionally, on the whole their copyright laws are not as developed as those of the UK and the US.
[106] See note 1.
[107] Jaszi (n9) 500.
[108] Statute of Anne 1710, 8 Anne Ch 19, the long title of which is, An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned ("Statute of Anne").
[109] See note 1.

adequately performing its key role of encouraging creativity. Accordingly, this thesis proposes an alignment of how copyright law is formulated and interpreted with its main objective. To this end, this research advocates for the free and ready creative re-use of ideas.

This thesis offers a unique contribution to the literature on copyright law as for the first time, Steiner's theory of social three-folding and Locke's theory of knowledge are applied to an evaluation on Kenyan copyright law. Whereas there have been previous considerations and applications of these theories to inquiries on culture, the creative industries and copyright law,[110] none have applied the theory specifically to the Kenyan context. Adopting the premise of social three-folding, this research focuses on how Kenyan copyright can be reformed for the encouragement of creativity. It offers an opportune in-depth scholarly discussion on copyright law matters in Kenya, which hitherto have not been adequately ventilated.[111]

1.5 Introductory discussion of key concepts and terminology

This research discusses and utilises technical concepts in the development of its thesis. The key of these are identified as - the theory of social three-folding; creativity and culture. These notions are developed in detail in the subsequent chapters. The following discussion offers an introduction and perspective.

[110] Regarding social three-folding, see Griffin (n38) 22 – 24, 105 -110, 158 – 187; James Griffin, 'Making a New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright' (2013) Intellectual Property Quarterly 69; Joseph Beuys, *What is Money?* (Isabelle Boccon-Gibod tr, Clairview Books 2012). For considerations of the theory of knowledge see, James Griffin, 'The Copyright Balancing Exercise in the Digital Era: A Proposal for Reform' (PhD Thesis, University of Bristol 2008); Griffin (n45).

[111] Jeremy de Beer, Chidi Oguamanam and Tobias Schonwetter, 'Innovation, Intellectual Property and Development Narratives in Africa' in Jeremy de Beer and others (eds), *Innovation & Intellectual Property Collaborative Dynamics in Africa* (UCT 2014) 3.

1.5.1 The theory of social three-folding

Rudolf Steiner put forward the concept of social three-folding most elaborately in his book, translated into English as, *Basic Issues of the Social Question: Towards Social Renewal.*[112] This book was first published in 1919 and was addressed to the German-speaking peoples of central Europe.[113] However, the English translator of the book, Frank Thomas Smith, notes in the book's preface that the book is far from outdated or irrelevant for the rest of society.[114] The suggestions and essential principles given by Rudolf Steiner are even more pertinent today than when they were originally described; if only because their realization has since become even more urgent.[115] Smith notes that Steiner's ideas were perhaps offered before their time and that today's world offers a platform in which they can be accepted and realised.[116]

Altogether, Steiner was an influential economist, philosopher, social reformer and spiritualist.[117] His theory of social three-folding argues for the separating of the three distinct domains of social life - the economic domain, the political domain and the cultural domain for the proper functioning of society. Specifically, for a "healthy" society, Steiner called for the freeing of the cultural domain, wherein the artefacts of creativity arise, from the economic domain.[118]

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[112] Steiner (n16).
[113] ibid 5.
[114] ibid.
[115] ibid. It is accepted that the translator Smith, was himself writing more than forty years ago today; however, it is contented that the social structure is virtually the same now as it was then. Moreover, the dominance of the economic domain may even be more pronounced today. See, for instance, Yanis Varoufakis, *Talking to My Daughter about the Economy: A Brief History of Capitalism* (Bodley Head 2017).
[116] Steiner (n16) 8.
[117] Encyclopedia Britannica website <https://www.britannica.com/biography/Rudolf-Steiner> accessed 17th June, 2019.
[118] Steiner (n16) 47.

A healthy society as envisaged by Steiner is one which is free, equal and mutual. Present-day scholars of Steiner's theory have noted that Steiner's conceptualisation of such a society is one that pushes back "the market" from politics and culture.[119] This can be accomplished by asserting boundaries between the private business sector, the public state sector, and the cultural sector. This shapes a three-fold society based on mutuality, equality, and freedom for all people.[120]

Social three-folding falls within a wider field known as critical theory. Critical theory is a school of thought, which emerged in the 1930s, that offers a reflective assessment and critique of society and culture.[121] More specifically, critical theory is a philosophical and sociological movement that assesses and evaluates modernity and capitalist society.[122] Unlike traditional theory critical theory offers solutions to the societal problems that it highlights.[123]

Social three-folding, although having been propounded before critical theory took shape, fits within the framework of critical theory as it analytically identifies the problem of society and offers a solution to it. For social three-folding this problem is the economic domain's dominance over the political and cultural domain. The theory urges that the solution to this problem is the structuring of society to allow for the autonomous development of the three domains. Critical

[119] Martin Large and Steven Briault (eds), *Free, Equal and Mutual: Rebalancing Society for the Common Good* (Hawthorn Press 2018).
[120] Other scholars have also undertaken the task to describing what they view as a healthy society. For instance, William Fisher has noted how copyright law can be reformed to obtain "the good life" and "the good society". With regard to the latter, "the good society", Professor Fisher contends that such a society is achievable if resources are deployed and divided to enable members to achieve a life of self-determination, commitment, moderate risk and meaningful work. William W. Fisher, 'Reconstructing the Fair Use Doctrine' (1988) 101(8) Harvard Law Review 1659, 1746 – 1756.
[121] Bronner (n18).
[122] Alan Bullock and Stephen Trombley (eds), *The New Fontana Dictionary of Modern Thought* (3rd edn, HarperCollins Publishers 1999) 185.
[123] Bronner (n18).

theory emerged from within the intellectual crucible of Marxism.[124] However, proponents of critical theory, who became known as the "Frankfurt School",[125] were concerned less with what Marx termed as the economic "base" than the political and cultural "superstructure" of society.[126]

Marx's general assumption was that the cultural superstructure was determined by the economic base.[127] Marx decried the debilitating impact of economic forces on art.[128] He argued that as the productive organisation of society advanced, it became impossible to create art to perfection.[129] He distinguished between art and "art production" which he said was 'art produced in accordance with organized, feudally oppressed or capitalistically alienated conditions of life'.[130]

Theodor Adorno and Max Horkheimer, members of the Frankfurt school, also noted that economic forces posed a challenge to the development of art.[131] Owing to these economic forces what had emerged was a culture which, like a

[124] Bronner (n18).
[125] Ian Buchanan, *Oxford Dictionary of Critical Theory* (1st edn, Oxford University Press 2010) 100. The term "Frankfurt School" arose informally to describe the thinkers affiliated or merely associated with the *Institut für Sozialforschung* (Institute for Social Research), an independent research centre affiliated with Frankfurt University. The key theorists in the School were Max Horkheimer (philosopher, sociologist and social psychologist), Theodor Adorno (philosopher, sociologist and musicologist), Erich Fromm (psychoanalyst) and Herbert Marcuse (philosopher and cultural critic). However, the Frankfurt School is not the title of any specific institution *per se*, and few of the theorists associated with the School used the term themselves. Rolf Wiggershaus, *The Frankfurt School: Its History, Theories, and Political Significance* (Michael Robertson tr, MIT Press 1994)/
[126] Bronner (n18). "Base" and "superstructure" are analogies put forward by Marx to characterize modern society as a dual system which comprises of two semi-autonomous types of operations: the base is the economy while the superstructure is the non-economic support apparatus comprising the judiciary, government, police and culture. Buchanan (n125) 44.
[127] O. K. Werckmeister, 'Marx on Ideology and Art' (1973) 4(3) New Literary History: Ideology and Literature 501, 504.
[128] ibid.
[129] ibid.
[130] ibid.
[131] Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Edmund Jephcott tr, Gunzelin Schmid Noerr ed, Stanford University Press 2002) 94.

factory, produced standardized goods.[132] They coined the phrase "culture industry" as a description of this phenomenon.[133] Their argument was that the consumption of the easy pleasures of mass culture, which were made available by the mass communications media, rendered people docile and content.[134] They denounced the 'withering of imagination and spontaneity'.[135] Another theorist associated with the Frankfurt School, Walter Benjamin, on his part discussed what he termed "the aura"[136] of a work of art and had argued that an artwork's aura is lost through the mechanical reproduction of such art.[137]

The binding link between the views of Steiner, Marx, Adorno, Horkheimer and Benjamin is that they recognised the negative impact of economic forces on art. They noted that art had become an appendage of the economic domain. As a cure to this scenario, social three-folding, specifically, urges for the autonomous development of the cultural domain, wherein art arises.[138]

It is argued that the theory of social three-folding can be applied to copyright law towards the obtaining of its key objective, the encouragement of creativity. As currently constituted copyright law is governed by economic concerns. The creativity that copyright law rewards is that which abides by these economic dictates and it is perpetuated in the rhetoric of creativity *ex nihilo* (out of

[132] ibid.
[133] ibid.
[134] ibid.
[135] ibid 100.
[136] Benjamin's use of the term "aura" throughout his work appears to relate to seemingly different, though closely related, concepts. The interpretation taken here is that of aura as the unique aesthetic authority of an artwork, or as Benjamin notes 'the uniqueness of a work of art' - Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Hannah Arendt (ed) *Illuminations* (Harry Zohn tr Schocken Books 1969) 6. For more on various interpretations of Benjamin's aura see Miriam Bratu Hansen, 'Benjamin's Aura' (2008) 34(2) Critical Inquiry 336-375.
[137] Benjamin (n136).
[138] Steiner (n16) 47.

nothing) and the author-genius construct.[139] Even as early as the Statute of Anne and the purported protection that it offered to authors, it was clear that the real force behind the law's enactment and its main beneficiaries were printers and book sellers seeking to dominate publishing in England.[140]

The view of a creator as an author-genius has had a significant impact on copyright law. Lord Camden's speech in the famed case of *Donaldson v Beckett*[141] very well summarises this influence:

> Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world or hoard up for themselves the common stock.[142]

It is argued that the economic domain's influence over copyright law has made it fail to adequately obtain its objective of encouraging creativity. Instead copyright law ought to be free of economic concerns and encourage creativity to arise independently.

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[139] An in-depth analysis of this viewpoint is tendered in Chapter 5, parts 5.4.2 and 5.4.3.
[140] Feather (n7); Patterson (n7). Deazley however, rejects this view as being too reductionist an analysis and instead maintains that the Statute of Anne was primarily concerned with the continued production of books. Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Hart Publishing 2004) 45.
[141] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774).
[142] ibid (emphasis added).

1.5.2 Creativity

Creativity has been defined as 'the ability to come up with ideas and artefacts that are new, surprising and valuable'.[143] The term is often associated with art expressions such as music, poetry, literature or design, which are considered as the cultural expressions of a society or community at a certain point in time.[144]

Innovation is a term that is closely related to creativity.[145] Generally, innovation consists of the discovery, development, and commercialization of new and improved products and processes.[146] Innovation has been defined as 'the emergence of a viable product or service that has an impact on the world'.[147]

At times, innovation has been used in the place of creativity in discourses on the creative economy and this has led some commentators to question whether there is really any difference between the two terms.[148] Some have described creativity as the "ideas" part of innovation, with innovation being identified as the action of implementing an idea.[149] Others view creativity as involving novel knowledge while innovation can be an incremental process,[150] whereby

[143] Margaret Boden, *The Creative Mind: Myths and Mechanisms* (Routledge 2004) 1.
[144] De Propris (n82). As noted above, there are many forms of creativity, the type of creativity considered in this research is artistic creativity.
[145] Andy C. Pratt and Paul Jeffcutt, 'Creativity, Innovation and the Cultural Economy: Snake Oil for the Twenty-first Century' in Andy C. Pratt and Paul Jeffcutt (eds), *Creativity, Innovation and the Cultural Economy* (Routledge 2011) 3.
[146] Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* (Oxford University Press 2009) 19.
[147] Keith Sawyer, 'The Collaborative Nature of Innovation' (2009) 30(1) Washington University Journal of Law and Policy 293, 296.
[148] Pratt and Jeffcutt (n145) 4.
[149] Teresa Amabile and others, 'Assessing the Work Environment for Creativity' (1996) 39(5) The Academy of Management Journal 1154.
[150] John Bessant, 'Developing Continuous Improvement Capability' (1998) 2(4) International Journal of Innovation Management 409.

changes are made to what already exists.[151] Some scholars have instead coined new terms to distinguish what they mean. The term “cultural innovation” is one such term that has been used to describe the creativity that occurs within the creative industries.[152]

Notwithstanding these notable efforts at distinguishing between these two technical words, the usage of both has been described as ‘inflated and often imprecise’.[153] Despite these differing standpoints, it is acknowledged that context is important for the distinction between creativity and innovation.[154] In this regard as the focus of this work is copyright law and concomitantly the creative industries, and following the viewpoint that innovation appears to be more closely connected with technical products, it is maintained that creativity is the appropriate term of use for this research and its proper prescription will be explored.

It is accepted that creativity can be studied through myriad perspectives and disciplines. This work focuses on encouraging what may be termed “artistic creativity” or “cultural creativity” or more specifically the type of creativity that brings forth “works” that can receive copyright protection. However, there are numerous forms of creativity including creativity in furthering acts that may be viewed as negative and illegal such as creative accounting.[155] As emphasised in Chapter four there are no hard and fast rules regarding creativity,[156] the

[151] Bengt-Åke Lundvall, *Innovation, Growth and Social Cohesion: The Danish Model* (Edward Elgar 2002) 43.
[152] Ben Sihanya, ‘Intellectual Property for Innovation and Industrialisation in Kenya’ (2008) 4 Convergence 185, 195.
[153] Yudhishthir Raj Isar and Helmut K. Anheir, ‘Introduction’ in Helmut Anheir and Yudhishthir Raj Isar (eds) *Cultural Expression, Creativity and Innovation* (Sage 2010) 4.
[154] Pratt and Jeffcutt (n145) 4.
[155] Griffin (n45) 238.
[156] See Chapter 4, part 4.3.

proposals of this thesis focus on the further development of the type of creativity herein considered.

This thesis argues that there is a disconnect between the actual nature of creativity and how copyright law views and provides for creativity. In actual fact creativity is a highly derivative process that draws heavily on existing ideas and concepts. Copyright law instead valorises the Romantic author-genius that is, one who creates *ex nihilo* a viewpoint that is accentuated in the doctrines of authorship, originality and the work.[157]

In putting forward the argument that creativity is a derivative process this thesis draws primarily on the theory of knowledge propounded by Locke. As noted above, this theory provides that by combining simple ideas into complex ideas new knowledge emerges. In essence, the combination of ideas results in something greater than the combination of the constituent parts.

It is contended that the process by which new knowledge emerges is equivalent to the process of creativity.

Congruence between Locke's theory of knowledge and his famous labour theory may be extrapolated. The act of the mind, in Locke's vernacular, "exerting its power"[158] over simple ideas to make complex ideas, that is to say the act of creativity, may be viewed as labour which Locke contended was the basis for private property.[159] The consonance between the theory of knowledge

[157] See a development of this point in Chapter 5, part 5.4.2.
[158] Locke (n58) Book IV, Chapter II, § 1.
[159] Locke (n58). Although a plain reading of Locke's labour theory appears to suggest that it is based on physical labour, Locke did not expressly rule out mental labour from his

and the labour theory strengthens the appeal of the theory of knowledge as a theory that can influence the structuring of copyright law.

Turning back to the discussion on creativity, modern views on the subject draw on Locke's theory of knowledge.[160] The consensus emerging from the primary academic field on creativity, creativity research, is that creativity is a derivative process that draws on existing ideas and concepts and not one that arises *ex nihilo*.[161]

It is argued that Locke's theory of knowledge offers a good basis for the consideration of creativity. In addition to the approval and use of the theory in contemporary discourses on creativity; although not explicitly cited, the theory of knowledge was latent in the very early UK copyright cases, particularly the well-known *Millar v Taylor,*[162] *Donaldson v Beckett*[163] and in the US Supreme Court case of *Baker v Selden*.[164]

For this research, the Western model of creativity, highlighted in the UK and US, particularly in their creative industries is considered *vis-à-vis* Kenyan

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conceptualisation of labour and copyright law scholars have argued that Locke's theory can as well be applied to mental labour. See, for instance, Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77(2) Georgetown Law Journal 287, 300; Robert P. Merges, *Justifying Intellectual Property* (Harvard University Press 2011) 32.

[160] It is worth stressing that Locke's theory is itself derived from ideas on knowledge first presented in antiquity, particularly, by Plato and Aristotle. Griffin (n45) 137.

[161] See, Sawyer (n70). It will be recalled that creativity research is an academic field which takes on an interdisciplinary approach towards explaining creativity and incorporates the views of psychologists, neuroscientists, biologists, sociologists and anthropologists among other scholarly opinions.

[162] (1769) 4 Burrow 2303, 98 ER 201.

[163] The Hansard Report of *Donaldson* v *Beckett*, reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774). As noted above, an emphasis on knowledge was also seen in the early UK cases concerning translations and abridgements. See for instance, *Burnett* v *Chetwood* (1721) 35 Eng Rep 1008 and *Hawkesworth* v *Newbery* (1774) referenced in Benjamin Kaplan, *An Unhurried View of Copyright* (The Lawbook Exchange 2008) 12.

[164] 101 U.S. 99 (1879). The analysis of this case law is developed in Chapter 5, part 5.5.2.

creativity which on its part is strongly influenced by its traditional culture, specifically, its TCEs. Creativity is regulated by copyright law and copyright law plays a key role in the shaping of creative endeavours.[165] The 'materials of all our knowledge' and thus the building blocks of creativity are simple ideas.[166] Copyright law recognises the necessity of availing ideas to creators. It does so under the device of the idea/expression dichotomy. This principle states that there is no copyright in an idea, rather copyright only subsists in the expression of an idea.[167] As argued above, in effect, for copyright law, Locke's simple ideas are what are termed generally as ideas whereas complex ideas, that is, new knowledge, that is, creativity, result in the expressions of an idea.

Once an idea is expressed and meets other pertinent requirements, as the case may be, such as being original and being recorded in material form[168] then it obtains copyright protection. Such elements are therefore no longer available to creators to borrow. Therefore, for the encouragement of creativity copyright law ought to focus on readily and freely availing ideas to creators. As noted, copyright law's mechanism for dealing with ideas is the idea/expression dichotomy.

However, despite the idea/expression dichotomy's rather straightforward formulation courts have struggled to develop a clear principle for how ideas and their expressions may be distinguished; with some going to the extent of noting that no clear principle exists or could be developed to distinguish between the

[165] Omri Rachum-Twaig, *Copyright Law and Derivative Works: Regulating Creativity* (Routledge 2018) 1; Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 32.
[166] Locke (n58) Book II, Chapter XIII.
[167] Caddick, Davies and Harbottle (n28) [3-179]; Bently and Sherman (n165) 212.
[168] Bently and Sherman (n165) 91 – 117.

two.[169] The exact problem has been in relation to ideas, more precisely, what is an idea? As Lord Hailsham put it in *LB (Plastics) Ltd v Swish Products Limited*[170] the distinction between ideas and their expressions 'all depends on what you mean by "ideas"'.[171]

Indeed, there are diverse definitions, acceptations, descriptions and conceptualisations of what ideas are. Such differences have undoubtedly exacerbated the difficulties with the idea/expression dichotomy's interpretation. Additionally, judges appear to have interpreted ideas as representing a metaphor for what they deem ought not to be protected by copyright law at a particular instance.[172] Such revelations demonstrate the lack of clarity with which the doctrine is fraught.

In today's post-modern culture, propelled by digital technologies and the internet, derivative works are the norm. Accordingly, potential authors ought to be able to tell with reasonable certainty, beforehand, the extent to which they can borrow from existing works. It is contended that the lack of clarity surrounding the doctrine's interpretation has led to a chilling of creativity.[173]

It should be noted that other principles of copyright, particularly fair dealing and fair use may as well be means of encouraging creativity.[174] However, by focusing on the idea/expression dichotomy an *ex ante* approach which deals

[169] *Baigent v Random House Group Ltd* [2007] EWCA Civ 247, [2007] FSR 24 [5] (Lloyd LJ).
[170] [1979] RPC 551 (HL).
[171] ibid 629.
[172] Pamela Samuelson, 'Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection' (2005-2006) 85(7) Texas Law Review 1921, 1922.
[173] Khaosaeng (n41).
[174] Julie E. Cohen, 'Intellectual Property and Public Values: The Place of the User in Copyright Law' (2005) 74(2) Fordham Law Review 347, 374.

with copyright subsistence is taken; as opposed to an *ex post* approach which the exceptions offer.[175]

Moreover, any intervention which would limit the rights of a copyright owner would itself be limited by the "three-step test", first pronounced in the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") and since then transplanted and modified in several multilateral copyright instruments.[176] Signatories of these treaties agree to standardize possible limitations and exceptions to exclusive rights under their respective national copyright laws. Kenya ratified the Berne Convention in 1993, the three-step test as provided for in the Berne Convention is to the effect that:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[177]

This provision is termed the three-step test because it establishes three cumulative conditions to the limitations and exceptions of a copyright holder's rights. Under its well-known terms, exceptions are only permitted (1) in certain special cases; (2) which do not result in a conflict with the normal exploitation of a work and (3) which do not unreasonably prejudice the legitimate interests of the author (or other right-holder).

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[175] Seagull Haiyan Song, *New Challenges of Chinese Copyright Law in the Digital Age: A Comparative Copyright Analysis of ISP Liability, Fair Use and Sports Telecasts* (Wolters Kluwer 2011) 61.

[176] The three-step test has been modified and transplanted into TRIPS, article 13, the WIPO Copyright Treaty, article 10 and the WIPO Performances and Phonograms Treaty among other multilateral copyright treaties and conventions.

[177] Berne Convention, article 9(2).

In similar vein the public domain, which conceptually would offer fodder for creative endeavours, is not considered owing to its very broad formulation.[178] Thus, it is contended that the discussion on reforming copyright law for the encouragement of creativity is rightly focused on copyright law's "fundamental axiom", the idea/expression dichotomy.[179]

The etymological and philosophical roots of the word idea *vis-à-vis* how courts in Kenya, the UK and the US have interpreted it are set out in Chapter six. What emerges from this discussion is that there are numerous definitions and conceptualisations of what ideas are. It is argued that such diverse views have contributed to the idea/expression dichotomy being a complex doctrine to interpret. The lack of coherence in the doctrine's formulation and interpretation has had, it is argued, a chilling effect on creativity.[180]

In light of this, it is argued that Kenya would benefit from a statutory provision, clearly delineating those elements of a work that do not receive copyright protection under the rubric of "ideas", similar to that of the US, albeit taking into consideration the fact that the creative industries in Kenya are highly derivative of its culture, specifically, its TCEs, would be a welcome reform for Kenya in this area of the law.

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[178] In lay terms the public domain contains works free from copyright. In technical terms the public domain arises in two general instances. First, works for which the term of copyright has expired. Second, works that are categorically excluded from copyright protection; these are, primarily, public documents, such as judicial opinions and legislative enactments. Edward Samuels, 'The Public Domain in Copyright Law' (1993) 41(2) Journal of the Copyright Society of the USA 137, 151. Samuels however, notes that no concrete "theory of the public domain" has emerged owing to the diverse public policy objectives that underlie the doctrine. This has led to the doctrine being conceptualised and defined in various ways. For instance, Litman defines the public domain as a 'commons that includes those aspects of copyrighted works which copyright does not protect'. These include, 'ideas, methods, systems, facts, utilitarian objects, titles, themes, plots, scènes à faire, words, short phrases and idioms, literary characters, style, or works of the federal government'. Litman (n14) 968, 992 – 993.

[179] *Feist Publications* (n40).

[180] Khaosaeng (n41)

Such a move would offer simplicity, clarity and predictability in the interpretation of the doctrine and protect the "field of ideas"[181] for the use of potential creators. A clearer provision on ideas would aid in the functioning of the online TCEs database that is discussed in Chapter seven. It is argued that these reforms to Kenyan copyright law would lead to enhanced creativity.

Creative endeavours crystallise in what are termed the creative industries or the cultural industries. There have been some definitional tensions between these two terms.[182] Whereas some have used the terms interchangeably[183] others have argued that the introduction and usage of the term creative industries has rephrased and evolved cultural industries, overlooking some important sectors such as cultural and experience based activities, including heritage, archives, museums, libraries, tourism and sport.[184] Another closely related, if not identical, term that has also waded into the debate is "copyright industries".

UNESCO defines cultural industries as:

> Industries which produce tangible or intangible artistic and creative outputs, and which have a potential for wealth creation and income generation through the exploitation of cultural assets and production of knowledge-based goods and services (both traditional and contemporary).[185]

[181] Hughes (n159).
[182] De Propris (n82) 113.
[183] See, for instance, Jason Potts, 'Creative Industries and Innovation in a Knowledge Economy' in David Rooney, Greg Hearn and Tim Kastelle (eds), *Handbook on the Knowledge Economy, Volume Two* (Edward Elgar 2012) 193; David Hesmondhalgh and Andy C. Pratt, 'Cultural Industries and Cultural Policy (2005) 11(1) International Journal of Cultural Policy 1-14.
[184] De Propris (n82).
[185] UNESCO, 'Statistics on Cultural Industries: Framework for the Elaboration of National Data Capacity Building Projects' 11 available at UNESCO website <http://unesdoc.unesco.org/images/0015/001549/154956e.pdf> accessed 26th June 2019.

The term creative industries has emerged more recently. It was formulated by the Creative Industries Taskforce in the UK in 1997.[186] The creative industries in this classic UK conception are, 'those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property'.[187]

The UK Government's Department of Culture, Media and Sport (DCMS) recognizes nine creative sectors, namely: advertising and marketing; architecture; crafts; product design, graphic design and fashion design; film, television, video, radio and photography; information technology, software, video games and computer services; publishing and translation; museums, galleries and libraries; and music, performing arts, visual arts and cultural education.[188]

Considered from this perspective, then one can appreciate the argument of those who view the term creative industries as a constraint on what was previously a wider notion. Indeed, it appears that in providing a clear classification of the creative industries the DCMS has steered the academic and policy debate preferring some sectors over others.[189] However, the shift from cultural industries to creative industries was deliberate as it sought to stop the arts from being treated as a subsidized sector toward asserting the importance of these activities to the creative economy.[190] The creative industries combine an established concern for classic cultural production (such as performing arts

[186] Olivia Khoo, 'Intellectual Property and the Creative Industries in Asia' (China and Singapore)' (2010) 18(1) Asia Pacific Law Review 151, 153.
[187] UK Department of Culture, Media and Sport, 'Creative Industries Mapping Document' (HMSO 2001) 5.
[188] UK Government website <https://www.gov.uk/government/collections/creative-industries-economic-estimates> accessed 21st June 2019.
[189] De Propris (n82) 106.
[190] Townley, Roscoe and Searle (n77) 3.

and literature) with a new interest in culture's commercial aspects (such as advertising and video game software).[191]

The copyright industries on their part have been defined as, 'as economic activities closely related to the substantive rights of authors and other creative artists that are carried out as an independent industry or within a conventional industry'.[192]

On the whole, these concepts can be defined in many ways, depending on the purpose of the definition.[193] Still, their cultural, economic and social importance to society cannot be gainsaid, neither can the relevance of IP law to them.[194] This research will consider processes and products within the creative and cultural economy, which form the subject matter of copyright law protection. What is important is that in these industries creators rely on copyright law to establish property rights and protect revenues, and this therefore becomes their unifying feature. Creativity protected by copyright is at the core of these industries.[195] For this reason, this research will adopt the term creative industries which is the more recent, active and relevant term in discussions on the creative economy within the context of copyright law.[196]

[191] ibid.
[192] Anne Kalvi, 'The Impact of the Copyright Industries on Copyright Law' (2005) 10 Juridica International 95, 96.
[193] ibid.
[194] Abbe E.L. Brown and Charlotte Waelde, 'Introduction' in Abbe E.L. Brown and Charlotte Waelde, *Research Handbook on Intellectual Property and Creative Industries* (Edward Elgar 2018) 1.
[195] Ruth Towse, 'Copyright and Cultural Policy' in Ove Granstand (ed), *Economics, Law and Intellectual Property: Seeking Strategies for Research and Teaching in a Developing Field* (Springer 2003) 423.
[196] For a recent explication of these terms, noting the relevance of the term creative industries to the debate on the creative economy and intellectual property rights see Townley, Roscoe and Searle (n77) 3 - 7.

1.5.3 Culture

Culture is a broad notion. It has been described as the 'social construction, articulation and reception of meaning…the lived and creative experience of individuals and a body of artefacts, symbols, texts and objects'.[197] Culture embraces numerous things including art, craft, drama, dress, education, literature, music, politics, religion and technology among others.[198] A comprehensive understanding of culture is important for this thesis as it considers how creativity can be encouraged within the Kenyan cultural model, an examination which is juxtaposed with the treatment of creativity in the Western cultural model, particularly in the UK and the US.

It is argued that today the Western cultural model is post-modern by description. The concept of the post-modernism has been associated with a wide range of different meanings.[199] On a whole post-modernism may be viewed as a broad movement that developed in the mid to late twentieth century across philosophy and the cultural genres which marked a departure from modernism.[200] More specifically, some have considered post-modernism a philosophical theory derived from Friedrich Nietzsche, the late nineteenth century German Philosopher whose radical scepticism informed the post-structuralist theories of Michel Foucault and Gilles Deleuze among others.[201] Others view it as merely

[197] Isar and Anheir (n153) 5.
[198] Sihanya (n152) 197.
[199] Ursula K Heise, 'Science, Technology and Postmodernism' in Steven Connor (ed), *The Cambridge Companion to Postmodernism* (Cambridge University Press 2004) 136
[200] ibid. For an in-depth discussion on modernism *vis-à-vis* postmodernism and the relatable concepts of "modernity" and "postmodernity" see Jürgen Habermas, 'Modernity – An Incomplete Concept' in Hal Foster (ed) *The Anti-Aesthetic: Essays on Postmodern Culture* (Bay Press 1983) 3 – 15 and Jochen Schulte-Sasse, 'Modernity and Modernism, Postmodernity and Postmodernism: Framing the Issue' (1986-1987) 5 Cultural Critique 5. It has been put forward that when reference to the historical period is intended the term "postmodernity" is used, whereas if it is the aesthetic dimension that is at issue the term "postmodernism" is used. Buchanan (n125) 375.
[201] Brian McHale, *Cambridge Introduction into Postmodernism* (Cambridge University Press 2015) 8. Post-structuralism is a loosely applied term often seen as a variety of post-modernism

designating a chronological period between particularly the 1970s and the 1990s.[202] Post-modernism has also been viewed as a style and aesthetic tendency found in some contemporary and cultural works such as painting, literature, architecture, photography, film, video, dance and music among others.[203]

Philosopher Jean-François Lyotard introduced the term post-modernism into philosophy and the social sciences. Up until then the word had mostly been used by art critics.[204] Lyotard noted that, 'Simplifying to the extreme, I define post-modern as incredulity toward metanarratives'.[205] Thus, whereas encompassing a broad range of notions, post-modernism is typically defined by an attitude of self-contradiction, self-undermining, irony and scepticism toward "grand narratives".[206] As has been noted by one commentator, 'it is rather like saying something and at the same time putting inverted commas around what is being said'.[207]

Although post-modern theory is today recognised as an integral part of the academic community,[208] since the turn of the twenty-first century there has been a growing feeling that post-modernism is in decline and has 'gone out of

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which arose as an internal critique of the movement that preceded it, structuralism. Post-structuralism involves going beyond the structuralism of theories that imply a rigid inner logic to relationships that describe any aspect of social reality. Buchanan (n125) 380; John Scott, *Oxford Dictionary of Sociology* (4th edn, Oxford University Press 2014) 584.

[202] Heise (n199).

[203] Linda Hutcheon, *The Politics of Postmodernism* (Routledge 2002).

[204] Ihab Hassan, *The Postmodern Turn: Essays in Postmodern Theory and Culture* (Ohio State University Press 1987) 12.

[205] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trs, University of Minnesota Press 1993) xxiv.

[206] Hutcheon (n203).

[207] ibid.

[208] Charles Jencks, 'Post-Modernism – The ism that Returns' in Charles Jencks, *The Post-Modern Reader* (2nd edn, Wiley 2010) 8; Sotiris Petridis, 'Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche' (2015) 32(8) Quarterly Review of Film and Video 728, 733.

fashion' and is being replaced by a post-postmodernism, as it were.[209] However, there have been few formal attempts to define and name the era succeeding post-modernism, and none of the proposed designations has yet become part of mainstream usage. Some suggested terms for this epoch are post-postmodernism,[210] trans-postmodernism.[211]

It is maintained that Western culture can be characterised as post-modern both in chronological terms and by its characteristics. Digitization has greatly enhanced the ability to appropriate or rewrite cultural works. Acts such as the sampling of music find a newly prominent role in post-modern society.[212] This has led to the creation of new works often termed derivative or transformative.[213] Most cultural works identified as post-modern such as appropriation art are by their very definition derivative works.[214] It follows that the process of creativity is more equivocal than what the Romantic model admits.[215]

The term culture within the Kenyan context has been conceived of differently than the Western conceptualisation as explained above. Kenyan culture may not be able to be appropriately termed as post-modern. Culture in Kenya is viewed from a traditional stand-point. In the Kenyan context, a commonly used

[209] Garry Potter and Jose Lopez, 'After Postmodernism: The New Millennium' in Garry Potter and Jose Lopez (eds) *After Postmodernism: An introduction to Critical Realism* (The Athlone Press 2001) 4.
[210] In relation to design and planning. Tom Turner, *City as Landscape: A Post Post-modern View of Design and Planning* (Taylor & Francis 1996).
[211] In relation to poetry. Mikhail N. Epstein, Alexander A. Genis and Slobodanka M. Vladiv-Glover, *Russian Postmodernism: New Perspectives on Post-Soviet Culture* (Slobodanka M. Vladiv-Glover tr Berghahn Books 1999).
[212] Giancarlo F. Frosio, 'A History of Aesthetics from Homer to Digital Mash-ups: Cumulative Creativity and the Demise of Copyright Exclusivity' (2015) 9(2) Law and Humanities 262, 293.
[213] Lipton and Tehranian (n42).
[214] Marci A. Hamilton, 'Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works' (1994-95) 42(2) Journal of the Copyright Society of the USA. 93, 95.
[215] Litman (n14).

definition of culture, which the country affirms in its National Policy on Culture and Heritage, is offered by the United Nations Educational, Scientific and Cultural Organisation ("UNESCO").[216] UNESCO, the specialised agency of the United Nations dealing with culture, proffers that:

> Culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.[217]

Under this view, culture gives a people their identity, which is passed on from one generation to another; it is however, capable of being enhanced over time.[218] Culture is thus, the totality of a people's way of life. Closely related to this notion of culture is the concept of cultural heritage. Cultural heritage is considered as, 'the expression of the legacy of physical artefacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations'.[219]

There are two main categories of cultural heritage, "tangible" and "intangible".[220] Tangible cultural heritage refers to the physical objects and artefacts belonging to a culture, for example, monuments, archaeological sites, paintings, sculptures and so on. Intangible cultural heritage is comprised of the non-physical aspects of a culture, for example: folklore, customs, beliefs, traditions,

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[216] Government of Kenya, 'Kenya National Policy on Culture and Heritage 2009' *2*.
[217] UNESCO, 'Universal Declaration on Cultural Diversity 2001', preamble.
[218] Government of Kenya (n214).
[219] UNESCO website <http://www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/> accessed 18th July 2019.
[220] ibid.

knowledge and language.[221] Natural heritage, which refers to natural sites of cultural importance including significant landscapes and biodiversity, may also be considered a form of cultural heritage.[222]

Kenya's tangible cultural heritage includes, among other examples, Kaya Kinondo sacred forest on the south-eastern coast and Lake Turkana in the north. The intangible side of the country's cultural heritage includes its over forty indigenous languages and numerous dialects; its traditional knowledge (TK); TCEs; belief systems; dressing styles, such as the famous Maasai (ethnic group inhabiting northern, central and southern Kenya) *shuka*;[223] naming systems; and celebrations and ceremonies including births, weddings and deaths among others.[224]

As noted above, contemporary art in Kenya reflects its culture, specifically its TCEs. Nestled within the notion of culture are two interesting and fashionable concepts in IP - TK and TCEs. TCEs are what one could loosely describe as traditional art whereas TK may be viewed as a knowledge system embedded in the cultural traditions of an indigenous community.[225] Accordingly, TCEs are more readily associated with copyright law than the wider notion of TK and

[221] UNESCO website <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/> accessed 18th July 2019.
[222] ibid.
[223] *Shuka* is Kiswahili (Kenya's national language) for a decorative cloth or sash wrapped around the body. The Maasai people believe that the combination of colours and the patterns represent their identity as a community. Grace A. Musila, *A Death Retold in Truth and Rumour: Kenya, Britain and the Julie Ward Murder* (James Currey 2015) 131.
[224] Orinda Shadrack Okumu, 'The Concept of Intangible Cultural Heritage in Kenya' in Anne-Marie Deisser and Mugwima Njuguna (eds), *Conservation of Natural and Cultural Heritage in Kenya: A Cross Disciplinary Approach* (UCL Press 2016) 45 - 46.
[225] Rahmatian (n22).

culture more broadly.[226] Therefore, the discussion on creativity in Kenya focuses on TCEs.[227]

This thesis argues that copyright law has failed to appreciate the creative process, as arising both in the Western post-modern culture and the Kenyan traditional culture. Focusing the discussion on Kenya, this thesis argues that Kenyan copyright law ought to take into consideration the nature of creativity as a derivative process, which draws on traditional culture, particularly TCEs, and should be reformed on this basis for the better encouragement of creativity.

1.6 Background information on Kenya

1.6.1 General overview of the country

Located in East Africa, Kenya is one of the most well-known and in many respects one of the most developed countries in sub-Saharan Africa.[228] Its territory lies along the equator and it is bordered by the Indian Ocean on the south-east, Somalia to the east and north-east, Ethiopia to the north, South Sudan to the north-west, Uganda to the west and north-west and Tanzania to the south and south-west.[229] The country has a total area of around 580,000 square kilometres and as of 2019 its population was approximately 47.6 million with 4.4 million people residing in the capital city, Nairobi.[230]

[226] ibid.
[227] This discussion is set forth in Chapter 2.
[228] Godfrey Mwakikagile, *Kenya: Identity of a Nation* (New Africa Press 2007) 13.
[229] *The World Fact Book: Demographics of Kenya 2018* <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> accessed 24th June 2019.
[230] Kenya National Bureau of Statistics, '2019 Kenya Population and Housing Census 2019' (Government of Kenya 2019) 9.

Kenya is classified by the United Nations (UN) as a developing economy.[231] The UN does not have an official definition of a developing country and notes that the designations “developed” and “developing” are intended for statistical convenience and do not necessarily express a judgment about the stage reached by a particular country in the process of development.[232] Indeed there appears to be no universally agreed upon criteria for what makes a country developing versus developed, although there are general reference points such as a nation’s GNI per capita compared with other nations.[233] Perhaps this would explain why the UN classifies Brazil and China, countries which are many times wealthier than Kenya, as developing countries as well.[234] On their part, the UK and the US are classified as developed countries.[235]

Developing countries, also referred to as less developed countries,[236] should not be confused with least developed countries which demonstrate the lowest indicators of economic development of all nations. According to the UN least developed countries include all the other members of the East African Community, apart from Kenya that is, Uganda, Tanzania, Rwanda, South Sudan and Burundi.[237]

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[231] United Nations, *World Economic Situations and Prospects 2018* (Carla Drysdale (ed), United Nations 2018) 142. Available at United Nations website <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/WESP2018_Full_Web-1.pdf> accessed 24th June 2019.

[232] United Nations Statistics Division website <https://unstats.un.org/unsd/methodology/m49/> accessed 24th June 2019.

[233] Jonathan E. Sanford and Anjula Sandhu, *Developing Countries: Definitions, Concepts and Comparisons* (Novinka Books 2003) 5. See note 62.

[234] United Nations (n232).

[235] ibid.

[236] John Black, Nigar Hashimzade and Gareth Myles, *Oxford Dictionary of Economics* (5th edn, Oxford University Press 2017) 201.

[237] United Nations (n232).The East African Community is a The East African Community (EAC) is a regional intergovernmental organisation comprising of the six states above.

Whereas Kenya is classified as a developing country, as discussed above, there is in place a long-term development plan to turn Kenya into a newly industrializing middle-income economy by 2030. This ideal is espoused in the country's main policy blueprint, *Vision 2030*.[238] Since its launch in 2008, *Vision 2030* has recognised the knowledge economy as a central plank of the drive towards development.[239] Towards its vision, the government has made noteworthy political, economic, legal and structural reforms that have largely driven sustained economic growth, social development and political gains over the past decade. Key of these reforms was the promulgation of a new Constitution in 2010 that introduced a bicameral legislative house, devolved county governments and a constitutionally tenured judiciary.

1.6.2 Legal system and structure of the judiciary

At the apex of Kenya's legal system is its Constitution, which is the primary source of law in the country. Other sources of law are Acts of Parliament including a few Acts of the UK Parliament; subordinate legislation; the English common law and the doctrines of equity; African customary law in civil cases in which one or more of the parties is subject to it or affected by it; and Islamic law, where all the parties profess the Muslim religion, on matters relating to personal status, marriage, divorce or inheritance.[240] The Constitution also mandates that the general rules of international law as well as any treaty or convention that has been ratified by Kenya form part of Kenyan law.[241] Thus, effectively

[238] See note 77.
[239] Sihanya (n23).
[240] Tudor Jackson, 'The Legal System of Kenya' (1990) 6 Modern Legal Systems Cyclopedia 6.260.1, 6.260.11 - 6.260.13.
[241] Constitution of Kenya 2010, article 2(5) and 2(6).

adopting a monist approach to international law, a shift from the dualist approach under the previous Constitution.[242]

Kenya's Constitution makes explicit reference to IP rights (IPRs).[243] It mandates the State to support, promote and protect the IPRs of the people.[244] The Constitution also makes provision for the protection of property rights with IP being expressly denoted as a form of property in this regard.[245]

As noted above and as is to be expected, the history and development of Kenyan copyright law is closely associated with its colonial history. After the declaration of Kenya as a British protectorate on 15 June 1895 and a colony in 1920, Kenya's copyright law evolved from the 1842, through the 1911 and 1956 UK Copyright Acts.[246] These statutes were applied together with English common law by virtue of the reception clause under the East African-Order-in-Council 1897.[247] The country enacted its first copyright act in 1966. Since 1966 statutory copyright law has undergone a few amendments and developments and the current applicable law is the Kenya Copyright Act which was enacted in 2001 and has been amended sparingly since then. On the international scene Kenya ratified the Berne Convention in 1993. Hitherto Kenya's adherence to the

[242] Tom Kabau and Chege Njoroge, 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System' (2011) 44(3) Comparative and International Law Journal of Southern Africa 293, 294. A monist state is one that sees international law and its national law as one order and when a treaty is ratified by the state it automatically becomes part of the national law. As opposed to a dualist state, such as the UK, where international law must be transferred to national law by some process such as the enactment of an act of parliament. Başak Çalı*, International Law for International Relations* (Oxford University Press 2010) 387.

[243] As will be shown this is despite inadequate understanding of issues concerning IP by the state, judiciary and public at large.

[244] Constitution of Kenya 2010, articles 11(1)(c), 40(5) and 69(1)(c).

[245] ibid, articles 40 and 260.

[246] Chege (n88).

[247] ibid.

Berne Convention was dictated by its colonial status.[248] The UK became a party to the Berne Convention on 5 December 1887, eight years before Kenya became a British protectorate. As was the practise, British adherence to the Berne Convention extended to Kenya and other protectorates and colonies such as Nigeria, Ghana and India.[249] Additionally, as a member state of the World Trade Organization, TRIPS applies in Kenya.[250] The country also has specific Acts of Parliament governing other areas of IP including patents (Industrial Property Act, Chapter 509 of the Laws of Kenya), trade marks (Trade Marks Act, Chapter 506 of the Laws of Kenya) and TK and TCEs (Protection of Traditional Knowledge and Cultural Expressions Act, Act No 33 of 2016).

The court system comprises, the Supreme Court, the Court of Appeal, the High Court and Magistrates' Courts as well as other courts and tribunals including the Kadhis' Courts that deal with matters of Islamic law.[251] Unlike other jurisdictions, such as the UK, Kenya has no specialist court for IP matters,[252] accordingly copyright issues and other IP matters are tried before the ordinary courts that is, the Magistrates' Courts or the High Court.[253]

1.7 Division of chapters

As Kenya is the focus jurisdiction of this thesis a consideration of creativity in the country and the law's provision for it is offered at the very beginning. After

[248] Sihanya (n89) 927.
[249] ibid.
[250] WTO website <https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm> accessed 24th June 2019.
[251] Constitution of Kenya, Chapter 10.
[252] See Chapter 7, part 7.4.4 for a discussion as to whether Kenya ought to implement such a specialist IP or more specifically, copyright court.
[253] The Magistrates' Court's civil pecuniary jurisdiction is 20 million Kenya shillings (roughly 150,000 pounds). The High Court has unlimited original civil and criminal jurisdiction (as well as appellate jurisdiction from the Magistrates' Court) however, its practice has been to try only capital offences such as murder thus leaving other criminal matters including copyright infringement to the Magistrates' Court.

this the theoretical framework in which this thesis is considered is explicated. Followed by the discussion on creativity in the UK and the US and how copyright law has hitherto understood and provided for it. Finally, the research proposes reforms to Kenyan copyright law to enable it to obtain its objective of encouraging creativity.

This thesis is divided into eight chapters as follows.

Following this introductory chapter, Chapter two will turn the inquiry to the question of creativity in Kenya. It will be seen that creativity in the Kenyan context significantly reflects the country's culture, specifically its TCEs. Currently, the legal regulation of TCEs in Kenya is under a *sui generis* law, the TCEs Act. It is contended that this Act locks-in ideas, preventing their use for further creativity. . . This demonstrates the economic domain's domination over both the political domain and the cultural domain, as existing property rights are emphasised and the creative re-use of TCEs and specifically the ideas therein is prevented. For the encouragement of creativity, it is proposed that creativity ought to be allowed to arise autonomously free from the constraints of economic dictates.

To this end, Chapter three, picking up the discussion in Chapter two, advances the argument that the legal regulation of TCEs in Kenya ought to fall under a reformed copyright law. It has been argued that copyright law does not readily lend itself for the protection of TCEs, this debate will be considered in detail, noting how Kenyan copyright law can be amended to appropriately bring TCEs under copyright's edifice. It is argued that this move will avail TCEs to copyright

law's tried and tested edifice, particularly, the idea/expression dichotomy, under which ideas within TCEs can be readily and easily borrowed for further creativity.

Chapter four will expound on the theory of social three-folding and delve into the question of how creativity occurs, particularly, in the Western context, that is in the UK and US as demonstrated in their creative industries. It will be seen that the key assertion of social three-folding is that the cultural domain should develop independently, free from the domination of the economic domain, for the resolution of the "social problem" and obtaining of a healthy society. It will be argued that social three-folding's premise can be utilised as a model for reforming copyright law, for the encouragement of creativity. In this regard it is argued that by focusing on allowing creativity to arise according to its own precepts and not by economic dictates copyright law can achieve the objective of encouraging creativity.

Chapter four will then discuss how creativity occurs particularly in the Western cultural model, exemplified in the UK and the US. The view of creativity that this thesis underscores, that is, one based on Locke's theory of knowledge will be elaborated. It will be seen that as with creativity in the Kenyan context, which is derivative of its traditional culture, under Locke's theory of knowledge creativity derives from existing ideas and concepts. This view of creativity is endorsed in modern discourses on the subject, particularly, the main academic field dealing with creativity, creativity research.

Chapter five begins with a consideration of how copyright law understands and provides for creativity. It will emerge that copyright law has failed to understand and make provision for the true nature of creativity as a derivative process. Instead copyright law's understanding and provision for creativity is guided by economic considerations. It is argued that to properly orient copyright law for the encouragement of creativity, it must move away from its current underlying premises, that is, the labour theory, the personality theory, the utilitarian theory and the cultural theory,[254] and instead be based on a theory that endorses the encouragement of creativity as its main objective.

Chapter six will offer a critical discussion of ideas and their role in creativity. Ideas are the building blocks of creativity. This position is recognized by copyright law through the doctrine that copyright law does not protect ideas, only the expression of ideas. This doctrine is often termed the idea/expression dichotomy. However, it will be noted in this chapter that there has not been a principled interpretation of this doctrine. It will be argued that this has led to a chilling effect on creativity as potential creators and other actors in the copyright regime, including even judges are unable to note or predict with consistency and certainty whether what has been borrowed from a work is an idea or an expression. To further expound on why the doctrine has been fraught with such difficulties a discussion on the etymological and philosophical origins of the

[254] William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property (*Cambridge University Press, 2001) 168. See also Professor Fisher's lectures on copyright under the Harvard Law School's CopyrightX programme available at the CopyrightX website <http://copyx.org/lectures/> accessed 8th April 2019. It is worth noting that other copyright law scholars have offered notable viewpoints on the subject of copyright theory. For instance, in addition to Fisher's four theories, Zemer argues that "traditional proprietarianism" and "authorial constructionism" are two other theories of copyright law. Lior Zemer, 'On the Value of Copyright Theory' (2006) 1 Intellectual Property Quarterly 55. Menell includes "ecological theory", "unjust enrichment" and "radical/socialist theory" to the list. Peter S. Menell, 'Intellectual Property: General Theories' in Boudewijn Bouckaert and Gerrit de Geest (eds), Encyclopedia of Law & Economics (Edward Elgar 2000), vol II 129.

word idea will be offered. It will be seen that these considerations offer little clarity on what an idea is and instead compound the difficulties with its interpretation.

Chapter six will then make a comparative analysis of the idea/expression dichotomy in the copyright laws of Kenya, the UK and the US. It will be noted that of the three countries only the US has a statutory provision governing the doctrine, thus offering an explicit delineation of its tenets. It is argued that implementing such an express statutory provision providing for the non-protection of ideas would be an apt reform for Kenyan law makers to introduce in the country's copyright laws to allow for a principled interpretation of the doctrine; thus, undoing the chilling effects on creativity owing to its current haphazard formulation and interpretation. Pertinently, the proposed statutory provision on the doctrine will take into consideration the important role of TCEs in creativity in Kenya.

Chapter seven will set forth a practical implementation of a copyright theory and law that seeks to achieve the objective of encouraging creativity in Kenya. To this end, it will be argued that Kenya ought to implement an online database for TCEs. This database, to be established and administered by the Kenya Copyright Board, would indicate the TCEs present in the country, their ownership and pertinently offer guidance on what aspects of a TCE would be deemed an idea and therefore freely available for use by others. A reformed idea/expression dichotomy, as proposed in Chapter six, which expressly indicates the elements of a TCE that are to be considered as ideas is germane to the operation of the TCEs database. It will be argued that the database is

focused on TCEs owing to their importance to modern creativity in Kenya. The necessary legal, administrative, and statutory reforms required to implement this system will be discussed. Finally, the system's potential international impact including on other African countries as well as on the UK and the US is noted.

Chapter eight offers a conclusion to the discussion of the previous chapters. It provides an overview of the study and a summary of the findings based on the research questions put forward. It then notes how the present research can be furthered including proposals regarding the undertaking of empirical research to identify the quantitative impact that reform of Kenyan copyright law will have to its creative industries as well as on how patent law may be reformed to encourage innovation. Before concluding, the research's creation and interpretation of new knowledge will be noted. The thesis closes with a concluding statement affirming that the proposals in the research would indeed encourage creativity in Kenya.

CHAPTER TWO

CREATIVITY IN KENYA: HOW THE LAW UNDERSTANDS AND PROVIDES FOR IT

2.1 Introduction

This chapter considers in detail the nature of creativity from the Kenyan perspective and how Kenyan law has understood and provided for it. The previous chapter offered an introduction to the thesis noting, among other preliminary issues, the questions that this thesis seeks to explore. As seen, the first research question for this thesis is how does the creative process occur?[255] The second research question is how does copyright law understand and make provision for creativity?[256] The present chapter offers explication to these questions in the Kenyan context.

Thus, the chapter begins by noting that there are two key conceptualisations of creativity[257] in Kenya, traditional creativity as exemplified through traditional cultural expressions ("TCEs") and modern creativity within the creative industries.[258] What is noted, pertinently, is that modern creativity in Kenya, derives from the country's culture, specifically its TCEs.[259]

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[255] See Chapter 1, part 1.2.
[256] ibid.
[257] As highlighted in the introductory chapter the version of creativity that this research explores is what may be termed "artistic creativity". See Chapter 1, part 1.5.2.
[258] As will become apparent in this chapter and the subsequent chapter whereas in some instances TCEs could fit within one of copyright law's subject matters such as literary or artistic works, certain key elements make an expression a TCE, chief of which being that they are created within a traditional community setting. See part 2.2.1.2 below.
[259] This contention is best evidenced by the discussion on Kenya's contemporary creative industries, which are heavily influenced by TCEs in part 2.2.4 below. See also Michael Shally-Jensen, *Countries, Peoples and Cultures: Eastern and Southern Africa* (Salem Press 2015) 120 – 124; Kathire Kiiru and Maina wa Mutonya, 'Music, Dance and Social Change in Eastern Africa' in Kathire Kiiru and Maina wa Mutonya (eds), Music and Dance in Eastern Africa (Twaweza Communications 2018) 8 – 9.

The “culture of Africa” is diverse and varied, each of the fifty-four African countries has various tribes that respectively have their own characteristics. African culture is expressed, in among other ways, through its religions, arts and crafts, music, dances, folklore, cuisines and languages.[260] Even though African cultures are widely diverse when looked at closely they are seen to have many similarities.[261] For instance, the strong reverence they have for the gods that they believe in and the important members of society such as kings and chiefs. Kenya boasts of its rich and diverse culture(s) and the country’s Constitution emphatically makes this point by providing that, ‘This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation’.[262]

Having offered a consideration on creativity in Kenya, underlining the role of TCEs in this regard, the chapter proceeds to discuss the law’s understanding of and provision for creativity. Here it is seen that whereas the country’s copyright law regulates the creative industries, TCEs are protected under a *sui generis* law, the Protection of Traditional Knowledge and Cultural Expressions Act 2016 (“TCEs Act”). It is argued that the TCEs Act has been a bar to creativity in Kenya by locking-in ideas, the building blocks of creativity.[263]

By strongly protecting existing property rights and not making provision for creativity the TCEs Act is an exemplar of the economic domain’s domination over the cultural domain as put forward in the theory of social three-folding. By

[260] Toyin Falola, *The Power of African Cultures* (University of Rochester Press 2008) 209.
[261] ibid 65.
[262] Constitution of Kenya 2010, article 11(1).
[263] This contention is deduced from Locke’s theory of knowledge which is explicated in Chapters 4 and 5. See also, Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009) 184; Graham M. Dutfield and Uma Suthersanen, ‘The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity’ (2004) 8(4) Intellectual Property Quarterly 379, 398.

preventing the derivative use of ideas within TCEs, the TCEs Act is effectively requiring a version of creativity in line with the Romantic "author-genius"[264] construct, which is the kind of creativity that copyright law currently rewards and protects.

As noted in the introductory chapter, copyright law valorises the author-genius, which is a rhetoric that has been a stalking horse for the furtherance of economic considerations.[265] According to this formulation, an author creates works extempore using his creative genius, leading to the production of utterly new and unique expressions.[266] Creativity, however, is a more equivocal process than what the Romantic conceptualisation permits.[267]

These considerations on the regulation of TCEs lay the basis for the reform proposed to Kenyan copyright law for the encouragement of creativity.

[264] As noted in the introductory chapter, the phrase "author-genius" developed from the scholarship that challenged the Romantic aesthetics propounded by copyright law. See for example: Martha Woodmansee, 'The Genius and the Copyright : Economic and Legal Conditions of the Emergence of the "Author" (1984) 17 Eighteenth Century Studies 425; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455; Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 Representations 51; David Saunders, *Authorship and Copyright* (Routledge 1992); Mark Rose, *Authors and Owners* (Harvard University Press 1993). However, the validity of associating the figure of the author genius with Romanticism has been critiqued as being too circumscribed. See for instance, Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 156 -159.

[265] Woodmansee (n10) 426; Jaszi (n10) 500.

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

[267] Litman (n12); Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 Representations 51, 54.

2.2 Creativity in Kenya

2.2.1 Nomenclature and conceptualisation of traditional cultural expressions and traditional communities

Contemporary art in Kenya reflects its culture.[268] Culture and the related concept of cultural heritage were discussed in the introductory chapter of this thesis.[269] Often discussed as part of the notion of culture are two interesting and fashionable concepts in intellectual property ("IP") – traditional knowledge ("TK") and TCEs. TCEs are what one could loosely describe as traditional art and thus, are more readily associated with copyright law than the wider notions of TK and culture more broadly.[270] Therefore, the following discussion focuses on TCEs within the Kenyan context, but after first offering preliminary insight on TK generally and noting how TCEs fit into this wider matrix.

2.2.1.1 Traditional knowledge

One of the key aspects of Kenyan culture and cultural heritage is TK. TK has been somewhat of a buzzword for both IP policy-making and scholarship in recent years.[271] This is primarily due to the growing view that TK deserves protection and promotion because of its economic and social value particularly with regard to medicine; agriculture and food security; ecological governance;

[268] See note 5.
[269] See Chapter 1, part 1.5.3.
[270] Andreas Rahmatian, 'Universalist Norms for a Globalised Diversity: On the Protection of Traditional Cultural Expressions' in Fiona Macmillan (ed), *New Directions in Copyright Law*, vol 6 (Edward Elgar 2007) 200.
[271] For instance, consider the on-going discourse by the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore whose mandate is to undertake text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s), which will ensure the effective protection of traditional knowledge (TK), TCEs and genetic resources ("GR"). See also, the works of scholars in this area, such as, Rahmatian (n16); Marisella Ouma, 'The Policy Context for a Commons-Based Approach to Traditional Knowledge in Kenya' in Jeremy de Beer and others (eds), *Innovation and Intellectual Property: Collaborative Dynamics in Kenya* (UCT Press 2014); among many others.

traditional music, stories, poem and dance; and design and sculpture.[272] Additionally, the protection and promotion of TK and intangible cultural heritage has been put forward as being a key enabler of sustainable development.[273] Despite the acceptance of TK's importance and relevance to nations and society broadly, there has not been general agreement regarding what it actually refers to.[274]

The World Intellectual Property Organisation ("WIPO") has been the primary international forum for discussions concerning TK.[275] WIPO notes that, 'Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity'.[276]

WIPO's current "loose" definition of the term appears to be its response to the debates around its previous efforts at defining the onerous concept. For instance, WIPO had previously maintained that TK refers to:

Tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the

[272] Ben Sihanya, 'Intellectual Property for Innovation and Industrialisation in Kenya' (2008) 4 Convergence 185, 191.
[273] See, Abbe E. L. Brown, 'ICH, Cultural Diversity and Sustainable Development' in Charlotte Waelde and others, *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Edward Elgar 2018). Sustainable development has been defined as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'. World Commission on Environment and Development (Brundtland Commission), 'Our Common Future' (1987) Chapter 2.
[274] J Janewa OseiTutu, 'A *Sui Generis* Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law' (2011) 15(1) Marquette Intellectual Property Law Review 147, 161.
[275] ibid.
[276] WIPO website <http://www.wipo.int/tk/en/tk/> accessed 20th July 2019. There are, however, numerous other definitions and descriptions of the term in the literature. See OseiTutu (n20) 162.

industrial, scientific, literary or artistic fields.[277]This definition was challenged for making it difficult to distinguish between TK and other types of knowledge.[278] The uncertainty surrounding the term saw commentators and various international instruments use a wide-range of other phrases to refer to TK including, “indigenous knowledge”, “local knowledge”, “community knowledge” and “cultural patrimony” among others.[279]

Despite the discontent on the term’s definition and the numerous name alternatives used for it, WIPO has offered a rather explicit and extensive description of what TK comprises of. WIPO notes that TK includes scientific knowledge; technical knowledge; agricultural knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; bio-diversity related knowledge; expressions of folklore (TCEs) in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties.[280]

Thus, it appears that the two major categories of TK are “science-based” knowledge including technical knowledge, agricultural knowledge, medicinal knowledge and ecological knowledge on the one hand; and “culture-based” knowledge, best exemplified by TCEs, on the other. Of these two categories of TK culture-based knowledge particularly, TCEs, have a closer connection with

[277] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, ‘Traditional Knowledge - Operational Terms and Definitions’ (WIPO 2002) 11. “Tradition-based” was noted therein as referring to ‘knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment’.
[278] OseiTutu (n20) 162-163.
[279] WIPO Intergovernmental Committee (n23) Annex I.
[280] ibid 11.

copyright law and creativity. In the Kenyan context, contemporary art borrows significantly from TCEs. Therefore, any discussion on Kenyan creativity ought to have TCEs as its focal point. This chapter therefore proceeds with a focus on TCEs.

2.2.1.2 Traditional cultural expressions

This part of the chapter reviews the various definitions, descriptions and categorizations of TCEs within the guiding international framework on TCEs, particularly as espoused by WIPO, and in Kenyan law, to gain an understanding and delineation of what TCEs are.

WIPO has noted that TCEs, also termed "expressions of folklore" ("EoF"), refer to, 'productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community'. [281] Particular examples of TCEs are noted as being – verbal expressions, musical expressions, expressions by action and tangible expressions.[282]

Succinctly, TCEs or EoF are productions or "works" derived from folklore.[283] The term folklore was coined by British writer William Thoms in 1846. For Thoms, folklore included customs, manners, superstitions, observations, ballads, proverbs and so on; he summarized the term as, its name suggests,

[281] WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1982, section 2.
[282] ibid.
[283] Meghan Ruesch, 'Creating Culture: Protection of Traditional Cultural Expressions and Folklore and the Impact on Creation and Innovation in the Marketplace of Ideas' (2008) 35(2) Syracuse Journal of International Law and Commerce 369, 371.

the lore of the people.[284] Thoms only provided a description of the term that he coined and scholars all over the world have struggled to develop a rational definition of it.[285] So much so that the term has been challenged as being vague and of little assistance.[286] Additionally, reservations have been expressed about the negative connotations of the word; with some countries, cultures and communities viewing the term folklore as derogatory.[287]

Be that as it may, the term folklore has been used recurrently in academic texts and statutory instruments, conterminously, it appears, with the terms TCEs and EoF. For instance, until only very recently, Kenya's operational copyright law, the Kenya Copyright Act 2001 ("Kenya Copyright Act") used the term folklore in reference to what essentially is a TCE or an EoF within the definition offered by WIPO noted above.[288] Under the Kenya Copyright Act, folklore meant:

> a literary, musical or artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya and includes

[284] P.V. Valsala G. Kutty, 'National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines' (WIPO 2002) 7.
[285] ibid.
[286] Rahmatian (n16).
[287] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Traditional Cultural Expressions/Expressions of Folklore' (WIPO 2003) 8.
[288] The Kenya Copyright Act was very recently amended by the Kenya Copyright (Amendment Act) 2019 which came into force in October 2019. The primary purposes of this amending Act is to provide digital copyright reform, strengthen the collective management of copyright works and implement the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty). The Amendment Act also provides numerous amendments to the definitions of various words and terms. The 2001 Act remains the principal law. The definition of folklore had remained in the Kenya Copyright Act for many years despite the TCEs Act being the operational Act with regard to folklore/TCEs. Oddly, despite the amending Act removing the definition of folklore from the Kenya Copyright Act, the amending Act defines "performer" to include 'performers of works of folklore'. Kenya Copyright Act, section 2. The substantive Act in its previous form provided no definition of performer.

(a) folktales, folk poetry and folk riddles;

(b) folk songs and instrumental folk music;

(c) folk dances and folk plays; and

(d) the production of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metalware, jewellery, handicrafts, costumes and indigenous textiles.[289]

This definition comprised of tangible and intangible expressions of folklore and thus, it is submitted that the more appropriate term for use, with reference to the above, would be TCE or EoF.[290] Currently, TCEs in Kenya are governed by the *sui generis* TCEs Act which has replaced the word folklore, as used in the Kenya Copyright Act with the term "cultural expressions". The TCEs Act extensively defines cultural expressions as:

> any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise of the following forms of expressions or combinations thereof -
>
> (a) verbal expressions including stories, epics, legends, poetry, riddles; other narratives; words, signs, names, and symbols;
>
> (b) musical expressions including songs and instrumental music;
>
> (c) expressions by movement, including dances, plays, rituals or other performances, whether or not reduced to a material form;
>
> (d) tangible expressions, including productions of art, drawings, etchings, lithographs, engravings, prints, photographs, designs, paintings, including body-painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, pictorial woven tissues, needlework, textiles, glassware, carpets, costumes; handicrafts; musical

[289] Kenya Copyright Act 2001, section 2.
[290] Emphasis added.

instruments, maps, plans, diagrams architectural buildings, architectural models; and architectural forms.[291]

This definition is essentially an expanded restatement of WIPO's definition of TCEs quoted above.[292] Accordingly, it is submitted that the "cultural expressions" of the TCEs Act falls within the widely accepted nomenclature and characterisation of TCEs, specifically as propagated by WIPO, and are thus referred to as TCEs herein.

As noted, the terms TCEs and EoF are often used synonymously and interchangeably. However, admittedly, EoF appears to be used more widely in international discussions and is found in many national laws.[293] Yet, due to the vague nature of the word folklore; the move by the Kenyan legislature to recently replace the word; the negative connotations attached to it; and WIPO's move to assume the term TCEs as their lead term in this discourse, this thesis adopts the term TCEs (unless when quoting directly from a statutory instrument or reference which uses an alternative term).

Although there has been some disconcertion in coming up with a suitable definition of TCEs, WIPO's definition offered above is widely accepted.[294] Whilst historically, the terms TCEs and TK were often erroneously used conterminously, today it appears in the literature that TCEs are viewed as a part

[291] TCEs Act, section 2.
[292] WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, section 2.
[293] WIPO, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: Overview' (WIPO 2015) 15.
[294] Elizabeth M. Lenjo, 'Inspiration versus Exploitation: Traditional Cultural Expressions at the Helm of the Fashion Industry' (2017) 21(2) Marquette Intellectual Property Law Review 139, 143.

of TK.[295] As seen above in respect of TK, definitions of such technical concepts can many times be argued as being vague. In this regard, WIPO's Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC), having considered how TCEs are defined in many national and regional laws, has distilled four key characteristics of TCEs, as follows. First, they are products of creative intellectual activity.[296] Second, they reflect a community's cultural and social identity.[297] Third, they are handed down from one generation to another, either orally or by imitation.[298] Fourth, they are constantly evolving, developing and being recreated within the community.[299]

Additionally, within this discussion it is noteworthy to consider the meaning of "traditional community". The term traditional community has been the subject of considerable discussion and study and there is no universal, standard definition thereof.[300] Various relatable or even synonymous terms have often been used in place of traditional community including "indigenous community", "local community" and "indigenous people" among others.[301]

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[295] Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring and Innovative Lawyering 2016) 312.
[296] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Thirty-Seventh Session), 'Traditional Knowledge, 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (WIPO 2018), Annex I, 4.
[297] ibid.
[298] ibid.
[299] ibid.
[300] WIPO website (glossary of terms related to TCEs) < http://www.wipo.int/tk/en/resources/glossary.html#i> accessed 18th July 2019.
[301] UNEP Secretariat of the Permanent Forum on Indigenous Issues, 'The Concept of Local Communities' (UNEP 2004) 2.

The term is seen in the Convention on Biological Diversity, 1992 (CBD) and also in the Nagoya Protocol.[302] Specifically, the CBD uses the term "indigenous and local communities" in recognition of communities that have a long association with the lands and waters that they have traditionally lived on or used.[303] WIPO appears to favour indigenous and local communities as its operative term in this regard and quotes the CBD's definition of this phrase in its glossary of key terms related to IP and genetic resources ("GR"), TK and TCEs.[304]

Kenya's TCEs Act does not offer a definition of traditional community or any of its commonly used relatable terms. It, however, operationalises the term "local and traditional communities", offering a definition for, specifically, "community" as:

> a homogeneous and consciously distinct group of the people who share any of the following attributes -
>
> (a) common ancestry;
>
> (b) similar culture or unique mode of livelihood or language;
>
> (c) geographical space;
>
> (d) ecological space; or
>
> (e) community of interest.[305]

The TCEs Act proceeds to offer a definition for "traditional context" as, 'the mode of using traditional knowledge or cultural expressions in their proper

[302] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010).
[303] UNEP Secretariat of the Permanent Forum on Indigenous Issues, 'The Concept of Local Communities' (UNEP 2004) 2.
[304] WIPO website (n46).
[305] TCEs Act, section 2.

artistic framework based on continuous usage by the community'.[306] The Act does not offer a concomitant definition for "local context" with regard to its use of the phrase "local and traditional communities". Therefore, this chapter and thesis altogether proposes to utilise the operative term "traditional community" as the most appropriate in the Kenyan context.

A cultural expression which fits the definition of a TCE as discussed above receives protection under Kenya's TCEs Act; and the ownership of the rights to such TCE are vested with the traditional community or the traditional community's entrusted "holder".[307] However, conceptually, what the TCEs Act refers to as a TCE would many times fall within copyright law's public domain.[308] That is, under copyright law, it would not receive protection and would readily be available for use by all.[309] Particularly, as many TCEs have existed for a long time and are therefore beyond the term of copyright protection, which is generally the life of the author and fifty years after her death.[310] Indeed, numerous "cultural expressions" that are not "traditional" fall within the public domain and are readily used by anyone who so wishes.

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[306] ibid.

[307] TCEs Act, section 16.

[308] WIPO, 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore' (WIPO 2003) 13. The public domain, a construct of copyright law, is used here to refer to works for which the term of copyright has expired or passed. Edward Samuels, 'The Public Domain in Copyright Law' (1993) 41(2) Journal of the Copyright Society of the USA 137, 151. This is one of the two main ways of conceptualising the public domain. The other describes the public domain as being comprised of public documents, such as judicial opinions and legislative enactments. However, Samuels notes that no concrete "theory of the public domain" has emerged owing to the diverse public policy objectives that underlie the doctrine. This has led to the doctrine being defined and interpreted in various ways.

[309] Litman (n12) 975.

[310] Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), article 7(1).

Such concerns have led some commentators to question the exalted position of TCEs within the law and the necessity for the legal protection of TCEs at all.[311] The following part considers these queries and arguments. Overall it is argued that there are compelling reasons to offer traditional communities rights over their TCEs; however, Kenya's TCEs Act locks-in ideas and prevents their creative reuse.

Thus, it is proposed that the appropriate legal regime governing TCEs should strike a proper balance between the protection of TCEs and the encouragement of further development and dissemination of TCEs as well as the encouragement of modern creativity inspired by TCEs. It is urged that copyright law, with appropriate reforms, can play this role.[312]

2.2.2 The rationale for protecting traditional cultural expressions

Culture and more specifically TCEs have been and continue to be very significant for Kenya and indeed the whole of sub-Saharan Africa. Following the imposition of European culture on the African colonies, for a long period of time anything traditional was taken as being uncivilized.[313] Despite these intrusions, traditional culture has always been held dear by Africans.[314]

On the whole, today, traditional culture is experiencing a renaissance and TCEs are in vogue again.[315] Kenya's Constitution recognises the importance of TCEs and mandates the State to, 'promote all forms of national and cultural

[311] It will be seen in part 2.3.3 below that TCEs were until the enactment of the TCEs Act protected under copyright law in Kenya, similarly in the international context the debate has always centered on whether TCEs can or should be protected under copyright law, thus, warranting this consideration on TCEs from the perspective of copyright law.
[312] This argument is developed in Chapter 3.
[313] Lenjo (n40).
[314] ibid.
[315] ibid.

expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage'.[316] Additionally, in the same article, the Constitution also calls on the State to promote the intellectual property rights (IPRs) of the people as well as to enact legislation to ensure that communities receive compensation for the use of their cultures or cultural heritage.[317]

However, to be sure, it has been questioned whether TCEs actually need legal protection and promotion to ensure their viability.[318] In this regard, it is argued that in the context of national and international trade TCEs cannot really be a commercial product.[319] Additionally, TCEs have been deemed to be products of ignorant and illiterate people who cannot accept that TCEs should not be protected.[320]

Furthermore, many traditional communities maintain a strong sentimental attachment to their TCEs and are satisfied that their products, for instance, folk songs such as praise songs, lullabies and dirges are popular.[321] Those of these views contend that communities should have the freedom to choose how to adapt old cultural practises to modern circumstances.[322] Reaching conclusions on what to leave unregulated is a difficult choice and often reveals the deepest differences in values and aspirations.[323]

[316] Constitution of Kenya 2010, article 11 (2) (a).
[317] ibid article 11(2) (c) and 11(3)(a) respectively.
[318] Peter Jaszi, 'Protecting Traditional Cultural Expressions – Some Questions for Lawmakers' (2017) 4 WIPO Magazine 10.
[319] Sihanya (n41) 314.
[320] ibid.
[321] ibid.
[322] Jaszi (n64).
[323] ibid.

Nevertheless, there is a broad perception that gaps exist in at least three functional areas concerning TCEs - attribution, remuneration and control.[324] Concerning attribution, the traditional communities seek for full and appropriate acknowledgement when their TCEs are disseminated.[325] With respect to remuneration, a community's concern is that when their TCEs are exploited they receive fair compensation.[326] Similarly, there are concerns about the need to control the use of TCEs, particularly those regarded as "secret", or intended by custom to circulate only within limited groups.[327]

Additionally, a considerable number of TCEs are forged with spiritual and sacred meaning.[328] Most of the time the spiritual side and symbolism attached to a particular TCE is kept in the hands of a few people within the community (the chiefs or community leaders) who allow some of their members to perform or to reproduce certain types of work.[329] Too often, this unique aspect is ignored or marginalised while addressing the concerns of traditional communities with regard to TCEs.

Thus, a satisfactory legal regime should include mechanisms to take into consideration these issues. Moreover, this chapter argues that such legal regime should strike a proper balance between protection of TCEs and the encouragement of the further development and dissemination of TCEs as well as the encouragement of modern creativity inspired by TCEs. As is elaborated

[324] ibid.
[325] ibid.
[326] ibid 11.
[327] ibid.
[328] Christine Haight Farley, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer' (1997) 30(1) Connecticut Law Review 1, 10 – 11.
[329] ibid.

in the subsequent chapter it is submitted that copyright law is the appropriate means to strike this balance.

2.2.3 A comparative inquiry on traditional cultural expressions in the UK and the US

The UK and the US on their parts do indeed have conceptualisations of "folklore".[330] *A Dictionary of English Folklore,*[331] for instance, contains explanations on a wide range of subjects in English folklore including oral and performance genres such as cheese rolling and Morris dancing; beliefs such as fairy rings and frog showers; superstitions like crossing fingers and wishbones; and calendar customs including St. Valentine's Day and April Fool's Day.[332] The dictionary is similarly a reference source on such legendary characters as Cinderella, Jack the Giant Killer and Robin Hood. Similar reference sources exist for the folklore of the other countries in the UK that is, Scotland,[333] Wales[334] and Northern Ireland;[335] as well as for the US.[336]

The operative term utilised in the UK and the US in this regard is folklore as opposed to TCEs. This is perhaps due to the fact that there is no general concomitant concept of traditional community in these jurisdictions as exists in Africa, Asia and other parts of the world.

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[330] Folklore is the term that appears to almost exclusively be used in this regard in the two jurisdictions.
[331] Jacqueline Simpson and Steve Roud, *A Dictionary of English Folklore* (Oxford University Press 2003).
[332] See, for instance, Ian Crofton, *A Dictionary of Scottish Phrase and Fable* (Birlinn 2012).
[333] See, for instance, Audrey L. Becket and Kristin Noone (eds), *Welsh Mythology and Folklore in Popular Culture* (McFarland and Company 2011).
[334] See, for instance, Donna M. Lanclos, *At Play in Belfast: Children's Folklore and Identities in Northern Ireland* (Rutgers University Press 2003).
[335] See, for instance, David Cooper, *The Music Traditions of Northern Ireland and Its Diaspora: Community and Conflict* (Ashgate 2010).
[336] See, for instance, Linda S. Watts, *Encyclopedia of American Folklore* (Facts on File 2007).

However, if the UK and the US do have conceptualisations of TCEs, or folklore, then why do they not receive protection under the law? Why should Kenyan TCEs require and receive protection when UK and US folklore does not enjoy the same privileged status? In this regard, one may consider the works of famed UK writers like Shakespeare and Wordsworth; and more generally the Roman, Greek, Egyptian and Babylonian historical events and stories which have long been used as the subjects of operas, books and plays and indeed have had a much greater impact on society, economy and culture worldwide than even the most prominent of TCEs. A key point which emerges is that these influential works of the Western world have been deemed "non-traditional" public domain works.[337]

It has been noted that attempts at a legal definition of "tradition" have been fraught with difficulties and entail potentially damaging limitations.[338] Rahmatian contends that in the context of culture it has been argued that tradition is actually made through its protection.[339] This is because the real nature of tradition in both the Western and non-Western world is that it is evolutionary.[340] Thus, tradition and traditional communities for that matter, are a creation and invention, a process of formalisation and ritualization by reference to the past for the purpose of nation-building, and for strengthening political and cultural institutions.[341]

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[337] WIPO (n54). Another prominent argument that has been put forward as to why particularly the UK has not recognised TCEs or more broadly intangible cultural heritage is that at present British cultural policy-making is firmly rooted in economic thinking which places emphasis on outputs, which are largely protected by copyright law, and fails to recognise the broader social value of culture. Charlotte Waelde, 'ICH and Human Rights: ICH, Contemporary Culture and Human Rights' in Charlotte Waelde and others (eds), *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Edward Elgar 2018) 139 -141.

[338] Rahmatian (n16).

[339] ibid.

[340] ibid.

[341] ibid.

It is argued that the legal protection of TCEs is part of this strategy. Tradition in this sense is created through the legal protection of TCEs, which in the current Kenyan context is provided for under the TCEs Act which specifically defines and therefore creates TCEs. Thus, setting a parameter on what is traditional and concomitantly what is a TCE and accordingly, protected by the law. Further, the TCEs Act, requires that the TCEs protected by the Act are recognised by the customary laws and customary practices of the relevant community.[342] Thus, bringing customary laws and customary practices into this normative framework.

Whereas there are no direct legal provisions for the legal protection of TCEs or folklore in UK copyright law it has been suggested that some legal protection can be had for TCEs under the Trade Marks Act 1994. Section 3(3)(a) of the UK Trade Marks Act provides that, 'A trade mark shall not be registered if it is contrary to public policy or to accepted principles of morality'. This provision can arguably provide general protection for trade marks containing unique cultural aspects which are particular to a specific community.[343]

It is worth noting that the recently passed Directive on Copyright in the Digital Single Market[344] underscores the, 'Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore'.[345] Furthermore, the Directive contains explicit

[342] TCEs Act, section 14(1)(b).
[343] Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions* (Edward Elgar 2010) 77.
[344] Formally, the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[345] Directive on Copyright in the Digital Single Market, Preamble.

provisions regarding European cultural heritage.[346] However, following "Brexit", the exit of the UK from the European Union (EU), the Directive will have no direct effect on UK copyright law.[347]

In the US, the discussion on the legal protection of TCEs has largely taken the form of arguments about the right of indigenous people to protect aspects of their culture.[348] Native American Indian knowledge and art, once marginalized are now recognized as commercially attractive.[349] However, because such commercialism has also taken a toll on indigenous culture, it has become necessary to control the exploitation of indigenous knowledge.[350]

Without making any changes to its IP laws, the US government has responded in piece-meal fashion to some of these concerns.[351] Building on a previous 1935 version, in 1990 congress enacted the Indian and Crafts Act. This Act is a "truth-in-advertising law" which makes it illegal to offer or display for sale, or sell, any art or craft product in the US in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian tribe.[352]

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[346] For example, article 6 mandates member states to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for the purposes of preservation of such works or other subject matter and to the extent necessary for such preservation.

[347] The UK left the EU on January 31st 2020 and there is now a transition period until the end of 2020 while the UK and EU negotiate additional arrangements. As the deadline for EU member states to implement the Directive is 7 June 2021 the UK will not be required to implement the Copyright Directive. However, EU law that is already in application in the UK, and its implementation, will be preserved as retained EU law under the powers in the European Union (Withdrawal Act) 2018. Abbe Brown and others, *Contemporary Intellectual Property: Law and Policy* (5th edn, Oxford University Press 2019) 41.

[348] Paul Kuruk, 'Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States' (1999) 48(4) American University Law Review 769, 822.

[349] WIPO (n54) 77.

[350] Kuruk (n94).

[351] ibid.

[352] US Department of Interior Website <https://www.doi.gov/iacb/act> accessed 29th March 2019.

The Act expanded the power of the Indian Arts and Crafts Board, previously established under the Indian Reorganization Act 1935, and mandated it to implement and oversee the 1990 Act as well as to promote the economic development of American Indians and Alaska Natives through the expansion of the Indian arts and crafts market.[353] The Indian Arts and Crafts Enforcement Act of 2000 expanded civil provisions to allow organizations and individuals to sue.[354] It also expanded liability to include indirect marketers.[355] Similarly, in 1990 as well, another significant legal development in connection with the rights of indigenous people in cultural property in the US was the passage of the Native American Graves Protection and Repatriation Act. This Act sanctioned the return by museums of human remains and objects taken from Indian graves.

Under the Act, the party requesting repatriation must demonstrate direct lineal descent in the case of human remains, and prior ownership in the case of objects.[356] The statute has had a profound effect on the debate about the rights of Indians to their cultural property and has emboldened them to seek return of numerous items, including those that may be perceived as falling beyond the scope of the Act.[357]

[353] US Indian and Crafts Act 1990, section 102.
[354] ibid.
[355] ibid.
[356] Native American Graves Protection and Repatriation Act, section 7. Similarly, the National Museum of the American Indian Act of 1989 established the National Museum of the American Indian as part of the Smithsonian Institution. The statute also mandated the Secretary of the Smithsonian to prepare an inventory of all Indian and Native Hawaiian human remains and funerary objects in Smithsonian collections, as well as expeditiously repatriate these items upon the request of culturally affiliated federally recognized Indian tribes and Native Hawaiian organizations.
[357] Kuruk (n94), 824.

These laws contain only limited solutions and do not by any means address the more fundamental difficulties of protecting TCEs under conventional models of IP, that is, patent, copyright and trade mark laws.[358] It may be argued that Native Americans may protect their moral rights of attribution and integrity in works of visual artistry such as murals under the Visual Artist Rights Act of 1990, the only statute in the US to expressly provide for moral rights.[359]

Be that as it may, the US government has yet to come out with a broad legislative solution that strikes an adequate balance between the claims of the indigenous people and the traditional goals of IP law. There has been loud opposition to the development of such strong IPRs for cultural property in the US. A leading sceptic, Anthropologist Michael Brown, has dismissed calls for greater IP protection for indigenous property with arguments based on free speech, and the need for continued access to information, especially information considered to be in the public domain.[360]

However, Professor Brown's viewpoint has been challenged. Anthropologist and lawyer Rosemary Coombe argues that Brown's framing of the debate in terms of the dichotomy of rights of private property and absolute rights of access is unduly narrow in scope and reflective of an essentially Western perspective without regard to the equally important relationships that traditional

[358] The United States Patent and Trademark Office (the USPTO) has however, established a comprehensive database for purposes of containing the official insignia of all State and federally recognized Native American tribes. Under Section 2(a) of the Lanham (Trademark) Act of 1946 a proposed trade mark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.

[359] However, such a move may run into difficult questions concerning who such moral rights shall attach to. These challenges arise out of the problem of delineating authorship of TCEs, discussed in detail in Chapter 3, part 3.4.1.

[360] Michael F Brown, 'Can Culture Be Copyrighted' (1998) 39(2) Current Anthropology 193.

communities have in their TCEs such as trust and obligations to relatives and ancestors.[361] Professor Coombe notes that in any event, the rigid dichotomy between rights of property and rights of access that Brown assumes, is unwarranted even under Western norms.[362] Western juridical traditions recognize relations of trust (express and constructive), fiduciary obligation, implicit license, breach of confidence, stewardship, and local observances of negotiated customs and ethics.[363] Moreover, while free speech issues are relevant to the debate, they should not necessarily override interests in protecting TCEs as Brown suggests. A balancing act is required rather than an automatic preclusion of the claims in TCEs when they appear to conflict with free speech concerns.[364]

2.2.4 Kenya's creative industries

As noted in the previous chapter, creative industries are, 'those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property'.[365] The creative industries are based on creativity and the accumulation of copyrighted and cultural products.[366] They create wealth and employment and are closely associated with industrialisation strategies; for instance, book writing and music composition find consummation through book publishing and sound recording industries.[367] Additionally, creative industries

[361] Rosemary J. Coombe, 'Comment to Michael F. Brown's Can Culture Be Copyrighted?' (1998) 39(2) Current Anthropology 193, 207-208.
[362] ibid, 207.
[363] ibid, 208.
[364] Kuruk (n94), 827.
[365] UK Department of Culture, Media and Sport, 'Creative Industries Mapping Document' (HMSO 2001) 5. See Chapter 1, part 1.5.2 for the discussion on the creative industries *vis-à-vis* the related, if not, conterminous terms, cultural industries and copyright industries.
[366] Sihanya (n41) 12.
[367] ibid.

are key in promoting and maintaining cultural diversity and in ensuring democratic access to culture and information.[368]

Kenya's creative industries include music, book publishing, film, arts and crafts and fashion.[369] However, Kenya has not sufficiently promoted its creative industries in the IP context.[370] As a result, these industries do not realize the full economic benefits as is seen in the UK and the US, among other countries, that would otherwise accrue to them if granted adequate IP protection and promotion.[371] Thus, currently, the role of IP in developing the creative industries in Kenya may be said to be wanting.

Kenya's creative industries borrow heavily from its TCEs. Therefore, a key role of IP law should be to facilitate and regulate the utilisation of TCEs by creators. The current law regulating TCEs in Kenya, the *sui generis* TCEs Act, has created the opposite scenario, effectively preventing the subsequent use of TCEs. This chapter begins the argument, which is carried on in the next chapter that by having TCEs regulated by a reformed copyright then modern creators would be able to utilise ideas within those TCEs for their modern creations in accordance with the precepts of the idea/expression dichotomy. Copyright law would also play the role of protecting these creations and enabling them to gain access to the market and economic value as well.

[368] ibid 13.
[369] ibid 12 – 13; Kennedy Manyala, 'Business Environment Reform Facility: Creative Economy Business Environment Reform, Kenya, (Main Report)' (UK Department for International Development 2016) 20 - 26.
[370] ibid 13.
[371] ibid 13.

For instance, if TCEs were brought under copyright protection then a modern Kenyan creator could easily utilise the idea of a particular TCE, say the theme of a catchy folksong, to compose a modern song. Copyright law would regulate the protection for this modern song as well as the availability and use of ideas from it and enable the modern composer to gain economically from his song which would additionally contribute to the nation's Gross Domestic Product and perhaps even export trade. Furthermore copyright law is an adequate system for the protection of the TCE itself in addition to the promotion of the creation of other TCEs.

As noted above Kenya's creative industries include music, book publishing, film, arts and crafts and fashion.[372]

Music - The music industry in Kenya is varied and lively, and ranges from traditional to modern music and is comprised of music creators, music arrangers and performers of the works of music arts. Additionally, the industry includes sound and audio-visual recordings; record companies; music trainers; and managers comprising of music publishers, promoters and distributors.[373] Most of the well-known Kenyan musical compositions and recordings have an apparent traditional tune reflective of a particular traditional community's folk songs and include Fadhili William Mdawida's *Malaika*[374] and *Jambo Bwana*[375] by the musical band Them Mushrooms. Contemporary artist Linda has used

[372] Sihanya (n41) 12 – 13; Manyala (n115).
[373] Manyala (n115) 20.
[374] "Malaika" is a Kiswahili (Kenya's national language) word meaning angel.
[375] "Jambo Bwana" is Kiswahili for hello sir.

lullabies from the Meru (ethnic group from Eastern Kenya) community in her songs as well.[376]

Book publishing - there are famous fiction writers and poets such as Ngugi wa Thiong'o, Francis Imbuga, Marjorie Oludhe Macgoye and Margaret Ogola. A key feature of the writings of these authors was the incorporation of folk tales into their works. Some of the most notable academic authors include Yash Ghai, HWO Okoth Ogendo (law), ES Atieno Odhiambo (social history and political science), Ali Mazrui (political science), Calestous Juma (science and technology policy), Chris Wanjala (literature) and several natural, physical and biological scientists. There are also important publishing houses like the Phoenix Publishers and East African Educational Publishers which have enabled the public to access the works of the foregoing and other creative and academic authors.[377]

Film – a Kenyan film or cinema industry is developing. Some major films have been shot in the country. In some of them Kenyans are leading actors, actresses, directors or producers. Such films include the Academy Award winning *Out of Africa* and *The First Grader* in addition to countless local productions. Both *Out of Africa* and *The First Grader* are famous for their showing of Kenyan culture particularly of the Kikuyu (ethnic community residing in central Kenya) people.

[376] Marisella Ouma, 'Traditional Knowledge and Traditional Cultural Expressions in Kenya' (2011) 4(4) Kenya Copyright Board's Copyright News 5.
[377] Sihanya (n41) 12.

Arts and crafts – The arts and craft industry has been described as the sleeping giant of Kenya's creative economy.[378] The industry employs many people and has the potential to employ more.[379] The main components of the industry include cultural handicrafts and artefacts such as the Akamba (ethnic group residing in eastern Kenya) carvings, Abagusii (ethnic group residing in western Kenya) soapstone and the *ciondo* (woven basket); visual and graphic art industries; performing art; and the emerging creative art industries such as storytelling, poetry and paintings.[380]

Fashion and design - Kenya's fashion and design sector has the potential to play a key role in the country's movement towards middle-income status and in serving as a source of gainful employment for its fast-growing labour force.[381] A salient aspect of Kenya's fashion and design industry, perhaps more than any of the other creative industries in the country, is its reliance on TCEs. The Maasai (ethnic group inhabiting northern, central and southern Kenya) *shuka* is a well-known example;[382] as is the *kikoi* (woven cloth), the *lesso* (decorative cloth or sash) and the *akala* (tyre sandals). Some of Kenya's leading contemporary indigenous fashion designers, who include aspects of traditional dress in their designs, include Ann McCreath (Kiko Romeo brand)[383] and Deepa Dosaja (Deepa Dosaja brand).[384]

[378] Manyala (n115) 17.
[379] Kenya National Bureau of Statistics, 'Economic Survey 2018' (KNBS 2018) 44.
[380] Manyala (n115) 17.
[381] Manyala (n115) 26.
[382] "Shuka" is Kiswahili for a decorative cloth or sash wrapped around the body. The Maasai people believe that the combination of colours and the patterns represent their identity as a community.
[383] See Kiko Romeo website <https://kikoromeo.com> accessed 22nd August 2019.
[384] See Deepa Dosaja website <http://www.deepadosaja.com> accessed 22nd August 2019.

As is evidenced from the above contemporary creativity, more specifically, the creative industries in Kenya, reflects Kenyan culture(s), particularly Kenyan TCEs. However, Kenya has not sufficiently promoted its creative industries within the IP context. In response to this failing this thesis proposes for reform to Kenya's copyright law which will encourage creativity and enhance the protection of the products of creativity. It is argued that this can be done by - bringing TCEs under copyright protection; implementing a principled interpretation of the idea/expression dichotomy; and putting in place an online TCEs database, the aim of which is to allow for the ready use of ideas from TCEs by contemporary creators.

2.3 Kenya copyright law's understanding of and response to creativity

2.3.1 The general legal framework governing creativity in Kenya

Property rights over creativity in Kenya derive almost entirely from statutory provisions; starting with the supreme law, the Constitution, and moving down the hierarchical ladder to judicial precedents including the English common law. The Constitution makes explicit reference to IPRs. In this regard the Constitution mandates the State to support, promote and protect the IPRs of the people of Kenya.[385] Additionally, the interpretation article of the Constitution interprets the word property as including IP.[386] This article notes that:

> "property" includes any vested or contingent right to, or interest in or arising from -
>
> (a) land, or permanent fixtures on, or improvements to, land;
>
> (b) goods or personal property;

[385] Constitution of Kenya 2010, articles 11 (2) (c), 40(5) and 69(1) (c)
[386] ibid, Article 260.

(c) intellectual property; or

(d) money, choses in action or negotiable instruments.

Therefore, within the constitutional framework, IP has been given an equal footing to real property and movable property. The inclusion of IPRs in the Constitution has been termed "remarkable" taking into consideration the rather low appreciation of IP in the country and the fact that the previous Constitution (1963 – 2010) made absolutely no mention of IPRs.[387]

The second tier of legal provisions over creativity is found in the Kenya Copyright Act and its attendant Copyright Regulations 2004. Discussed in greater detail below, the provisions of this Act and Regulations form, almost entirely, the legal regime governing the creative industries in Kenya. On the other hand, protection and promotion of TCEs is now provided for under the *sui generis* TCEs Act; TCEs were previously governed under the Kenya Copyright Act.

Additionally, pursuant to the Kenya Judicature Act, the English common law of copyright applies in Kenya to the extent that the Constitution and the Kenya Copyright Act do not; provided that the said common law shall apply only so far, 'as the circumstances of Kenya and its inhabitants permit'.[388] In spite of this provision, the legal accurateness of the applicability of the common law to copyright can be contested. Kenya and most African states liberally apply the

[387] Sihanya (n41) 190. In a separate writing Professor Sihanya argues that some of the repealed Constitution's provisions may, however, have been read as legislation on copyright by metaphor, largely providing a broad framework within which copyright is to be constructed. These provisions included the protection of property, the freedom of expression, access to information and the equal protection under the law. Ben Sihanya, 'Copyright Law in Kenya' (2010) 41(8) International Review of Intellectual Property and Competition Law 926, 928.

[388] Kenya Judicature Act, Chapter 8 of the Laws of Kenya, section 3(1) (c)

common law of copyright, despite the provisions found in some copyright statutes that purport to abrogate the common law of copyright. Such statutes seek to limit what laws apply to copyright.[389] In this regard, the Kenya Copyright Act provides that, 'No copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some enactment in that behalf'.[390]

This provision was first enacted in Kenya as section 17 of the Copyright Act, 1966, Kenya's first copyright legislation, the clause having been copied from the 1911 UK Copyright Act.[391] The marginal note to the section reads, 'Abrogation of common law rights'. On this, Kenyan copyright law scholar Ben Sihanya contends that it is arguable whether the said section 17 only abolished non-statutory (common law) *right* in copyright, or the entire non-statutory (common) *law* of copyright.[392] The latter would mean that non-statutory rights as well as remedies and procedures are also abrogated, and that copyright would be the subject of strict (literal) interpretation.

However, such strictness does not always apply to Kenyan copyright.[393] This is evidenced by the fact that under the Kenya Judicature Act the procedural and evidentiary rules regarding copyright administration and litigation (especially in collecting societies and courts) are drawn directly or indirectly from UK legislation or practice.[394] Kenyan laws that further the application of English law

[389] Ben Sihanya, 'Copyright Law in Kenya' (2010) 41(8) International Review of Intellectual Property and Competition Law 926, 928.
[390] Kenya Copyright Act, section 51.
[391] UK Copyright Act 1911 (repealed), section 31.
[392] Sihanya (n135) 929. (Emphasis added).
[393] Sihanya (n135) 929.
[394] Kenya Copyright Act, section 3(1)(b).

and procedure in this regard include the Evidence Act[395] and the Civil Procedure Act[396] as well as judicial precedents.

Concerning the applicability of international law regarding copyright, the Constitution now makes Kenya a monist state, a move away from its previous dualist character.[397] In this regard the Constitution provides, 'The general rules of international law shall form part of the law of Kenya'.[398] The Constitution proceeds to note that, 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.[399]

However, it may be argued that the constitutional provisions do not act retrospectively, thus, they only apply to treaties and conventions that the country signed after the promulgation of the Constitution on 27th August 2010. Since the said date of constitutional promulgation, the country has not signed any major copyright related treaties or conventions.[400] Under the previous constitutional dispensation, Kenya had acceded to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), the Universal Copyright Convention ("UCC") and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Yet, as noted, as the country was a dualist state then these international laws would not have automatically become part of Kenyan laws unless through enactment, domestication or transformation.

[395] Chapter 80 of the Laws of Kenya.
[396] Chapter 21 of the Laws of Kenya.
[397] A monist state is one that views its own national law and international law as one order and when a treaty is ratified by the state it automatically becomes part of the national law. As opposed to a dualist state, such as the UK, where international law must be transferred to national law by some process such as the enactment of an Act of Parliament. Başak Çalı, *International Law for International Relations* (Oxford University Press 2010) 387.
[398] Constitution of Kenya 2010, article 2(5).
[399] ibid, article 2(6).
[400] Kenya signed the Marrakesh Treaty in 2013, ratified it in 2017, however, it was only in October 2019, as noted, following the amendment to the Kenya Copyright Act that the Treaty's provisions became operational in the country. The requirement for domestication of the Treaty's provisions calls into question the monist status of the country, pronounced by the Constitution.

These international copyright treaties have today largely been domesticated through the Kenya Copyright Act.[401]

Thus, the immediate legal framework governing creativity in Kenya, comprises of the Constitution, the Kenya Copyright Act and its attendant Regulations and the English common law where applicable to the Kenyan context.

2.3.2 Copyright protection of the creative industries

Kenya enacted its first Copyright Act in 1966.[402] However, in Kenya as well as in Nigeria, South Africa and in Anglophone Africa generally, copyright law began with the application of the UK Copyright Acts of 1842, 1911 and 1956.[403] These statutes were applied in tandem with the English common law of copyright. This was by virtue of the reception clauses of the respective countries. Additionally, Kenya and these other African countries were engaged in the multilateral copyright system through colonialism. For instance, the Berne Convention and the UCC were negotiated, signed and ratified on behalf of Kenya and other African countries by colonial authorities.[404]

Following independence these treaties continued to apply to the former colonies through the doctrine of state succession.[405] Since the 1966 Act there have been

[401] Sihanya (n135) 938. Despite the constitutional provisions making the nation a monist state, as a matter of practise international law continues to have to be domesticated before its implementation in Kenya. For instance, the country recently implemented the Marrakesh Treaty, which was signed in 2013 and which the country ratified in 2017, through the Kenya Copyright (Amendment) Act 2019.
[402] Copyright Act 1966 (repealed), Chapter 130 of the Laws of Kenya.
[403] Sihanya (n135) 927.
[404] Sihanya (n135) 929.
[405] State succession refer to, 'the replacement of one state by another in the responsibility for the international relations of territory'. Vienna Convention on Succession of States in Respect of Territories 1978, article 2 (1) (b).

numerous amendments and reforms to Kenyan copyright law culminating in the present-day Copyright Act.

The stated remit of the Kenya Copyright Act is, 'to make provision for copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts and for connected purposes'.[406] To be sure, the Act does not explicitly seek to encourage creativity as is the case with the UK Statute of Anne, which had as its stated purpose the encouragement of learning.[407] Or with the US copyright regime through the constitutional "Intellectual Property Clause" which grants Congress the power, 'To promote the progress of science and useful arts…'[408]

All the same, Kenya's copyright law has remained disproportionately Western in substance, form and practice in spite of the significantly different economic, social, political and cultural conditions and interests in these two contexts. Particularly the fact that Kenyan creativity is largely derived from its culture and even its modern creative industries borrow heavily from its TCEs. Kenyan copyright law's Western predilection can be inferred from a number of aspects. For instance, Kenya's operative copyright law, the Copyright Act 2001 provides protection for largely the same works that are protected by the copyright Acts of

[406] Kenya Copyright Act, preamble.
[407] The full title of the Statute of Anne, also known as the Copyright Act 1710, is, 'An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned'. The preamble of the Act made a long reference to the goal of the 'encouragement of learned men to compose and write useful books' See Chapter 5, part 5.3 for an exposition on the claim that the main objective of the copyright laws of the UK and the US is the encouragement of creativity.
[408] US Constitution Article 1, Section 8, Clause 8. The Intellectual Property Clause is also termed the Copyright Clause and has also been referred to as the Creativity Clause. Daniel Gervais and Dashiell Renaud, 'The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It' (2013) 28(3) Berkeley Technology Law Journal 1459, 1460.

the UK and the US. These works are literary works, musical works, artistic works, dramatic works, audio-visual works, sound recordings and broadcasts.[409]

Similarly, Kenyan copyright law recognises and applies the key doctrines and devices of UK and US copyright laws including the idea/expression dichotomy,[410] the public domain and fair dealing.[411] Kenyan copyright law like UK and US copyright law protects both original and entrepreneurial works under the title "copyright works".[412] In this regard original works that is, literary works, musical works, dramatic works and artistic works are governed under the same edifice as entrepreneurial works that is, audio-visual works, sound recordings and broadcasts and are both referred to as, generally, copyright works.[413]

Kenya's creative industries, as discussed above, fall on both sides of copyright works. For instance, a song would contain a literary work and a musical work

[409] Kenya Copyright Act 2001, section 22(1). The UK nomenclature of works includes the typographical arrangement of published editions (the US Copyright Act 1976 does not provide for the typographical arrangement of published editions as a subject matter of copyright, instead subsuming this category of work in what the Act refers to as a "collective work"). However, oddly, section 2 of the Kenyan Copyright Act utilises the term published editions in the definition of author, yet this term is not operationalised in the substantive text.

[410] Whilst, as discussed in detail in Chapter six, the Kenya Copyright Act 2001 does not contain an explicit provision of the idea/expression dichotomy, the principle has been recognised in case law. See, for instance, *Parity Information Systems v Vista Solutions Limited & 2 Others* [2012] eKLR, Civil Case 833 of 2010.

[411] Kenya Copyright Act 2001, section 26(3) read together with the Second Schedule Paragraph A. Regarding exceptions and limitations to copyright Kenya follows the UK approach of fair dealing as opposed to the US approach of fair use. Whereas these exceptions and limitations are in fact pronounced in international copyright law, under the prescription of the "three-step test" Berne Convention, article 9(2), Kenya's interpretation of them has followed a Western, particularly UK, approach. See, the Kenya Supreme Court Case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated)) where the UK approach of fair dealing was endorsed over the US's fair use.

[412] Kenya Copyright Act, section 22.

[413] This is in marked contrast to the position in civil law systems, prominently France, which differentiate between "author's rights" (*droit d'auteur*) and "neighbouring or entrepreneurial rights" (*droits voisins*). Lionel Bently and Brad Sherman*, Intellectual Property Law* (4th edn, Oxford University Press) 60. The UK had previously taken a somewhat similar approach under the Copyright Act 1956 by dividing the works into Part I works (original works) and Part II works (entrepreneurial works). Under the current UK Copyright, Designs and Patents Act 1988 both original works and entrepreneurial works are considered copyright works, as detailed in Part I of the Act.

which are original works and would ultimately be recorded in a sound recording, an entrepreneurial work. Thus, the Kenya Copyright Act is the fundamental law governing the creative industries in Kenya. It is underpinned by the Copyright Regulations together with the pertinent provisions of the Constitution and additionally the relevant and applicable provisions of UK law.

Therefore, this research argues that focused reform of Kenya's copyright law would lead to the encouragement of creativity. It is maintained that by bringing the regulation of TCEs under copyright law then modern creators would benefit from the easy and ready utilisation of ideas within those TCEs for their own subsequent creations. At the same time, it is argued that copyright protection for TCEs would also encourage further creation of TCEs themselves. All the while the copyright regime would offer adequate protection for the TCEs and modern creations deriving from TCEs. On the whole this thesis proposes that Kenyan copyright law be reformed by - bringing TCEs under copyright protection; reformulating the idea/expression dichotomy to enable the easy delineation of ideas; by enacting of an online TCEs database through which creators may access existing ideas within TCEs for their subsequent use. These reforms it is urged would lead to an encouragement of creativity.

This part has discussed the copyright protection of the creative industries, TCEs on their part were previously governed under the Kenya Copyright Act but as of 2016 are catered for under a *sui generis* regime found in the TCEs Act. The legislative journey of TCEs is discussed next.

2.3.3 Copyright protection of traditional cultural expressions

Prior to the TCEs Act's enactment, TCEs had been considered under copyright jurisprudence. Many African countries included similar provisions in their copyright laws.[414] This was part of the campaign by African and other developing countries as well as the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") to protect and promote TCEs.[415] The country's first independent copyright legislation, the Copyright Act 1966, made no mention of TCEs or TK.

At around this time on the international scene was a strong movement, guided by UNESCO, to protect cultural and natural heritage in African and other developing countries as well as to promote the then budding interest in international trade in cultural products.[416] As a response to this the Kenyan legislature passed an amendment to the Kenya Copyright Act in 1975 introducing TCEs into the copyright edifice.[417] (As discussed above within Kenyan copyright jurisprudence the term folklore is utilised with reference to TCEs. However, for the reasons highlighted above, this chapter and thesis generally utilises the term TCEs unless when quoting from the Acts).

The 1975 Amendment Act consolidated national imperatives in an international context: aspects of TCEs could be protected within the framework of the three traditional categories of copyright works - literary, artistic, or musical.[418] As the

[414] Sihanya (n41).
[415] ibid.
[416] Sihanya (n135) 930.
[417] Copyright (Amendment) Act, 1975, Act No. 3 of 1975 (repealed).
[418] In the Kenyan context dramatic works were only very recently recognised as copyright works following the amendment of the Kenya Copyright Act in October 2019 by the Kenya Copyright (Amendment) Act 2019.

international clamour for the protection of TCEs intensified, a local fire was raging as well.

The introduction of TCEs protection into the Copyright (Amendment) Act 1975 followed a heated debate fronted by Kenyan literary scholars, most of whom were based at the University of Nairobi's English Department, about the role of Kenyan history, culture, traditions and other aspects of Kenyan heritage in national development.[419] Among other things, they argued for the teaching of oral literature and developed appropriate curricula for schools and universities.[420] Their efforts lead to the replacement of "English Literature" with "Literature in English" as part of the curricula of schools and universities. The English Department at the University of Nairobi was also renamed the Department of Literature.[421]

However, those looking to Parliament and other government agencies to make appropriate laws on TCEs protection were soon to be disappointed. The protection, exploitation and promotion of TCEs was not included in the framework of the mainstream provisions of the 1975 Act. It was instead made contingent on ministerial rule making. In this respect the 1975 Act provided:

> The Attorney-General may make regulations authorizing and prescribing terms and conditions governing, any authorized use of folklore, except by a national public entity for non-commercial purposes, or the importation of any work made aboard which embodies folklore.[422]

[419] Sihanya (n41) 313.
[420] ibid.
[421] ibid.
[422] Kenya Copyright Act 1975 (repealed), section 18(3).

The 1975 Act went on to provide, a rather ambivalent definition of “folklore”, circumscribed in its scope. It noted that:

> for the purposes of subsection (3) ‘folklore’ means a literary, musical or artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya.[423]

The Attorney General did not provide the requisite regulatory framework until 2004 when the Copyright Regulations made provision for some of the issues on TCEs. The Regulations were made under Kenya’s current copyright law, the Kenya Copyright Act, which prior to a very recent amendment of the Act,[424] in section 49(d) replicated the above-quoted section 18(3) of the 1975 Act, granting the attorney general the authority to make regulations governing the use of TCEs.

The Copyright Regulations 2004 denote the process of applying to use TCEs for commercial purposes, which application ought to be made to the Kenya Copyright Board.[425] The Regulations also provide for moral rights in TCEs and makes the breach of these rights a criminal offence. Interestingly, the breach of moral rights with regard to the subject matters of copyright, as provided in the Kenya Copyright Act proper, do not occasion a criminal offence, raising the possibility for civil claims only.[426]

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[423] ibid section 18(4).
[424] As noted above, the Kenya Copyright Act was in October 2019 amended by the Kenya Copyright (Amendment Act) 2019.
[425] Kenya Copyright Regulations 2004, regulation 20. The transitional provisions of the TCEs Act appear to supersede this regulation, as they require anyone who was before the commencement of the TCEs Act involved in the exploitation and dissemination of TCEs to comply with the provisions of that Act within 12 months.
[426] Kenya Copyright Act, section 32(3).

The provisions of the Kenya Copyright Act have been used by numerous artists to allow them to borrow aspects of TCEs to create recordings and performances. For example, the popular music group Kayamba Africa have incorporated traditional folk songs from several communities in their albums.[427] Similarly, as noted above, the artist Linda Muthama has used lullabies from the Meru (ethnic group from Eastern Kenya) community in her songs as well.[428]

The review of the TCEs Act offered below will highlight that the *sui generis* regime offered by this Act locks-in ideas and prevents their use by subsequent creators. This is detrimental to creativity in Kenya; particularly on the cognisance of the fact that products within the contemporary creative industries in Kenya borrow heavily from TCEs.

2.3.4 *Sui generis* protection of traditional cultural expressions: preliminary issues

TCEs in Kenya are currently protected under the *sui generis* TCEs Act. This Act also protects TK. Certain aspects of the TCEs Act with regard to TCEs are important to consider before offering a discussion on the Act itself. These are the nature of the right provided for under the TCEs Act and the considerations, both international and local, which informed the TCEs Act's enactment. These are considered below.

[427] Marisella Ouma, 'Traditional Knowledge and Traditional Cultural Expressions in Kenya' (2011) 4(4) Kenya Copyright Board's Copyright News 5.
[428] ibid.

2.3.4.1 The nature of right provided by the Protection of Traditional Knowledge and Cultural Expressions Act 2016

It is generally accepted that copyright is a private property right.[429] It is needless to remind any copyright law scholar that this contention has a long history. Influential writings on the origins and history of copyright law in both the UK[430] and the US[431] have challenged this general view of copyright. The main argument in this regard being that copyright is not a natural-law property right of the author but rather a conventional right, a regulatory concept, which is a pure creation of the law for the accommodation of the interests of authors, entrepreneurs and users.[432] The end result of this debate has been the acceptance of copyright as a property right, its nature as natural right or statutory creation notwithstanding.

TCEs in Kenya are protected under the *sui generis* TCEs Act. The rights created by the Act are of two categories - traditional cultural rights (economic rights) and moral rights.[433] It is worth considering the nature of the traditional cultural rights offered in the Act, because as has been seen in the case of copyright this is not an obvious inquiry.

[429] This is explicitly stated in the UK Copyright, Designs and Patents Act 1988 (UK CDPA 1988) at section 1(1). Whereas the same has not been expressly stated in the copyright laws of Kenya and the US, copyright law scholars in these two countries have taken this position. See, for instance Sihanya (n41) 194; Craig Joyce and others, *Copyright Law* (10th edn, Carolina Academic Press) 1. It is worth pointing out that the UK CDPA 1988 does not conceptualise all rights as property rights. For instance, certain rights of a performer including the requirement of their consent for recording their live performance are expressly stated to be non-property rights (section 192A).

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

[431] See, as a good example, Lyman Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law Users' Right* (The University of Georgia Press 1991).

[432] Patterson and Lindberg (n177) 122.

[433] TCEs Act, section 21.

The TCEs Act makes no explicit mention of offering a property right to the owners of the TCEs. Similarly, none of the model laws on *sui generis* protection of TCEs (elaborated below) make any mention of property rights. However, the TCEs Act provides the owner of a TCE the right to deal with it commercially, including licensing it for derivative uses.[434] The ability to utilise the TCEs commercially and the ability to delineate an owner for each and every TCE,[435] lends to the conclusion that the right provided for under the TCEs Act is a property right, even if only in the statutory creation sense. On this premise and drawing reference from the debate surrounding the nature of copyright, it is argued that the TCEs Act does indeed offer property rights over TCEs.

2.3.4.2 Model laws for *sui generis* protection of traditional cultural expressions

The want and need of traditional communities to have their TCEs protected has made this issue a fixed agenda within international negotiations on IP.[436] However, to date there is no international legal instrument offering TCEs protection multilaterally, despite the gallant efforts of, particularly, WIPO and UNESCO towards this end.[437] In spite of the lack of a binding multilateral instrument, the international community has responded to the concerns of traditional communities by developing model laws which may be used as the basis for the development of national legislation.[438] These model laws are in the form of *sui generis* regimes, based on the argument that TCEs are not a ready

[434] TCEs Act, sections 10, 16 and 20.
[435] TCEs Act, section 16.
[436] Kilian Bizer and others, 'Sui Generis Rights for the Protection of Traditional Cultural Expressions' (2011) 2(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 114.
[437] WIPO (n54) 22.
[438] Kilian Bizer and others (n182) 115.

fit for copyright protection owing to doctrinal, legal and practical considerations.[439]

There are five key model laws in this regard - Tunis Model Law on Copyright for Developing Countries 1976 ("Tunis Model Law"); WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1982 ("WIPO-UNESCO Model Provisions"); Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture 2002 ("Pacific Model Law"); WIPO (IGC) Draft Articles for the Protection of Traditional Cultural Expressions 2014 ("WIPO Draft Articles"); and African Regional Intellectual Property Organisation ("ARIPO") Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore 2010 ("Swakopmund Protocol").

These model laws share many features. For instance, all of them contain rules of exclusion of the public and mechanisms of benefit sharing. Additionally, they all recognize group ownership and seek protection in perpetuity. However, the model provisions differ in respect of the holders of rights. Within the five model laws, three systems of rights holding are identifiable. First, rights held by a central state agency (Tunis Model Law).[440] Second, rights held by the traditional communities (WIPO-UNESCO Model Provisions,[441] WIPO Draft Articles[442] and Pacific Model Law[443]). Third, a hybrid system whereby the traditional communities are entitled to their elements of TCEs and a state agency is

[439] These issues are discussed in detail below in part 2.3.4.3 below.
[440] Tunis Model Law, section 6(1).
[441] WIPO-UNESCO Model Provisions, section 3.
[442] WIPO Draft Articles, section 2.
[443] Pacific Model Law, section 6.

responsible for negotiating access with non-traditional users. (Swakopmund Protocol).[444]

The Swakopmund Protocol was adopted in 2010 and came into force on May 11, 2015. Kenya, as a member state of ARIPO, has signed the Protocol and it appears to have implemented the Protocol through the enactment of the TCEs Act. The TCEs Act is to a good extent drawn from the Protocol.[445] The TCEs Act, like the Swakopmund Protocol, implements a hybrid system of rights holding whereby the rights of ownership over TCEs are granted to traditional communities, specifically, to recognized individuals or organizations within such communities in whom the custody or protection of TCEs are entrusted in accordance with the customary law and practices of that community.[446] Additionally, the Cabinet Secretary responsible for matters relating to culture is mandated to approve all authorized user agreements with regard to the commercial exploitation of TCEs.[447]

The TCEs Act provides both defensive and positive protection which are necessities for a good legal regime protecting TCEs.[448] The aim of defensive protection is to stop people outside the community from acquiring IPRs over TCEs.[449] On the other hand, positive protection is the granting of rights that empower communities to promote their TCEs, control their uses and benefit from their commercial exploitation.[450]

[444] Swakopmund Protocol, sections 6 and 8, respectively.
[445] Ouma (n17) 139 – 140.
[446] TCEs Act, section 9 read together with section 2 (the interpretation of the words “holder” and “owner”).
[447] TCEs Act, section 2.
[448] WIPO website <http://www.wipo.int/tk/en/tk/html> accessed 29th August 2019.
[449] ibid.
[450] ibid.

Leading to the TCEs Act's enactment were a number of doctrinal, constitutional, legal and practical considerations. These are detailed below.

2.3.4.3 Considerations behind the enactment of the Protection of Traditional Knowledge and Cultural Expressions Act 2016

Many individual TCEs may satisfy some or even all of the requirements for copyright protection, but many others do not.[451] It has been mooted that types of TCEs that could be regulated under copyright law include traditional drawings, paintings and sculptures as artistic works; folk songs as musical works; and folk tales as literary works, among others. This may be justified on the basis of the similarities between ordinary copyright works and these TCEs.[452]

Like any subject of copyright, (literary, dramatic, musical and artistic works), TCEs are the product of a creative process.[453] Again, TCEs like any subject matter of copyright take the form of a "work". For instance, folk songs can be regarded as a variation of the type of song that is protected by copyright, whereas folk art and designs can be assimilated to decorative art and so on.

Thus, in respect of their form of expression, TCEs are readily comparable to copyright works.[454] Based on this, proponents for the copyright protection of TCEs further posit that to avoid creating duplicative agencies to administer

[451] It has also been noted that many TCEs and TK more broadly do not fit easily within the protection framework of the other "conventional IP laws" that is, patent and trade mark, and even trade secrets laws. See Patricia L. Judd, 'The Difficulties in Harmonizing Legal Protections for Traditional Knowledge and Intellectual Property' (2019) 58(2) Washburn Law Journal 249.
[452] Kuruk (n94) 792.
[453] E.P. Gavrilov, 'The Legal Protection of Works of Folklore' (1984) 20(2) Copyright, Monthly Review of the World Intellectual Property Organization 78.
[454] ibid.

TCEs and copyright works separately, it would simplify matters to charge existing copyright authorities with the responsibility of protecting TCEs.[455]

A good example of the interaction between TCEs and copyright arises in the case of Aboriginal art in Australia. Australian Aboriginal art is art made by the Aboriginal race of Australia, often referred to as Aborigines,[456] who are the original people of Australia that is, the people that were already living in Australia when the British began the process of Australia's colonisation in 1788.[457] Australian Aboriginal art has elicited stimulating questions for copyright law.[458] This was brought to the fore in the Australian Federal Court in the case of *Re Terry Yumbulul v Reserve Bank of Australia; Aboriginal Artists Agency Limited and Anthony Wallis.*[459]

The brief facts of this case were that in 1988 the Reserve Bank of Australia issued a special ten Australian Dollar banknote to commemorate the first European settlement in Australia. The note incorporated elements of Aboriginal artworks including, in part, a reproduction of the design of a "Morning Star Pole" made by Terry Yumbulul, an Aboriginal artist in 1986. The reproduction was made under a sub-licence of the copyright in the work granted to the Bank by the Aboriginal Artists Agency Limited. That company in turn, had an exclusive licence from Yumbulul. Yumbulul contended that he was induced to sign the licence by misleading or deceptive conduct on the part of the Agency. His action

[455] Kuruk (n94) 793.
[456] Whereas the term Aboriginals or Aborigines is used in common parlance with regard to Australian Aboriginals, Aboriginals have also been noted as arising in, among other places, Canada and New Zealand. See, Louis A. Knafla and Haijo Westra (eds), *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press 2010).
[457] Richard Broome, *Aboriginal Australians: A History Since 1788* (4th edn, Allen & Unwin 2010).
[458] Jane Anderson, 'The Making of Indigenous Knowledge in Intellectual Property Law in Australia' (2005) 12(3) International Journal of Cultural Property 347, 380.
[459] [1991] FCA 332; 21 IPR 481.

against the Bank for infringement of his copyright was settled by a consent order earlier in the proceedings. He continued the proceedings against the Agency and its director, Anthony Wallis, seeking injunctive and declaratory relief and damages.[460]

Whilst the court found Yumbulul's copyright in the artefact to have been validly assigned; it found the Morning Star Pole to be an original artistic work of Yumbulul, within the meaning of the Australia Copyright Act.[461] French J, noted that, 'In the sense relevant to the Copyright Act, there is no doubt that the pole was an original artistic work, and that he [Yumbulul] was its author, in whom copyright subsisted'.[462]

Building on French J's analysis in *Yumbulul* above, the Federal Court expounded on and again underscored copyright protection for Aboriginal art in *George Milpurrurru and others v Indofurn Pty Ltd and others (the Carpets Case)*.[463] Here, the applicants alleged that from late 1992 the respondents manufactured, imported in Australia, offered for sale and sold woollen carpets which reproduced Aboriginal artwork or substantial parts thereof of each of the applicants without the license of the owners of the copyright therein. The court held that the unauthorised importation of the carpets constituted infringement of the copyright of the applicants in the artworks.[464] On the specific query of whether Aboriginal artworks could attract copyright protection, Von Doussa J was clear. He noted:

[460] [1991] FCA 332; 21 IPR 481 [1].
[461] Australia Copyright Act 1968 (Principal Act).
[462] [1991] FCA 332; 21 IPR 481 [6].
[463] [1994] FCA 1544; 30 IPR 209.
[464] Additionally, the court noted that the partial reproductions of artworks were in each case substantial reproductions.

> These papers also discuss a problem perceived to exist at one time in relation to the application of the Copyright Act to Aboriginal artworks based on pre-existing tradition and images. That problem was whether works incorporating them satisfied the requirement of originality so to attract copyright protection. In the present case that issue has not arisen, and by the end of the trial the copyright ownership of the artists in each of the eight works was admitted. Although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality.[465]

Advocates, drawing inspiration from such decisions of the Federal Court of Australia, suggest that it would be far more effective in the long run to protect TCEs under existing IP laws generally, and copyright particularly, than to attempt to develop new laws specifically for their protection.[466] However, there are difficult inherent limitations in protecting TCEs in a copyright regime. These complications relate primarily to the doctrines of authorship, ownership, originality, tangibility and duration of protection. These limitations are highlighted in detail in the following chapter.[467] The contention put forward is that copyright law can overcome these difficulties and provide adequate protection and promotion for TCEs. Thus, the responses to these difficulties are also discussed. However, the challenges of copyright protection for TCEs formed the basis of proposals made by stakeholders, under the auspices of the

[465] [1994] FCA 1544, 30 IPR 209 [20] (emphasis added).
[466] Kuruk (n94) 793. On a whole Australia does not have a *sui generis* law to protect TCEs. However, the State of Victoria passed legislative protection for intangible cultural heritage through the Aboriginal Heritage Amendment Act 2016. For a recent and insightful discourse on the topic of Australian Aboriginal art and copyright law see Daniel Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press 2019) Chapter 4: Australian Indigenous Art.
[467] See Chapter 3, part 3.4.

Kenya Copyright Board to review the Kenya Copyright Act in respect of TCEs.[468]

As noted above, the Constitution of Kenya 2010, recognises the importance of TCEs and mandates the State to, 'promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage'.[469] Additionally, in the same article, the Constitution also calls on the State to promote the IPRs of the people as well as to enact legislation to ensure that communities receive compensation for the use of their cultures or cultural heritage.[470] The Constitution further provides that this legislation on indigenous culture ought to have been enacted within five years of the Constitution's promulgation (on 27th August 2010).[471]

It is argued that the Kenya Copyright Act 2001 already provided the legal framework dealing with indigenous culture. Therefore, Parliament's specific role ought to have been the reform of the Kenya Copyright Act to answer to specific queries on the protection of indigenous culture. After all, the TCEs Act was enacted six years after the promulgation of the Constitution and one could feasibly argue that as the Constitution had mandated a time-frame of five years for the law's enactment then on the expiry of this time-frame the Kenya Copyright Act became the operational law with regard to TCEs. All the same, Parliament eventually enacted the TCEs Act, which became operational on 31st

[468] Sihanya (n41) 324.
[469] Constitution of Kenya, article 11 (2) (a).
[470] ibid, article 11(2) (c) and 11(3)(a) respectively.
[471] ibid, fifth schedule.

August 2016; a year after of the Constitution's mandated time-frame of five years.[472]

Prior to the enactment of the TCEs Act, the government had recognised the importance of TCEs to its social and economic goals and had put forward a National Policy on TCEs in 2009 (the TCEs Policy).[473] The opening lines of the TCEs Policy note the necessity for its implementation:

> This policy has been developed in response to a growing need to address three main challenges facing the country today: accelerating technological development, integration of the world economic, ecological, cultural, trading and information systems and the growing relevance of intellectual property rights to these areas of activity.[474]

One of the key concerns which the TCEs Policy noted was the widespread unfair exploitation of Kenya's cultural heritage for commercial interests.[475] For instance, French luxury fashion label Louis Vuitton turned the Maasai *shuka* design into hats, scarves and shirts; a move which has seen the Maasai people seek to challenge what they consider the inappropriate use of their cultural brand.[476] To address such concerns the TCEs Policy called on the government

[472] No reason for this delay in enactment seems to have been given by Parliament but such delays do appear to be the norm regarding time frames for the enactment of supporting legislation under the Constitution of Kenya 2010.
[473] Government of Kenya, The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions 2009.
[474] ibid 1.
[475] ibid 14.
[476] See, The Independent <https://www.independent.co.uk/life-style/fashion/maasai-people culturalappropriation-luxury-fashion-retailers-louis-vuitton-east-africa-intellectual-a7553701.html> accessed 26th March 2019.

to protect and promote TCEs whilst ensuring that the owners of TCEs benefit directly from any commercial exploitation of it.[477]

Furthermore, the TCEs Policy recited the international position that existing IPR regimes are inadequate and do not address all the issues involved in the protection of TCEs.[478] Thus, it called on the government to enact a *sui generis* regime for the promotion and protection of TCEs.[479]

At the multilateral level discussions on TCEs had been commonplace since at least the 1950s. Since then, several international instruments have attempted to address specific aspects of TCEs and TK generally. These include the CBD, the Nagoya Protocol, the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on the Protection and Promotion of Diversity of Cultural Expressions and the Convention for the Safeguarding of Intangible Cultural Heritage. Negotiations are ongoing at WIPO under the IGC towards an international *sui generis* system of protection.[480]

At the regional level, as discussed above, the Swakopmund Protocol was adopted in 2010 and came into force on May 11, 2015. The Protocol presents a model law that ARIPO member states can adopt with regard to protecting their TCEs. It proposes a *sui generis* regime in this regard. Kenya appears to have implemented the Protocol through the TCEs Act, which reflects, to a good extent, the provisions the Protocol.[481]

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[477] Government of Kenya (n219) 14.
[478] ibid 13.
[479] ibid.
[480] WIPO website <https://www.wipo.int/ipdevelopment/en/agenda/flexibilities/resources/tk_gr_tce_f.html> accessed 27th October, 2019.
[481] Ouma (n17) 139 – 140.

The above noted issues of copyright doctrine; together with the constitutional, international and regional law and local policy interventions; as well as practical concerns, including the clamour by Kenyan literary scholars for the recognition of Kenyan culture in national development endeavours, all served to inform the enactment of the TCEs Act.

2.4 An examination of the *sui generis* protection of traditional knowledge and traditional cultural expressions

2.4.1 A Review of the Protection of Traditional Knowledge and Cultural Expressions Act 2016

The TCEs Act is meant to provide a framework for the protection and promotion of TK and TCEs in Kenya. It also gives effect to articles 11, 40 and 69(1)(c) of the Constitution. As stated above, article 11 recognises the importance of culture and requires the State to promote all forms of national cultural expressions and provide an enabling legal environment. Article 40 provides for the right to property while article 69(1)(c) directs the State to protect and enhance the IP in, and indigenous knowledge of, biodiversity and the GR of communities.

The TCEs Act is a good first step in offering a legal framework for the protection of TK and TCEs in Kenya. The Act provides defensive and positive protection which are necessities for a good legal regime protecting TCEs.[482] The aim of defensive protection is to stop people outside the community from acquiring IPRs over TCEs. One prominent form of defensive protection is the use of databases or other inventories of the TCEs available in a country.

[482] WIPO website <http://www.wipo.int/tk/en/tk/html> accessed 29th August 2018.

A good example of this is seen in India. In India the Council of Scientific and Industrial Research (CSIR) has developed a digital database, the "Traditional Knowledge Digital Library" which captures information on India's existing TK.[483] The information in the TKDL is used, in among other ways, by patent offices to verify applications based on Indian TK, especially in the area of pharmaceuticals.[484]

This database model is currently under investigation by Kenyan government agencies.[485] The TCEs Act has sought to mimic the Indian effort. [486] The Act calls on the national government, interestingly through the Kenya Copyright Board, to establish and maintain the "Traditional Knowledge Digital Repository" which shall contain information relating to both TK and TCEs that have been documented and registered by county governments.[487] To date the Kenya Copyright Board has yet to effect this provision of the TCEs Act.[488] County governments on their part are required to be the primary registry of TK and TCEs within their specific counties.[489]

[483] India CSIR Website < http://www.csir.res.in/documents/tkdl> accessed 29th August 2018.
[484] ibid.
[485] Ouma (n17) 134. See the proposals for the implementation of an online TCEs database in Kenya in Chapter 7, part 7.4.
[486] Ouma (n17) 134.
[487] TCEs Act, sections 5(a) and 8(3). Kenya has a two-tier governance structure comprising the national government and the county governments. The counties of Kenya are forty-seven geographical units created by the Constitution of Kenya (2010) article 176 as the units of devolved government. Each country has a county government consisting of a county assembly and a county executive.
[488] The Kenya Copyright Board, in accordance with the Kenya Copyright Act, section 33(f), has however, implemented an online database for copyright works. 'The Kenya Copyright Board Database of Authors and their Works' indicates - the title of the work, the work's registration number, its category, the right holder, the author and the date of registration. This database is available at Kenya Copyright Board's website <http://register.copyright.go.ke:8095/kecobo/details.php> accessed 1st September, 2019. See the discussion in Chapter 7 part 7.3.1.
[489] TCEs Act, section 4(1)(a).

Furthermore, Kenya is a party to the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003. This Convention sets out provisions for the safeguarding of intangible cultural heritage at the national[490] and international levels.[491] Additionally, the Convention establishes two lists of intangible cultural heritage – the "Representative List of the Intangible Cultural Heritage of Humanity"[492] and the "List of Intangible Cultural Heritage in Need of Urgent Safeguarding".[493] These lists are published and maintained by the Committee to the Convention and are available on UNESCO's website.[494] The Committee has published three of Kenya's nominations to the List of Intangible Cultural Heritage in Need of Urgent Safeguarding. These are - *Enkipaata*, *Eunoto* and *Olng'esherr*, three male rites of passage of the Maasai community (inscribed in 2018); *Isukuti* dance of Isukha and Idakho communities of Western Kenya (inscribed in 2014); and Traditions and practices associated with the *Kayas* in the sacred forests of the Mijikenda (ethnic group inhabiting the Coastal region of Kenya) (inscribed in 2009).[495]

On the other hand, positive protection is the granting of rights that empower communities to promote their TCEs, control their uses and benefit from their commercial exploitation.[496] Positive protection of TCEs, is intended to give TCE holders the right to take action or seek remedies against certain forms of misuse of their TCEs.[497] Part VII of the TCEs Act offers extensive sanctions and remedies of both a civil and criminal nature.

[490] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003, Part III.
[491] ibid, Part IV.
[492] ibid, article 16.
[493] ibid, article 17.
[494] UNESCO website <https://ich.unesco.org/en/lists> accessed 1st September, 2019.
[495] ibid.
[496] WIPO website < http://www.wipo.int/tk/en/tk/html> accessed 1st September, 2019.
[497] ibid.

Positive protection is the essence of the TCEs Act; the Act having been enacted, as noted above to promote and protect TK and TCEs as well as to give statutory effect to a constitutional provision mandating parliament to enact laws that provide for adequate compensation of communities in the event of the commercial exploitation of their TKs and TCEs.

Additionally, another noteworthy provision of the Act requires that the TCEs protected by the Act are recognised by the customary laws and customary practices of the relevant community.[498] Further, any concurrent claim arising from different communities shall be resolved by the county or national government, with reference to, among other things, the customary law and protocol of the communities in question.[499] These two provisions bring customary law into the framework of the legal protection of TCEs in Kenya.

The Act, however, is silent on the resolution of cross-border disputes regarding TCEs. Indeed, this is probably the purview of international law. Writing with regard to TK and GR, Dutfield and Suthersanen argue that they are very hard to fix geographically and temporally.[500] Frankel on the other hand opines that much TK is place-based with regard to its origin and use.[501]

[498] TCEs Act, section 14(1)(b).
[499] ibid, section 15(6).
[500] Graham Dutfield and Uma Suthersanen, 'Traditional Knowledge and Genetic Resources: Observing Legal Protection through the Lens of Historical Geography and Human Rights' 2019 58(2) Washburn Law Journal 399, 411. As seen above, TCEs may be considered part of TK and thus, this contention may be said to apply to TCEs as well. In any case, TCEs are "structurally" similar to TK, particularly, as they both relate to forms of knowledge developed by traditional communities.
[501] Susy Frankel, 'The Challenge of Cross-Border Protection of Traditional Knowledge' in Daniel F. Robinson, Ahmed Abdel-Latif, Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge 2017) 325. Dutfield and Suthersanen, however, contend that Frankel's views are quite strongly oriented towards New Zealand where her statement is probably truer than in many other countries. Dutfield and Suthersanen (n245) note 36.

All in all, potential cross-border disputes is something worth taking into consideration. The Swakopmund Protocol, which, as argued above, has been largely implemented in Kenya through the TCEs Act, provides that where there where two or more communities in different countries share a TCE, the ARIPO office shall be responsible for dispute resolution.[502] WIPO on its part advocates for alternative dispute resolution mechanisms in the case of such cross-border disputes.[503]

2.4.2 The Protection of Traditional Knowledge and Cultural Expressions Act 2016 as a bar to creativity

The TCEs Act locks-in ideas through its wide and equivocal definition of derivative works and by creating a property right in TCEs in perpetuity. By doing so, it is argued that the Act panders to the dictates of the economic domain by emphasising existing property rights and preventing further creativity to arise readily and easily. It is as if the Act is guided by the "invisible hand" of capitalism, whereby the prescriptions of capitalism direct the actions of members of society, in this case the Kenyan legislature, even without them being aware of it.[504]

[502] Swakopmund Protocol, section 22.4.
[503] Jane Anderson, 'Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: Background Brief' (WIPO 2016).
[504] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan and T Caddell 1776) Vol II, Book IV, Chapter II.

The Act pays no heed to future creative endeavours. The economic domain obtains complete domination over both the political and cultural domain. For the enhanced encouragement of creativity, it is proposed that creativity ought to be allowed to arise autonomously free from the constraints of economic dictates

2.4.2.1 Locking-in ideas

Whereas the provisions of the TCEs Act are a commendable first step in the protection of TCEs, they give the Act a disproportionate protectionist bent with little provisions to support the development and promotion of TCEs. The Act's lop-sidedness is seen starkly in its provisions concerning the derivate uses of TCES. The Act denotes that TCEs shall not be used for the creation of derivative works without the prior informed consent of the owners of the relevant TCE.[505]

Further, where a work based on a TCE is to be used for a commercial purpose the written consent of the right holder is required.[506] The key issue with respect to derivative uses of TCEs in this sense is the restrictive definition of derivative works provided in the Act. The Act defines a derivative work as, 'any intellectual creation or innovation based upon or derived from traditional knowledge or cultural expressions'.[507]

The Act therefore appears to include within the definition of derivative works, any work that may have been inspired by TK and TCEs; even one which may,

[505] TCEs Act, section 18(2)(h).
[506] ibid, section 20(2). The rights holder is defined in section 2 of the Act to mean, 'recognized individuals or organizations within communities in whom the custody or protection of traditional knowledge and cultural expressions are entrusted in accordance with the customary law and practices of that community'.
[507] TCEs Act, section 2.

within the precepts of copyright law, be original. This limits creativity and creates a lock-in of knowledge. It is argued that the “all-encompassing” definition of derivative works in the TCEs Act goes further than protecting expressions of TCEs and protects ideas within the TCEs as well. As noted above, most of Kenya’s modern creative industries borrow heavily from TCEs. This is seen in contemporary songs, art, dress and film, among others. Similarly, this provision limits the use of an existing TCE for the creation of a new TCE.

As is wont to happen, a local Kenyan artist may, for instance, be inspired by a traditional song to create a contemporary song. The above provision of the TCEs Act would mandate her to obtain the prior written consent of the relevant community to use the traditional music. The Act in is in effect requiring a license for the use of ideas within a TCE, thus, completely subjecting creativity to the dictates of the economic domain as propounded by Rudolf Steiner in his theory of social three-folding.

The utilisation of ideas should be differentiated from a situation where someone uses the actual traditional music for commercial purposes. In other words, there ought to be a distinction between instances where one uses the expression of ideas and the ideas themselves. It is important to distinguish between works inspired by TCEs and works that are actual existing TCEs. The law ought to limit itself to the latter situations so as to avoid instances where the sharing of ideas is limited or even made illegal.

A work inspired by a TCE, is differentiated from one that is derived from a TCE by reference to the idea/expression dichotomy in that, inspiration refers to borrowing ideas while derivation means borrowing from the expression itself.

2.4.2.2 Property right in perpetuity

The TCEs Act does not place a term duration on the rights held in respect of TCEs, effectively leading to a scenario wherein the rights are held in perpetuity. Thus, TCEs would never fall into the public domain or be available for use by other creators, indeed, even within the traditional set up itself. Explicitly, the Act provides that, 'Cultural expressions shall be protected against all acts of misappropriation, misuse, unlawful access or exploitation for as long as the cultural expressions fulfil the protection criteria set out in section 14'.[508]

Parallels can be drawn between the TCEs Act's property right in perpetuity and the perpetual common law copyright allowed by the Court of the King's Bench in England in the famed *Millar v Taylor*[509] case. Here the court held, by a majority, that an author enjoyed the exclusive right of publishing his work in perpetuity regardless of the provisions of the Statute of Anne. Lord Mansfield C.J., leading the majority decision of the court, provided a robust and influential justification as to the endless existence of an author's rights in literary property at common law. Yates, J., focussing upon the potential detriment to the public that would flow from the existence of a perpetual right, provided the dissenting opinion.

The heart of Lord Mansfield C.J.'s contention lay in the following lines of his speech:

[508] TCEs Act, section 17.
[509] (1769) 4 Burrow 2303, 98 ER 201.

> From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication? From this argument-because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.[510]

On this basis Lord Mansfield C.J. concluded that, '"it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication." But the same reasons hold, after the author has published'.[511] On his part Yates J. refused to accept that copyright should accrue to an author in perpetuity. The assertion in his dissent, which was to become influential in the years to follow, was, instructively:

> Shall an author's claim continue, without bounds of limitation; and for ever restrain all the rest of mankind from their natural rights, by an endless monopoly? Yet such is the claim that is now made; a claim to an exclusive right of publication, for ever: for, nothing less is demanded as a reward and fruit of the author's labour, than an absolute perpetuity.[512]

[510] (1769) 4 Burrow 2303, 2398, 98 ER 201.
[511] ibid.
[512] Ibid 2360.

Picking up from Yates J.'s dissent in *Milla*r, the contention for a perpetual common law copyright was effectively repudiated a few years later by the House of Lords in *Donaldson v Beckett.*[513] Here, Lord Camden opined:

> All societies, good or bad, arbitrary or illegal, must have some laws to regulate them. When an author died, his executors naturally became his successors. The manner in which the copy-right was held was a kind of copyhold tenure, in which the owner has a title by custom only, at the will and pleasure of the lord. The two sole titles by which a man secured his right was the royal patent and the licence of the Stationers' Company; I challenge any man alive to shew me any other right or title. Where is it to be fund? some of the learned judges say the words 'or otherwise' in the statute of queen Anne relate to a prior common law right? To what common law right could these words refer?"[514]

A similar position was taken by the US Supreme Court in *Wheaton v Peters,*[515] the first copyright case heard in the Supreme Court, which rejected the doctrine of common law copyright. The decision in *Wheaton*, as was the case in *Millar* and *Donaldson*, was a majority one. Justice McLean, writing for the majority, stated that there can be no doubt that at common law an author has a property in his manuscript, and can obtain redress against anyone who improperly obtains a copy and publishes it; 'but this is a very different right from that which

[513] The Hansard Report of *Donaldson* v *Beckett*, reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774). There's however, discontent as to whether *Donaldson* did in fact repudiate common law copyright; the argument being that the actual holding of the case was that the author's common-law right to the sole printing, publishing and vending of his works, a right which he could assign in perpetuity is taken away and supplanted by the Statute of Anne. The judges did not use the terms "copy" or "copyright" but spoke instead of the right of "printing and publishing for sale." Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 173 – 174.
[514] The Hansard Report of *Donaldson* v *Beckett*, reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950, 993 - 994 (1774)
[515] 33 U.S. 591 (1834).

asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world'.[516]

Comparisons can be made between the peril of a perpetual copyright as announced first in dissent by Yates J. in *Millar* then by Lord Camden in *Donaldson* and eventually by Justice McLean in *Wheaton* and the hazard posed by a perpetual property right over TCEs in the Kenyan context. As argued above, the perpetual property right over TCEs created by the Kenyan legislation would lead to a scenario whereby TCEs would never fall into the public domain or be available for use and reuse by other creators – within the traditional context itself and for modern creators, many of whom borrow from aspects of TCEs to make their creations. Should the claim over a TCE 'continue without bounds of limitation? And for ever restrain all the rest of mankind from their natural rights, by an endless monopoly?'[517]

The perpetual property right over TCEs completely negates a public domain for TCEs.[518] The TCEs Act lacks a mechanism to ensure a public domain. It is argued that a public domain for TCEs is merited as the public domain works in tandem with the idea/expression dichotomy for the encouragement of creativity.[519] In this regard the expressed form of a TCE, in addition to the idea(s) latent therein, becomes a basis for subsequent creativity.

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[516] ibid, 658.
[517] *Millar v Taylor* (1769) 4 Burrow 2303, 2360, 98 ER 201 (Yates J.)
[518] Chapter 3, part 3.4.4 discusses how the public domain for TCEs would arise, arguing for a period of protection of fifty years. The concerns of traditional communities in having their TCEs "fall" (or "rise", as the case may be) into the public domain are also noted.
[519] Wendy J Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102(7) Yale Law Journal 1533, 1559.

2.5 Conclusion

Kenya's creativity may be divided into traditional creativity as demonstrated by TCEs and modern creativity seen in the creative industries. It is clear that culture is the cornerstone of Kenyan society. The Constitution emphatically makes this point, providing that, 'This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation'.[520] With culture's overriding influence on Kenyan society, it is no wonder that modern creativity, seen in the creative industries, draws heavily on TCEs.[521]

Recognising that creativity in the Kenyan context is derived from TCEs then the focus of this chapter's inquiries has been how TCEs are regulated. It was seen that the *sui generis* protection of TCEs under the TCEs Act acts as a bar to creativity by locking-in ideas through the wide and equivocal definition of derivative works and by providing a perpetual property right for TCEs. In doing so, the Act emphasises existing property rights and does not support creativity to creativity to arise freely. Thus, the TCEs Act panders to the economic domain's domination over the cultural domain as put forward by the theory of social three-folding.

For the better encouragement of creativity, it is proposed that creativity ought to be allowed to arise autonomously free from the constraints of economic dictates. Following the elaboration put forward in this chapter of the law's current chilling effect on creativity the next chapter argues that the regulation of TCEs in Kenya ought to be brought under copyright law for the encouragement

[520] Constitution of Kenya, article 11(1).
[521] Shally-Jensen (n5).

of creativity. All the while it is acknowledged that Kenyan copyright law ought to be appropriately reformed to facilitate this objective.

CHAPTER THREE

PROTECTING KENYAN TRADITIONAL CULTURAL EXPRESSIONS UNDER COPYRIGHT LAW FOR THE ENCOURAGEMENT OF CREATIVITY

3.1 Introduction

This chapter urges for the copyright protection of traditional cultural expressions ("TCEs") in Kenya for the encouragement of creativity. The discussion here picks up from the arguments in the previous chapter regarding the regulation of TCEs. In Chapter two it was put forward that creativity in Kenya is highly derivative of its culture, specifically its TCEs.[1] Therefore the regulation of TCEs is a critical issue for creativity in the country. TCEs are currently protected under the *sui generis* Protection of Traditional Knowledge and Cultural Expressions Act 2016 ("TCEs Act").

It was seen in the preceding chapter that the TCEs Act inhibits creativity and emphasises existing property rights. .[2] By doing so , the TCEs Act panders to the dictates of the economic domain and acts as a bar to the cultural domain developing independently, against the prescriptions of the theory of social three-folding.[3] For the better encouragement of creativity, in line with the theory of

[1] This contention is best evidenced by the discussion on Kenya's contemporary creative industries, which are heavily influenced by TCEs in Chapter 2, part 2.2.4. See also Michael Shally-Jensen, *Countries, Peoples and Cultures: Eastern and Southern Africa* (Salem Press 2015) 120 – 124; Kathire Kiiru and Maina wa Mutonya, 'Music, Dance and Social Change in Eastern Africa' in Kathire Kiiru and Maina wa Mutonya (eds), Music and Dance in Eastern Africa (Twaweza Communications 2018) 8 – 9.

[2] See Chapter 2, part 2.4.2.

[3] Rudolf Steiner, *Basic Issues of the Social Question: Towards Social Renewal* (Frank Thomas Smith tr, Rudolf Steiner Press 1977) 58. Available at the *Institut Für Soziale Dreigliederung* (Institute of Social Threefolding) website <http://www.threefolding.org/archiv/800.html> accessed 18th November, 2019.

social three-folding, it is proposed that creativity ought to be allowed to arise autonomously free from the constraints of economic dictates.[4]

To this end it is argued that so as to encourage the creation of new works in Kenya, then TCEs ought to be regulated under copyright law, enabling the TCEs to benefit from copyright's tried and true edifice; more so, its fundamental axiom, the idea/expression dichotomy. All the time particular aspects of TCEs which may not bode well for their protection under copyright will be taken into consideration and it will be noted how Kenyan copyright law may be reformed to cater for these issues. In this regard, this chapter urges for a special category of copyright works for TCEs.

This chapter begins to answer the thesis's third research question, how may Kenya's copyright law be reformed for it to better encourage creativity? This task is continued in subsequent chapters, particularly, Chapters six and seven. Whereas the discussion in this chapter is placed specifically in the Kenyan context, it is framed within the precepts of Rudolf Steiner's theory of social three-folding, which forms the theoretical framework of this thesis and is considered in greater detail in the next chapter. However, having offered an introductory discussion to this theory in the first chapter then the references to it in this chapter will be properly understood.[5]

[4] ibid 60.
[5] See Chapter 1, part 1.5.1.

3.2 Initial considerations for the protection of traditional cultural expressions under copyright law

This chapter proposes that the legal regulation of TCEs be provided for within copyright law. As noted, TCEs are currently protected under the TCEs Act. This Act is the legal framework under which both TCEs and traditional knowledge (TK) are protected and promoted. It is argued and indeed has been demonstrated that Kenya's creative industries draw heavily from TCEs.[6] As will be noted in the ensuing discussion the "social costs" of not freely availing TCEs for use by modern creators significantly outweighs the rigid protection offered to traditional communities in the TCEs Act.

Whereas it is proposed that the regulation of TCEs ought to fall under copyright law, the same is not proposed for TK. While TCEs may be considered a part of TK, TCEs and TK are conceptually different.[7] TK effectively refers to traditional "know-how", for instance, for curing certain diseases.[8] Thus, it is argued, the nature of TK is far removed from the nature of the types of works that copyright offers protection to. Accordingly, the specific proposals for reform that this chapter and thesis explore is one for copyright protection for TCEs, without further consideration of the protection of TK under the TCEs Act.[9]

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[6] See Chapter 2, part 2.2.4.

[7] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Traditional Knowledge - Operational Terms and Definitions' (WIPO 2002) 11.

[8] ibid.

[9] The TCEs Act may provide an adequate regime for the regulation of TK. As TK generally refers to "know how" which in copyright terms would be considered "ideas" or "concepts" then copyright law would not be able to protect such knowledge. This contention can be gleaned from the decision of the US Supreme Court in *Baker v Selden* 101 U.S. 99 (1879), which is often cited as the genesis of the idea/expression dichotomy. In this case, the court held that a book describing a system of book-keeping did not give an author the right to exclude others from practising what was described in the book, only the right to exclude reproduction of the material in the book.

Laying the ground for the specific reform to be considered are preliminary issues which support the proposal of copyright protection for TCEs, these are, the social costs of locking-in ideas and the current protection of performers of TCEs under the Kenya Copyright Act. Additionally, this introductory discussion makes note of the principles which ought to govern a viable protection regime; the meaning of the words “protection” and “promotion” as well as the definition of TCEs that the operational copyright law, Kenya Copyright Act 2001 (“Kenya Copyright Act”), ought to utilise.

3.2.1 Social costs of locking-in ideas

It is argued that in order to secure the “field of ideas”[10] for use by creators then the protection of TCEs ought to be brought under copyright law. It is acceded that traditional communities require and deserve protection for their TCEs. Indeed, it may be averred that by protecting TCEs under copyright law, they will lose the strong protection that they currently have under the *sui generis* TCEs Act, to the detriment of the traditional communities from which the TCEs come from. However, a proper balance ought to be struck between the protection of TCEs and the encouragement of creativity both in the modern sense, seen in the creative industries, as well as in the traditional sense through the production and dissemination of more TCEs.

Whereas both of these competing interests are equally important, it is submitted that the desire to promote creativity is one that society cannot do without.

[10] Justin Hughes, ‘The Philosophy of Intellectual Property’ (1988-1989) 77(2) Georgetown Law Journal 287, 315.

Making things is a key element of what it is to be human.[11] We cannot help but to create, be that due to necessity or for enjoyment.[12]

Sui generis regimes for protecting TCEs can be evaluated by considering their social costs.[13] Karl William Kapp developed the theory of social costs in the context of economic theory.[14] In this regard, by social costs he meant all direct and indirect losses sustained by third persons or the general public as a result of unrestrained economic activities.[15] Kapp however, noted that an inquiry into social costs would be incomplete without considering other aspects that are non-economic in character.[16] Kapp concluded that the theory of social costs, and concomitantly social benefits, had transcended economic theory.[17] The theory of social costs has been applied to queries on intellectual property ("IP"), for instance, with regard to analyses on the impact of the extension of the duration in copyright protection.[18] In this respect, social costs may be said to be, 'a variety of "diseconomies", increased risks and uncertainties…borne by third persons or society'.[19]

It is argued that by locking-in ideas and allowing a property right in perpetuity over TCEs, Kenya's TCEs Act effectively deprives the country of the necessary building blocks for creative activity to occur optimally. The social costs of such a

[11] James Griffin, *The State of Creativity: The Future of 3D Printing, 4D Printing and Augmented Reality* (Edward Elgar 2019) 2.
[12] ibid.
[13] Kilian Bizer and others, 'Sui Generis Rights for the Protection of Traditional Cultural Expressions' (2011) 2(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 114, 115.
[14] Karl William Kapp, *The Social Costs of Private Enterprises* (Schocken Books 1975) 11.
[15] ibid.
[16] ibid.
[17] Karl William Kapp, *The Heterodox Theory of Social Costs* (Sebastian Berger ed, Routledge 2016) 94.
[18] See, for instance, Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 186 – 188.
[19] Kapp (n17) 95.

regime significantly outweigh the social benefits. Creativity is what has driven mankind forwards, to make us achieve, to make us create from the mind what does not yet exist in our reality.[20] From the moment in which the human is conceived, the process of creativity begins.[21] The human infant comes to terms with their surroundings and with other humans, thus, begins the process of creativity.[22] It is from the web of creativity that great civilisations and societies develop.[23] If creativity is so central, if it is so important to the development of life, of society, and the individual, we should recognise this within our laws.[24] Copyright law is one of the most important means of regulating the flow of ideas and knowledge-based products.[25] It is urged that bringing TCEs under copyright law would lead to an enhanced flow of ideas and encourage further creativity in Kenya.

Whereas some TCEs may not be readily protectable by copyright law owing to copyright law's doctrinal and normative restrictions this is not an insurmountable problem and as argued below these aspects of Kenyan copyright law can be reformed to cater to TCEs, which form and influence a significant portion of Kenya's artistic creativity.

3.2.2 Aspects of traditional cultural expressions already under copyright protection: performers' rights

It is important to consider the rights of performers of TCEs as this is an area that Kenyan and well as international copyright law already makes provision for.

[20] Griffin (n11) 9.
[21] ibid.
[22] ibid.
[23] Griffin (n11) 9.
[24] ibid 14.
[25] Wei Shi, 'Intellectual Property, Innovation and the Ladder of Development: Experience of Developed Countries for China' in Ken Shao and Xiaoqing Feng (eds), *Innovation and Intellectual Property in China: Strategies, Contexts and Challenges* (Edward Elgar 2014) 223.

Whereas the TCEs Act offers protection to traditional communities over the performance of their TCEs;[26] it is arguable that further, more elaborate protection is offered in the Kenya Copyright Act, under the rubric of performers' rights. Performers' rights refer to the rights granted to a performer to require her consent for the fixation and exploitation of her performance.[27]

Performers' rights, perhaps though not considered a mainstream copyright right, are now a generally accepted aspect of copyright law.[28] As early as 1925 the UK introduced criminal sanctions against people abusing a performer's right to control the fixation and subsequent use of their performance.[29] Today, the rights in performances are elaborately provided for in the UK in the Copyright Designs and Patents Act 1988 ("UK CDPA 1988"), Part II, sections 180 – 212A. On its part, the US Copyright Act of 1976 ("US Copyright Act") expressly precludes the unauthorized fixation and trafficking in sound recordings and music videos without the consent of the performer involved.[30]

In Kenya, performers' rights have existed in copyright law since 1989.[31] One of the four collective management organisations in the country, the Performers' Rights Society of Kenya, represents performers in musical and dramatic works.[32] The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") which Kenya is a party to as a member of the World Trade Organization, is the leading international regime on the protection of performers'

[26] TCEs Act, section 18(2)(c).
[27] Mathilde Pavis, 'Runway Models, Runway Performers? Unravelling the *Ashby* Jurisprudence under UK Law' (2018) 13(11) Journal of Intellectual Property Law & Practice 867, 868.
[28] Bently and Sherman (n18) 341.
[29] Dramatic and Musical Performers Protection Act 1925, consolidated and amended in the Performers' Protection Acts 1958 and 1972.
[30] US Copyright Act of 1976, sections 1101 and 2319A.
[31] This was by virtue of the Kenya Copyright (Amendment) Act 1989.
[32] For an in-depth consideration of Kenya's collecting societies see Chapter 7, part 7.3.4.

rights. It provides for the protection of performers, producers of phonograms (sound recordings) and broadcasting organizations by annexing the Rome Convention for the Protection of Performers, Producers, Phonograms and Broadcasting Organizations of 1961,[33] which is the principal and founding stand-alone instrument on the protection of a performer's rights in the transnational context.

Additionally, the World Intellectual Property Organization ("WIPO") Performances and Phonograms Treaty 1996 ("WPPT") and the Beijing Treaty on Audiovisual Performance, both of which Kenya has signed (although not acceded to or ratified) provide for the rights of performers internationally.[34] Notably, the WPPT, defines performers to include performers of "expressions of folklore".[35]

The Kenya Copyright Act provides for the rights of performers.[36] Rights of performers were introduced to Kenyan copyright law by virtue of the Copyright (Amendment) Act, 1989. A very recent amendment to the Kenya Copyright Act 2001, the Copyright (Amendment) Act 2019 provided a definition for performer, a provision which was absent from the principle Act.[37] Following this

[33] TRIPS, article 2(2).
[34] It has been argued that international copyright law has largely been domesticated in Kenya through the Kenya Copyright Act, therefore the WPPT would have operation in Kenya in this regard. Ben Sihanya, 'Copyright Law in Kenya' (2010) 41(8) International Review of Intellectual Property and Competition Law 926, 938. On its part, the Beijing Treaty will not enter into force until it has been ratified or acceded to by at least 30 parties, as of August 2019 26 parties have ratified it. WIPO website < https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=841> accessed 26th August 2019.
[35] WPPT, article 2(a).
[36] Kenya Copyright Act, section 30.
[37] The Kenya Copyright Act was very recently amended by the Kenya Copyright (Amendment Act) 2019 which came into force in October 2019. The primary purposes of this amending Act is to provide digital copyright reform, strengthen the collective management of copyright works and implement the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. The Amendment Act also provides

amendment a performer is now defined as 'an actor, singer, declaimer, musician or other person who performs a literary, musical work or a work of folklore and includes the conductor of the performance of any such work'.[38] As discussed in Chapter two, the term folklore as utilised in Kenyan law fits within the nomenclature of TCEs and for this thesis the operational term employed is TCEs.[39] Whereas the Kenya Copyright (Amendment Act) 2019 included a performer of TCEs (folklore) within its definition of performer, it removed from the principal Act substantial provisions regarding TCEs.[40]

All in all, section 30 of the Kenya Copyright Act provides elaborate rights of performers including *inter alia*, , the rights to - broadcast a performance,[41] make a fixation of a performance,[42] and rent out a performance.[43] Owing to the inclusion of performers of TCEs within the definition of performer then it is contended that the rights of performers under the Kenya Copyright Act also extend to performers of TCEs. Additionally, as discussed above, owing to Kenya signing the WPPT and arguably, domesticating it through the Kenya Copyright Act, then it seems apparent that performers of TCEs are given rights under the Kenya Copyright Act. Accepting this position then it is clear that a

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numerous amendments to the definitions of various words and terms. The 2001 Act remains the principal law.

[38] Kenya Copyright Act, section 2(1) (emphasis added).

[39] Chapter 2, part 2.2.1.2.

[40] Previously, the Kenya Copyright Act at section 49(d) granted the attorney general the authority to make regulations governing the use of TCEs. Oddly, whilst the Amendment Act of 2019 removed this provision it did not repeal the regulations that the attorney general had made regarding TCEs in the Copyright Regulations of 2004 and thus, arguably, these regulations are still in force. These Regulations denote the process of applying to use TCEs for commercial purposes, which application ought to be made to the Kenya Copyright Board (regulation 20(2)). However, the transitional provisions of the TCEs Act appear to supersede this regulation, as they require anyone who was before the commencement of the TCEs Act involved in the exploitation and dissemination of TCEs to comply with the provisions of that Act within 12 months (section 42(2). The Copyright Regulations of 2004 also provide for moral rights in TCEs and makes the breach of these rights a criminal offence (regulation 20(4)), a provision which has remained intact.

[41] Kenya Copyright Act, section 30(1) (a).

[42] ibid, section 30(1) (c).

[43] ibid, section 30(1) (e).

significant portion of the extent of rights that are important for TCEs are already protected by copyright law and this would set the stage for the entire edifice of TCEs to come under copyright protection.[44]

3.2.3 Principles governing a viable protection regime

WIPO has identified three principles that may be considered when coming up with a viable system for the protection of TCEs.[45] First, pre-existing TCEs are a basis for further creativity, copyright laws are generally adequate to protect contemporary TCEs.[46] Second, the establishment of property rights over TCEs currently in the public domain is not appropriate, neither as a matter of IP policy nor cultural policy.[47] Third, however, an absolutely free and unregulated public domain does not meet all needs of traditional communities, specifically in respect of inappropriate uses of their TCEs.[48] In this regard it should be possible for traditional communities to prevent particular uses of public domain TCEs taking place outside the context of the community. Such uses include uses that falsely suggest a connection with a traditional community; derogatory, libellous, defamatory, fallacious and offensive uses; and uses of sacred and secret TCEs.[49]

It has been noted that many of the needs of traditional communities in respect of the third principle have been answered by consumer protection laws, unfair

[44] It is accepted that a performer of a work or TCE need not have any connection with the underlying work she is performing or in the case of a TCE specifically be a member of the traditional community from which the TCE emanates. However, in the context of TCEs in Kenya, owing to among other things, language barriers, TCEs are most often performed by members of the relevant traditional community. Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring and Innovative Lawyering 2016) 296.

[45] WIPO, 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore' (WIPO 2003) 19.

[46] ibid.

[47] ibid. This position is opposed, as discussed in part 3.4.2 below.

[48] ibid.

[49] ibid 20.

competition laws and laws on advertising and marketing.[50] For example, as seen in Chapter two, in the US, the Indian Arts and Crafts Act, 1990 protects Native American artisans by assuring them of the authenticity of Indian artefacts under the authority of an Indian Arts and Crafts Board.[51] This Act prevents the marketing of products as "Indian made" when the products are not made by Indians as they are defined by the Act.[52]

Regarding the importance of maintaining a public domain in respect of TCEs, as put forward by WIPO, it is contended that the copyright protection of existing TCEs[53], as proposed in this chapter, would not diminish the public domain as ideas within TCEs would be easily and readily available for use by all; and copyright protection, when granted, would only be availed for a set duration of time.[54]

3.2.4 The meaning of "protection" and "promotion"

It has been stated that the term "protection" may have several different meanings, including: preserving, promoting wider use, preventing misuse, controlling use or channelling a proper share of benefits to TCE holders.[55]

[50] ibid 46.
[51] US Indian Arts and Crafts Act 1990, section 102. See Chapter 2, part 2.2.3.
[52] ibid, section 104.
[53] See the discussion in part 3.4.
[54] In its lay categorisation the public domain refers to works that are free from copyright. In technical terms the public domain arises in two general instances. First, works for which the term of copyright has expired. Second, works that are categorically excluded from copyright protection; these are, primarily, public documents, such as judicial opinions and legislative enactments. Edward Samuels, 'The Public Domain in Copyright Law' (1993) 41(2) Journal of the Copyright Society of the USA 137, 151. However, Samuels, notes that no concrete "theory of the public domain" has emerged owing to the diverse public policy objectives that underlie the doctrine. This has led to the doctrine being conceptualised and defined in various ways. For instance, Litman defines the public domain as a 'commons that includes those aspects of copyrighted works which copyright does not protect'. These include, 'ideas, methods, systems, facts, utilitarian objects, titles, themes, plots, scènes à faire, words, short phrases and idioms, literary characters, style, or works of the federal government'. Jessica Litman, 'The Public Domain' (1990) 39(4) Emory Law Journal 965, 968, 992 – 993.
[55] WIPO (n45) 12.

Viewed from this standpoint the "promotion" of TCEs may be said to be subsumed within their "protection". It may, however, be advisable to clarify these two terms. As noted in the preceding chapter, it is particularly important to consider issues of attribution, remuneration and control of TCEs, three functional areas in which traditional communities ought to be "protected".[56] It is argued that considerations on these three key areas is what may be properly termed "protection" whereas the promotion of wider use of the TCEs may be termed "promotion".

It is maintained that Kenya's copyright law ought to be reformed so as to bring the protection and promotion of TCEs under its mandate; this would lead to encouraged creativity in both the traditional and modern setting as discussed herein. Thus, copyright law ought to respond for the "protection and promotion" of TCEs in this regard.[57]

3.2.5 Definition of traditional cultural expressions to be adopted

It is proposed that the definition of TCEs within the TCEs Act, which as noted in the preceding chapter is effectively a reproduction of WIPO's definition of the term offered within the Model Provisions of WIPO and the United Nations Educational, Scientific and Cultural Organisation ("UNESCO"), is a sufficient definition of TCEs to be carried on for utilisation in the Kenya Copyright Act.[58]

[56] Peter Jaszi, 'Protecting Traditional Cultural Expressions – Some Questions for Lawmakers' (2017) 4 WIPO Magazine 10. See Chapter 2, part 2.2.
[57] On this point copyright law may learn from cultural heritage studies and cultural heritage regulations which have moved from the limited way of understanding the protection of culture as "freezing" it in some pure or primordial form to viewing protection as "safeguarding" which includes encouraging access, engagement, transmission and re-use. See UNESCO website < https://ich.unesco.org/en/safeguarding-00012> accessed 27th March 2019.
[58] See Chapter 2, part 2.2.1.2.

It will be recalled that the TCEs Act defines TCEs as:

> [A]ny forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise of the following forms of expressions or combinations thereof -
>
> (a) verbal expressions including stories, epics, legends, poetry, riddles; other narratives; words, signs, names, and symbols;
>
> (b) musical expressions including songs and instrumental music;
>
> (c) expressions by movement, including dances, plays, rituals or other performances, whether or not reduced to a material form;
>
> (d) tangible expressions, including productions of art, drawings, etchings, lithographs, engravings, prints, photographs, designs, paintings, including body-painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, pictorial woven tissues, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments, maps, plans, diagrams architectural buildings, architectural models; and architectural forms.[59]

Having laid the foundation for why and how copyright protection can be useful for TCEs in the Kenyan context and noted preliminary issues that ought to be considered; the discussion now turns to the specific reform that ought to be carried out to Kenyan law to enable the copyright protection of TCEs.

3.3. A proposal for reform of Kenyan copyright law for the protection and promotion of traditional cultural expressions

Under the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), copyright protection is available to literary and artistic

[59] TCEs Act, section 2.

works which, 'include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression'.[60] The Kenya Copyright Act on its part has the following works as works subject to copyright protection – literary, musical, artistic, dramatic, audio-visual, sound recordings and broadcasts.[61] The protection provided by copyright is mainly the right to prevent or authorize the copying, adaptation, communication to the public of the work; as well as the moral rights of attribution and integrity. This chapter argues that these rights are well suited to meeting the needs and objectives of traditional communities and society at large in respect of the protection and promotion of TCEs.

Many TCEs may already constitute the subject matter of copyright protection. For instance, traditional paintings and drawings may be artistic works. Many other TCEs owing to their subject matter, or due to particular principles of copyright law, do not appropriately fit within copyright's structure. For instance, folk songs, are mostly "created" and passed down from generation to generation in oral form.[62] Owing to the requirement that copyright works be fixed in a material form that is currently in effect in Kenya such songs would not automatically be liable for copyright protection.[63]

[60] Berne Convention, article 2(1).
[61] Kenya Copyright Act, section 22(1). However, strangely, under section 2 of the Kenya Copyright Act an author of a "published editions" is included in the definition of author, yet, published editions are not a stated subject matter of copyright.
[62] WIPO (n45) 42.
[63] A well-known fact of copyright law is that the Berne Convention, article 2(2), makes it clear that national laws need not provide that fixation in some material form is a general condition for protection. Kenya has chosen to include a fixation requirement for copyright protection in its copyright law, Kenya Copyright Act, section 22(5). The same is true of the UK, UK CDPA 1988, section 3(2), and the US, US Copyright Act, § 102(a).
See further explication on the requirement for fixation in part 3.4.3 below.

On the whole, it is submitted that Kenya ought to enact provisions in the Kenya Copyright Act providing for TCEs as a special category of work. This special category is important as it would enable TCEs to maintain their character as TCEs. What differentiates TCEs from ordinary copyright works is their "traditional" nature, which gives them unique characteristics. For instance, a considerable number of TCEs are forged with sacred and spiritual meaning.[64]

This unique nature would be lost if TCEs were to be subsumed into other copyright works, even if they could appropriately fit into those categorisations. However, to buttress the placing of TCEs as a special category of copyright work it is important that queries that may be raised regarding the copyright protection of TCEs are addressed; these questions concern – authorship, ownership, originality, the public domain, tangibility and duration of protection.

3.4 Overcoming challenges to the copyright protection of traditional cultural expressions

3.4.1 Authorship and ownership

Concerning authorship and ownership, the question that arises in respect of TCEs is who would be regarded as the author and thus, first owner of such a production in the copyright sense.[65] Copyright recognises the "individual" who has created the work as its author.[66] More specifically, the author of a work is the person who has expended the relevant skill, labour and judgment in the work's creation.[67] Where a TCE is created by virtue of individual creativity then

[64] Christine Haight Farley, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer' (1997) 30(1) Connecticut Law Review 1, 10 – 11.
[65] Bently and Sherman (n18) 132.
[66] Jane C. Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52(4) DePaul Law Review 1063.
[67] Bently and Sherman (n18) 126.

such author may be easily identifiable. If such sole creator is not easily identifiable, then one viable response to this issue, it has been proposed, is to be found within article 15(4)(a) of the Berne Convention.[68] This article provides that:

> In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

This article was introduced into the Berne Convention in 1967 specifically to provide protection to TCEs which have no identifiable author.[69] The disadvantages of article 15(4)(a) are that once an anonymous work is 'lawfully made available to the public' the period of protection will expire in 50 years.[70] (It is accepted, that this is only a minimum standard and a member state could in its national laws provide for a longer term).[71] Thus, raising issues with copyright duration (issues which are discussed in detail below). Also, article 15(4)(a) makes no explicit mention of the role of communities, providing that rights on behalf of the author are exercised by "a competent authority".[72] Despite these objections, it is clear that the Berne Convention has contemplated the copyright protection of TCEs.

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[68] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Traditional Knowledge, 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (WIPO 2018), Annex I, 13.
[69] ibid.
[70] Berne Convention, article 7(3). The Kenya Copyright Act incorporates this provision, section 23(3).
[71] Berne Convention, article 7(6).
[72] Jaszi (n56) 13.

However, the Berne Convention solution above, applies in instances where the TCE has been created by an individual creator, what about in cases where the production emerges from a number of members of a traditional community, as is wont to occur, working collectively?[73] Most TCEs are custodial, passed down from generation to generation, so there often is no one identifiable author or set of discrete joint authors to whom copyright protection can attach.[74]

On this point it is argued that the Kenya Copyright Act would provide that a member of a traditional community, nominated by the community in accordance with its customary laws, would hold the copyright in the TCE in trust on behalf of other community members and shall be limited in his interaction with the TCE in line with the community's customary laws. The TCEs Act in its current formulation contemplates this scenario by defining the "owner" of a TCE as:

> [L]ocal and traditional communities, and recognized individuals or organizations within such communities in whom the custody or protection of traditional knowledge and cultural expressions are entrusted in accordance with the customary law and practices of that community.[75]

The Ghana Copyright Act 2005 (Ghana Copyright Act) has in fact implemented this suggested approach. The Ghana Copyright Act provides for "folklore" as a separate category of copyright work distinct from the typical categories of works

[73] Peter Jaszi notes that such a group would be working "collectively" rather than "collaboratively" in terms of joint authorship, expounded on below. Jaszi (n56) 13.
[74] Patricia L. Judd, 'The Difficulties in Harmonizing Legal Protections for Traditional Knowledge and Intellectual Property' (2019) 58(2) Washburn Law Journal 249, 260.
[75] TCEs Act, section 2 (emphasis added). The definition of owner subsumes the almost identical definition for "holder" of a TCE in the same section. Holders are defined as, 'recognized individuals or organizations within communities in whom the custody or protection of traditional knowledge and cultural expressions are entrusted in accordance with the customary law and practices of that community'. Both words are operationalised variably and interchangeably.

including literary, artistic and musical works.[76] The rights in TCEs are vested in the President on behalf of and in trust for the people of the Republic.[77] Additionally, the provision which denotes the protection of TCEs does not require TCEs to be original or fixed in order to gain copyright protection.[78] The Ghana Copyright Act distinctly separates TCEs from other copyright works, providing for their protection as a separate category of copyright work. This is different from where TCEs are included together in a list of works to which copyright protection may apply as is the case in Tunisia,[79] for instance. This separation allows for separate rules to apply with regard to TCEs.

In instances of collective creativity as is often the case with TCEs the concept of joint authorship may spring to mind. The Kenya Copyright Act defines a work of joint authorship as, 'a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors'.[80] Beyond this pronouncement there does not appear to be any more commentary on the concept of joint authorship either from leading Kenyan copyright law texts or from case law.[81]

In the absence of its own dicta on the concept, the most authoritative conceptualisation of the notion of joint authorship for Kenya would come from the UK. Kenya's provision clearly derives from the statement in the UK CDPA 1988 which provides that a work of joint authorship, 'means a work produced

[76] Ghana Copyright Act, sections 1 and 4. Similarly, folklore is specifically administered by the National Folklore Board (section 63) which is a separate agency to the Copyright Office which administers copyright generally (section 66).
[77] Ghana Copyright Act, section 4(2).
[78] ibid, section 4(1).
[79] Law No. 94—36 of February 24, 1994, on Literary and Artistic Property, section 1.
[80] Kenya Copyright Act, section 2.
[81] See, Kenya's leading copyright law text, Sihanya (n44); and the most elaborate repertoire of case law, Kenya Law Reports website <http://kenyalaw.org/caselaw/> accessed 26th August, 2019.

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'.[82]

From this statutory definition three conditions are noted. First, it is necessary to show that each of the authors contributed to the making of the work and that their contribution was significant and original; second, the work must have been produced through a process of common design, co-operation of plan among the authors; third, the respective contributions must not be distinct or separate from each other.[83]

The US Copyright Act on its part defines a "joint work" as, 'a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole'.[84] Here, it has been noted that the touchstone is the intention, at the time the work was created, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either "inseparable" (as in the case of a novel or painting) or

[82] UK CDPA 1988, section 10(1), which is a provision which has been carried forward from the UK Copyright Act 1911. Joint authorship ought to be differentiated from the concept of "works of co-authorship" which means, 'a work produced by the collaboration of the author of a musical work and the author of a literary work where the two works are created in order to be used together'. UK CDPA 1988, section 10A. The Kenya Copyright Act does not provide for the concept of co-authorship.

[83] Bently and Sherman (n18) 130 – 131. Hacon J offers a summary of the UK case law on joint authorship, which has nuanced the statutory provisions, in his judgment in *Martin v Kogan* [2017] EWHC 3266 (IPEC), [2018] FSR 10. On appeal, the Court of Appeal has recently further clarified the law on joint authorship in the UK in *Kogan v Martin* [2019] EWCA Civ 1645, [2020] FSR 3. Here, the Court of Appeal enunciated 11 propositions (succinctly listed in paragraph 53) including that contributions that were not "authorial" did not count (paragraph 42) and that respective shares of joint authors are not required to be equal and can reflect pro rata the relative amounts of their contributions (paragraph 52). Simone's recent illuminating monograph on "collective authorship" offers explication on the three requirements of the UK CDPA 1988 regarding joint authorship, the Court of Appeal referred to this work in its decision in *Kogan*. Daniela Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press 2019) 29 – 42.

[84] US Copyright Act, section 101. In the US, a joint work may be contrasted with a "collective work". A collective work is, 'a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole'. US Copyright Act, section 101. This definition subsumes what the UK refers to as a published edition, which in the UK is a stand-alone subject matter of copyright. UK CDPA, section 8.

"interdependent" (as in the case of a motion picture, or opera, words and music of a song).[85]

Despite joint authorship appearing as a viable response to queries on collective creativity within a traditional community, one soon runs into the same fundamental headwinds as described above concerning individual authorship. As the joint authors will only be those members of the community involved in the actual creation of the work, then this would leave only a small number of the traditional community with legal rights. Specifically, as the first condition above for authorship denotes, each author's contribution ought to have been significant and original. In this regard a person who merely suggests the idea, without contributing anything to the literary, dramatic or other form/expression in which copyright subsists, is not a joint author.[86]

Be that as it may, even if joint authorship was to be proven amongst a number of members of a community, a key concern regarding TCEs is that they belong to the entire community and not only those members who fix the expression of the TCE. The conditions for joint authorship detailed above are likely to curtail a finding in favour of joint authorship for an entire traditional community. Therefore, leaving a significant portion of such community without the attendant rights over "their" TCE.

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[85] Craig Joyce and others, *Copyright Law* (10th edn, Carolina Academic Press) 258. In this latter sense of interdependence, the US's concept of joint authorship subsumes the UK's separate notion of co-authorship, UK CDPA 1988, section 10A. In *Aalmuhammed v Lee* 202 F.3d 1227 (9th Cir. 2000), the Ninth Circuit noted that among the several factors that suggest themselves as criteria for joint authorship, the ability to have creative control and objective manifestations of a shared intent to be joint authors were key.

[86] Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (17th Ed. Sweet and Maxwell 2016) para 4-47. However, Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 noted that a joint author included one who contributed significantly to creating, selecting or gathering together the detailed concepts or emotions that the words fixed in writing. [para 41] (emphasis added). Thus, to qualify this would have to be a detailed engagement and not merely a suggestion.

It has also been argued that the Western notion of property is inappropriate for the protection of TCEs.[87] In this framework, property rights confer wide-ranging individualistic power to the owners of property.[88] As is detailed in Chapter four this notion arises within the framework of the Western cultural model.[89] The Western cultural model, seen, it is contended, in the UK and the US, is individualistic in nature; in this regard individuals emphasize how they are different, unique and better than others.[90] They tend to see themselves as distinct from others. In such cultures, people believe that artists embody these traits to an extreme - artists are more unique, more different, and more separate than the average person.[91]

Collectivist cultures such as Kenya, it is contended, hold a radically different cultural model of creativity. In collectivist cultures people emphasize that they are ordinary, similar to, and no different from others; and rather than separateness, they emphasize their connectedness.[92] As TCEs are many times the result of members of a traditional community working collectively then their protection through copyright would raise inherent tensions, the argument would go.

In response to this it should be noted that the homogeneity of the concept of property has been questioned with the individualistic conception of property ownership being attacked within the Western world itself for being too

[87] Andreas Rahmatian, 'Universalist Norms for a Globalised Diversity: On the Protection of Traditional Cultural Expressions' in Fiona Macmillan (ed), *New Directions in Copyright Law*, vol 6 (Edward Elgar 2007) 220.
[88] ibid.
[89] See Chapter 4, parts 4.3.2.2 and 4.4.3.1.
[90] Keith Sawyer, 'The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law' (2011) 86(5) Notre Dame Law Review 2027, 2029. See Chapter 4, part 4.3.3.1
[91] ibid.
[92] ibid.

individualistic, selfish, anti-collective and asocial.[93] Additionally, as was submitted in the preceding chapter, the nature of right created by the TCEs Act is indeed a property right.[94] Therefore, the rights currently attaching to TCEs are property rights and it would not be untoward to continue their protection within copyright's edifice which provides property rights.

3.4.2 Originality

Concerning the requirement of originality, although the Berne Convention does not expressly say so, it is apparent that copyright works must be intellectual creations.[95] For this reason, many national laws provide that works must be "original". It has been argued that this requirement prevents the protection of TCEs by copyright.[96] Under the Kenya Copyright Act for a literary, musical, artistic or dramatic work to be copyrightable or "eligible for copyright",[97] in the phraseology of the Act, it must be original.[98] Explicitly, section 22(3)(a) provides that, 'A literary, musical, artistic or dramatic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character'.

Kenyan copyright law scholar, Ben Sihanya, argues that in the Kenyan context originality means that the work - is the author's own work, that is, is not copied; and embodies skill and judgement.[99] Instructively, Sihanya notes that taking into consideration the language of section 22(3)(a) '…unless sufficient effort has

[93] Rahmatian (n87) 220 – 221.
[94] See Chapter 2, part 2.3.4.1.
[95] See Berne Convention, articles 2(1) and 2(5).
[96] WIPO (n45) 37.
[97] Kenya Copyright Act, section 22 (3)(a). In *Sapra Singh v Tip Top Clothing* [1971] EA 489 the Kenyan court clarified that the phrase, "eligible for copyright" did actually confer copyright on works.
[98] Sihanya (n44) 197 – 198.
[99] ibid.

been expended'[100] and relevant case law on the matter, effort or labour, "sweat of the brow", may be dispositive in a query on originality in Kenya. For instance, in the case of *Systems Africa Ltd vs. Kalamazoo Ltd and Another*[101] the entry point for the court was the effort or labour that had been applied without discussing the skill and judgment.

Although this perspective seems to be supported by the wording of section 22(3)(a) it is not doctrinally or normatively sound in the wider context of the Kenya Copyright Act and in the copyright law of common law jurisdictions generally.[102] Within common law jurisdictions originality is generally taken to mean that the work is not the result of slavish copying but has been produced independently by the expenditure of a sufficiently substantial amount of skill, knowledge, mental labour, taste or judgment.[103]

[100] Emphasis added.
[101] Civil Appeal No. 34 of 1971 [1974] EA 21.
[102] Sihanya (n44) 197 – 198. It has however been argued that current UK cases strongly emphasise the merit of labour in the making of a copyright work. As Griffin notes, 'provided that there is a sufficient amount (of labour) the reward of property in the guise of copyright will be forthcoming'. James Griffin, 'Making a New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright' (2013) Intellectual Property Quarterly 69, 77. In the US the requirements of independent creation plus a modicum of creativity as propounded in *Feist Publications v Rural Telephone Services Company* 499 U.S. 340, 344 (1991) abide. However, Fisher contends that in the US Judges and juries find ways to favor plaintiffs who have created what they consider meritorious works, and to disfavor plaintiffs who have created what they consider bad or unimpressive material. On the other hand, judges and juries find ways to penalize defendants whose work seems poor, and to give extra latitude to defendants whose work seems worthy of respect. William Fisher, 'CopyrightX Lecture 1.2 Foundations of Copyright Law – Originality' available at Copyright X website < http://copyx.org/lectures/> accessed 28th October, 2019.
[103] Adrian Speck and others, *Laddie, Prescott and Vitoria: The Modern Law of Copyright* (5th edn, LexisNexis Butterworths 2018) [3.40] – [3.46]. In the UK, the concept of originality had been required to be interpreted in conformity with EU legislation and decisions of the Court of Justice of the European Union ("CJEU") which led to "subtle changes". However, following the recent "Brexit", the exit of the UK from the European Union ("EU"), EU legislation and decisions of the CJEU no longer have application in the UK generally and on UK copyright law specifically. Nonetheless, EU law that is already in application in the UK, and its implementation, will be preserved as retained EU law under the powers in the European Union (Withdrawal Act) 2018. Abbe Brown and others, *Contemporary Intellectual Property: Law and Policy* (5th edn, Oxford University Press 2019) 41.

Accepting the requirements of originality for Kenyan copyright law as being that the work is the author's own work and that it embodies sufficient skill, labour and judgement, then it appears that at first blush the requirement of originality does not pose major difficulties in respect of TCEs seeking copyright protection. Such TCEs would be judged at par with other copyright works. This was seen in the Australian case of *George Milpurrurru and others v Indofurn Pty Ltd and others (the Carpets Case)*[104], discussed in detail in Chapter two,[105] where, the court had no difficulty in noting that the aboriginal artwork before it was original. In the words of the court, 'Although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality'.[106]

Whereas the originality threshold is indeed obtainable by many TCEs some may lose out as they differ only slightly from previous works. It has been argued that creativity in respect of TCEs is limited as they emerge within a particular cultural setting which follows an established history.[107] For instance, in order for a cloth to be recognised as a Maasai (ethnic group inhabiting northern, central and southern Kenya) *shuka*[108] it would invariably have to be a cotton plaid fabric in a limited range of bright colours including red, blue, green and yellow.

However, this reality may not have a strong impact on the copyright protection of TCEs. To begin with the originality threshold is in practice a low one.[109]

[104] [1994] FCA 1544; 30 IPR 209.
[105] See Chapter 2, part 2.3.4.3.
[106] [1994] FCA 1544; 30 IPR 209 [20].
[107] Farley (n64) 21.
[108] "Shuka" is Kiswahili (Kenya's national language) for a decorative cloth or sash wrapped around the body. The Maasai people believe that the combination of colours and the patterns in the *shuka* represent their identity as a community. Grace A. Musila, *A Death Retold in Truth and Rumour: Kenya, Britain and the Julie Ward Murder* (James Currey 2015) 131.
[109] Farley (n64) 22.

Secondly, new TCEs are not readily created on a daily basis as is the case with works in the modern creative industries. Indeed, once a traditional community creates a TCE their main objective would be its preservation, as close to the original as possible.[110] Therefore, the main concern regarding originality would be for the traditional community to demonstrate that a particular TCE is original. Once a TCE is protected then its further impact on creativity would be primarily regarding derivative works or more accurately, works that borrow ideas from the TCE, within the setting of the modern creative industries.

3.4.3 Tangibility

According to general international copyright principles, protection is available for both written and oral works. Article 2(1) of the Berne Convention provides that:

> 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.[111]

The last few words in this quote, 'of the same nature', may however, arguably, restrict the range of oral works that may be protected to those similar to lectures, addresses and sermons. All the same, article 2(2) of the Convention proceeds to make it clear that national laws are at liberty to require or not to require fixation in some material form as a general condition for protection. This provision explicitly states that, 'It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified

[110] Daphne Zografos, 'The Legal Protection of Traditional Cultural Expressions: The Tunisia Example' (2004) 7(2) The Journal of World Intellectual Property 229, 233.
[111] Emphasis added.

categories of works shall not be protected unless they have been fixed in some material form'. Kenya copyright law on its part makes fixation a requirement. The Kenya Copyright Act provides that, 'Rights protected by copyright shall accrue to the author automatically on affixation of a work subject to copyright in a material form'.[112]

Whereas some TCEs, such as traditional drawings and sculptures, are, from the outset, materialized as objects others do not have a material form; they have the incorporeity, the evanescence of gesture, of sound, of speech. These include traditional dances, music, songs, oral narratives, poems and tales which may have been handed down from generation to generation and may not have been written down or recorded anywhere.[113]

Thus, the fixation requirement of Kenya copyright law would prevent such intangible and oral expressions from being protected unless and until they are fixed in some form or media. Indeed, it has been noted that even fixed expressions such as graffiti; body art including tattoos and face and body painting; and street art may not meet the fixation requirement.[114]

As fixation is not a treaty requirement, some countries such France, Australia and Spain do not explicitly require it in general terms. However, many national laws, particularly in the common law jurisdictions including the UK[115] and the

[112] Kenya Copyright Act, section 22(5).
[113] Judd (n74).
[114] Enrico Bonadio and Nicola Lucchi, 'Introduction: Setting the Scene for Non-Conventional Copyright' in Enrico Bonadio and Nicola Lucchi (eds), *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?* (Edward Elgar 2018) 9. The authors of this chapter note that the rigid application of the fixation requirement may leave such new forms of art without protection.
[115] UK CDPA 1988, section 3(2).

US[116] do mandate it as it proves the existence of the work and provides for a clearer and more definite basis for rights.[117]

It is argued that the copyright protection of TCEs in Kenya, as a special category of work ought not to require fixation. Reference can be had to the Tunis Model Law on Copyright for Developing Countries 1976 (Tunis Model Law) which rules out any possibility for demanding fixation for a work of "folklore".[118] The Tunis Model Law was written to provide a model for developing countries to enact comprehensive copyright legislation. According to the commentary by UNESCO and WIPO on the Tunis Model Law, 'in developing countries national folklore constitutes an appreciable part of the cultural heritage and is susceptible of economic exploitation, the fruits of which should not be denied to those countries'.[119]

The commentary proceeds to explain that works of folklore are often by their very nature in oral form and never recorded, and therefore, the fixation requirement might destroy the protection of folklore; particularly since, if the requirement were sustained, copyright in such works might end up belonging to the person who takes the initiative of fixing them.[120] On the national level, Sri Lanka, for instance, has explicitly protected TCEs within its copyright law and does not mandate fixation as a requirement for the protection of TCEs; or any other copyright works for that matter.[121] This is similarly the case in Ghana as noted above.

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[116] US Copyright Act, § 102(a).
[117] WIPO (n45) 41.
[118] Article 5[bis]
[119] WIPO, 'Tunis Model Law on Copyright for Developing Countries 1976' *Copyright* 166.
[120] ibid 167.
[121] Sri Lanka Intellectual Property Act, No. 36 of 2003, section 6(2).

Regarding the query of how to prove that such works exist, it should be recalled the context in which TCEs arise. TCEs arise in a traditional setting and mainly continue within that setting. Thus, a folk song which was created centuries ago will today still be sung, in more or less the same fashion by the abiding members of the traditional community to which it belongs; having been handed down generation after generation.[122] Thus, for the members of a particular traditional community, the necessity of fixation may not be immediate, particularly, so as to prove the works existence. Additionally, and perhaps taking into consideration the needs of the wider public of knowing of the existence of a TCE, as this thesis in Chapter seven proposes an online database of TCEs which shall, *inter alia*, contain information regarding the name, description and ownership of the TCE, then it is argued that this shall form substantial proof of the TCEs existence.[123]

3.4.4 Duration of protection

Building on the above, it is important to then consider how long copyright protection for TCEs ought to last. The Berne Convention stipulates a minimum period of copyright protection as the life of the author and fifty years after her death.[124] Most member states of the Berne Union, including Kenya, replicate this provision in their own copyright laws.[125] A small number of states have provided for an extended period of protection in their national copyright laws

[122] Indeed, that TCEs are handed down from one generation to another are one of their key characteristics as elucidated by WIPO. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Thirty-Seventh Session), 'Traditional Knowledge, 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (WIPO 2018), Annex I, 4.
[123] See Chapter 7, part 7.3.1.
[124] Berne Convention, article 7(1).
[125] Kenya Copyright Act, section 23(2).

including the UK[126] and the US[127] which both (generally) provide for a period of protection comprising of the life of the author and seventy years after her death. Currently Mexico is noted as having the longest term of protection with the Mexico Federal Law on Copyright providing for a period of protection comprising of the author's life plus a hundred years after her death.[128]

The provisions on copyright duration in the Berne Convention, as minimum standards, mean that member-states of the Berne Union are free to protect copyright for longer periods. This would work well for traditional communities, who generally desire indefinite protection for some aspects of their TCEs.[129] This demand, it is argued, is justified because protecting an expression that has been unique to a community since time immemorial for a limited period serves little purpose.[130] Additionally, the granting of limited protection requires certainty as to the date of a work's creation (or first publication), which may be unknown in the case of pre-existing TCEs.

In principle the Berne Convention possesses no barrier to member states implementing the concept of indefinite protection. Indeed, as discussed in the previous chapter,[131] the idea of perpetual copyright is not strange to copyright, having been the case as early as with the Stationers' copyright[132] and thereafter

[126] UK CDPA 1988, section 12(2). This provision was introduced into the UK CDPA 1988 as a result of the EU Term Directive. See Norma Dawson, 'Copyright in the European Union: Plundering the Public Domain' (1994) 45 Northern Ireland Legal Quarterly 193.
[127] US Copyright Act, section 302(a). The life of the author plus seventy years period applies specifically in relation to works created on or after January 1, 1978 following the enactment of the Copyright Term Extension Act (CTEA) of 1998.
[128] Mexico Federal Law on Copyright, article 29(1).
[129] WIPO (n45) 42.
[130] Anurag Dwivedi and Monika Saroha, 'Copyright Laws as a Means of Extending Protection to Expressions of Folklore' (2005) 10(4) Journal of Intellectual Property Rights 308, 312.
[131] See Chapter 2, part 2.5.2.2.
[132] The Stationers' copyright refers to the "right to copy" held by the members of the Stationers' Company, which was a perpetual right. Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 43.

endorsed by the House of Lords in 1769 in the famed case of *Millar v Taylor,*[133] albeit this position being effectively reversed a few years later in *Donaldson v Beckett.*[134] Similarly, in Sri Lanka for instance, the previous copyright law[135] provided that TCEs be protected without a time limitation, as a special feature of Sri Lankan copyright law.[136] This provision was however, repealed by the current copyright law.[137]

Nevertheless, the idea of perpetual copyright would cause some tension with settled copyright doctrine. That the term of protection ought not to be indefinite is generally seen as integral to copyright doctrine.[138] This is to ensure that copyright protected works eventually enter the public domain.[139] To answer to the demands of adequate copyright protection and the necessity of a public domain it is submitted that the term of copyright protection for TCEs would be fifty years after a particular TCE is lawfully made available to the public. Such a provision would borrow from the Berne Convention's provision regarding anonymous and pseudonymous works as discussed above.[140] The provisions guiding the protection of anonymous works under the Berne Convention are argued as being a demonstration of Berne's consideration for TCEs.[141] As

[133] (1769) 4 Burrow 2303, 98 ER 201.
[134] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774). There's however, discontent as to whether Donaldson did in fact repudiate common law copyright; the argument being that the actual holding of the case was that the author's common-law right to the sole printing, publishing and vending of his works, a right which he could assign in perpetuity is taken away and supplanted by the Statute of Anne. The judges did not use the terms "copy" or "copyright" but spoke instead of the right of "printing and publishing for sale." Lyman Ray Patterson, Copyright in Historical Perspective (Vanderbilt University Press 1968) 173 – 174.
[135] Sri Lanka Intellectual Property Act, No. 52 of 1979 (repealed).
[136] ibid, section 12(2).
[137] Sri Lanka Intellectual Property Act, No. No. 36 of 2003.
[138] WIPO (n45) 42.
[139] ibid.
[140] Berne Convention, article 7(3).
[141] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Traditional Knowledge, 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (WIPO 2018), Annex I, 13.

noted, the minimum period of protection of 50 years stipulated in the Berne Convention is replicated in the Kenya Copyright Act, and it is contended that this period of protection would be appropriate for TCEs as well.[142]

This thesis advocates for encouraged creativity in Kenya through reform to the country's copyright law. Specifically, the focus is on making ideas within TCEs easily and readily available for creative reuse. This is because according to the idea/expression dichotomy doctrine copyright protection does not extend to ideas, only the expression of ideas.[143] Ideas in this regard are distinguished from the expression of ideas, the latter representing a TCE "itself" in its expressed form.

It is argued that there is merit in creating a public domain for TCEs from which creators may further borrow as the idea/expression dichotomy works in tandem with the public domain for the encouragement of creativity.[144] In this regard the expressed form of a TCE, in addition to the idea(s) latent therein, becomes a basis for subsequent creativity.

The conceptualisation of creativity that this research adopts is based on Locke's "theory of knowledge", according to which it is propounded that by combining

[142] In this regard consider the political undertones and private interests upon which the Copyright Term Extension Act (CTEA) of 1998 was enacted in the US, whereby the general copyright term of the life of the author plus fifty years was extended to the life of the author plus seventy years. See, Dennis S. Karjala, 'Judicial Review of Copyright Term Extension Legislation' (2002) 36(1) Loyola of Los Angeles Law Review 199. Consider also the same underlying context in the increase of the term of copyright protection in the UK, particularly regarding sound recordings from fifty to seventy years, which was an EU-wide change, following the amendments to the Information Society Directive in 2011, Directive 2011/77/EU. See Bently and Sherman (n18) 177 – 180.

[143] Laddie, Prescott & Vitoria: The Modern Law of Copyright and Designs (4th edn, LexisNexis Butterworths, London 2011) [3.74]; Nicholas Caddick, Gillian Davies and Gwilym Harbottle, Copinger and Skone James on Copyright (17th Ed. Sweet and Maxwell 2016) [2-09].

[144] Wendy J Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102(7) Yale Law Journal 1533, 1559.

what Locke terms as “simple ideas” together into “complex ideas” society can gain new knowledge which then ought to be disseminated to others. It is contended that the process by which new knowledge emerges is equivalent to the process of creativity. According to Locke simple ideas are ideas that contain only one uniform conception in the mind and are not distinguishable into different ideas.

Generally, complex ideas are a combination of simple ideas. However, implicit within Locke‘s argument is that a complex idea may also arise from combining two other complex ideas. He notes that creativity comes from the world all around us. ‘Whence has it all the materials of reason and knowledge? To this I answer in one word; from experience; in that all our knowledge is founded and from that it ultimately derives itself.’ Locke continues, noting that the resulting ideas within an individual can become wider than the knowledge around them. It is in this that creativity can be said to lie. Furthermore, this knowledge can then be used in further creations.

It is argued that in effect, for copyright law, Locke’s simple ideas are what are termed generally as “ideas” whereas complex ideas, that is, new knowledge, that is, creativity, are “expressions”. Accordingly, the expressed form of a TCE would be deemed to be a complex idea and which itself can be used for further creativity.

Currently TCEs are protected under the TCEs Act. In effect this Act operates both retrospectively and prospectively to provide protection to existing and new TCEs. As noted above, as TCEs are not readily created on a daily basis as is

the case with works in the modern creative industries, it would be vital for the proposed amendments to the Kenya Copyright Act to take this into consideration and as well provide for the protection of TCEs existing before the amendment's coming into force and thereafter. In this way protection would be had for both existing and new TCEs. It would follow then that if the proposals on duration are implemented, many TCEs would lose copyright protection around the same time that is fifty years after being made available to the public.

This in its own right may not be a negative thing. In the US many copyright works entered into the public domain on the same day, 1 January, 2019, having had their terms of copyright protection expire.[145] This is a move which has been celebrated as opposed to being castigated.[146] Such works will "finally" be free for all to use and build upon without requiring permission.[147] Additionally, in the ensuing period of fifty years, it can be reasonably expected that other TCEs would have been created and made available to the public, thus, continuing to offer the benefits of copyright protection to traditional communities.

3.5 Making provision for the copyright protection of traditional cultural expressions

Thus, with focused review and reform the protection and promotion of TCEs may be brought under the operation of copyright law. Specifically, it is submitted that Kenya ought to enact provisions in the Kenya Copyright Act providing for

[145] Under the CTEA copyright protection for works made and published in 1923 or afterwards that were still protected by copyright when the CTEA was passed in 1988 were protected for a total of 95 years.

[146] January 1, 2019 has been christened "Public Domain Day" by some copyright law scholars. See Duke University School of Law website <https://web.law.duke.edu/cspd/publicdomainday/2019/> accessed 28th October, 2019.

[147] Duke University School of Law website <https://web.law.duke.edu/cspd/publicdomainday/2019/> accessed 28th October, 2019.

TCEs as a special category of work. In this way the Kenya Copyright Act would take into consideration the unique features of TCEs. As seen above, the particular aspects of this special category for TCEs would be that:

- a member of the community, nominated by the community in accordance with its customary laws, would hold the copyright in the TCE in trust on behalf of other community members and shall be limited in his interaction with the TCE without the community's consent. (This would answer to the queries on authorship and ownership).
- the fixation requirement would not apply to TCEs. (This would answer to the queries on tangibility).
- to receive copyright protection, TCEs would have to be original in the traditional copyright sense.
- the term of copyright protection for TCEs would be fifty years after a particular TCE is lawfully made available to the public. (This would balance the demands of adequate copyright protection with the necessity of a public domain).
- all TCEs, whether created before or after the enactment of the Act would receive copyright protection. (This would provide protection to both existing and new TCEs).

Apart from these special aspects, TCEs would be dealt with in the same way as ordinary copyright works. Infringement of TCEs would be deemed to arise in the same way as infringement of ordinary copyright works does and the defences to and remedies for such infringement would be the same.[148] Similarly, TCEs

[148] The Kenyan context follows the UK inquiry of substantiality, both in terms of quantity and quality, on queries of infringement. Sihanya (n44) 314.

would also have moral rights attached to them in the same way as ordinary copyright works. The Kenya Copyright Act provides the moral rights of attribution and integrity to authors.[149] Pertinently, TCEs would also be subject to the same exceptions and limitations as other copyright works, which would be particularly important when applied to cultural sector institutions such as libraries and archives which invariably play a key role in the preservation of intangible cultural heritage.[150] Additionally, the right to create a derivative work based on a TCE (derivative right), as in the case of other authorial works,[151] shall vest in its owner/holder (on behalf of the community). Enacting TCEs as a part of copyright law would invariably require amendments to the TCEs Act to remove TCEs from its ambit.[152]

It can be argued that the proposed intervention, a special category of work for TCEs, is a contortion of copyright law *per se*. However, in response to this it can be said that in necessary circumstances the law, and specifically copyright law, has been apt at developing "legal fictions" to respond to difficult queries. The concept of the "works made for hire" for instance, is a legal fiction which arose to mediate the tension between individual and collective creative rights.[153] The

[149] Kenya Copyright Act, section 32(1). The TCEs Act on its part provides for the moral rights of attribution (including the right to prevent false attribution), integrity and the right to prevent false claims of authenticity. TCEs Act, section 21.

[150] Tim Padfield, 'Preserving and Accessing our Cultural Heritage – Issues for Cultural Sector Institutions: Archives, Libraries, Museums and Galleries' in Estelle Derclaye (ed), *Copyright and Cultural Heritage: Preservation and Access to Works in a Digital Age* (Edward Elgar 2010) 195. The recent amendments to the Kenya Copyright Act contained in the Kenya (Amendment) Act 2019 introduced copyright exceptions for libraries and archives. Providing that their shall be an exception to copyright for 'the reproduction of a work by or under the direction or control of the Government, or by such public libraries or archives, non-commercial documentation and scientific institutions as may be prescribed, where the reproduction is in the public interest and no revenue is derived there from'. Kenya Copyright Act, section 26(3) read together with the Second Schedule, Paragraph C.

[151] Kenya Copyright Act, section 26(1)(e).

[152] As noted above it is contended that the TCEs Act may continue to provide an adequate regime for the regulation of TK particularly, as TK generally refers to know-how which in copyright terms would be considered "ideas" or "concepts", and are not protected.

[153] Catherine L. Fisk, 'Authors at Work: The Origins of the Work-for-Hire Doctrine' (2003) 15(1) Yale Journal of Law & the Humanities 1, 2.

works made for hire doctrine represents the paradoxical apotheosis of the Romantic conception of authorship whereby employers lay claim to direct ownership over the products of their employees and not by an assignment or implied grant. [154] Accordingly, it is submitted that adopting specific rules to cater to TCEs within copyright law is an acceptable and welcome reform.

It is contended that a move to regulate TCEs under copyright law within the Kenyan context is timely and necessary. As noted, before the enactment of the TCEs Act, TCEs were protected under the Kenya Copyright Act.[155] One was required to obtain the permission of the Kenya Copyright Board to utilise TCEs for commercial purposes.[156] This provision was utilised, successfully, by a number of contemporary artists to use elements of TCEs in their works.[157] Additionally, as noted above, the Kenya Copyright Act still contains provisions on TCEs, including defining a performer as including a performer of TCEs.[158] Whereas the TCEs Act in its transitional provisions calls for the review and harmonisation of any rights to TCEs, acquired under the copyright system, with the provisions of the TCEs Act;[159] the fact that some of the provisions of the Kenya Copyright Act touching on TCEs are yet to be expressly repealed can be used to strongly argue that the Kenya Copyright Act reserves substantive operation over TCEs.

[154] Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011) 22. See more on the Romantic conception of authorship in Chapter 4, part 4.4.2.2.
[155] See Chapter 2, part 2.3.3.
[156] Kenya Copyright Act, section 49(d) as read with Copyright Regulations, regulation 20.
[157] Marisella Ouma, 'Traditional Knowledge and Traditional Cultural Expressions in Kenya' (2011) 4(4) Kenya Copyright Board's Copyright News 5.
[158] Kenya Copyright Act, section 2.
[159] TCEs Act, section 42(2).

With the discord between the TCEs Act and the Kenya Copyright Act over the protection of TCEs, this chapter's argument for the protection and promotion of TCEs to come under copyright is timely as such a move would have the additional benefit of clarifying that the legal regime governing the protection of TCEs is copyright law.

It is also worth noting, as has been highlighted in particular instances above, a number of other jurisdictions have sought to protect TCEs under copyright law including Ghana,[160] Tunisia,[161] Sri Lanka,[162]Canada[163] and Australia[164] among others. As discussed above Ghana has taken a unique and noteworthy approach in this regard. The Ghanaian Copyright Act presents a rather direct and straightforward way of going about some of the most ardent concerns for the copyright protection of TCEs, specifically, questions on originality, ownership and fixation. This approach is in line with Rahmatian's argument that the, 'only workable solution' with regard to the protection of TCEs is a limited amendment of existing copyright laws in relation to problems arising from specific TCEs.[165]

It is therefore conceptually and practically conceivable that Kenya's copyright law, once appropriately reformed, can be utilised for the successful promotion and protection of TCEs. A considerable number of products within the creative

[160] Copyright Act 2005.
[161] Law No. 94—36 of February 24, 1994, on Literary and Artistic Property.
[162] Intellectual Property Act, No. 36 of 2003.
[163] In Canada, the Copyright Act 1985 has been used by a range of Aboriginal artists, composers and writers to protect their tradition-based creations. Examples include silver jewellery of Haida (ethnic group native to the Canadian archipelago Haida Gwaii) and sculptures of Inuit (ethnic group inhabiting the arctic region of Canada) artists. WIPO (n45) 106, note 103.
[164] See the cases of *Re Terry Yumbulul v Reserve Bank of Australia; Aboriginal Artists Agency Limited and Anthony Wallis* [1991] FCA 332; 21 IPR 481 and *George Milpurrurru and others v Indofurn Pty Ltd and others (the Carpets Case)* [1994] FCA 1544; 30 IPR 209, discussed above.
[165] Rahmatian (n87) 229.

industries draw on TCEs. The TCEs Act however, locks-in ideas by preventing the free use of TCEs for the creation of derivative works and provides for a property right in perpetuity over the TCEs. Under the regulation of copyright law TCEs would benefit from adequate protection for traditional communities and at the same time Kenyan creativity would enjoy copyright's mechanism of the idea/expression dichotomy, for the encouragement of creativity. It is argued that this will aid Kenyan creativity to be freed from the dictates of the economic domain and be able to arise autonomously and more readily.

However, it is not lost on this chapter that the idea/expression dichotomy as it currently stands is itself in disarray. Its current formulation is indefinite and unprincipled leading to a chilling of creativity and thus, Chapter six discusses the principle in detail and proposes a formulation of the dichotomy to ease its construction and therefore lead to a principled interpretation for encouraged creativity.

3.6 Conclusion

Owing to the influential role that TCEs play on Kenyan creativity, their regulation is a critical issue. It has been argued in this chapter that the social costs of not encouraging creativity would outweigh the social benefits of solely protecting traditional communities through a *sui generis* regime that would depress creativity.

Recognising how creativity arises in the Kenyan context and having copyright law respond to it would enable creativity to arise according to its own precepts. This would aid in freeing Kenya's cultural domain from the domination of the

economic domain leading to enhanced creativity. The reform to Kenyan copyright law for encouraged creativity is proposed in line with the theory of social three-folding. The next chapter elaborates on this theory and how it is a model for the reform of copyright law for encouraged creativity.

CHAPTER FOUR

THE THEORY OF SOCIAL THREE-FOLDING AS A FRAMEWORK FOR REFORMING COPYRIGHT LAW FOR THE ENCOURAGEMENT OF CREATIVITY

4.1 Introduction

The previous chapter started the discussion of how Kenyan copyright law can be reformed to encourage creativity. It was seen that in the Kenyan context creativity is significantly influenced by the country's culture(s) specifically its traditional cultural expressions ("TCEs"). Currently, the legal regulation of TCEs in Kenya is under a *sui generis* law, the Protection of Traditional Knowledge and Cultural Expressions Act 2016 ("TCEs Act"). The protection of TCEs under the TCEs Act precludes the use of ideas by disallowing derivative uses of TCEs and creating a property right in TCEs in perpetuity. It was argued that this is a demonstration of the law (political domain) and creativity (cultural domain) abiding by the dictates of the economic domain, as pronounced by the theory of social three-folding. For the encouragement of creativity, it was contended that creativity ought to be allowed to arise autonomously free from the constraints of economic dictates. To this end, it was proposed that the legal regulation of TCEs in Kenya ought to fall under a reformed copyright law.

The present chapter offers an explication of Rudolf Steiner's theory of social three-folding. By the theory of social three-folding Steiner proposed the autonomous development of society's economic, political and cultural domains, at the same time acknowledging their inevitable interdependencies, for

economic and social prosperity.[1] Steiner argued that an undesirable social state had been caused by the economic domain's dominance over the political domain and cultural domain.[2] Key in resolving this "social problem", according to Steiner, was enabling the cultural domain to develop independently without domination by economic and political considerations.[3] For the first time a comprehensive application of Rudolf Steiner's theory of social three-folding is made to Kenyan copyright law[4] with the aim of adapting copyright law for the obtaining of its key objective, the encouragement of creativity.[5]

Like the TCEs Act discussed in the previous chapter copyright law (political domain) is also dominated by the economic domain, upsetting society's three-fold equilibrium to the detriment of the cultural domain (wherein creativity arises). This predominantly economic structure has led copyright law to fail in its key objective of encouraging creativity. Therefore, in line with social three-folding, it is argued that copyright law should be freed of these overriding economic considerations so as to promote creativity to arise autonomously. It is

[1] Rudolf Steiner, *Basic Issues of the Social Question: Towards Social Renewal* (Frank Thomas Smith tr, Rudolf Steiner Press 1977) 10 - 13. Available at the *Institut Für Soziale Dreigliederung* (Institute of Social Threefolding) website <http://www.threefolding.org/archiv/800.html> accessed 18th November, 2019.
[2] ibid 52.
[3] ibid 11.
[4] The theory of social three-folding has been of utility in discourses on law and society and has been applied as a guiding framework to discussions seeking to reform copyright law in the United Kingdom ("UK"). See James Griffin, *The State of Creativity: The Future of 3D Printing, 4D Printing and Augmented Reality* (Edward Elgar 2019) 22 – 24, 105 -110, 158 – 187; James Griffin, 'Making a New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright' (2013) Intellectual Property Quarterly 69.
[5] Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) 14 – 16; Julie E. Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40(3) UC Davis Law Review 1151; Omri Rachum-Twaig, 'Recreating Copyright: The Cognitive Process of Creation and Copyright Law' (2017) 27(2) Fordham Intellectual Property, Media and Entertainment Law Journal 287, 288. See Chapter 5, part 5.3 for an in-depth discussion on this contention.

argued that this can happen if the law is structured to readily and easily avail ideas, the building blocks of creativity,[6] for the use of creators.

The economic domain's current dominance over copyright law is well evidenced by the placing of copyright within the global trade agenda under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). This domination carries on to the principles of substantive copyright law through, particularly, the devices of authorship (the "author-genius" construct), originality and the work.[7] However, creativity is a more equivocal process than what the author-genius construct presents.[8] Creativity is in fact a highly derivative process, drawing on existing ideas and concepts.[9] This thesis calls for a greater understanding of and provision for creativity by copyright law.

Thus, in the second part of this chapter creativity is examined. Here the focus is on obtaining an understanding of what creativity is, how it occurs and its relevance. It is acceded that creativity can be studied through myriad perspectives and disciplines. This discussion focuses its study on creativity, primarily, on the theory of knowledge put forward by the philosopher John Locke.[10] The disquisition on creativity narrows on the Western cultural model of creativity, highlighted in the UK and US, particularly in their creative industries.

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[6] John Locke, *An Essay Concerning Human Understanding* (T. Tegg and Son 1836) Book II, Chapter II § 1, §2. See also, Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009) 184; Graham M. Dutfield and Uma Suthersanen, 'The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) 8(4) Intellectual Property Quarterly 379, 398, among others.

[7] Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011) 11 – 19.

[8] Jessica Litman, 'The Public Domain' (1990) 39(4) Emory Law Journal 965, 966.

[9] Keith Sawyer, 'Creativity, Innovation and Obviousness'(2008) 12(2) Lewis & Clark Law Review 461, 464.

[10] Locke (n6).

4.2 Rudolf Steiner's theory of social three-folding

4.2.1 The three domains of social life: the economic domain, the political domain and the cultural domain

In Steiner's conceptualisation, the three domains of the social organism can be compared to the three systems of the human organism – the nerve and sense faculties centralized in the head; the rhythmic system comprising of the respiration and blood circulation; and the metabolism system.[11] He argued that these three systems contain everything, which when properly coordinated, maintain the entire functioning of the human organism in a healthy way.[12] Steiner contended that these three human systems function, with a certain autonomy; with no absolute centralization; and each with its own particular relation to the outer world.[13] Thus, he theorised, that in order for the social organism to be healthy it must like the human organism be tri-formed.[14]

The three domains of the social organism represent the following, the economic domain signifies all aspects of the production, circulation and consumption of commodities.[15] The second member of the social organism, the political domain, is that of civil rights; this sector concerns itself with all aspects of the relations between human beings which derive from purely human sources.[16] The third sector, the cultural domain, represents everything which is based on the natural aptitudes and capabilities of each human individual which blossom forth from each person's individuality and are integrated into the social organism.[17] This latter system includes among other things, literature, art,

[11] Steiner (n1) 54.
[12] ibid.
[13] ibid 55.
[14] ibid 56.
[15] ibid 58.
[16] ibid.
[17] ibid 59.

science, music, theatre, religion and education.[18] Creativity and the artefacts of creativity arise within the cultural domain.

4.2.2 The social problem: the domination of the economic domain

Steiner noted that the economic domain has dominated the social organism particularly through technology and capitalism.[19] The other two domains have not been able to properly integrate themselves in society with the same certitude.[20] He contended that economic activity encompasses more than is good for a healthy social organism.[21] The economy has of itself taken on quite definite forms and through one-sided efficiency has exerted an especially powerful influence on human life.[22] The economic domain has infiltrated both the political domain and the cultural domain.[23] These two systems, have become “commodity producers” for the economic process.[24]

The dominance of the economic domain over the other two domains is what Steiner identified as the “social problem”. The task ahead of him therefore became how to resolve this problem. In this regard he put forward, the “social question”, that is, how can a healthy society be formed?

4.2.3 Addressing the social question: liberating the cultural domain

Steiner identified the social question as revolving around the nature of the cultural domain.[25] The development of the cultural domain has been largely dependent on the forces of capitalism and political institutions, that is, the

[18] ibid 7.
[19] ibid 58.
[20] ibid 60.
[21] ibid 66.
[22] ibid.
[23] ibid.
[24] ibid 118.
[25] ibid 47.

economic domain and the political domain respectively.[26] Therefore, the liberation of the cultural domain from this dependence constitutes the key element of answering the social question.[27] Steiner wrote:

> Contemporary society has become ill due to the impotence of spiritual life and the illness is aggravated by reluctance to recognize its existence. By recognizing this fact, we would acquire the foundation on which ideas could be developed which are truly appropriate to the social movement.[28]

Steiner urged that the characteristic element which has given the social organism its particular form is that the economic domain, primarily capitalism and technology, have brought an inner order to society and dominated the other two domains.[29] The focus of society has been on technology and capitalism and society has diverted its attention from the other two domains.[30] If the social organism is to become healthy then it is necessary to attain efficacy in these two areas as well, more so in the cultural domain.[31]

Therefore, social three-folding emphasises an autonomous cultural domain. Everything that occurs in the economic and political domains of the social organism is influenced by the individual abilities of each human being, that is, the cultural domain.[32] This includes the greatest cultural accomplishments as well as superior or inferior physical aptitudes.[33] The human efforts and achievements which result from such abilities are, to a great extent, deprived of

[26] ibid 11.
[27] ibid.
[28] ibid 46 – 47. Steiner utilises the term spiritual life interchangeably with cultural life or domain. This thesis adopts the term cultural domain.
[29] ibid 52.
[30] ibid.
[31] ibid.
[32] ibid 74.
[33] ibid.

their true essence if they are influenced by the economic and political domains.[34] This true essence can only exist in the forces which human effort and achievement must develop of and by themselves.[35] There is only one possible healthy form of development for the cultural domain: what it produces shall be the result of its own impulses and a relationship of mutual understanding shall exist between itself and the recipients of its achievements.[36]

A healthy society as envisaged by Steiner is one which is free, equal and mutual. Present-day scholars of Steiner's theory have noted that Steiner's conceptualisation of a healthy society is one that pushes back "the market" from politics and culture.[37] This is accomplished by asserting boundaries between the private business sector, the public state sector, and the plural cultural sector. This shapes a healthy three-fold society based on mutuality, equality, and freedom for all people.[38]

Steiner noted that the social changes that he proposed can be brought about largely by utilising existing social structures, for instance, legislatures and judiciaries, and only where these structures have disintegrated or are in the

[34] ibid.
[35] ibid.
[36] ibid.
[37] Martin Large and Steven Briault (eds), *Free, Equal and Mutual: Rebalancing Society for the Common Good* (Hawthorn Press 2018).
[38] Numerous other scholars have also described their versions of societal utopia. In the field of copyright law, William Fisher has noted how copyright law can be reformed to obtain "the good life" and "the good society". Particularly, with regard to the latter, "the good society", Professor Fisher contends that such a society is achievable if resources are deployed and divided to enable members to achieve a life of self-determination, commitment, moderate risk and meaningful work. William W. Fisher, 'Reconstructing the Fair Use Doctrine' (1988) 101(8) Harvard Law Review 1659, 1746 – 1756.

process of doing so, then individuals or groups of individuals should take the initiative in attempting to reorganize society in the indicated direction.[39]

4.2.4 Social three-folding in operation: criticisms and support

4.2.4.1 Social three-folding not a panacea but a good workable framework

Whereas proffering logical and practical ideas for "healing" the social organism, social three-folding has not escaped the criticism that invariably attaches itself to all sociological and philosophical theories. The opposition towards social three-folding appears strongest with regard to doubts as to whether Steiner's proposals can be practically applied in society.[40] Some critics going to the extent of calling the concept a fantasy.[41]

Able to anticipate such criticisms, Steiner sought to offer a rejoinder to them in advance. He argued that social three-folding was, like any other social system, not perfect, but merely a good and workable model for society's advancement and improvement. He noted that we cannot expect perfection but can only strive toward the best possible situation.[42] Steiner contended that his theory is offered as the direction in which social arrangements can be made towards this best possible situation, accepting that it is possible that quite different arrangements would be appropriate in specific circumstances.[43] Moreover, he noted that with regard to social conceptions, hard and fast proof of their efficacy, as with the natural sciences may not be required.[44]

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[39] Steiner (n1) 70.
[40] Albert Schmelzer, *The Threefolding Movement, 1919: A History* (Edward Udell tr, Rudolf Steiner Press 2017) 151.
[41] ibid.
[42] Steiner (n1) 12.
[43] Steiner (n1) 115.
[44] ibid 124.

4.2.4.2 Inspiration for and approval of social three-folding

i. The French Revolution's three ideals – liberty, equality, fraternity

Whilst Steiner's three-folding may not be deemed a perfect system, it was inspired by and has found approval in past and succeeding ideas and concepts. Steiner related the three domains of society to the three emancipatory ideals of the French Revolution – *liberty, equality, fraternity.*[45] He contended that liberty was necessary in the cultural domain; in the political domain, which is concerned with purely human, person-to-person relations, it was necessary to strive for the realization of the idea of equality; and that human co-operation in the economic domain must be based on the fraternity which is inherent in associations.[46]

As with the three ideals of the French Revolution, at social three-folding's inception is an idealistic belief in the power of an idea to motivate human action.[47] The real worth of the three ideals of the French Revolution, Steiner argued, cannot be realized in a chaotic society but only in a tri-formed social organism.[48]

ii. Daniel Bell's three realms

The influential sociologist, Professor Daniel Bell in his book, *The Cultural Contradictions of Capitalism*[49] offered an analysis of Western (specifically American) liberal capitalist society. By utilising the social three-folding model he decried the pervasive influence of capitalism over society.[50] In advancing his

[45] These ideals have been written into the French Constitution since 1958.
[46] ibid 81.
[47] Schmelzer (n40) 73.
[48] ibid 82.
[49] Daniel Bell, *The Cultural Contradictions of Capitalism* (Basic Books 1976).
[50] ibid.

thesis, Bell used the “three realms” methodology by which, like Steiner’s social three-folding, he divided modern society into three spheres - the economic, political and cultural domains.[51]

iii. Joseph Beuys’ extended concept of art

Joseph Beuys applied the notion of social three-folding to the field of art. Beuys was a prominent artist who constantly pushed the boundaries of art. His art was grounded on concepts of sociology and philosophy.[52] Like Steiner, Beuys criticized the domination of the economic domain over the cultural domain. In order to escape this “dead-end”, he argued, the only way out was by focusing on human creativity.[53] He emphasised the independent growth of the cultural domain, to develop a healthy interaction between the, ‘three great strata or spheres of social forces’.[54]

He noted:

> If we want to achieve a different society where the principle of money operates equitably, if we want to abolish the power money has developed over people historically, and position money in relationship to freedom, equality and fraternity – in other words develop a functional view of the interaction between the three great strata or spheres of social forces: the spiritual life, the rights life and the economic life – then we must elaborate a concept of culture and a concept of art where every person must be an artist in this realm of social sculpture, or social art or social architecture.[55]

[51] ibid xxx.
[52] Michael Kelly (ed), *Encyclopedia of Aesthetics* (2nd edn, Oxford University Press 2014) 44.
[53] Joseph Beuys, *What is Money?* (Isabelle Boccon-Gibod tr, Clairview Books 2012)18.
[54] ibid 19.
[55] Beuys (n53) 19.

Beuys suggested that a separation of the cultural domain from the economic domain would permit a more appropriate and accurate regulation of culture which would directly address the worth of the culture produced.[56]

iv. Social three-folding in present-day politics

Social three-folding has also found utility in a number of present-day political movements.[57] Social three-folding has been advanced by many leaders who may even never have heard of the theory but inadvertently put forward one or another of its three aspects. For instance, reform seeking to reduce the influence of money in politics by increasing governmental transparency would as a matter of fact be advancing the concepts of social three-folding.[58]

v. Social three-folding as critical theory

Social three-folding can be placed within the wider sociological study that is critical theory. As noted in the introductory chapter, critical theory is a study which seeks to critique society and additionally, unlike traditional theory, offer solutions to the societal problems that it highlights.[59] The term critical theory was coined by philosopher and sociologist Max Horkheimer in 1937 to describe the work of the "Frankfurt School".[60] Horkheimer defined critical theory against

[56] James Griffin, 'Making a New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright' (2013) 1 Intellectual Property Quarterly 69, 73.
[57] See, for instance, Nicanor Perlas, *Shaping Globalization: Civil Society, Cultural Power and Threefolding* (New Society 2003). The author of this book, Nicanor Perlas, is a Filipino politician and former presidential candidate who has strongly advocated for social change through the social three-folding model.
[58] This is of course an issue that has been discussed in numerous countries. See Surendra Munshi, *Democracy Under Threat* (Oxford University Press 2017).
[59] Stephen Eric Bronner, *Critical Theory: A Very Short Introduction* (Oxford University Press 2011) 2. See the introductory discussion on social three-folding in Chapter 1, part 1.5.1.
[60] Ian Buchanan, *Oxford Dictionary of Critical Theory* (1st edn, Oxford University Press 2010) 100. The term "Frankfurt School" arose informally to describe the thinkers affiliated or merely associated with the *Institut für Sozialforschung* (Institute for Social Research), an independent research centre affiliated with Frankfurt University. The key theorists in the School were Max Horkheimer (philosopher, sociologist and social psychologist), Theodor Adorno (philosopher, sociologist and musicologist), Erich Fromm (psychoanalyst) and Herbert Marcuse (philosopher

the traditional conception of theory governing the sciences including the social or human sciences such as sociology.[61] Critical theory derived its basic conceptualisations from Marxism, however, unlike Marxists whose focus was on the economic features of society, critical theorists were more concerned with the political and cultural aspects of society.[62]

Social three-folding although having come before critical theory in time demonstrates the key attribute of critical theory which is the critiquing of society and the offering of solutions to the problems noted. As seen, social three-folding highlights the social problem which it notes is the domination by the economic domain over the other two domains, particularly, the cultural domain. Having stated this problem, social three-folding offers a means of resolution by calling for the autonomous development of the social organism's three domains, with an emphasis on the necessity for the independence of the cultural domain.

Critical theory is wary of the domination of capitalism in society and its negative effects. Horkheimer and another member of the Frankfurt School Theodor Adorno argued that capitalism's domination of society had turned culture into a machine or system similar to a factory which produces standardized cultural goods which are distributed by mass media including films, radio and magazines (and today, social media).[63] They described this phenomenon as the

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and cultural critic). However, the Frankfurt School is not the title of any specific institution *per se*, and few of the theorists associated with the School used the term themselves. Rolf Wiggershaus, *The Frankfurt School: Its History, Theories, and Political Significance* (Michael Robertson tr, MIT Press 1994).

[61] Max Horkheimer, 'Traditional and Critical Theory' in Max Horkheimer, *Critical Theory: Selected Essays* (Mathew J O'Connell and others trs, Continuum 2002) 188 – 243.

[62] Bronner (n59).

[63] Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Edmund Jephcott tr, Gunzelin Schmid Noerr ed, Stanford University Press 2002) 94.

"culture industry".[64] The contended that the culture industry had rendered people content and docile regardless of their economic circumstances owing to the consumption of the easy pleasures of the mass culture which were made available by the mass communications media.[65] They especially viewed mass culture as dangerous to the more technically and intellectually difficult high arts and warned against, 'the withering of imagination and spontaneity'.[66]

Fellow cultural critic Walter Benjamin had before Horkheimer and Adorno discussed what he termed "the aura"[67] of a work of art and had argued that an artwork's aura is lost through the mechanical reproduction of such art.[68] Marx as well decried the debilitating impact of economic forces on art.[69] He argued that as societies developed it became impossible to create art to perfection.[70] He distinguished between art and "art production" which he said was 'art produced in accordance with organized, feudally oppressed or capitalistically alienated conditions of life'.[71]

The binding link between the views of these theorists and Steiner is that they recognised the negative impact of economic forces on art. They noted that art had become an appendage of the economic domain. As a cure to this scenario,

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[64] ibid.
[65] ibid.
[66] ibid 100.
[67] Benjamin's use of the term "aura" throughout his work appears to relate to seemingly different, though closely related, concepts. The interpretation taken here is that of aura as the unique aesthetic authority of an artwork, or as Benjamin notes, 'the uniqueness of a work of art'. Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Hannah Arendt (ed) *Illuminations* (Harry Zohn tr Schocken Books 1969) 6. For more on various interpretations of Benjamin's aura see Miriam Bratu Hansen, 'Benjamin's Aura' (2008) 34(2) Critical Inquiry 336-375.
[68] Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Hannah Arendt (ed) *Illuminations* (Harry Zohn tr Schocken Books 1969) 6
[69] O. K. Werckmeister, 'Marx on Ideology and Art' (1973) 4(3) New Literary History: Ideology and Literature 501, 504.
[70] ibid.
[71] ibid.

social three-folding, specifically, urges for the autonomous development of the cultural domain, wherein art arises.[72]

4.2.5 Social three-folding as a model for addressing copyright law's problems

The essence of social three-folding is that it argues for an independent development of the cultural domain, free from the influences of the economic and political domains of society. The cultural domain includes among other things, literature, art, science, music, theatre, religion and education.[73] These constituents of the cultural domain are the products of creativity. Copyright law is the key mechanism for the legal regulation of this domain.[74]

Whereas the objective of copyright law is the encouragement of creativity,[75] it is argued that under its current structure copyright law is unable to adequately fulfil this goal. Copyright law is guided and indeed dominated by economic concerns and it cannot be said with certainty that this model encourages creativity. It is urged that in order for copyright law to obtain its objective of encouraging creativity, then it ought to focus on the creativity process itself, noting how creativity arises and making adequate provisions to enable creative processes to occur autonomously without economic concerns guiding the process. This chapter proposes that copyright law should be reformed to enable art, theatre, music, literature and other artefacts of creativity regulated by copyright law to arise and develop, as social three-folding proposes, independent of economic and political concerns.

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[72] Steiner (n1) 47.
[73] ibid 7.
[74] Omri Rachum-Twaig, *Copyright Law and Derivative Works: Regulating Creativity* (Routledge 2018) 1.
[75] An in-depth discussion on this contention is presented in Chapter 5, part 5.3.

As with Steiner's conceptualisation, Kenya's society is similarly tri-formed. As discussed in the preceding chapters a characteristic aspect of creativity in Kenya is that it draws heavily on its traditional culture, specifically, its TCEs.[76] The country's modern creativity seen through its contemporary creative industries such as books, fashion and film derive from its TCEs.[77] Kenya's culture is thus traditional in description.

The social problem that Steiner diagnosed, the economic domain's dominance over the cultural domain is clearly seen in the Kenyan cultural context. TCEs in Kenya are protected under a *sui generis* law, the Protection of Traditional Knowledge and Cultural Expressions Act 2016 ("TCEs Act"). The TCEs Act precludes the use of ideas, the building blocks of creativity, by preventing the derivative use of TCEs[78] and creating a property right in them in perpetuity.[79] In this regard, the TCEs Act is guided and dominated by the dictates of the economic domain by emphasising existing property rights and preventing further creativity to arise through the ready and easy use of ideas. In line with Steiner's proposed cure for the social problem the preceding chapter proposed that the legal regulation of TCEs in Kenya ought to fall under a reformed copyright law which will enable creativity to arise readily and easily, free from the dictates of the economic system.

[76] See, particularly, Chapter 2, part 2.2.
[77] Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring and Innovative Lawyering 2016) 12 – 13; Kennedy Manyala, 'Business Environment Reform Facility: Creative Economy Business Environment Reform, Kenya, (Main Report)' (UK Department for International Development 2016) 20 - 26.
[78] The Protection of Traditional Knowledge and Cultural Expressions Act 2016, sections 2, 17 and 18(2)(h). See Chapter 2, part 2.5.2.
[79] The Protection of Traditional Knowledge and Cultural Expressions Act 2016, sections 2 and 20(2). See Chapter 2, part 2.5.2.

A copyright law which allows creativity to arise independently is one which understands how the creative process arises and makes provision for it. The following part of this chapter considers the nature of creativity. It is seen that creativity is a highly derivative process, drawing on existing ideas. Accordingly, it is argued that copyright law's focus ought to be on making ideas, the building blocks of creativity, readily and easily available for creators.

4.3 Explaining and understanding creativity

4.3.1 What is creativity?

Creativity is a highly important aspect of society. It is in effect, the answer to the "social question" as put forward by Steiner. Modern society has become geared to the constant production and reception of the culturally new.[80] This applies to the economy, the arts, lifestyle, the self, the media and urban development. We are witnessing the crystallization of what has been termed a "creativity dispositif"[81] whereby contemporary society has seen an unparalleled rise in both the demand and the desire to be creative.[82] Creativity, once the reserve of artistic sub-cultures, has today become a universal model for culture and an imperative in many parts of society.[83]

[80] Andrea Reckwitz, *The Invention of Creativity: Modern Society and the Culture of the New* (Steven Black tr, Polity 2017) 11.
[81] ibid. Reckwitz adopts French philosopher Michel Foucault's term *dispositif*. The term *dispositif* has been interpreted and translated as meaning "apparatus" or "device". David M. Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press 1995) 189. A summary of Foucault's own explication of the meaning of *dispositif* has noted that, 'The term refers to a heterogenous body of discourses, propositions (philosophical, moral, philanthropic and so on) institutions, laws and scientific statements; the dispositif itself is the network that binds them together, that governs the play between the heterogenous strands'. David Macey, *The Lives of Michel Foucault* (Hutchinson 1993) 355. Macey bases this definition on Foucault's statements in an interview entitled "*Le Jeu de Michel Foucault"* (The game of Michel Foucault) Ornicar? 10 (July 1977) 62 – 93.
[82] Reckwitz (n80).
[83] ibid.

Yet, in order to explain and understand creativity, it is first necessary to define what it is. The term creativity is used in very diverse contexts, including in art, psychology, philosophy, education, business, marketing and advertising, among others.[84] Therefore, considering its wide application, already, it is apparent why the question, "what is creativity?" is a difficult question to answer. Indeed it has been suggested that it might not be possible to define or describe the term.[85] Nevertheless, compelling definitions, descriptions and conceptualisations have in fact been offered.[86]

This discussion focuses its study on creativity, primarily, on the theory of knowledge put forward by the philosopher John Locke.[87] By this theory Locke contended that creativity arises by exerting work over what he termed "simple ideas", that is, the basic unit of creativity.[88] Locke's ideas on creativity are compelling and they have been rehashed in contemporary discourses on the topic. In this regard, further recourse is had to the discipline of creativity research, which is the primary academic field on creativity. Creativity research is a scholarly area which grew out of the desire to rationally explain creativity. It incorporates the views of psychologists, neuroscientists, biologists, sociologists and anthropologists among other scholarly opinions.[89] Creativity research therefore offers a thorough and comprehensive perspective on creativity.

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[84] Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 182.
[85] Griffin, *The State of Creativity: The Future of 3D Printing, 4D Printing and Augmented Reality* (Edward Elgar 2019) 160.
[86] See, for instance, Kerry Thomas and Janet Chan (eds), Handbook of Research on Creativity (Edward Elgar 2013). The chapters in this handbook consider creativity within a wide array of subjects including cultural studies, creative industries, art history and theory, experimental music and performance studies, digital and new media studies, engineering, economics, sociology, psychology and social psychology, management studies, and education.
[87] Locke (n6).
[88] Locke (n6) Book II, Chapter II § 1, §2; Book IV, Chapter II, § 1.
[89] Keith Sawyer, *Explaining Creativity: The Science of Human Innovation* (2nd edn, Oxford University Press 2012) 4. Sawyer, a leading voice in the field, notes that creativity research also considers the viewpoints of scholars who study specific creative domains including historians of

Additionally, and pertinently, Locke's theory of knowledge was latent in the very early UK and US copyright cases, particularly in *Millar v Taylor,*[90] *Donaldson v Beckett*[91] and *Baker v Selden*;[92] which have had a significant influence in the shaping of copyright law as we now know it.[93]

4.3.2 Creativity under Locke's theory of knowledge

Locke did not outrightly define creativity. However, a conceptualisation of the term can be gleaned from his views on knowledge put forward in his treatise, *An Essay Concerning Human Understanding*.[94] Locke was an Empiricist,[95] the central claim of Empiricism is that knowledge derives solely from experience.[96] For Locke such experience arises from one of two sources - sensation or reflection.[97] Locke opposed the view that knowledge is innate, as had been put forward by Plato[98] and Descartes[99] among other proponents of innatism who argued that knowledge is inborn, belonging to the mind from its birth.[100]Locke,

art, musicologists, philosophers of science, scholars of theatrical performances and legal scholars who study intellectual property.

[90] (1769) 4 Burrow 2303, 98 ER 201.

[91] The Hansard Report of *Donaldson* v *Beckett*, reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774). Locke's theory of knowledge also influenced the early UK cases concerning translations and abridgements. See for instance, *Burnett* v *Chetwood* (1721) 35 Eng Rep 1008 and *Hawkesworth* v *Newbery* (1774) referenced in Benjamin Kaplan, *An Unhurried View of Copyright* (The Lawbook Exchange 2008*)* 12.

[92] 101 U.S. 99 (1879). The analysis of this case law is developed in Chapter 5, part 5.5.2.

[93] See, Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 168 -179; Kaplan (n91) 33.

[94] Locke (n6).

[95] Locke is normally regarded as the father of British empiricism and was followed in his views by George Berkeley and David Hume. It has been noted that empiricism is a loose term which may mean several things. However, when the term is utilised, particularly with regard to British empiricism, the general disposition is that it refers to the argument that human beings can have no knowledge of the world other than what they derive from experience. John Dunn, J. O. Urmson and Alfred Jules Ayer, *The British Empiricists* (Oxford University Press 1992) v.

[96] Dunn, Urmson and Ayer (n95) 2.

[97] Locke (n6) Book II, Chapter I, § 2.

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

[99] See, Rene Descartes, 'Meditations on First Philosophy: Third Meditation' in John Cottingham (ed), *Descartes: Selected Philosophical Writings* (John Cottingham and others trs, Cambridge University Press, 1988).

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

the most influential of the Empiricists,[101] conceptualised knowledge within the terms of his famous *tabula rasa* (blank slate) argument according to which at birth the mind is a *tabula rasa*, a perfectly blank surface, on to which sensations are projected.[102] He contended thus:

> Let us then suppose the mind to be, as we say, white paper, void of all characters, without any ideas; how comes it to be furnished? Whence comes it by that vast store which the busy and boundless fancy of man has painted on it, with an almost endless variety? To this I answer in one word, from experience; in that all our knowledge is founded and from that it ultimately derives itself. Our observation employed either about external sensible objects, or about internal operations of our minds, perceived and reflected on by ourselves, is that which supplies our understandings with all the materials of thinking. These two are the fountains of knowledge, from whence all the ideas we have, or can naturally have, do spring.[103]

Therefore, according to Locke, one is born without any ideas in one's mind and develops knowledge from one's experiences, that is, her sensation or reflection. Locke defined an idea as:

> …that term which, I think, serves best to stand for whatsoever is the object of the understanding when a man thinks; I have used it to express whatever is

[101] Whereas Locke's formulation of the theory of knowledge is the most prominent and influential and is the focal point in this discussion, other important theorists also advanced theses regarding knowledge. In this regard one may consider: George Berkeley, *The Principles of Human Knowledge* [1710] (Collins 1962); Étienne Condillac, *Essay on the Origin of Human Knowledge* [1746] (Hans Aarsleff tr, Cambridge University Press 2001); David Hume, *An Enquiry Concerning Human Understanding* [1748] (Hackett 1993).
[102] Frederick Ryland, *A Students Handbook of Psychology and Ethics* (W. Swan Sonnenchein Allen 1880) 98.
[103] Locke (n6) Book II, Chapter I, § 2.

> meant by phantasm, notion, species, or whatever it is, which the mind can be employed about in thinking; and I could not avoid frequently using it.[104]

Locke proceeded to identify two sub-sets of ideas that he called “simple” and “complex”.[105] A simple idea is one that, ‘contains in it nothing but one uniform appearance, or conception in the mind, and is not distinguishable into different ideas’.[106] The mind is passive in the reception of these ideas and can neither make one on its own nor have any idea which does not consist of a simple idea.[107] Locke states:

> The mind can neither make nor destroy them. The simple ideas, the materials of all our knowledge, are suggested and furnished to the mind only by those two ways above mentioned, viz. sensation and reflection. When the understanding is once stored with these simple ideas, it has the power to repeat, compare, and unite them, even to an almost infinite variety, and so can make at pleasure new complex ideas.[108]

Complex ideas arise when the mind ‘exerts its powers over simple ideas’ by combining, comparing or abstracting.[109]

Locke summarises aptly:

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[104] ibid Book I, Chapter I, § 8. An in-depth discussion on the definition of the word idea is set out in Chapter 6, part 6.3. What emerges from this discussion is that there are numerous definitions and conceptualisations of what ideas are. This discussion is placed in Chapter Six instead of this chapter because the argument made in that regard is that such diverse viewpoints on what an idea is have contributed to the idea/expression dichotomy being a complex doctrine to interpret.
[105] Locke (n6) Book II, Chapter II, § 1.
[106] ibid Book II, Chapter II, § 1.
[107] ibid Book IV, Chapter II, § 1
[108] ibid Book II, Chapter II § 2.
[109] ibid. These processes are expounded on in the following part of this chapter.

> Since the mind in all its thoughts and reasonings, hath no other immediate object, but its own ideas, which it alone does or can contemplate, it is evident that our knowledge is only conversant about them. Knowledge then seems to me to be nothing but 'the perception of the connexion and agreement, or disagreement and repugnancy, of any of our ideas'.[110]

Therefore, new knowledge arises in the same way as complex ideas. It is contended that what Locke refers to as new knowledge that is, complex ideas, is equivalent to creativity. When the mind exerts its power on simple ideas, which are 'the basic raw material for all of its compositions',[111] what results is knowledge which is 'narrower than our ideas'.[112] The result is therefore greater than the sum of its parts. It is argued that the process by which this knowledge arises may be described as creativity.[113]

An in-depth analysis of how this creativity arises is offered in the following part of this chapter, after other viewpoints on what creativity is have been discussed. It will become clear that these viewpoints clearly endorse Locke's premises noted above.[114]

4.3.2 Creativity as defined in creativity research

In modern times research on creativity has most prominently arisen in the academic field termed creativity research.[115] Creativity research is an academic field which grew out of the desire to rationally explain creativity. It was initially

[110] ibid Book IV, Chapter I, §1 and §2.
[111] ibid Book II, Chapter XII, §2.
[112] ibid Book IV, Chapter III, §6.
[113] It will be recalled in Chapter three, part 3.4.4 it was contended that implicit within Locke's argument is that a complex idea may also arise from combining two other complex ideas.
[114] It bears noting that Locke's theory of knowledge is itself derived from ideas on knowledge first presented in antiquity, particularly, by Plato and Aristotle. Griffin (n85) 137.
[115] Sawyer (n89).

driven by psychologists and scientists before taking on a multi-disciplinary approach;[116] thus, offering a thorough and comprehensive viewpoint on the subject. Within creativity research a standard definition of creativity has been proposed and accepted.[117]

This definition dates to psychologist Morris Stein.[118] Stein defined the creative work as 'a novel work that is accepted as tenable or useful or satisfying by a group in some point in time.'[119] Stein clarifies that by "novel" he did not mean that the work was being produced "for the first time", as it were, but instead novel means 'that the creative product did not exist previously in precisely the same form. It arises from a reintegration of already existing materials or knowledge, but when it is completed it contains elements that are new.'[120] From Stein's definition it has been concluded that the standard definition of creativity is two-fold; it requires originality and effectiveness.[121]

Today, a leading voice in the field of creativity research is American psychologist Keith Sawyer.[122] Sawyer notes that creativity research begun in

[116] ibid.
[117] Mark A. Runco and Garrett J. Jaeger, 'The Standard Definition of Creativity' (2012) 24(1) Creativity Research Journal 92.
[118] ibid, 94.
[119] Morris I. Stein, 'Creativity and Culture (1953) 36(2) The Journal of Psychology 311, 318.
[120] ibid.
[121] Runco and Jaeger (n1157).
[122] It bears restating that there have been other persuasive explications on creativity, for instance, the dictionary of the history of ideas emphasises three key historical conceptions of creativity – divinity, madness and craft. Maryanne Cline Horowitz (ed), *New Dictionary of the History of Ideas* (Thomson Gale 2005) vol 2, 493 – 495. Sawyer as well draws attention to other views on creativity including creativity as self-discovery, the democratic view of creativity, creativity as originality and creativity as fine art, not craft. Similarly, there have been other recent important texts on the nexus between copyright law and creativity which view this area through nuanced lenses. See, Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity: The Third Paradigm* (Edward Elgar 2018) where Professor Frosio examines the long history of creativity, from cave art to digital remix, in order to demonstrate a consistent disparity between the traditional cumulative mechanics of creativity and modern copyright policies. Other important texts include Griffin (n85) and Rachum-Twaig (n74).

the 1950s and grew through three phases.[123] The first phase which occurred in the 1950s and 1960s was focused on studying the personalities of exceptional creators.[124] The second phase in the 1970s and 1980s saw researchers adopt a cognitive approach through which they shifted their focus to the internal mental processes that occur while people are engaged in creativity.[125] In the 1980s and 1990s the third phase developed during which a multidisciplinary socio-cultural approach emerged.[126] This approach saw researchers focus on creative social systems, that is, groups of people in social and cultural contexts.[127] This third phase included research carried out by, among others, sociologists, historians and anthropologists.[128]

Sawyer distils these three perspectives, the personality approach, the cognitive approach and the socio-cultural approach into what he terms the interdisciplinary approach.[129] Through this approach he considers the work of scientists who study the creative individual including, neuroscientists, psychologists and biologists; as well as scientists who study the contexts of creativity, that is, sociologists of science and art, and anthropologists who study art, ritual performance and verbal creativity in different cultures.[130] Additionally, he draws on the work of scholars who study creativity within specific fields, such as, historians of art, musicologists, scholars of theatrical performance, legal scholars of intellectual property ("IP") and philosophers of science.[131]

[123] Sawyer (n89).
[124] ibid.
[125] ibid.
[126] ibid.
[127] ibid.
[128] ibid.
[129] ibid.
[130] ibid.
[131] ibid.

By combining all these perspectives on creativity Sawyer's interdisciplinary approach provides a persuasive explanation of creativity. Moreover, Sawyer critiques most previous creativity researchers, who he argues, have only considered creativity from the viewpoint of those expressions of creativity which are highly valued in Western cultures, the high arts. He notes that by limiting their studies to high art forms, for instance, fine art painting rather than decorative painting, graphic arts or animations; basic science rather than applied science, engineering or technology; symphonic compositions rather than the improvision of a jazz group or the ensemble interaction of a chamber quartet; these researchers have implicitly accepted a set of values that is culturally and historically specific.[132] Sawyer's approach cautions against such biases.

However, Sawyer makes it clear that a critical explanation of creativity requires it to be considered from a particular cultural model.[133] For this chapter the adopted cultural model within which creativity is considered herein is the Western cultural model, denoted specifically within the UK and the US creative industries. This consideration is juxtaposed with the disquisition on creativity in the Kenyan cultural model which was tendered in Chapters two and three.

Notions on creativity vary from country to country. Most people in the UK and the US and in the Western world more generally share a set of implicit assumptions about creativity. Anthropologists refer to an integrated framework of assumptions as a cultural model.[134] Sawyer argues that the Western cultural

[132] ibid 5 – 6.
[133] ibid 33.
[134] Keith Sawyer, 'The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law' (2011) 86(5) Notre Dame Law Review 2027.

model of creativity, is a set of implicit beliefs about creativity that members of Western and European cultures often hold.[135]

In several cases, the scientifically grounded view of creativity is diametrically opposed to the Western cultural model.[136] Sawyer concludes that several aspects of our current IP regime are grounded in these implicit beliefs.[137] For those beliefs that are not consistent with scientific research on creativity, this is problematic, because if IP and specifically copyright law is not aligned with the empirical processes of creativity, then it will be less effective at its goal of encouraging creativity.[138]

Through his compelling interdisciplinary approach Sawyer argues that there are two definitions of creativity. These two definitions arise from his grouping of creativity researchers into two major traditions of research: an individualist approach and a socio-cultural approach.[139] According to the individualist definition, creativity is, 'a new mental combination that is expressed in the world'.[140] Thus, this approach denotes three elements. Creativity is new – that is, novel or original.[141] Creativity is a combination – all concepts and thoughts are combinations of existing thoughts and concepts, creativity involves a combination of two or more thoughts or concepts that have never been combined before by a particular person.[142] Creativity is expressed in the world – as scientists can only study that which they can see, the scientific definition of

[135] ibid.
[136] As highlighted in the ensuing discussion, whereas the Western cultural model relates creativity to genius, creativity in fact requires industry and is derivative of existing ideas and concepts.
[137] Sawyer (n134).
[138] See note 3.
[139] Sawyer (n89) 7.
[140] ibid.
[141] ibid.
[142] ibid.

creativity has to exclude ideas that remain in a person's head and are not expressed.[143]

Sawyer notes that the individualist approach is based on one of the oldest theories in psychology, associationism.[144] Associationism refers to a psychological doctrine according to which all mental activities are based on connections between basic mental events such as sensations and feelings.[145] The Scottish psychologist Alexander Bain was the first to suggest that behavioural actions can also form associations with ideas.[146] According to Alexander, 'new combinations grow out of elements already in the possession of the mind'.[147] Most of these combinations will not be completely new to the world, but provided they are new to a particular person they satisfy the individualist definition.[148]

Creativity researchers refer to this as "little c" creativity.[149] Little c creativity includes activities that people engage in everyday for example, finding a way to avoid a traffic jam by using side streets or working out how to cook a meal with a limited range of ingredients.[150] Many people have already engaged in such

[143] ibid.
[144] ibid.
[145] M. Rajamanickam, *Modern General Psychology*, vol 1 (2nd edn, Concept Publishing 2008) 35.
[146] Sawyer (n89) 8.
[147] Alexander Bain, *The Senses and the Intellect* (University Publications of America 1977, reprint of 1855 edition published by John W. Parker and Sons, London) 8.
[148] Sawyer (n89) 8.
[149] ibid.
[150] ibid. For a detailed exposition on the concepts of "little c" creativity and "big C" creativity, discussed below, see, Anna Craft, ''Little c Creativity' in Anna Craft, Bob Jeffrey and Mike Leibling (eds), *Creativity in Education* (Continuum 2001) 45 – 61; Dean Keith Simonton, 'What is A Creative Idea? Little-c Creativity versus Big-C Creativity' in Kerry Thomas and Janet Chan, *Handbook of Research on Creativity* (Edward Elgar 2013) 69 – 83.

activities however, provided it is a particular individual's first time to do so then it meets the individualist definition of creativity.[151]

Associationism has its origins in the philosophies of the early Greeks, particularly Empedocles, Plato and Aristotle and the Empiricist theories of Locke, Berkeley and Hume among others.[152] Associationism accommodates both innatism and empiricism as the key aspect of associationism is the connection made by the existing ideas, whether innate or based on experience, to produce new ideas. As noted above, proponents of innatism such as Plato argue that man's knowledge is innate.[153] On the other hand the Empiricists such as Locke argue that knowledge derives solely from experience.[154]

The Western cultural model is rooted in individualism. Individualist cultures value individual needs and interests over those of a social group, and they value personal outcomes and goals more than social relationships.[155] The self is defined as an inner property of the individual without any necessary reference to the group.[156] Collectivist cultures on the other hand are those in which people are integrated into strong, loyal groups.[157] These cultures value group goals and outcomes over the individual.[158] The self is defined by reference to the group and to one's position in it; there is no firm separation between individual and

[151] Sawyer (n89) 8.
[152] Jon E. Roeckelein, *Dictionary of Theories, Laws and Concepts in Psychology* (Greenwood Press 1998) 44.
[153] Rogers (n98) 193.
[154] Locke (n6) Book II, Chapter I, § 2.
[155] Sawyer (n132) 2029.
[156] ibid.
[157] ibid.
[158] ibid.

group.[159] There are differences in degree however; even individualist cultures may have some collectivist elements, and vice versa.[160]

In individualist cultures like the UK and the US, it is contended, individuals emphasize how they are different, unique and better than others.[161] They tend to see themselves as distinct from others. In such cultures, people believe that artists embody these traits to an extreme - artists are more unique, more different, and more separate than the average person.[162] Collectivist cultures such as Kenya, it is argued, hold a radically different cultural model of creativity. In collectivist cultures people emphasize that they are ordinary, similar to, and no different from others; and rather than separateness, they emphasize their connectedness.[163] The collectivist nature of Kenya's culture was highlighted in Chapter two. It was seen that modern creativity in Kenya derives from the country's TCEs which invariably are produced by the collaborative efforts of several members of traditional communities.[164]

Under the socio-cultural definition creativity, 'is the generation of a product that is judged to be novel, useful and valuable by a suitably knowledgeable social group'.[165] The socio-cultural definition of creativity requires that some socially valuable product be generated before the act or the person is called creative.[166] Only solutions to extremely difficult problems, or significant works of genius are

[159] ibid.
[160] ibid.
[161] ibid.
[162] ibid.
[163] ibid.
[164] See, Chapter 2, part 2.2.4. See also Peter Jaszi, 'Protecting Traditional Cultural Expressions – Some Questions for Lawmakers' (2017) 4 WIPO Magazine 13.
[165] Sawyer (n89) 8.
[166] ibid.

recognised as creative. This is referred to as “big C” creativity.[167] Every creation that satisfies the big C definition will by default also satisfy the little c definition as any creation that is new to a social group will invariably be new to each individual in that group.[168] Sawyer notes that the socio-cultural definition of creativity is rather similar to definitions of “innovation” among business scholars.[169] Business scholars distinguish between creativity as the ideas or products generated by individuals and innovation as the successful execution of a product or new service by an entire organisation.[170]

To satisfy the socio-cultural definition, novelty to the creator is not enough. Creators themselves cannot truly know if their work is the first one in the history of the world. Social cultural novelty can only be judged by a social group, who can collectively determine whether an individual creation is new.[171] Additionally, the creation must also be appropriate, that is, recognised as socially valuable in some way to some community.[172] Appropriateness, like novelty, can be judged only by a social group. The socio-cultural definition of creativity has been widely adopted in creativity research even by personality and cognitive psychologists.[173] That is because it is extremely difficult to scientifically determine what a “new combination” is for an individual under the individual definition.[174]

[167] ibid.
[168] ibid.
[169] ibid.
[170] ibid. See the discussion on creativity *vis-à-vis* innovation in part 1.5.2 of the introductory chapter.
[171] ibid 9.
[172] ibid.
[173] ibid.
[174] ibid.

4.3.4 Creativity in art

Whereas Locke's and Sawyer's conceptualisations of creativity are influential, taking into consideration various viewpoints on the subject as they do, relevant for a discussion on copyright are descriptions of artistic creativity specifically not general psychological models of creativity which may, but do not necessarily, encompass artistic creativity.[175] In this regard, Margaret Boden has offered an attractive working definition from the angle of the philosophy of art, 'creativity is the capacity to generate ideas or artefacts that are both new and positively valuable.'[176]

With these acceptable definitions of creativity at the back of our minds then we can proceed to inquire into the nature of creativity, that is, how does it occur?

4.4 How does creativity occur?

4.4.1 Locke's approach

As put forward above, it is argued that what Locke refers to as new knowledge that is, complex ideas, is equivalent to creativity. Locke's premise regarding knowledge is that new knowledge arises when one performs mental labour on simple ideas.[177]

As noted above Locke identified two sub-groups of ideas, simple and complex.[178] A simple idea is the basic unit of knowledge.[179] Complex ideas

[175] Rahmatian (n84).
[176] Margaret Boden, 'Creativity' in Berys Gaut and Dominic McIver Lopes (eds), *The Routledge Companion to Aesthetics* (2nd Edition, Routledge 2005) 477.
[177] Locke (n6) Book IV, Chapter II, § 1.
[178] ibid Book II, Chapter II, § 1.
[179] ibid Book II, Chapter II, § 2.

arise when the mind 'exerts its powers over simple ideas'.[180] That is to say, when the mind performs "mental labour" over simple ideas. Thus, simple ideas are the building blocks of complex ideas and new knowledge.

It is therefore contended that the process of coming up with complex ideas, is the same as that of deriving new knowledge, and these two processes are equivalent to the act of creativity. Hence, the act of creativity arises when the mind performs labour over simple ideas. This process of creativity occurs in the following way:

> The acts of the mind wherein it exerts its power over its simple ideas, are chiefly these three: 1. Combining several simple ideas into one compound one, and thus all complex ideas are made. 2. The second is bringing two ideas. Whether simple or complex, together; and setting them by one another, so as to take a view of them at once, without uniting them into one by which it gets all ideas or relations. 3. The third is separating them from all other ideas that accompany them in their real existence this is called abstraction and thus all its general ideas are made.[181]

Therefore, creativity primarily arises when two or more simple ideas are combined. Further, by comparing both simple and complex ideas as well as through abstraction creativity can also occur. Locke's theory of knowledge, which this thesis argues defines and describes creativity can be encapsulated as – new knowledge, that is creativity, arises when simple ideas, the basic units of thought, are combined together. Locke therefore views creativity as an incremental and derivative process, a position which has come to be accepted

[180] ibid.
[181] ibid Book II, Chapter XII, § 1.

by psychologists, neuroscientists, biologists, sociologists and other scholars of creativity.

4.4.2 Historical approaches

In putting forward an understanding of how creativity arises, within the field of creativity research, Sawyer notes that conceptions of creativity have over the centuries veered between two main ideas, Rationalism and Romanticism.[182] Rationalism is the belief that creativity is generated by the conscious deliberating, intelligent, rational mind.[183] Romanticism is the belief that creativity arises from an irrational unconscious and that rational deliberation interferes with the creative process.[184] These two broad conceptions of creativity are discussed below.

4.4.2.1 Rationalism

Rationalism is the epistemological view that regards reason as the chief source of knowledge. The foundations for Rationalism were laid down in antiquity. Aristotle's view of art emphasised deliberation and rationality and stressed the conscious effort and human skill needed to bring a creative inspiration to completion.[185] The Rationalist view was dominant through the European Renaissance and Enlightenment, between the fourteen and eighteenth century, when reason was valued above everything else.[186] Locke conceptualised his

[182] Sawyer (n89) 23.
[183] ibid.
[184] ibid.
[185] ibid.
[186] ibid.

views on knowledge and creativity in the seventeenth century at the heart of this era.[187]

During this period a creator was viewed primarily as a craftsman, a master of a body of rules preserved and handed down to him.[188] This was associated with the concept of *facere* which was connected to makings involving the repetition of esthetical or technical conventions in the shaping of existing matter.[189] Reason, knowledge, education and training were considered necessary to create good art.[190] When the term *originality* was coined it referred to newness and truth of observation, not a radical break with convention.[191]

During the eighteenth century the word genius was used for the first time in reference to creative individuals and this concept of genius was primarily associated with rational conscious processes.[192] However, around this period English writers, such as Shaftsbury and Addison, more than any of their other counterparts from the rest of Europe, began to theorise about genius and stress its irrational traits.[193] Such thinkers began to consider that art might be created through non-rational processes.[194] Towards the end of the eighteenth century this line of thinking gradually evolved into the Romanticist view that thinking

[187] Peter A. Schouls, *Reasoned Freedom: John Locke and Enlightenment* (Cornell University Press 1992) 1.
[188] Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author' (1984) 17(4) Eighteenth-Century Studies 425, 426.
[189] Eric Booth, 'Creativity in the Arts and Arts Education: Intentionally Reclaiming our Rightful, Central Place' in Mike Fleming, Liora Bresler and John O'Toole (eds), *The Routledge International Handbook of the Arts and Education* (Routledge 2015) 51.
[190] Sawyer (n89) 23.
[191] ibid.
[192] Giorgio Tonelli, 'Genius from the Renaissance to 1770' in Philip P. Wiener (ed), *Dictionary of the History of Ideas*, vol II (Charles Scribner's Sons 1973) 293.
[193] Giorgio Tonelli, 'Genius from the Renaissance to 1770' in Philip P. Wiener (ed), *Dictionary of the History of Ideas*, vol II (Charles Scribner's Sons 1973) 294.
[194] Sawyer (n89) 23.

rationally and deliberately would erode the creative impulse.[195] Instead of rational deliberation an artist should simply listen to her inner muse and create without conscious control.[196]

4.4.2.2 Romanticism

The Romantics were revolutionary, they argued that creativity requires temporary escape from the conscious ego and a freeing of emotion and instinct.[197] The Romantics took from Kant both the emphasis on free will and the doctrine that reality is ultimately spiritual, with nature itself a mirror of the human soul.[198] Opposed to *facere*, which as noted above emphasised technical skill and craftsmanship, Romanticism was connected with the concept of *creare*, creation out of nothing, also referred to as *ex nihilo* creation.[199]

These ideas were not completely novel; for thousands of years, scholars had associated creativity with altered or heightened states of consciousness. Plato used the term *enthousiasmos* or "divine madness" to describe creativity.[200] Creativity and madness have continuously been linked together.[201] The Romantics believed that clinical madness was an unfortunate side effect of extreme creativity.[202]

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[195] ibid.
[196] ibid.
[197] ibid 24.
[198] Simon Blackburn, *Oxford Dictionary of Philosophy* (3rd edn, Oxford University Press) 418.
[199] Eric Booth, 'Creativity in the Arts and Arts Education: Intentionally Reclaiming our Rightful, Central Place' in Mike Fleming, Liora Bresler and John O'Toole (eds), *The Routledge International Handbook of the Arts and Education* (Routledge 2015) 51.
[200] Sawyer (n89) 24.
[201] See, James C. Kaufman (ed), *Creativity and Mental Illness* (Cambridge University Press 2014).
[202] Sawyer (n89) 24.

Pertinently, the Romantic era witnessed the birth of contemporary notions of creativity.[203] Indeed it is argued that the concept of authorship in copyright law emerged on the backdrop of the Romantic movement in literature and art.[204] Within copyright law creatorship is generally termed authorship and the creator is referred to as an author.

The linking of authorship and Romanticism, a contention pioneered by literary theorist Martha Woodmansee, has been the assertion of some scholars in literature, law and the social sciences.[205] Woodmansee's pathbreaking research shows the way in which the idea of the author was constructed by the Romantic movement in literature and art in the eighteenth century and highlights the connection of this development with the emerging copyright laws.[206] Woodmansee's central argument is that the author, in its modern sense, is a relatively recent invention.[207]

Professor Woodmansee contends that the modern conception of authorship emerged on the backdrop of a new class of professional writers who in eighteenth-century Germany, constrained by the lack of safeguards which are today found in copyright laws, sought to justify legal protection for their labours.[208] To this end these writers set about redefining the nature of writing and thus helped give the concept of authorship its current form.[209] This form of authorship views the author as an individual who is the sole creator of unique

[203] ibid.
[204] Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity' (1992) 10(2)
Cardozo Arts & Entertainment Law Journal 293.
[205] See Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press 1994).
[206] Woodmansee (n188) 425.
[207] ibid 426.
[208] ibid.
[209] ibid.

works and therefore exclusively deserving of the credit arising from their production.[210]

Before this development, during the Renaissance the author was viewed as a craftsman, a master of a body of rules handed down to him.[211] However, in rare moments when a writer managed to produce something which appeared to have been the result of much more than the training offered in his craft, such incidences were explained by inspiration arising from an external source – a muse or even God.[212]

The Romantic view minimised and discarded the elements of craftsmanship and rare external influence in favour of the element of inspiration which comes from within the writer himself.[213] In this regard Woodmansee notes that inspiration came to be explicated in terms of *original genius* with the consequence that the inspired work was made peculiarly and distinctively the product and the property of the writer'.[214] Thus, Woodmansee states, '…from a (mere) vehicle of preordained truths - truths as ordained either by universal human agreement or by some higher agency - the *writer* becomes an ***author'***.[215]

Jaszi has applied Woodmansee's thesis to copyright law. He notes that the '"author" has been the main character in a drama played out on the parallel stages of literary and legal culture'.[216] Professor Jaszi is categorical that the dominant doctrinal structures of UK and US copyright law arose around the

[210] ibid.
[211] ibid.
[212] ibid 427.
[213] ibid.
[214] ibid.
[215] ibid 429.
[216] Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455.

same time as the Romantic conception of authorship at the end of the eighteenth century, stating that, 'British and American copyright presents myriad reflections of the romantic conception of "authorship"'.[217]

Romanticism dominated the nineteenth century, but by the end of the century, "anti-Romanticism" was growing.[218] The twentieth century witnessed a re-emergence of Rationalism in Modernism.[219] Modernism was an international artistic movement, comprising of all the arts from architecture to arts and crafts and film and literature that began in the latter part of the nineteenth century and continued until the middle part of the twentieth century.[220] Modernism's defining characteristic is perhaps best captured by American poet and critic Ezra Pound's injunction "make it new" which enjoined artists to abandon tradition and experiment with the possibilities inherent in every medium, regardless of the apparent senselessness or indeed ugliness of the outcome.[221] From around the 1960s a "new" wave of modernism, characterised as post-modernism arose.

As discussed in the introductory chapter, post-modernism is a broad movement that developed in the mid to late twentieth century across philosophy and the cultural genres which marked a departure from modernism.[222] The phrase was introduced into philosophy and social sciences by philosopher Jean-François

[217] ibid 456. Whereas the Woodmansee/Jaszi interpretation of copyright law is compelling, it has not escaped criticism. Rahmatian, for instance, decries its focus on literary copyright and lack of consideration of other cultural works such as the visual arts and music, Rahmatian (n84) 156 - 159. For other divergent views, see Lionel Bently, 'Review Article: Copyright and the Death of the Author in Literature and Law' (1994) 57 The Modern Law Review 973, 977; Mark Lemley, 'Romantic Authorship and the Rhetoric of Property' 75 Texas Law Review 873, 876-7, 879-95; Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright' (2008) 118 The Yale Law Journal 186, 192-2.
[218] Sawyer (n89) 24.
[219] ibid.
[220] Buchanan (n60) 323.
[221] ibid.
[222] Ursula K Heise, 'Science, Technology and Postmodernism' in Steven Connor (ed), *The Cambridge Companion to Postmodernism* (Cambridge University Press 2004) 136. See Chapter 1, part 1.5.3.

Lyotard, hitherto, it had mostly been used by art critics.[223] Lyotard noted that, 'Simplifying to the extreme, I define post-modern as incredulity toward metanarratives'.[224] Thus, whereas encompassing a broad range of notions, post-modernism is typically defined by an attitude of self-contradiction, self-undermining, irony and scepticism toward "grand narratives".[225]

It is argued that culture in the Western world, particularly in the UK and the US,[226] can be characterised as post-modern both in chronological terms and by its characteristics.[227] The digital age has emerged within the crucible of post-modernism. Digital technologies and the internet have enabled content recipients to more readily receive content, to borrow elements from existing works and to easily utilise such elements in the creation of their own works.[228] This chapter maintains that this is the essence of creativity, that is, it is a derivative process.

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[223] Ihab Hassan, *The Postmodern Turn: Essays in Postmodern Theory and Culture* (Ohio State University Press 1987) 12.
[224] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trs, University of Minnesota Press 1993) xxiv.
[225] Hutcheon (n78).
[226] As noted in the introductory chapter and emphasised in Chapter 2, Kenyan culture may not accurately be described as post-modern, instead a more appropriate characterisation of Kenyan culture is that it is traditional.
[227] Since the turn of the twenty-first century some have argued that post-modernism is in decline and has "gone out of fashion" and is being replaced by a post post-modernism, as it were, Garry Potter and Jose Lopez, 'After Postmodernism: The New Millennium' in Garry Potter and Jose Lopez (eds) *After Postmodernism: An introduction to Critical Realism* (The Athlone Press 2001). However, there have been few formal attempts to define and name the era succeeding post-modernism, and none of the proposed designations has yet become part of mainstream usage. Some suggested terms for this epoch are post-postmodernism, Tom Turner, *City as Landscape: A Post Post-modern View of Design and Planning* (Taylor & Francis 1996) and trans-postmodernism, Mikhail N. Epstein, Alexander A. Genis and Slobodanka M. Vladiv-Glover, *Russian Postmodernism: New Perspectives on Post-Soviet Culture* (Slobodanka M. Vladiv-Glover tr Berghahn Books 1999).
[228] Lawrence Lessig, *Free Culture: How Big Media uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press, 2004).

4.4.3 Tying in other pertinent views on creativity

4.4.3.1 The eight stages of creativity

As noted above, many elements of our current IP regime are grounded in the Western cultural model. Sawyer posits that the Western cultural model is a total of ten beliefs that represent shared cultural assumptions taken for granted and often unquestioned.[229] First and paramount amongst these beliefs is that the essence of creativity is the moment of insight.[230]

Over the centuries, philosophers have developed two competing theories about the course of creativity – idealist and action.[231] Idealist theorists argue that after a creator has a creative idea, the creative work is complete.[232] It does not matter whether the idea is ever executed in material form, or whether anyone else ever sees it. This theory is often called the "Croce-Collingwood" theory, after the two philosophers who promoted it in the twentieth century.[233]

On the other hand, action theorists argue that the execution of the creative work is essential to the creative process.[234] Action theorists point out that in real life, creative ideas often happen while one is working with materials.[235] They emphasis trial and error – once a creator begins to execute an idea it often does not work out as expected, and it becomes necessary to modify the original idea. It is rather common therefore for the final product to be very different from the original idea.[236]

[229] Sawyer (n134) 2030.
[230] ibid.
[231] ibid.
[232] ibid.
[233] ibid.
[234] ibid.
[235] ibid.
[236] ibid.

Many of the creativity beliefs associated with the Western cultural model are more consistent with the idealist theory than the action theory.[237] The Western cultural model tends to suppose that ideas emerge spontaneously, fully formed, from the unconscious mind of the creator. However, Sawyer clarifies that creativity research has found that the idealist theory is false; only an action theory can explain creativity.[238] Creativity takes place over time, and most of the creativity occurs while doing the work. The medium is an essential part of the creative process, and creators often get ideas while working with their materials.[239]

In this regard Sawyer highlights that psychological research has concluded that creativity tends to occur in a sequence of eight stages. First, finding and formulating the problem. Second, acquiring knowledge relevant to the problem. Third, gathering a wide range of potentially related information. Fourth, taking time off for incubation. Fifth, generating a large variety of ideas. Sixth, combining ideas in an unexpected way. Seventh, selecting the best ideas and applying relevant criteria. Eighth, externalising the idea using materials and representations.[240]

Whereas Sawyer accepts that creative people often report having a sudden flash of insight, an "Aha" moment,[241] he however, argues that the moment of insight is overrated.[242] The consensus emerging from cognitive psychology is that creativity is not a single, unitary mental process; it is instead the result of

[237] ibid.
[238] ibid.
[239] ibid.
[240] ibid 2031.
[241] ibid 2032.
[242] ibid.

many different mental processes, each associated with one of the eight stages above. Scientists may still not completely understand exactly what goes on in the mind, but experiments have demonstrated that insights are based in previous experiences, they build on acquired knowledge and memory, and they result from combinations of existing mental material.[243]

This view of creativity is only emphasised in the post-modern age. Sawyer stresses on the view of present-day creativity as being derivative, he notes:

> We live in an age of mash-ups, open-source software, creative commons licensing — what legal expert Lawrence Lessig has called free culture (2004). The Internet has blurred the concept of creative ownership, with millions of people borrowing video clips and recorded music excerpts to generate their own combinations.[244]

4.4.3.2 No new thing under the sun

Indeed, it has long been averred that, 'There is no new thing under the sun'.[245] Or as the Greek philosopher Parmenides taught 2,500 years ago, 'Out of nothing, nothing can emerge'.[246] Parmenides deduced from this tenet that change is impossible, so change must be an illusion.[247] The founders of the atomic theory, Leucippus and Democritus, followed him in so far as they taught that what exists are only unchanging atoms, and that they move in the void, in empty space.[248] The only possible changes are thus the movements, collisions,

[243] ibid.
[244] Sawyer (n89) 427.
[245] The Holy Bible, Ecclesiastes Chapter 1, Verse 9 (King James Version)
[246] Karl Popper and John C. Eccles, *The Self and Its Brain: An Argument for Interactionism* (Routledge 1983) 14.
[247] ibid.
[248] ibid.

and re-combinations of atoms, including the very fine atoms which constitute our souls.[249]

Continuing with these notions, American philosopher and cognitive psychologist Daniel Dennett argues that all creation, proceeds by trial and error of one sort or another.[250] Furthermore, no human being, no matter how great a genius, does all the creative work that goes into a work of art.[251] Dennet explicates:

> How long did it take Johann Sebastian Bach to create the *St. Matthew Passion*? An early version was performed in 1727 or 1729, but the version we listen to today dates from ten years later and incorporated many revisions. How long did it take to create Johann Sebastian Bach? He had the benefit of forty-two years of living when the first version was heard, and more[252] than half a century when the later version was completed. How long did it take to create the Christianity without which the St Matthew Passion would have been literally inconceivable by Bach or anyone else? Roughly two millennia. How long did it take to create the social and cultural context in which Christianity could be born? Somewhere between a hundred millennia and three million years – depending on when we decide to date the birth of human culture.[253]

A compelling aspect of Dennett's views on creativity is that he considers not only a person's life and life experiences as having a bearing on their creative outputs but even the social and cultural context that pre-dates a person, indeed going all the way back to the start of human culture, as it were; emphasising his

[249] ibid.
[250] Daniel Dennet, 'Collision, Detection, Muselot, and Scribble: Some Reflections on Creativity' in David Cope (ed) Virtual Music: Computer Synthesis of Musical Style (MIT Press 2001) 283. Griffin argues in similar vein, relating creativity to erring. Griffin (n85) 29.
[251] Dennet (n250).
[252] ibid 284.
[253] ibid.

persuasion against *ex nihilo* creativity. However, Dennett is aware that many would find this vision of creativity deeply unsettling, he notes that some would argue that it is not just unsettling, 'it is crass, shallow, philistine, despicable, or even obscene'.[254] With regard to this contention Sawyer rejoins that perhaps this is because the average person still holds to Romanticist conceptions of creativity which view creativity as arising *ex nihilo*, out of nothing, and in which the creator was a genius.

Whereas the notion of *ex nihilo* creation has been rejected throughout time,[255] that creativity is in fact a derivative process is accentuated in today's post-modern culture. A number of practices emerging in post-modern art since the 1960s led to a readjustment of the claim of artworks to originality and radical novelty. The concept of the creative genius and the distinction between original and copy have been rejected.

However, this deconstruction of the claim to originality should not be misinterpreted as meaning that post-modern art has abandoned artistic novelty altogether. Novelty simply becomes relative and more subtly shaded, which in turn renders it all more potent. Good examples of this include the appropriation art found in the *readymades* of Marchel Duchamp, Andy Warhol's screen prints and Mark Rothko's abstract paintings. The aim of such art is not to add an artefact created *ex nihilo* but instead to respond to the world of things and meanings by means of things found in it.[256] The artist then becomes a

[254] ibid 283.
[255] Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Vintage Books 2002) 250.
[256] Reckwitz (n80) 102 – 103.

"plagiarist" for whom everyday culture has become an enormous encyclopaedia from which he draws.[257]

4.4.3.3 The inevitability of intertextuality

Barthes stated that, 'every text being itself the intertext of another text, belongs to the intertextual, which must not be confused with a text's origins: to search for the "sources of" and "influence upon" a work is to satisfy the myth of filiation'.[258] Post-structuralist thought emphasizes this inevitable interrelationship termed "intertextuality" among all texts.[259] Post-structuralism is often viewed as a variety of post-modernism which arose as an internal critique of the movement that preceded it, modernism.[260] Post-structuralism involves going beyond the structuralism of theories that imply a rigid inner logic to relationships that describe any aspect of social reality.[261]

Post-structuralist criticism posits that intertextuality arises out of both the reading and the writing process. Texts do not exist independently of someone reading them, and the text is never a separate work but is always permeated by other texts that the reader brings to the process of reading.[262] Similarly, post-modernist thought asserts that the text does not arise anew out of the mind of an author-genius, but instead is inevitably a reproduction of other texts.

The binding link between all these views on creativity, as perpetuated by the philosophers of yore, Locke, Sawyer, Dennet, Griffin and Barthes, among other thinkers is that they all reject Romanticism's view of *ex nihilo* creativity and

[257] ibid.
[258] Roland Barthes, 'The Death of the Author' in *Image Music Text* (Stephen Heath tr, Fontana Press 1977) 160.
[259] Robert H. Rotstein, 'Beyond Metaphor: Copyright Infringement and the Fiction of the Work' (1993) 68(2) Chicago-Kent Law Review 725, 737.
[260] Buchanan (n60) 380.
[261] John Scott, *Oxford Dictionary of Sociology* (4th edn, Oxford University Press 2014) 584.
[262] Rotstein (n259).

propound that creativity is an incremental and derivative process. With subtle clarity Locke, particularly, advances that new knowledge, that is creativity, derives from combining existing ideas and concepts.

4.5 Conclusion

This chapter considered Rudolf Steiner's theory of social three-folding wherein it was seen that the domination of the economic domain over the political and cultural domains in the social organism have led to the social problem. The social problem is recognised as the undesirable state of society. As a cure to this problem Steiner proposes that the three domains of society ought to develop autonomously. Specifically, Steiner notes that the cure to the social problem lies with the cultural domain developing independent of economic concerns.

It was argued that the theory of social three-folding provides a framework within which copyright law may be reformed to better obtain its key objective, the encouragement of creativity. Through a focus on Locke's theory of knowledge it was seen that creativity is a highly derivative process, drawing on existing ideas and concepts.[263] It is not a process that arises *ex nihilo*, as the Romantic conceptualisation presupposes. This is true, more so, in today's post-modern culture, wherein digital technologies and the internet have enabled content recipients to more easily and readily borrow elements from existing works and to easily utilise such elements in the creation of their own works.[264]

[263] Sawyer (n9).
[264] Lessig (n228).

However, copyright law has failed to appreciate and provide for this true nature of creativity. Instead, copyright law is dominated by economic concerns, preventing it from adequately encouraging creativity. The next chapter discusses how copyright law has understood and provided for creativity and how, by interpreting and providing for creativity in similar terms as Locke, copyright law may be reformed to better encourage creativity.

Reforming Copyright Law to Encourage Creativity in Kenya:
A Comparative Study of Kenya, the United Kingdom and the United States

Volume 2 of 2

Submitted by Paul Njoroge Kimani to the University of Exeter
as a thesis for the degree of
Doctor of Philosophy in Law in February 2020

I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

(Signature) ……

CHAPTER FIVE

TOWARDS A COPYRIGHT LAW THAT ENCOURAGES CREATIVITY

5.1 Introduction

The previous chapter postulated that creativity is an incremental and derivative process. Locke's theory of knowledge was highlighted in this regard.[1] It was argued that creativity can be conceptualised within the precepts of this theory. According to Locke, knowledge arises when "simple ideas", the material elements of knowledge, are combined together.[2] It was urged that this process of coming up with new knowledge can be equated with the process of creativity. Similarly creativity was considered within the main academic field dealing with the subject, creativity research. The apogee of these viewpoints, that is, Locke's theory of knowledge and creativity under creativity research is the rejection of *ex nihilo* (out of nothing) creativity.

Before examining creativity, the previous chapter discussed the theory of social three-folding. It was seen that social three-folding argues for the autonomous development of society's three domains, that is, the economic domain, the political domain and the cultural domain, for a "healthy" society.[3] However, it was noted that an undesirable social state had been caused by the economic domain's domination of the other two domains, particularly, the cultural

[1] John Locke, *An Essay Concerning Human Understanding* (T. Tegg and Son 1836).
[2] ibid Book IV, Chapter II, § 1
[3] Rudolf Steiner, *Basic Issues of the Social Question: Towards Social Renewal* (Frank Thomas Smith tr, Rudolf Steiner Press 1977) 29 - 30. Available at the *Institut Für Soziale Dreigliederung* (Institute of Social Threefolding) website <http://www.threefolding.org/archiv/800.html> accessed 18th November, 2019. See Chapter 4, part 4.2.1.

domain.[4] The theory's main contention is that a resolution to this scenario can be effected by freeing, particularly, the cultural domain from the economic domain.[5] This thesis applies the theory of social three-folding to copyright law as a framework through which copyright law may more adequately obtain its key objective, the encouragement of creativity.[6]

The present chapter maintains that copyright law as currently constituted does not adequately meet its primary goal of encouraging creativity. This is because instead of copyright law focusing on how creativity arises and providing a structure through which the creative process can be enhanced, how copyright law understands and provides for creativity emanates from a frame of reference that is dominated by economic concerns.

The economic domain's dominance over copyright law is seen in a number of regards. Most overtly has been the coupling of copyright law with the global trade agenda following the entering into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") on 1 January 1995.

Additionally, the form of creativity that copyright law protects and rewards is one based on the Romantic "author-genius".[7] According to this formulation, an

[4] Steiner (n3) 58. See Chapter 4, part 4.2.2.
[5] Steiner (n3) 47.
[6] See the exposition on the contention that the key objective of copyright law is the encouragement of creativity in part 5.2.2.
[7] The phrase "author-genius" was developed by the scholarship that challenged the Romantic aesthetics propounded by copyright law. See for example: Martha Woodmansee, 'The Genius and the Copyright : Economic and Legal Conditions of the Emergence of the "Author" (1984) 17 (4) Eighteenth Century Studies 425; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455; Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 Representations 51; David Saunders, *Authorship and Copyright* (Routledge 1992); Mark Rose, *Authors and Owners* (Harvard University Press 1993). It is worth point out that the validity of associating the figure of the author genius with Romanticism has been robustly critiqued. For instance, Rahmatian attacks Woodmansee's viewpoint as being "irritatingly myopic" for its

author creates works extempore using his creative genius thus, leading to the production of utterly new and unique expressions.[8] Creativity is however a more equivocal process than this model admits and builds on existing ideas and concepts. It has been argued that the author genius rhetoric, since the beginning of copyright law, has been used by entrepreneurs and businesspeople to slyly conceal their real agenda. For instance, even though the Statute of Anne,[9] offered copyright protection to authors, the real force behind the law's enactment and its main beneficiaries were printers and book sellers seeking to dominate publishing in England.[10] Today, entrepreneurs continue to invoke the author genius rhetoric in the furtherance of their own interests as has been seen, for instance, in recent debates regarding online file sharing software.[11]

This chapter sets out the discourse on how copyright law understands and provides for creativity *vis*-à-*vis* the real nature of creativity as a derivate process. It is put forward that the key objective of copyright law is the encouragement of creativity. The discussion then moves to how copyright law

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exclusive focus on literature in the eighteenth century, whereas the Romantic period in reality began around 1800. Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 156 -157. For other criticism, see, Lionel Bently, 'Review Article: Copyright and the Death of the Author in Literature and Law' (1994) 57 The Modern Law Review 973, 977; Mark Lemley, 'Romantic Authorship and the Rhetoric of Property' 75 Texas Law Review 873, 876-7, 879-95; Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright' (2008) 118 The Yale Law Journal 186, 192-2.

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

[9] Statute of Anne 1710, 8 Anne Ch 19, the long title of which is, An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned ("Statute of Anne").

[10] John Feather, 'The Book Trade in Politics: The Making of the Copyright Act of 1710' (1980) 8 Publishing History 37; Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 143 – 150. As is elaborated in part 5.3 below, Deazley however, rejects this view as being too reductionist an analysis and instead maintains that the Statute of Anne was primarily concerned with the continued production of books. Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Hart Publishing 2004) 45.

[11] See the discussion on these viewpoints in part 5.4.3 below.

has been influenced and dominated by the economic domain, leading to a structure that, as noted above, has prevented copyright law from obtaining its key objective. Finally, it is argued that by looking beyond the current theories that underlie copyright law and by structuring copyright law based on an understanding of creativity as proposed by Locke in his theory of knowledge, then copyright law can more adequately obtain its key objective of encouraging creativity.

5.2 Copyright law's regulation of the cultural domain

Accepting that creativity in reality is a process that is derivative, this chapter now turns to a discussion of how copyright has conceptualised and provided for creativity. Copyright law regulates the outputs of creativity, or in Steiner's terminology, the cultural domain, and more specifically those elements that fall within the confines of the "work".[12]

It is argued that copyright law is a viable and necessary tool within society; it rightly secures an author's economic and personhood rights. More pertinently, copyright law is a usable means to encourage creativity. Indeed, the key objective of copyright law is to encourage creativity. Whereas it has been urged that creativity can be encouraged through a number of other means including, government grants,[13] tax credits,[14] limiting property rights[15] and so on; the role of encouraging creativity appropriately fits within the edifice of copyright law specifically due to the protection that it provides for authors and

[12] Omri Rachum-Twaig, *Copyright Law and Derivative Works: Regulating Creativity* (Routledge 2018) 1; Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 32.
[13] Peter S. Menell, 'Intellectual Property: General Theories' in Boudewijn Bouckaert and Gerrit de Geest (eds), *Encyclopedia of Law and Economics* (vol 2, Edward Elgar 2000) 143.
[14] ibid.
[15] Lawrence Lessig, *Free Culture: How Big Media uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press, 2004).

the allowances that it makes, or ought to make, for potential creators to build on the works of others so that they too can become authors and add social value.

As discussed in the previous chapter Rudolf Steiner's theory of social three-folding noted that the "social problem", that is, the undesirable state of society, had arisen due to the economic domain's domination of the other two domains, the political domain and the cultural domain.[16] He therefore called for the autonomous development of the three domains of society, emphasising that freeing of the cultural domain from the clutches of the economic domain would play the most significant role in curing the social problem.[17] The cultural domain includes among other things, literature, art, music and theatre.[18] These constituents of the cultural domain are the products of creativity.

Following Steiner's theory of social three-folding this thesis advocates for creativity to arise within its own precepts and not guided by political and economic concerns. Yet, all ideas and theories, howsoever persuasive and enthralling find themselves tempered by the practicalities of application in the real world; and Steiner's theory of social three-folding is no exception to this rule. In this regard, Steiner highlighted the inevitable linkages between the three social domains, a caveat which, it is argued, makes his thesis all the stronger. Particularly he noted that the political domain, wherein laws are formulated, was to be oriented in a way to govern the mutual relations between persons and groups.[19] Accepting copyright law as a practicable tool for

[16] Steiner (n3) 60.
[17] ibid 47.
[18] ibid 7.
[19] ibid 63 – 64.

encouraging creativity; a key failing of copyright law, is that its current structure has been dictated by economic tenets so much so that it has failed to adequately obtain the objective of encouraging creativity. Therefore, this thesis argues for a reconsideration of copyright law in this regard.

The next part of this chapter makes the case that copyright law's key objective is the encouragement of creativity. It then notes how economic considerations have dominated copyright law. This domination is evidenced by how copyright law deals with the creative industries. The creative industries of the United Kingdom ("UK") and the United States ("US") are highlighted. When this structure of copyright is juxtaposed with how creativity arises in reality, that is, as a derivative process, it exposes copyright law's weaknesses with regard to encouraging creativity. The following chapters of this thesis will focus the discussion on how copyright law, particularly, Kenya copyright law can be reformed to enable it to obtain the objective of encouraging creativity.

5.3 Copyright law's key objective – the encouragement of creativity

It is argued that the key objective of copyright law is to encourage creativity. As very well encapsulated by the US Supreme Court in *Twentieth Century Music Corp. v. Aiken,*[20] 'The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good'.[21]

It is appreciated that an opposing view argues that copyright is not required to facilitate creativity, rather it is an impediment to the free and open exchanges of

[20] 422 U.S. 151 (1975).
[21] ibid 156 (Justice Stewart).

knowledge, culture and technology that form the core of creative modalities.[22] Furthermore, in addition to acting as a stimulus for creativity, there are other significant underlying principles governing copyright legislation. These principles can be described under three main headings, the natural rights of the author, just reward for labour (as can be deduced from Justice Stewarts quote above, copyright as a just reward for labour and as a stimulus for creativity are inextricably linked) and social requirements.[23]

Moreover, the history of the development of copyright law cannot be gainsaid. In this regard it is noted that the conditions necessary for the birth of copyright were brought about by the introduction of printing.[24] However, it was the grant of printing monopolies by the Crown in the UK, engendered by a desire to censor the material made available to the reading public through the print medium, that brought about the idea of exclusive rights to issue copies of particular works to the public thereby introducing the idea of literary property which later came to be known as copyright.[25] In similar vein it has been argued that the statutory copyright which came into effect in 1710 following the enactment of the Statute of Anne was in reality a publisher's copyright and not an author's copyright.[26]

In similar vein, the copyright laws currently in operation in Kenya,[27] the UK[28] and the US[29] do not outrightly state their objective. The objective of encouraging creativity is however gleaned from the history of copyright legislation. A fair and

[22] Lessig (n15) 199.
[23] Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (17th Ed. Sweet and Maxwell 2016) 2-28.
[24] Patterson (n10) 20.
[25] ibid 21; Deazley (n10) 4.
[26] Patterson (n10) 144; Feather (n10).
[27] Kenya Copyright Act 2001 ("Kenya Copyright Act").
[28] UK Copyright, Designs and Patents Act 1988 ("UK CDPA 1988").
[29] US Copyright Act of 1976 ("US Copyright Act").

unbiased consideration of the foundations of UK and US copyright law leads one to conclude that they both laid emphasis on the role of copyright protection in the stimulation of creativity.

An examination of the Statute of Anne, the first statute to provide for copyright regulated by the government and courts,[30] reveals this point. The Statute of Anne is the foundation upon which the modern concept of copyright in the Western world was built.[31] The Act was formally titled 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned'. Part of its stated aim was '…the Encouragement of Learned Men to Compose and Write useful Books'.[32]

The Statute of Anne provided for literary copyright only, more specifically copyright in books. However, soon thereafter, it influenced the enactment of a motley of other statutes which protected various works, leading to the Copyright Act 1911.[33] These Acts, no fewer than twenty-two, were passed at different times between 1735 and 1906. The first of these to be passed, the Engravers' Copyright Act 1735 was, 'An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein mentioned'. Similarly, the Sculpture Act 1814 was enacted for, 'the encouraging the art of

[30] Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) 9.
[31] ibid.
[32] The Statute of Anne, Preamble. Whereas preambles to laws are often thought of as not being part of the substantive provisions of statutes, they play important roles in clarifying and offering meaning to statutes. See Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23(1) Melbourne University Law Review 184.
[33] Brad Sherman and Lionel Bentley, *The Making of Modern Intellectual Property Law: The British Experience, 1760 – 1911* (Cambridge University Press 2003) 128. The Copyright Act 1911 is largely recognised as the first modern copyright law and provided, for the first time, for the protection of the "work" in homogeneous terms.

making new models and cafts and bufts, and other things therein mentioned; and for giving further encouragement to such arts'.

Thus, it is clear that from its inception the stated objective of UK copyright law was the encouragement of creativity. Deazley summarises this viewpoint succinctly thus:

> …this Act was primarily concerned with the continued production of books. Regardless of the fact that the booksellers might have made much of the rights and deserving nature of the author in their arguments for protection, Parliament focused upon the social contribution the author could make in the encouragement and advancement of learning. It made good sense to make some provision for writers, and inevitably book-sellers, to ensure a continued production of intelligible literature. The central plank of the 1709 Act was then, and remains, a cultural *quid pro quo*. Parliament, to encourage "learned Men (sic) to compose and write useful Books", provided a guaranteed, infinite, right to print and reprint those works so composed….It was the free market of ideas, not the marketplace of the bookseller, which provided the central focus for the Statute of Anne.[34]

On its part, the US Constitution's Intellectual Property ("IP") Clause provides that the US Congress shall have power 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'.[35]

[34] Deazley (n10) 46.
[35] Article I, section 8, clause 8 (emphasis added).

The IP Clause, also known as the Copyright Clause, has likewise been referred to as the "Creativity Clause".[36] The US copyright system is derived from the Creativity Clause. Pursuant to the constitutional authority proffered by the Creativity Clause, the First Congress passed the first federal copyright statute, the Copyright Act of 1790.[37] The Act was entitled, 'An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned'.[38]

This Act's provisions were modelled on the Statute of Anne and set the tone for future statutes.[39] In sharp contrast to the proceedings leading to the Statute of Anne eighty years earlier, there was no vocal opposition or discernible divisions among different interests lobbying for or against such legislation.[40] Both the history of the Act's legislation and its specific content clearly indicate that there was no significant break with familiar English and colonial concepts and practices.[41] Since then, when construing the Copyright Acts the US Supreme Court has noted that the primary objective of the Acts is inducing the production and dissemination of products of the intellect.[42] Lower courts have concurred.[43]

The underlying intention of encouraging creativity was also stated in many of the state copyright statutes which were in operation prior to the enactment of

[36] Daniel Gervais and Dashiell Renaud, 'The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It' (2013) 28(3) Berkeley Technology Law Journal 1459, 1460.
[37] Patterson (n10) 197.
[38] 1. Stat. 124.
[39] Craig Joyce and others, Copyright Law (10th edn, Carolina Academic Press) 258
[40] Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* (S.J.D. Dissertation, Harvard Law School, 2005) 278.
[41] ibid 279.
[42] See, for example, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932).
[43] See, for example, *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1151 (9th Cir. 1986).

the federal copyright law in 1790. Patterson notes that these state statutes deserve special attention because the preambles of eight of them[44] state the purpose of copyright, the reason for it and the legal theory upon which it was based.[45] Patterson posits that according to these preambles: the purpose of copyright was to secure profits to the author; the reason for it was to encourage authors to produce and thus to improve learning; and the theory upon which it was based was that of the natural rights of the author.[46]

Connecticut was the first state to pass a general colonial copyright law in 1783.[47] This law was entitled, 'An Act for the Encouragement of Genius and Literature'.[48] Its preamble provided:

> Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his work, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind'.

The preambles to the Georgia and New York statutes were substantially the same.[49] The preambles of the other five statutes under consideration were clear in their encouragement of authors to produce useful works.[50]

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[44] Those of Connecticut, Georgia, New York, Massachusetts, New Jersey, New Hampshire, North Carolina and Rhode Island.
[45] Patterson (n10) 186.
[46] ibid.
[47] ibid.
[48] Primary Sources on Copyright (1450 – 1900) website <http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783a> accessed 22nd October, 2019. Note, at this very early stage of copyright, the overt conceptualisation of creativity in terms of "genius", a perspective it is argued falls in line with the economic domain's dominance over copyright law and creative endeavours and has prevented copyright law from adequately encouraging creativity. See the discussion in part 5.2.3.3 below.
[49] Patterson (n10) 187.

The preambles of the state copyright statutes appear to be the only place where the purpose, reason and legal theory of copyright were expressed in copyright statutes.[51] The ideas expressed in the preambles are particularly valuable as an aid in interpreting the statutes to determine the concept of copyright held in mind by the draftsmen of the statutes.[52] Furthermore, since these statutes were enacted so close to the enactment of the first federal statute in 1790, they would invariably have had an influence on the tenor of the federal law.[53]

Therefore, a review of these influential copyright regimes persuasively demonstrates that copyright law's key objective was and abides as the stimulation of creativity.

5.4 The influence and dominance of the economic domain on copyright law

5.4.1 The coupling of copyright law with the global trade agenda

According to the theory of social three-folding the economic domain has dominated the political and cultural domains of the social organism. This theory finds practical exemplification in copyright law, which has been over-ridden by economic concerns. The dominance of the economic domain over copyright law became settled following the entering into force of TRIPS on 1 January 1995. However, even before TRIPS there were clear signs of the influence of economic concerns over copyright law.

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[50] ibid.
[51] ibid.
[52] ibid.
[53] However, Patterson is quick to point out that owing to their being supplanted by the federal statute, some of the state statutes never became operative in their own terms. Additionally it seems fairly certain that no opportunity arose for courts to interpret them. How the courts would have construed them remains a matter for conjecture. Patterson (n10) 188.

Before the enactment of the Statute of Anne and the protection for authors that it offered, copyright was purely a right for entrepreneurs – bookbinders, printers and booksellers as was the case under the printing privileges system, the licensing regime of the Stationers' Company and the "common-law copyright".[54] However, despite the stated protection for authors provided by the Statute of Anne it has been argued that the statute was merely a device of entrepreneurs. In this regard Feather argues that the Statute of Anne, was designed to ensure, 'the control of production by a few wealthy capitalists ... [and] the continued dominance of English publishing by a few London firms'.[55] In similar vein Patterson contends, that the statute was, 'a trade-regulation statute directed to the problem of monopoly in various forms'.[56]

Deazley rejects these views for being too reductionist an analysis.[57] He argues that whereas many of the aspects of the Statute of Anne can be read and understood as anti-monopoly measures, designed to address previous inequities in the book trade in general; Feather's and Patterson's analysis overlooks the other important and indeed central feature of the statute.[58] The Act was not primarily concerned with securing the position of the booksellers nor with the guarding against their monopolistic control of the press.[59] Instead, as noted above, Deazley maintains that the Act was primarily concerned with the continued production of books.[60]

[54] Patterson (n10) 42 – 43.
[55] Feather (n10).
[56] Patterson (n10) 150.
[57] Deazley (n10) 45.
[58] ibid 46.
[59] ibid.
[60] ibid.

These diverging views notwithstanding what is clear is that the development of copyright law has been a contested political process producing successive phases of settlement and institutionalization.[61] Whereas elements of the influence of the economic domain could be seen as early as with the Statute of Anne and with subsequent Copyright Acts in both the UK and the US it was not until the coming into force of TRIPS that this economic structure became an overt international policy agenda.[62] It is in the post-TRIPS era that the outright dominance of the economic domain over copyright law is witnessed.

The development of IP legislation, first at the national and then at the international level, has been subject to the continued mobilization of interest to establish and reinforce positions of advantage.[63] In 1994, the World Trade Organisation ("WTO"), during the Uruguay Round of trade negotiations, extended its jurisdiction to IP matters through TRIPS.[64] TRIPS makes the protection of intellectual goods a mandatory requirement for any country entering the WTO multilateral trading system, requiring nations to comply with the substantive provisions of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") with the notable exception of the moral rights provisions.[65]

This aspect of TRIPS succeeds in internationalising a model of copyright which promotes commodification and economic autonomy without the

[61] Susan Sell and Christopher May, 'Contestation and Settlement in the History of Intellectual Property' (2001) 8(3) Review of International Political Economy 467, 468.
[62] Fiona Macmillan, 'Love is Blind and Lovers Cannot See: Resisting Copyright's Romance' in Hanns Ullrich, Peter Drahos and Gustavo Ghidini (eds), *Kritika: Essays on Intellectual Property* (Edward Elgar 2018) vol 3, 6 -10.
[63] Sell and May (n61).
[64] ibid.
[65] TRIPS, article 9(1).

counterbalancing recognition of authorial rights.[66] Overall it has been noted that IP protection as codified and formalized in TRIPS is the result of a long struggle between various groups over the control of economically significant knowledge resources.[67]

As discussed above, it has been argued that from its inception, copyright law has been influenced by the pressures of economic and political systems, specifically, the lobbying of rights holders and intermediaries, all the while neglecting the needs of the "creative system".[68] The argument continues that the origin of copyright law is effectively the regulation by the authorities of competition between publishers and not authors.[69]

As noted above, the printing privileges, the "stationer's copyright" and the "common-law copyright" offered protection to entrepreneurs. The printing privilege or printing patent was a right to publish a work granted by the sovereign in the exercise of his royal prerogative.[70] The "stationer's copyright" which derived from its progenitor the Stationers' Company was a private affair of the company.[71] It was strictly regulated by company ordinances and was deemed to exist in perpetuity.[72] The "common-law copyright" that is, a copyright

[66] Daniel Burkitt, 'Copyrighting Culture - the History and Cultural Specificity of the Western Model of Copyright' (2001) Intellectual Property Quarterly 146, 176.
[67] Sell and May (n61).
[68] Katarzyna Gracz, 'Regulatory Failure of Copyright Law Through the Lenses of Autopoietic Systems Theory' (2014) 22(4) International Journal of Law and Information Technology 334, 341. The author defines the creative system as the structures of society concerned with the creation, reproduction, distribution and access to creative works *vis*-à-*vis* the economic system that is ruled by right holders and intermediaries in the market for creative works.
[69] Antoon Quaedvlieg, 'Copyright's Orbit Round Private, Commercial and Economic Law - The Copyright System and The Place of the User' (1998) 29(4) International Review of Intellectual Property and Competition Law 420, 427.
[70] Patterson (n10) 78.
[71] ibid 5.
[72] ibid.

recognised by the common-law courts, was defined by the House of Lords as the right of first publication in the *Donaldson*[73] case.[74]

The role and the status of the author in all of this was minimal.[75] Copyrights were the result of attempts by the printers and stationers to secure their rights to publish free from the competition of others.[76] Publishers were again the driving force behind the enactment of the copyright laws in the eighteenth century; despite the insistence with which the natural rights of the author were invoked.[77] The circumstances under which during the nineteenth century, the author emerged increasingly as copyright's central player did not change the fact that the publishing industry was still there in the background, and that the rationales for the protection of that industry had not changed.[78]

Further eroding the creative system is the fact that publishers and producers are today increasingly involved in and directing the creative process itself.[79] Publishers and producers used to be intermediaries; they were merchants buying the intellectual product as raw material from the author and selling it as a finished product.[80] However, now, the former intermediary has become an "author" herself. [81] Increasingly, for more and more products, publishers and

[73] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774).
[74] Patterson (n10) 5.
[75] Quaedvlieg (n69).
[76] Sell and May (n61) 481.
[77] Quaedvlieg (n69).
[78] ibid.
[79] ibid 433.
[80] ibid.
[81] Under the copyright laws of the UK, the US and Kenya, "creators" of "entrepreneurial" works are considered authors. However, international copyright law makes the distinction between copyright (the Berne Convention) and neighbouring rights (the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations) leaving room for countries not to refer to such creators of entrepreneurial works as authors. For instance, the substantive copyright statute in Australia, the Copyright Act 1968 refers to creators of entrepreneurial works, particularly sound recordings and films, as "makers".

producers take the initiative to select the persons able to “create” the product and organise the facilities and schemes for the production.[82] This is seen, for instance, in the book publishing industry which has evolved from a business into a profession; today, book publishers are far more active in the creation of the literature that they publish.[83]

However, none of these observations should be surprising, copyright is after all a form of intellectual *property.* IP is a property which can be explained as the reward for the author's labour, through a Lockean approach or as the protection of the author's personality, through a Kantian approach.[84] The author who wants to offer his work to the public, must offer it to the market. By his own will and choice, he subjects it to a commercial transaction. In the market, the principal actors are not the individual creators but the creative industries - publishers and producers.[85] In this regard, it is as if authors are guided by the “invisible hand” of capitalism, whereby individuals act together towards the development of a capitalist society without necessarily being aware of the larger capitalist picture.[86]

5.4.2 How copyright law has understood and provided for creativity – authorship, originality and the work

Steiner’s premise of the economic domain having dominated over the political and cultural domains is manifest in modern copyright law. Copyright law’s understanding of and provisions regarding creativity have been guided by

[82] Quaedvlieg (n69) 433.
[83] ibid.
[84] See the discussion on these theories in part 5.3.1.
[85] Quaedvlieg (n69).
[86] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan and T Caddell 1776) Vol II, Book IV, Chapter II.

economic concerns. This is seen particularly in the devices of authorship, originality and the copyright work.

Most accounts of copyright recognise creativity as central to copyright's aim of promoting artistic and intellectual progress.[87] Without creativity there would be nothing to which copyright's incentives could attach. Indeed, copyright law has been formulated largely on the basis of the assumptions about what creativity is.[88] This takes the form of an oversimplified model of authorship.[89] Within copyright law the person who effectively creates a work is termed an author. The author is Anglo-American copyright law's main character and authorship its foundational concept.[90] It is through authorship that a copyrightable work comes into existence; through authorship that a copyrightable interest is established; and through authorship that the first owner of copyright is determined.[91]

Highlighting the significance of the concept of authorship reveals the extent to which the Western copyright law model is influenced and moulded by this subtle concept. Thus, an inquiry into the nature, processes and products of authorship offers the opportunity to rethink the shape of copyright protection.[92] Michel Foucault in his seminal essay, 'What is an Author?' implored that, 'it would be worth examining how the author became individualized in a culture like ours…and how this fundamental category of the "the-man-and-his-work"

[87] Julie E. Cohen, *Configuring the Networked Self* (Yale University Press 2012) 134.
[88] See, Keith Sawyer, 'The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law' (2011) 86(5) Notre Dame Law Review 2027.
[89] Cohen (n87).
[90] Jaszi (n7) 455.
[91] Bently and Sherman (n12) 132.
[92] Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011) 11.

began'.[93] As elaborated in the previous chapter, this challenge has since been taken up by both literary theorists and copyright law scholars, most notably Martha Woodmansee and Peter Jaszi, who have produced important texts on the development of the modern concept of authorship in the eighteenth century and its impact on copyright law.[94] These examinations reveal the extent to which the modern concept of the author as the sole independent creator of an original work has pervaded literature and copyright law.

As noted, the eighteenth century saw the emergence of the Romantic author-genius as a dominant figure in literature and legal narrative. This contention has been put forward by Woodmansee, Jaszi and other members of the school of thought referred to as the "Romantic authorship discourse", "the author-genius critique"[95] or the "author effect".[96] According to Woodmansee, the eighteenth century saw a shift from a poetics of imitation to a valorisation of originality, prior to the eighteenth century imitation was the aesthetic norm.[97] This viewpoint coloured Lord Camden's decision in 1774 in *Donaldson v Beckett*[98] where the House of Lords repudiated the contention for perpetual common law copyright[99]

[93] Michel Foucault, 'What is an Author?' in Paul Rabinow (ed.), *The Foucault Reader* (Pantheon Books, 1984) 101.
[94] See Chapter 4 part 4.4.2.2.
[95] Mathilde Pavis, 'The Author-Performer Divide in Intellectual Property Law: A Comparative Analysis of the American, Australian, British and French Legal Frameworks' (PhD Thesis, University of Exeter 2016) 157.
[96] Martha Woodmansee, 'On the Author Effect: Recovering Collectivity' (1992) 10(2) Cardozo Arts & Entertainment Law Journal 279; Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity' (1992) 10(2) Cardozo Arts & Entertainment Law Journal 293.
[97] Woodmansee (n7) 426.
[98] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774). As discussed in part 5.5.2 below Lord Camden's decision in *Donaldson* is also interpreted as a basis for the recognition of Locke's theory of knowledge in early copyright law.
[99] There's however, discontent as to whether *Donaldson* did in fact repudiate common law copyright; the argument being that the actual holding of the case was that the author's common-law right to the sole printing, publishing and vending of his works, a right which he could assign in perpetuity is taken away and supplanted by the Statute of Anne. The judges did not use the terms "copy" or "copyright" but spoke instead of the right of "printing and publishing for sale." Patterson (n10) 173 – 174.

which had previously been endorsed by the Law Lords in *Millar v Taylor*.[100] In *Donaldson* Lord Camden elegantly put it thus:

> Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock.[101]

As discussed above, before the US's independence there were Copyright Acts enacted in various states and colonies at the time. In its decision in *Wheaton v Peters,*[102] the first copyright case heard in the US Supreme Court, the Supreme Court surveyed some of these Acts paying particular heed to the preambles of these state Acts, some of which expressly provided that the Acts were enacted for "the encouragement of genius". The court noted that in 1783 the state of Connecticut had passed an Act for "The Encouragement of Literature and Genius".[103] Similarly, the Colony of New York in 1786 had passed a law to encourage persons of learning and genius to publish their writings.[104]

It was not until towards the tail-end of the Romantic era that the concept of the author as genius was seen explicitly in a decision of the US Supreme Court; this

[100] (1769) 4 Burrow 2303, 98 ER 201.
[101] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950, 999 (1774) (emphasis added).
[102] 33 U.S. 591 (1834).
[103] ibid 683.
[104] ibid.

was in *Baker v. Selden*.[105] In *Baker*, a leading US Supreme Court copyright case often cited as the genesis of the idea/expression dichotomy and the merger doctrine,[106] the court held that a book did not give an author the right to exclude others from practising what was described in the book, only the right to exclude reproduction of the material in the book.

Specifically, the court noted that the copyright of a work on mathematical science cannot give to its author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them. Contrasting such works of mathematical science to ornamental designs or pictorial illustrations the court stated that with regard to the latter types of works:

> …their form is their essence, and their object, the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition as are the lines of the poet or the historian's period.[107]

Frosio elaborates on the Romantic ethic of the author-genius. He notes that during the pre-copyright period, an epoch he terms the "first paradigm of creativity", borrowing, imitation and copying played a paramount role in the development of popular culture.[108] Beyond the West, imitation was the prevailing paradigm of creativity in many cultures for many years, until perhaps only recently. For instance, in China it has been put forward that the resistance

[105] 101 U.S. 99 (1879).
[106] As detailed in Chapter six the merger doctrine, closely related to the idea/expression dichotomy, provides that where ideas can only be expressed intelligibly in one or a limited number of ways, the expression of such ideas effectively merges with the idea and the idea is therefore not protected. See Chapter 6, part 6.4.3.
[107] 101 U.S. 99, 103 (1879) [Justice Bradley].
[108] Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity: The Third Paradigm* (Edward Elgar 2018) 15.

to the adoption of Western copyright law is attributable in part to the absence of a Romantic tradition in Chinese culture.[109]

While culture in Europe and the US was being reshaped by Romanticism, China, Alford argues, remained steeped in the Confucian tradition.[110] Confucianism included, among many other things, a radically different conception of art and creativity. Confucianism emphasised the power of the past and its consequences for possession of the fruits of intellectual endeavour.[111] Similarly, in Kenya, where traditional culture and traditional cultural expressions ("TCEs") are ubiquitous it is often thought that the preservation of tradition and traditional artefacts is only about imitation and reproduction.[112]

Returning to the Western mould of creativity, Frosio continues, noting that Romanticism brought about the "second paradigm of creativity" based on absolute originality that represented individualism as the sole *Grundnorm* that should govern creativity.[113] Central to the Romantic ideal is the sanctity of individual creativity. The distinction between imitation and originality is therefore intricately tied to the perceived nature of man, such that true authorship represents the essence of human individuality.[114]

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[109] See, William P. Alford, *To Steal A Book is An Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press 1995).
[110] ibid.
[111] ibid.
[112] Daphne Zografos, 'The Legal Protection of Traditional Cultural Expressions: The Tunisia Example' (2004) 7(2) The Journal of World Intellectual Property 229, 233. However, as highlighted in Chapter 3, part 3.2.4 the "preservation" of tradition is not only about "protection" but is also about "promotion". This thesis underscores this viewpoint and advocates for reform to Kenyan copyright law so as to encourage creativity in the country based on the recognition of the influence of its traditional culture in its modern art.
[113] Frosio (n108) 9.
[114] Craig (n92) 14.

Craig explores in significant detail the impact of the Romantic ideal on copyright law.[115] She notes that the valorisation of the individual author and his originality, and the resulting denigration of imitation within the Romantic era is axiomatic in modern copyright law.[116] Copyright's subject is the "author-as-originator". The author is defined by, and rewarded because of, the originality of his creation. The essence of the standard of originality in copyright is independent creation.[117]

It is true that copyright does not concern itself with questions of genius, quality or creativity in the sense discussed in the previous chapter; and it offers protection to works that demonstrate the lowest 'modicum of creativity'.[118] These features of the modern copyright system would seem to suggest on their face that copyright's author is in fact very far from the individual genius hypothesized in Romantic rhetoric; however, Craig notes this apparent disparity simply reflects a divergence between copyright's guiding rationale and its reality.[119] The Romantic aesthetic of individual origination has nevertheless become engrained in the underlying rationale of the copyright system and its conception of authorship in particular.[120]

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[115] Craig (n92).
[116] ibid 14.
[117] *Feist Publications v Rural Telephone Service Company* 499 U.S. 340, 353 [Justice O'Connor].
[118] ibid 361.
[119] Craig (n92) 14.
[120] ibid 15. A recent, enlightening, text on art and copyright by Cooper puts forward a different underlying rationale for copyright regarding artworks, particularly, paintings. For such works, copyright was a tool by which owners of paintings controlled the painters thereof from making reproductions of the paintings once they had sold them; as the value of the original painting could become impaired by reproductions by the artist of the same work. Elena Cooper, *Art and Modern Copyright: The Contested Image* (Cambridge University Press 2018) 109. With money as the driving force behind these endeavours the influence of the economic domain is clearly seen again in copyright's early stages.

The economic domain's influence on copyright law is further seen in the propertisation of creativity in the work. In copyright law, the work represents the crystallisation of the creative process in an independent, identifiable and alienable object of personal property.[121] Copyright doctrine therefore presents the work as an autonomous object with immutable characteristics and a fixed textual meaning: a conception that facilitates its propertisation as an essential adjunct to the individualisation of the author of the work.[122] The notion of the work as a discrete free-standing entity differs greatly from the understanding of "text" that existed from the classical period through to the Renaissance, when, as Rose notes, 'the dominant conception of literature was rhetorical. A text was conceived less an object than as an intentional act, a way of doing something, of accomplishing some end such as 'teaching and delighting''.[123]

During this period because the text was conceived as a mode of action and not as some object of property owned by the author, the concept of protection of a work of authorship had no basis for development. As noted above, in the course of this era - Frosio's first paradigm of creativity, copying, in the sense of imitating previous great poets and writers, was a laudable objective rather than an unethical or immoral act of theft.[124] The concept of a work as an autonomous object and the birth of copyright law arose more or less at the same time.[125] Artists in the early modern era were usually dependent on aristocratic or church

[121] Craig (n92) 19.
[122] ibid.
[123] Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 Representations 51, 54. However, it has been noted that the conception of the text as a mode of action and not a fixed object can be traced back to antiquity. Robert H. Rotstein, 'Beyond Metaphor: Copyright Infringement and the Fiction of the Work' (1993) 68(2) Chicago-Kent Law Review 725, 730.
[124] Rotstein (n123) 733.
[125] ibid.

patronage.[126] As such, they could lay little claim to original genius, their function being primarily to increase the fame of the patron.[127]

The conception of a text as autonomous property began to develop only during the second half of the eighteenth century, with the breakdown of the patronage system and with the increased audience accompanying the rise of commercial printing.[128] Because the author's subsistence depended on sales of his or her printed work, the personal relationship that the author had with the audience, formerly, his or her patrons, no longer existed.[129] From the late seventeenth century through the nineteenth century and the coming of the Romantic age, the text evolved into a commodity, a piece of property.[130] The propertisation of literary creativity demanded this understanding of the text as an unchanging entity capable of commodification; an understanding that meshed readily with the Romantic understanding of originality and author-genius.[131] Craig aptly explicates:

> Indeed, our continued attachment to the notion of the sole author and the solitary genius, in spite of the disaggregationist impulse of our post-modern age, could be regarded as a testament to the powerful vision of text as just another form of private property in our capitalist society.[132]

As noted above, at its inception copyright protected specific artefacts only, for instance, the Statute of Anne protected books. Subsequently, the range of

[126] Andrea Reckwitz, *The Invention of Creativity: Modern Society and the Culture of the New* (Steven Black tr, Polity 2017) 65.
[127] ibid.
[128] Rotstein (n123) 733.
[129] ibid.
[130] ibid.
[131] Craig (n92) 19.
[132] ibid.

creative forms protected by copyright expanded under artefact-specific Acts.[133] In 1911 the work became the protected element under the Copyright Act 1911 which repealed and codified these artefact-specific regimes.[134] Progressively since then copyright has become a property right, which also protects the intangible property within the copyright work.[135] Today, the totality of copyright protection extends to an immaterial, malleable essence.[136] This expansion has been driven by the underlying economic value of the intangible elements of a substantive work. A good example of this is copyright's protection of fictional characters in movies[137] and books[138] which, though not strictly falling under a category of work themselves, are usually of high commercial value.[139]

While the extent to which copyright carries forward a Romantic ideology may remain a subject for discussion there is little doubt that copyright law reinforces an exclusionary ideal for the individual author that reflects a particular ideology and a particular locus in history.[140] Although copyright readily extends protection to commonplace works that are undoubtedly far from the Romantic aspiration, the label of author and its concomitant Romanticisation ensure that these uninspired works are nevertheless over-protected, and that such "original authorship" is disproportionately valued against excluded forms of cultural expression.[141] Indeed, the less copyright's subject-matter looks like the creation

[133] For instance, The Engravers' Copyright Act 1735 and the Sculpture Act 1814.
[134] Jonathan Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33(4) Oxford Journal of Legal Studies 767, 769.
[135] James Griffin, 'Making a New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright' (2013) Intellectual Property Quarterly 69, 70.
[136] Griffiths (n134) 767.
[137] For instance, in *Anderson v. Stallone*, 11 U.S.P.Q.2d 1161 (C.D. Cal. 1989) the famous "Rocky Balboa" movie character was granted protection.
[138] For instance, *Klinger v. Conan Doyle Estate Ltd* 755 F.3d 496 (2014).
[139] The protection of fictional characters is recognised under both UK and US copyright law, albeit with specific nuances. See, Bashayer Al-Mukhaizeem, 'Copyright Protection of Fictional Characters in Films: UK and US Perspectives' (2017) 5(1) Legal Issues Journal 1.
[140] Craig (n92) 16.
[141] ibid.

of a Romantic author, the more powerful is the role of Romantic ideology in maintaining the moral divide between author and copier.[142]

Yet, the moral divide between author and copier, between origination and imitation, is as untenable in today's post-modernity as it was in the first paradigm. It captures and reifies a period in the evolution of authorship; yet, that period has passed.[143] In 1967, Roland Barthes famously declared the death of the author.[144] This pronouncement did not signal the death of the author concept *per se*, but rather the demise of its Romantic conceptualisation. Frosio, calls this post-Romantic era the "third paradigm of creativity".[145] The third paradigm represents today's post-modern society wherein creativity occurs as a derivative process largely propelled by digital technologies and the internet. Here, the "Web 2.0" cultural movement, open access, mass collaboration, remix and user-generated creativity take centre stage. However, copyright law's insistence on an outdated and overplayed Romantic rhetoric and over-all the law's domination by economic considerations hinder the growth and potential of open, decentralized and collaborative creativity.

5.4.3 The Romantic aesthetic of the "author-genius" abides: modern creative industries in the UK and the US

The discussion above highlighting the Romantic ethic of the author-genius's impact on copyright law, and how this norm has itself been influenced and dominated by economic concerns, may appear unduly abstract but it has very

[142] ibid.
[143] ibid.
[144] Roland Barthes, 'The Death of the Author' in *Image Music Text* (Stephen Heath tr, Fontana Press 1977).
[145] Frosio (n108) 9.

real consequences for the interpretation, operation and application of modern copyright law.

Whereas post-modernism and post-structuralism directly challenge many of the ideas central to the current system of copyright the fetishisation of the individual and original author is still very much alive in our current construction of copyright and the policies that inform its development.[146] The creative industries have appropriated the rhetoric of Romantic authorship.[147] The creative economy is at the vanguard of contemporary capitalism and the solitary artist, a figment of Romantic thought, has become the creative entrepreneur of twenty-first century economic imagining.[148]

The UK is a global leader in the creative economy.[149] The creative industries combine an established concern for classic cultural production including performing arts and literature with a new interest in culture's commercial elements, such as computer services and video game software.[150] Likewise, the US is one of the world leader's in the creative industries.[151] The US has developed a "charismatic domination"[152] through its creative industries in

[146] Craig (n92) 16.
[147] Jane C. Ginsburg, 'The Role of the Author in Copyright' in Ruth L. Okediji (ed), Copyright Law in an Age of Limitations and Exceptions (Cambridge University Press 2017) 67.
[148] Barbara Townley, Philip Roscoe and Nicola Searle, *Creating Economy: Enterprise, Intellectual Property and the Valuation of Goods* (Oxford University Press 2019) 1.
[149] Lisa De Propris, 'Creative Industries in the United Kingdom', in Luciana Lazzeretti (ed), *Creative Industries and Innovation in Europe: Concepts, Measures and Comparative Case-Studies* (Routledge 2013) 103.
[150] Townley, Roscoe and Searle (n148).
[151] John P. Synott, *Global and International Studies: Transdisciplinary Perspectives* (Thomson 2004) 362.
[152] The metaphor of charismatic domination is adopted from Max Weber's "charismatic authority" explicated in the text *Economy and Society*. See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Ephraim Fischoff and others trs, Guenther Ross and Claus Wittich eds, University of California Press 1978). Charismatic authority is a concept of leadership in which authority derives from the charisma of the leader. This stands in contrast to two other types of authority: legal authority and traditional authority.

Hollywood, and popular fashions in music, clothing and consumer lifestyles.[153] Copyright law has been critical to the development of these dominant creative industries.[154]

Today, the creative industries have become a representation of the pervading post-modernism in society. Post-modernism rejects the objectivity of knowledge and the certainty of meaning.[155] Instead it posits a system of creation based on continual transformation and ongoing dialogue.[156] In particular it emphasises the symbiotic tensions between creators and users, each of whom constitute a defining part of the process of progress of the useful arts.[157] The line between creators and users has further been thinned by the internet and digital technologies which enable users to more readily become creators themselves and distribute their creations almost instantaneously.

A good example of the intersection between post-modernism culture and digital technologies is to be found in the sub-culture of fan-dom and specifically through the device of fan-fiction. In this context a fan is someone who has a strong interest in or admiration for a particular thing or work set in a specific context or about a particular character or set of characters within such context, thing or work.[158] The fans of a particular thing, are in the aggregate, a fan-dom.[159] A fan-work is any work by a fan or indeed by anyone other than the

[153] Synott (n151).
[154] Ruth Towse,' Cultural Economics, Copyright and the Cultural Industries' (2000) 22(4) Society and Economy in Central and Eastern Europe 107, 123.
[155] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trs, University of Minnesota Press 1993) xxiv.
[156] ibid.
[157] Paul Ganley, 'Digital Copyright and the New Creative Dynamics' (2004) 12(3) International Journal of Law & Information Technology 282, 305.
[158] Aaron Schwabach, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Routledge 2016) 8.
[159] ibid.

content owner(s), set generally within the original context or in another context as supposed by the fan.[160] Fan-works may be fiction or non-fiction and may be created in any medium.[161] When such works are fictional, they are fan-fiction.[162] Fan-fiction includes all derivative fiction and related works created by fans, whether authorised or unauthorised by the author of or current rights holder in the original work.[163] Some fan-fiction is commercially published.[164] The vast majority of fan-fiction, however, is only published online (or in pre-Web days, in fan-zines, that is, fan magazines) without the express permission of the author or other rights-holder, for an audience of fellow fans.[165]

The ethos of post-modernism is that, almost all possible themes seem to have been already produced, therefore, reworking may be the only creative act still available.[166] However, despite this practical reality the Romantic ethic of the author-genius continues to influence courts and legislators to dismiss the creativity and social and economic value of works of secondary authorship such as fan-fiction as well as remixes, "mash-ups" and other re-castings.[167]

The pervasiveness of the Romantic ethic of the author-genius is well illustrated in the infamous ruling of the US Court of Appeals for the Second Circuit in *Rogers v. Koons*.[168] The brief facts in this case were that Art Rogers, a professional photographer, took a black-and-white photo of a man and a woman

[160] ibid.
[161] ibid.
[162] ibid.
[163] ibid.
[164] ibid.
[165] ibid.
[166] Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17(3) Loyola of Los Angeles Entertainment Law Journal 651, 658.
[167] Neil W. Netanel, 'Why Has Copyright Expanded? Analysis and Critique' in Fiona MacMillan (ed), *New Directions in Copyright Law* (vol 6 Edward Elgar 2017) 24.
[168] 960 F.2d 301 (2d Cir. 1992).

with their arms full of puppies. The photograph was simply entitled, *Puppies*, and was used on greeting cards and other generic merchandise. Jeff Koons, an internationally known artist, found the picture on a postcard and wanted to make a sculpture based on the photograph for an art exhibition entitled the "Banality Show" at the Sonnabend Gallery; whose theme was the banality of everyday items. After removing the copyright label from the postcard, he gave it to his artisans with instructions on how to model the sculpture. He stressed that he wanted *Puppies* copied faithfully in the sculpture, though the puppies were to be made blue, their noses exaggerated, and flowers to be added to the hair of the man and woman.

The sculpture, entitled, *String of Puppies*, became a success. Koons sold three of them for a total of $367,000. Upon discovering that his picture had been copied, Rogers sued Koons and the Sonnabend Gallery for copyright infringement. Koons admitted to having copied the image intentionally, but attempted to claim fair use by parody. Koons argued that the sculpture was a satire of society at large and belonged to an artistic tradition that critiqued modern consumer culture through the incorporation of objects and media images drawn from contemporary, mass-produced culture.[169] Nonetheless, Rogers was successful in his copyright infringement suit against Koons, whose work was regarded by the court to be intentionally exploitative, lacking in parodic value and beyond the scope of fair use.[170]

Whereas the Second Circuit gave its judgment in this case twenty-seven years ago, its relevance today cannot be gainsaid. Craig notes that *Rogers v. Koons*

[169] ibid.
[170] ibid, 309 – 314.

presents a concrete example of the troublesome nature of author-based reasoning.[171] Aoki elaborates, he argues that from the outset, the Second Circuit's opinion casts the parties into a set of polarities defined by a particular vision of creativity as exemplified by the Romantic author - pure artist versus conniving and cynical art world rook; solo production of photographs versus fabrication to specification by different skilled labourers; and photo from life versus parodistic treatment of pre-existing cultural material.[172]

By thus casting these dichotomies, Koons lost on his fair use defence in large part because he failed, or refused, to conform to the stereotype of the serious, dedicated creator around which our copyright law increasingly came to be organized from the early nineteenth century on.[173] By contrast, artist-photographer Rogers, was portrayed as an earnest artist who justly deserved his rights in his works. In the words of the court:

> Koons' claim that his infringement of Rogers' work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus cannot be accepted. The rule's function is to ensure that credit is given where credit is due.[174]

[171] Craig (n92) 23.
[172] Keith Aoki, 'Adrift in the Intertext: Authorship and Audience Recoding Rights' (1993) 68(2) Chicago-Kent Law Review 805, 814.
[173] ibid.
[174] 960 F.2d 301, 310 (2d Cir. 1992) (Cardamone, Circuit Judge) (emphasis added).

Commenting on this case and similar cases one artist has discussed, 'the hierarchical relationship between appropriating authors and those from whom they appropriate'.[175] He notes:

> As in *Rogers* there was a tendency in *Cariou v. Prince* (784 F. Supp. 2d 337 (S.D.N.Y. 2011)) for the defense to draw the distinction between an artistic author and a mass author, with the former because of his statute in the contemporary art world, entitled to a creative license that superseded the authorial agency of the latter.[176]

Fan-dom has been greatly enabled by peer-to-peer ("P2P") software. In essence P2P technology allows people to exchange information over the internet through many "peer" or equal machines which are linked across a network, rather than on a central server.[177] In the context of copyright law, the main issue surrounding P2P networks is whether providers of P2P technology and services can be liable when users infringe copyright through their networks. This controversy has been hotly debated in legal circles and in the press especially when the US Supreme Court delivered its highly anticipated decision in the controversial case *MGM Studios, Inc v. Grokster Ltd*[178] In this decision the Supreme Court held that two popular file-sharing networks, Grokster and Streamcast were indeed liable for actively inducing the acts of infringement of

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[175] Nate Harrison, 'Authoring Contradictions: Modern Appropriation Art and Postmodern Copyright Law in *Cariou v Prince*' in Daniel McClean (ed*), Artist, Authorship & Legacy: A Reader* (Ridinghouse 2018) 88.

[176] ibid. However, on appeal *Cariou v Prince* 714 F.3d 694 (2d Cir. 2013) The Second Circuit, overturned the District Court's decision, holding that Prince's appropriation art were transformative fair uses of Cariou's photographs. Harrison argues that the Second Circuit's decision represents a 'postmodern turn' in copyright law. ibid 92.

[177] Alain Strowel, 'Introduction: Peer-to-Peer File Sharing and Secondary Liability in Copyright Law' in Alain Strowel (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law (*Edward Elgar 2009) 1.

[178] 545 U.S. 913 (2005).

end users. The liability for inducement is one form of secondary liability for copyright infringement.

In recent debates over P2P software, the venerated author-figure has been revived by the appeals of recording industry stakeholders whose lobbying strategies point to the noble and deserving artist as a reason to stamp out online file sharing.[179] The plaintiffs in *Grokster* above were a consortium of twenty-eight of the largest entertainment companies (led by Metro-Goldwyn-Mayer studios). *Grokster* is frequently characterized as a re-examination of the issues in *Sony Corp. v. Universal City Studios*,[180] "the Betamax Case", a decision that protected VCR manufacturers from liability for contributory infringement. Whereas the Supreme Court appeared reluctant to change what had been previously decided in the Betamax Case, in finding for the plaintiffs, the language of the court was coloured with influence from the Romantic ethic of the author-genius:

> To say this is not to doubt the basic need to protect copyrighted material from infringement. The Constitution itself stresses the vital role that copyright plays in advancing the "useful Arts." Art. I, § 8, cl. 8. No one disputes that "reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 158 (1948).[181]

As can be gleaned from the above, in the file-sharing debates, it is the corporate actors who stand to benefit most from the regulation and

[179] Craig (n92) 21.
[180] 464 U.S. 417 (1984).
[181] 545 U.S. 913, 961 (2005).

commercialisation of music downloading. Similarly, in the case of the computer software, appeals to authorship tended to promote the interests of the large corporate bodies and obscure the actual practical and policy concerns posed by the protection of software.[182] The irony of all of this lies in the extent to which the Romantic notion of authorship has served the commercial interests of publishers, employers and distributors, often at the expense of the people whose role in the creative process was most similar to that of the Romantic author figure.[183]

Indeed, the exploitation of the author concept has achieved its paradoxical apex in the "works made for hire" concept in the US and the related "works created by employees" concept in the UK and other common law jurisdictions including Kenya.[184] Under these concepts an employer is deemed to be the first owner of any copyright in works created by an employee in the course of employment.[185] The claims of employers to direct ownership over the products of their employees have been rationalised in terms of a bizarre inversion of the authorship concept.[186] Under the works made for hire doctrine the employer's rights do *not* derive from the employee by an assignment or implied grant. Ironically, the claims of employers are rationalised in terms of the Romantic

[182] Craig (n92) 22.
[183] ibid.
[184] The works made for hire concept beyond referring to works made by employees in the course of their employment extends to commissioned works whereby in certain circumstances in the US, copyright in such works is granted to the person who has commissioned such works (US Copyright Act, sections 101, 201(b)). In Kenya, oddly or rather in complete subservience to the economic domain's dominance, the first owner of copyright in a commissioned work is always the person who has commissioned the work (Copyright Act 2001, section 31(1)). In the UK, the first owner of copyright in a commissioned work is the creator of the work (Bently and Sherman (n12). Regarding the granting of first copyright to employers, in the UK the rule applies to literary, dramatic, musical, artistic works and films in the US and Kenya the rule applies to works generally.
[185] Bently and Sherman (n12) 132 – 135. However, it should be noted that the copyright in works made in the course of employment will not be treated as belonging to the employer where
[186] Craig (n92) 22.

conception of authorship with its concomitant values of "originality" and "inspiration".[187]

5.4.4 A moment of recollection

The tension between copyright law's model of creativity and how creativity actually arises in society today calls for a moment of recollection. Indeed, if we were to take up the view adopted by Max Weber in his seminal *Economy and Society*,[188] the last thing we would expect of modern capitalism would be to see it systematically promoting creativity.

According to Weber, the main structural feature of capitalism is not the mobilization of innovation and creativity but regularity and standardization.[189] Weber regards Western capitalism's mode of production of goods in the early twentieth century as one of the most prominent instances of what he calls formal, bureaucratic or technical rationality.[190] He characterizes the modern economy as "enterprise capitalism" based on rational-purposive rules for organizing production and labour towards the final aim of maximizing economic efficiency.[191]

Enterprise capitalism is thus distinguished fundamentally from the fluid, unpredictable, adventure capitalism of pre-modern societies.[192] In enterprise capitalism, the enterprise introduces the division of labour, hierarchic direction and planning, and a calculable interaction among people and between people

[187] Jaszi (n7) 486.
[188] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* ((Ephraim Fischoff and others trs, Guenther Roth and Claus Wittich eds, University of California Press 1978).
[189] ibid 65ff.
[190] ibid.
[191] ibid.
[192] Reckwitz (n126) 127.

and things.[193] Under this structure, the modern economy resembles a machine, a bringer of objectification and disenchantment.[194]

The common law copyright model places emphasis on economic rights such as the right to produce copies.[195] In contrast the civil law *droit d'auteur (*author's rights) model is said to be more concerned with the natural rights of authors in their creations.[196] A key problem with the economic treatment of cultural goods is that economic analysis is indeterminate. Scholars in economics and law disagree on whether copyright law's economically oriented model actually encourages the creation of cultural goods, which is what copyright law ought to be all about.

Economists Landes and Posner contend in their seminal article on the economics of copyright that overly strong copyright inhibits creativity because it imposes higher costs on later generations of creators.[197] Copyright law scholar Lessig argues in similar vein. He maintains that copyright has been used to stifle the free and open exchanges of knowledge, culture and technology that form the core of creative modalities.[198] On the other hand Goldstein argues that copyright provides incentives for creativity by securing rewards, economic revenue streams and related benefits to the respective authors and creators.[199] This viewpoint, underscores the flexibility and public interest concerns which

[193] ibid.
[194] ibid.
[195] Bently and Sherman (n12) 32.
[196] ibid.
[197] William M. Landes and Richard A. Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) Journal of Legal Studies 325.
[198] Lessig (n15) 199.
[199] Paul Goldstein, 'Copyright Law and Policy' in Paula R. Newberg (ed), New Directions in Telecommunications Policy (vol 2, Duke University Press 1989).

copyright embodies, including the fact that only expressions - and not ideas - are copyrightable, and for a limited time.

Despite this contestation, as copyright law's key objective is the encouragement of creativity it is argued that there must be a model of copyright that adequately achieves this goal. There must be a formula that would acknowledge that all creativity relies on previous work, builds "on the shoulders of giants", yet would encourage and maximise creative expression in multiple media and forms.

As seen above policy makers and legislators have deliberately tied-in copyright law with economic concerns, particularly, with the advent of TRIPS.[200] It is thus, not too late or impossible to re-calibrate copyright law. This thesis proposes a roadmap towards such reform. It is argued that copyright law can adequately encourage creativity if it is freed from economic concerns and if it were to understand and provide for creativity in accordance with its true nature as a derivative process in line with Locke's theory of knowledge.

5.5 Towards a theory of copyright law that encourages creativity

If copyright law were to consider creativity within the precepts of Locke's theory of knowledge, then it would be better styled to achieve its stated aim of encouraging creativity. As noted in the previous chapter Locke's theory of knowledge urges that knowledge arises when simple ideas, the material elements of knowledge, are combined together.[201] It is urged that this process of coming up with knowledge can be equated with the process of creativity.[202] Thus, the central premise of Locke's theory of knowledge is that creativity is an

[200] Macmillan (n62).
[201] Locke (n1) Book IV, Chapter II, § 1
[202] See Chapter 4, parts 4.3.2.1 and 4.4.1.

incremental and derivative process. A similar view on creativity is endorsed in the main academic field dealing with the subject, creativity research.[203]

This framework finds sustenance in the theory of social three-folding. As discussed in detail in Chapter four, social three-folding maintains that the economic domain of the social structure has dominated the other two domains, the political domain and the cultural domain leading to an undesirable social organism.[204] The response to this unwarranted scenario is to enable the three domains of society to develop autonomously. Particularly, Steiner urges for the cultural domain, within which artefacts of creativity arise, to develop independent of economic constraints, for a healthy society.[205] Thus, for social three-folding a healthy society is one which emphasises creative freedom.

It is argued that copyright law can play the role of encouraging creativity arise autonomously. By adopting a structure which considers creativity in line with Locke's theory of knowledge, whereby creativity arises when simple ideas are combined together, then copyright law can encourage creativity to arise independently. To this end, ideas, the building blocks of creativity,[206] are to be readily and freely availed for use by potential creators.

A copyright law that is styled for the encouragement of creativity ought to be based on an underlying theory that is geared towards this end. The current

[203] See Chapter 4, parts 4.3.2.2 and 4.4.3.
[204] See Chapter 4, part 4.2.3.
[205] Steiner (n3) 47. See discussion in Chapter 4 part 4.2.4.
[206] This premise is deduced from Locke's theory of knowledge. See also, Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009) 184; Graham M. Dutfield and Uma Suthersanen, 'The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) 8(4) Intellectual Property Quarterly 379, 398.

theories said to underlie copyright law, as elaborated below, make no reference to copyright law's key objective.

5.5.1 A shift away from the existing theories of copyright

Legal and political scholars have for long debated the status and legitimacy of copyright.[207] In this regard the question typically asked is why copyright should be granted. For scholars it is important that this question should be answered as societies have a choice as to whether to grant copyright or not.[208] Furthermore, it is also important as the decision to grant copyright inhibits the way people interact with and use cultural objects.[209] Moreover, as the conventional arguments that justify the grant of private property rights in tangible property are often based on the limited availability or scarcity of such resources and the impossibility of sharing, it seems important to justify the granting of exclusive rights over intangible resources that are not scarce and can be replicated without any direct detriment to the original possessor of the resource.[210]

Indeed, some commentators doubt that copyright is justified.[211] Particularly with the advent of digital technologies and the internet many think that copyright unjustifiably impinges on the public domain.[212] Others argue that while some aspects of copyright are justified others are not. In this regard, the typical argument is that copyright has gone too far.[213] In response to these arguments

[207] For an overview see Robert P. Merges, *Justifying Intellectual Property* (Harvard University Press 2011).
[208] Bently and Sherman (n12) 5.
[209] ibid 35.
[210] ibid 6.
[211] See Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs (1970) 84(2) Harvard Law Review 281.
[212] Bently and Sherman (n12) 36.
[213] ibid.

various theories have often been employed in support of copyright. Currently, there are many such approaches to copyright theory. However, these theories can generally be seen as falling into one of two general categories.

First commentators often call upon deontological arguments to justify copyright.[214] These justifications view copyright as a matter of rights or duty; copyright is justified on the basis that it is morally right to have copyright.[215] For example, copyright is justified because the law recognizes authors' natural and human rights over the products of their labour. On the other hand, instrumental justifications seek to justify copyright on the basis that copyright induces or encourages desirable activities.[216] For example, copyright is a necessary way of incentivising the creation of new creative works.

Under the umbrellas of these two large groups, one may indeed find many approaches to copyright theory. However, it has cogently been put forward that these approaches may be approximated into four main theories. In his influential writings on copyright theory, Professor Fisher argues that the four main theories of copyright are the – labour theory, welfare theory, personality theory and cultural theory.[217]

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[214] ibid 5.
[215] ibid.
[216] ibid.
[217] William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property (*Cambridge University Press, 2001) 168. See also Professor Fisher's lectures on copyright under the Harvard Law School's CopyrightX programme available at the CopyrightX website <http://copyx.org/lectures/> accessed 8th April 2019. It is worth noting that other copyright law scholars have offered notable viewpoints on the subject of copyright theory. For instance, in addition to Fisher's four theories, Zemer argues that "traditional proprietarianism" and "authorial constructionism" are two other theories of copyright law. Lior Zemer, 'On the Value of Copyright Theory' (2006) 1 Intellectual Property Quarterly 55. Menell includes "ecological theory", "unjust enrichment" and "radical/socialist theory" to the list. Menell (n13) 129.

Labour theory

According to the labour theory, a person who labours upon resources that are either unowned or "held in common" has a natural property right to the fruits of his or her efforts; and the State has a duty to respect and enforce that natural right.[218] These ideas, originating in the writings of John Locke, are widely thought to be especially applicable to copyright, where the pertinent raw materials, ideas, seem in some sense to be held in common and where labour seems to contribute so importantly to the value of finished products.[219] Owing to his enormous influence on the discourse of property, it is justified to consider Locke's thesis in some detail.

The Lockean labour theory can be regarded as the union of two basic propositions. First, everyone has a natural property right in their own person and in the labour of their body. Second, property rights are limited by specific norms. Locke noted:

> Though men as a whole own the earth and all inferior creatures, every individual man has a property in his own person; this is something that nobody else has any right to. The labour of his body and the work of his hands, we may say, are strictly his. So, when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property. He has removed the item from the common state that nature has placed it in, and through this labour the item has had annexed to it something that excludes the common right of other men: for this labour is unquestionably the property of the labourer, so no

[218] John Locke, *Two Treatises of Government: The Second Treatise* [1690] (P. Laslett ed, 2nd edn, Cambridge University Press, 1967) 11.
[219] Fisher (n217) 170. For an elaborate discussion on Locke's labour theory see Merges (n207) 31 - 67.

> other man can have a right to anything the labour is joined to—at least where there is enough, and as good, left in common for others.[220]

Although some have asserted that the labour theory is premised on physical labour;[221] it can as well be applied to mental labour, justifying copyright as property over the production of the mental labour.[222] As Hughes notes:

> Indeed, the Lockean explanation of intellectual property has immediate, intuitive appeal: it seems as though people *do* work to produce ideas and that the value of these ideas-especially since there is no physical component-depends solely upon the individual's mental "work". [223]

Others have even argued that Locke's labour theory appears to apply more readily to IP, specifically copyright, than to real property.[224] Altogether, the premise of the labour theory, which Fisher also terms the fairness theory, is that people who engage in creative labour are fairly rewarded.

In this regard there appears to be congruence between Locke's labour theory and his theory of knowledge. Under the precepts of the theory of knowledge the act of the mind exerting its powers over simple ideas to form new knowledge, that is to say the act of creativity; may, within the labour theory, be viewed as labour which Locke contended is the basis for private property. The consonance between the theory of knowledge and the labour theory strengthens the appeal

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[220] Locke (n218) 11.
[221] Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate 1996) 47.
[222] Locke himself did not expressly rule out mental labour from his conceptualization of labour.
[223] Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77(2) Georgetown Law Journal 287, 300.
[224] Merges (n207) 32.

of the theory of knowledge as a theory that can influence the structuring of copyright law.

Turning back to the labour theory, Locke contends that in the state of nature men share a common right in all things. Thus, justifying the individual's right to property is difficult: once one takes a particular thing from the common, one violates the right of other commoners, to whom this particular item also belongs. Locke resolves this seeming contradiction by introducing the idea of expenditure of labour. Labour justifies the personal ownership of a particular object. A labourer's right, however, is not unconditional. It is subject to two key limitations, commonly known as provisos. The first is known as the "sufficiency proviso". According to Locke, the acquisition of natural property rights only occurs if one has left as much and as good for others. The second proviso is known as the "no spoilage proviso", its precept is that 'nothing was made by God for man to spoil or destroy'.[225]

Proponents of the labour theory are mainly attracted by Locke's attempt to reconcile the tension between private acquisition and public interest: the right of the labourer, the good of the public, and the conservation of the public domain.[226] However, some have questioned Locke's appeal to labour in justifying property rights. Craig wonders whether 'Lockean property theory can be re-imagined to shape a copyright system that furthers the…maximum

[225] Locke (n218) 12. It has been put forward that a third proviso, less clearly recognized in *The Second Treatise* but implicit in other portions of Locke's work, particularly *The First Treatise of Government* is sometimes referred to as the duty of charity. This restriction, emphasized by Wendy Gordon in a pathbreaking article, entails an obligation to let others share one's property in times of great need, so long as one's own survival is not threatened. Wendy Gordon, 'Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102(7) Yale Law Journal 1533.
[226] Zemer (n217) 56.

creation and dissemination of intellectual works'.[227] Craig is concerned with the social and cultural aspects of our copyright regime and whether they can be accommodated in a copyright law drafted close to a robust property rights system.[228] It seems that Locke's theory cannot meet these challenges alone. Indeed, the main difficulty in Lockean approaches to copyright based on the *Second Treatise* is that they carry 'the same threat of copyright expansionism'.[229]

Similarly, in an influential article, Shiffrin challenges the traditional Lockean views on IP that emphasise a natural right.[230] Instead Professor Shiffrin argues that the conditions of effective use of common property together with the appeal to the right of subsistence, not labour, initially justify some appropriation out of the stock.[231]

The welfare theory

The welfare theory of copyright law employs a utilitarian guideline when shaping property rights, for the maximization of net social welfare. It is directed by the ideas of Jeremy Bentham and John Stuart Mill, who put forward a distinctive conceptualisation of political thought and economics in the late eighteenth century.[232] The primary notion of utilitarianism is that government, and law in particular, should be organized so as to promote the greatest happiness for the

[227] Carys J Craig, 'Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law'(2002) 28(1) Queen's Law Journal 1, 54. In this regard Craig proposes a 'relational theory of copyright' whose basis is a dialogic account of authorship and is guided by the public interest in a vibrant, participatory culture. Craig (n92).
[228] Craig (n227) 1.
[229] ibid 55.
[230] Seana Valentine Shiffrin, 'Lockean Arguments for Private Intellectual Property' in Stephen R. Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001)139.
[231] ibid 139.
[232] John Troyer (ed), *The Classical Utilitarians: Bentham and Mill* (Hackett Publishing 2003).

greatest number.[233] More specifically, law should be organized to induce people to behave in ways that contribute to the benefit of the public at large; primarily by creating combinations of incentives and penalties to direct people towards socially beneficial behaviour.[234]

The way this notion is brought to bear on IP is through the concept of "public goods". Public goods is a phrase common in economics, although less familiar outside the field of economics. A public good, economists tell us, is a good that has two related features – it's non-rivalrous and non-excludable.[235] Non-rivalrous means that one consumer's use or enjoyment of a good has no appreciable effect on another consumer's opportunity to use and enjoy the good.[236] Non-excludable means that the owner of a good finds it extremely difficult to prevent its use by others.[237]

Public goods, such as lighthouses, streetlights and poems, are special in a couple of ways. First, usually though not invariably, they have especially large social benefits.[238] Second, they are likely to be underproduced. In other words, it is probable that they will be generated at socially sub-optimal levels, leading to market failure, market distortions or market imperfections.[239] When free markets do not deliver optimum resource allocation, they are said to fail.

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[233] Jeremy Bentham, 'Formation of Government' in Ross Harrison (ed), *Bentham: A Fragment of Government* (Cambridge University Press 1988) 58.
[234] Bhikhu Parekh, 'Bentham's Theory of Equality' in Bhikhu Parekh (ed), *Jeremy Bentham: Critical Assessments* (Routledge 1993) vol 3, 649.
[235] John Black, Nigar Hashimzade and Gareth Myles, *Oxford Dictionary of Economics* (5th edn, Oxford University Press 2017) 422.
[236] ibid.
[237] ibid.
[238] Public goods are not necessarily always desirable, undesirable ones are sometimes called "public bads" for example polluted air, it is non-excludable and non-rivalrous and negatively affects welfare. Black, Hashimzade and Myles (n235) 422.
[239] Black, Hashimzade and Myles (n235) 422.

The initial costs of producing non-rivalrous and non-excludable products are very high, for instance, the initial cost of publishing and marketing a book including writing, editing, printing and advertising.[240] However, the marginal or subsequent cost of producing an extra unit of such products is very limited.[241] Copying is cheap, and the author and publisher often lose out having spent a lot of skill, judgment, time and money in producing the original unit.[242] This is sometimes called the "free rider" problem, the symmetry of the "fair follower" phenomenon.[243] Free riders normally undermine the creator's or legitimate trader's market by competing unfairly, they are free loaders.[244] Fair followers on the other hand pay to use the intellectual products such as music and books.[245]

If lawmakers wish to prevent the unfortunate outcome of a distorted or failed market, they have to act in some way; they have to provide a special stimulus for the creation of public goods. In this regard it is argued that IP exists to solve the public goods problem.[246] Thus, copyright law addresses the public goods problem by granting the creator of an expressive work the legal right to prohibit what they could not otherwise practically prevent – the unauthorized copying, distribution, public display and/or public performance of their work.[247] As a result of copyright law a creator can get paid for her work, recover her investment in making it, and therefore, has an incentive to produce it.[248]

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[240] Tyler Cowen, 'Public Goods and Externalities: Old and New Perspectives' in Tyler Cowen (ed), *Public Goods and Market Failures: A Critical Examination* (Transaction Publishers 1999) 3.
[241] ibid.
[242] Cowen (n240) 3.
[243] ibid.
[244] Black, Hashimzade and Myles (n235) 422.
[245] ibid.
[246] Glynn S. Lunney, 'Copyright, Private Copying, and Discrete Public Goods' (2009) 12(1) Tulane Journal of Technology and Intellectual Property 1, 7.
[247] Mark F. Schultz, 'Copynorms: Copyright Law and Social Norms' in Peter K. Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Praeger Publishers 2007) vol 1, 218.
[248] ibid. For an in-depth discussion on the public goods problem, particularly regarding circumstances that may mitigate market failure and alternative government solutions to market

The personality theory

The premise of the personality theory, derived from the writings of Kant and Hegel, is that private property rights are crucial to the satisfaction of some fundamental human needs including dignity, personal expression, recognition as an individual person and self-actualization.[249] This theory posits that policymakers should thus strive to create and allocate entitlements to resources in the fashion that best enables people to fulfil such needs.[250] From this viewpoint, copyright is thought to be justified on two main grounds. First, it will shield from appropriation or modification, artefacts through which authors and artists have expressed their "wills", an activity which is thought to be central to "personhood".[251] Second it will create economic and social conditions conducive to creative intellectual activity, which in turn is important to human flourishing.[252]

The cultural theory

The cultural theory of copyright is based on the premise that copyright can and should be shaped so as to help foster the achievement of a just and attractive culture.[253] In such a society all persons would enjoy both some degree of financial independence and considerable responsibility in shaping their local social and economic environments.[254]

Copyright law can aid in advancing this society in two main ways. First, copyright offers an incentive for creative expression regarding a large array of

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failure including prizes and subsidies see William Fisher, 'CopyrightX Lecture 4.1 Welfare Theory – The Utilitarian Framework' available at Copyright X website < http://copyx.org/lectures/> accessed 9th April 2019.

[249] Hughes (n223) 330.

[250] Fisher (n217) 172.

[251] Hughes (n223) 330.

[252] Fisher (n217) 171.

[253] ibid; William Fisher, 'CopyrightX Lecture 10.1 Cultural Theory: Premises' Copyright X website < http://copyx.org/lectures/> accessed 1st June 2019

[254] Fisher (n217) 171.

aesthetic, social and political issues, therefore reinforcing the discursive foundations for democratic culture and civic association.[255] Second, copyright supports creative and communicative activity that is relatively free from reliance on cultural hierarchy, elite patronage, and state subsidy.[256]

Scholars who put forward these proposals generally draw inspiration from a wide-ranging collection of legal and political theorists, including Jefferson, Marx, the legal realists and the more contemporary arguments of Amartya Sen and Martha Nussbaum.[257] The cultural theory is comparable to the welfare theory in its teleological approach however, it is dissimilar in its willingness to deploy visions of a desirable society richer than the conceptions of social welfare deployed by Utilitarians.[258]

5.5.1.1 How the existing theories of copyright have been applied in Kenya, the UK and the US

It has been argued that UK copyright law has historically been justified on the basis of Locke's labour theory.[259] This theory has indeed been invoked in leading historical copyright cases.[260] However, influences of the other theories can also be seen in UK copyright law. In this regard it has been noted that in the UK the need to protect the natural rights of authors and to encourage creativity by protecting the products of their intellects has always been recognised.[261]

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[255] ibid.
[256] ibid.
[257] ibid. See, Amartya Sen, *Development as Freedom* (Anchor Books 2000) and Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Press, 2011).
[258] Fisher (n217).
[259] Andreas Rahmatian, 'Dealing with Rights in Copyright-Protected Works: Assignments and Licenses' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 288.
[260] See, for instance, *Millar v Taylor* (1769) 4 Burrow 2303, 98 ER 201.
[261] Caddick, Davies and Harbottle (n23) 2 – 28.

There is a concern to balance the interest of authors in the protection of their works, on the one hand, with the interest of the public in access to works, on the other. Traditionally, copyright law in the UK has created rights and has been regularly adapted to provide authors and other owners of rights with protection with respect to new developments in technology, but at the same time conditions and limitations have been imposed on these rights.[262]

US copyright law has developed on a hard, utilitarian calculus that balances the needs of copyright producers against the needs of copyright consumers, a viewpoint, it is often argued, that leaves authors at the margins of the equation.[263] This position can be gleaned starting from the IP Clause of the Constitution[264] upon which the copyright and patent Acts rest, which indicates that the purpose of those laws is to offer incentives for the creation of intellectual products that will benefit society at large.[265] As noted above, when construing the copyright Acts the US Supreme Court has stated that the primary objective of the Acts is inducing the production and dissemination of products of the intellect.[266] Lower courts have concurred.[267]

Patterson, however, cautions that the wording of the Constitution's IP Clause is so general that it is not possible to infer any one theory of copyright alone from the language.[268] Indeed, Fisher argues that in seeking a prevailing underlying

[262] ibid.
[263] Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford University Press 2003) 138.
[264] As noted above, the IP Clause is also termed the Copyright Clause and has also been referred to as the Creativity Clause. Gervais and Renaud (n36).
[265] US Constitution article I, section 8, clause 8. The clause states that Congress shall have the power to 'to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'.
[266] See, for example, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932).
[267] See, for example, *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1151 (9th Cir. 1986).
[268] Patterson (n10) 195.

theory of US copyright law, invocations of the labour theory are almost as common as references to the welfare theory among courts, jurists and scholars.[269] For instance, in *Wheaton*[270] Justice McLean noted that, 'The argument that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted'.[271] Opinions of many lower courts have followed in similar vein.[272] Similarly, the personality theory and cultural theory have recently began to obtain currency in US copyright law.[273]

The personality theory has long figured very prominently in Continental Europe.[274] For example, the French and German copyright regimes have been strongly shaped by the writings of Kant and Hegel.[275] This influence is especially evident in the generous protection these countries provide for *droit moral*, moral rights. Moral rights are non-economic rights; they shield the personal or personhood interests of authors and artists, rather than their interests in making money. These rights include the right of the author to claim authorship of the work (right of attribution) and the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work which would be prejudicial to the author's honour or reputation (right of integrity).[276]

[269] Fisher (n217) 174.
[270] 33 U.S. 591 (1834).
[271] ibid 657.
[272] See, for example, the decision of the District Court for the Southern District of New York in *Time, Inc. v. Bernard Geis Associate* 293 F. Supp. 130 (S.D.N.Y. 1968).
[273] Fisher (n217) 173.
[274] Goldstein (n263) 137.
[275] ibid.
[276] Berne Convention, Article 6*bis.* For an explication on moral rights see Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011).

Fisher argues that the moral rights doctrine and its theoretical basis have found increasing favour in US law makers in recent years.[277] This, he contends, is demonstrated by the proliferation of state art preservation statutes and the adoption of the federal Visual Artists Rights Act of 1990, which was the first federal statute to explicitly grant protection to moral rights.[278] Similarly, the influence of the cultural theory in the US can be gathered from the favourable treatment that courts offer to criticism, commentary and education.[279]

Needless to say, the development of Kenyan copyright law has not been as rich as in the UK and the US.[280] The country's copyright law has remained disproportionately Western in theory, substance, form and practice in spite of the significantly different economic, social, political and cultural conditions and interests in these two contexts.[281] Particularly the fact that Kenyan creativity is largely derived from its culture and even its modern creative industries borrow heavily from its TCEs.[282] Kenyan copyright law's Western predilection can be inferred from a number of aspects. For instance, Kenya's operative copyright law, the Copyright Act 2001 provides protection for largely the same works that are protected by the copyright acts of the UK and the US. These works are

[277] Fisher (n217) 173.
[278] Although federal law had not acknowledged moral rights before this act, some state legislatures and judicial decisions created limited moral-rights protection. See, Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press 2010).
[279] Fisher (n217) 173.
[280] Rather unfortunately in this regard it has been argued that whereas Kenya has had a Copyright Act since 1966 and recognised copyright laws before independence, in some instances Kenyan judges are still not aware of basic features of copyright law. Ben Sihanya, 'Copyright Law in Kenya' (2010) 41(8) International Review of Intellectual Property and Competition Law 926, 944.
[281] Sihanya (n280) 938.
[282] This contention is best evidenced by the discussion on Kenya's contemporary creative industries, which are heavily influenced by TCEs in Chapter 2, part 2.2.4. See also Michael Shally-Jensen, *Countries, Peoples and Cultures: Eastern and Southern Africa* (Salem Press 2015) 120 – 124; Kathire Kiiru and Maina wa Mutonya, 'Music, Dance and Social Change in Eastern Africa' in Kathire Kiiru and Maina wa Mutonya (eds), Music and Dance in Eastern Africa (Twaweza Communications 2018) 8 – 9.

literary works, musical works, artistic works, dramatic works, audio-visual works, sound recordings and broadcasts.[283]

Similarly, Kenyan copyright law recognises and applies the key doctrines and devices of UK and US copyright laws including the idea/expression dichotomy,[284] the public domain and fair dealing.[285] Overall Kenyan courts and copyright law scholars have shied away from debating a theoretical framework for Kenyan copyright law; instead focussing the discussion on Kenyan copyright law within the labour and welfare theories that dominate UK and US copyright law.[286]

The influence of the labour theory on Kenyan copyright law can be discerned from the High Court's decision in the case of *Nevin Jiwani v Going Out Magazine*[287] wherein the court allowed an interim prohibitive injunction with

[283] Kenya Copyright Act, section 22(1). The UK nomenclature of works includes the typographical arrangement of published editions (the US Copyright Act does not provide for the typographical arrangement of published editions as a subject matter of copyright, instead subsuming this category of work in what the Act refers to as a "collective work"). However, oddly, section 2 of the Kenyan Copyright Act utilises the terms "dramatic works" and "published editions" in the definition of author, yet these terms are not operationalised in the substantive text.

[284] Whilst, as discussed in detail in Chapter six, the Kenya Copyright Act 2001 does not contain an explicit provision of the idea/expression dichotomy, the principle has been recognised in case law. See, for instance, *Parity Information Systems v Vista Solutions Limited & 2 Others* [2012] eKLR, Civil Case 833 of 2010.

[285] Kenya Copyright Act 2001, Section 26(3) read together with the Second Schedule Paragraph A. Regarding exceptions and limitations to copyright Kenya follows the UK approach of fair dealing as opposed to the US approach of fair use. Whereas these exceptions and limitations are in fact pronounced in international copyright law, under the prescription of the "three-step test" Berne Convention, article 9(2), Kenya's interpretation of them has followed a Western, particularly UK, approach. See, the Kenya Supreme Court Case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated)) where the UK approach of fair dealing was endorsed over the US's fair use.

[286] See, Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring and Innovative Lawyering 2016). In this leading text on Kenyan copyright law, Kenya's foremost copyright law scholar Ben Sihanya does not identify a theoretical framework for Kenyan copyright law, but rather deliberates on Kenyan copyright law within the frameworks of the labour and welfare theories.

[287] [2002] eKLR, Civil Suit No. 336 of 2002.

regard to a claim for copyright infringement in a magazine. In so deciding the court noted that:

> The same applies to the literary text or script: I am persuaded that sufficient mental labour has gone into its collection, collation, arrangement and creative expression to confer on it an original character. In the premises I do find that the plaintiff is probably going to succeed at the trial in her case that she has copyright in the said artistic and literary works. As regards infringement of the said copyright by the defendant I have diligently scanned the rival magazines exhibited in the affidavits and I have come to the tentative conclusion that the defendant's work is not a product of an independent mind working and arriving at the same work as the plaintiff. It appears to me to be a case of plain copying and reproduction of the plaintiff's work including the errors therein. The defendant's genius is not apparent and the impression that the defendant is a mere 'copy cat' is strong in my mind.[288]

Despite the lack of academic deliberations on a theoretical framework of Kenyan copyright law, it has been noted that within the Kenyan context copyright law performs two key tasks. First, it regulates and controls IP.[289] Second, it propagates education, ideology and propaganda.[290] Furthermore, copyright has been seen as performing the task of a revenue-earning enterprise and an important medium of mass communication.[291] Additionally, copyright law has been linked with the changes in the economic infrastructure and it has been

[288] [2002] eKLR, Civil Suit No. 336 of 2002, 6 (emphasis added).
[289] John Chege, *Copyright Law and Publishing in Kenya* (Kenya Literature Bureau 1978) 24
[290] ibid.
[291] ibid.

shown that the law has always been amended to accommodate the technological and class changes in the political set-up.[292]

Therefore, the theory of Kenyan copyright, indeed like the UK and the US appears to be 'very much of a mixed blessing'[293] incorporating aspects of the labour, welfare, personality[294] and cultural theories.[295] This varied disposition of Kenyan copyright theory, as well as of the copyright theories of the UK and the US, calls into question the role of theory in copyright. In this regard Bently and Sherman caution that one ought not to, 'believe the rhetoric and assume that copyright law is determined and shaped by philosophical ideals'.[296]

It is argued that a single overriding theory of copyright law is hard to justify owing to the inherent disparity between the key theories that justify copyright law and copyright law's key objective, the encouragement of creativity. Accordingly, this thesis calls for a streamlining of copyright theory and copyright objective, specifically in the Kenyan context, by proposing that Locke's theory of Knowledge may guide copyright law towards its key objective, the creation of new works.

As seen above, in the Western context, and by extension in the Kenyan context, the welfare theory appears to be the primary theory of copyright law. However,

[292] ibid. However, it has been argued that John Chege's analysis focused on doctrinaire Marxist political economy of copyright and paid little attention to the discourse on the role of copyright in cultural and educational industries. Sihanya (n280). All the same, regarding the argument that Kenyan copyright law adapts to technological changes consider the Copyright (Amendment) Act 2019, which is a recent amendment to the principal Kenya Copyright Act 2001 which primarily seeks to provide digital copyright reform.
[293] Breyer (n211) 351.
[294] With regard to the personality theory the Kenya Copyright Act 2001 at section 32 recognises the moral rights of attribution and integrity.
[295] See, Sihanya (n280).
[296] Bently and Sherman (n12) 40.

it has been argued that the normative use of economics in copyright suffers from, among other things, the problems inherent in defining and measuring society's welfare.[297] Whereas certain components of welfare may be known generally, constructing a scale which effectively measures the existence and value of each of these components is not possible.[298] As noted above, the overall effect of this is that economic analysis is indeterminate.

On the backdrop of such disconcertion, uncertainty and failings this thesis calls for a theory of copyright law which will guide copyright law towards obtaining its key objective, the encouragement of creativity. It is urged that if copyright law were to consider creativity within the precepts of Locke's theory of knowledge, then it would be better styled to achieve its stated aim of encouraging creativity.

5.5.2 Locke's theory of knowledge in copyright law

Although many cases do not explicitly cite Locke, even when propounding his more famous labour theory, the theory of knowledge was latent in the very early UK copyright cases, particularly the well-known *Millar,*[299] *Donaldson*[300] and in the US Supreme Court case of *Baker*.[301] These cases were highly influential in the formation of copyright law as we now know it.[302]

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[297] Alfred C. Yen, 'Restoring the Natural Law: Copyright as Labour and Possession' (1990) 51(2) Ohio State Law Journal 517, 539.
[298] ibid.
[299] (1769) 4 Burrow 2303, 98 ER 201.
[300] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774). An emphasis on knowledge was also seen in the early UK cases concerning translations and abridgements. See for instance, *Burnett* v *Chetwood* (1721) 35 Eng Rep 1008 and *Hawkesworth* v *Newbery* (1774) referenced in Benjamin Kaplan, *An Unhurried View of Copyright* (The Lawbook Exchange 2008*)* 12.
[301] 101 U.S. 99 (1879).
[302] See, Patterson (n10) 168 -179; Benjamin Kaplan, *An Unhurried View of Copyright* (The Lawbook Exchange 2008*)* 33.

In *Millar,* the Court of King's Bench infamously held that there was a perpetual common law copyright. Here, Justice Yates, dissenting, noted that, 'Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion'.[303] Justice Yates argued that once the author has set his "birds" (ideas) at liberty, he cannot prevent another from claiming them.

Similarly, Lord Camden's decision in *Donaldson* built on Locke's theory of knowledge. In this case, the House of Lords essentially repudiated the contention for perpetual common law copyright which had previously been endorsed in *Millar.* Lord Camden, the first of the Law Lords to speak, delivered a long and passionate speech that had a considerable effect on the final vote.[304] Lord Camden went through the principal legal issues, arguing that there was no precedent for an interminable property and that ideas could not be treated as such.[305] According to him if there was anything in the world that ought to be free and general it was knowledge and science.[306] Men of genius did not write for money:

> Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. *'Scire tuum nihil est, nisi te scire hoc sciat alter*.' [Your knowledge is nothing when no one else knows you know it]. Glory is the reward of science, and those who deserve it, scorn all meaner views'.[307]

[303] (1769) 4 Burrow 2303, 2378-9, 98 ER 201.
[304] Rose (n123) 68.
[305] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774).
[306] ibid 1001.
[307] ibid 1000.

Lord Camden was of the opinion that the justification for copyright was the propagation of knowledge 'for the common welfare of the species'.[308] To elaborate Lord Camden noted:

> but what says the common law about the incorporeal ideas, and where does it prescribe a remedy for the recovery of them, independent of the materials to which they are affixed? I see nothing about the matter in all my books; nor were I to admit ideas to be ever so distinguishable and definable, should I infer they must be matters of private property, and objects of the common law?[309]

A hundred years after *Donaldson*, the US Supreme Court in *Baker,* which is often cited as the genesis of the idea/expression dichotomy and the merger doctrine, held that a book did not give an author the right to exclude others from practising the concepts, notions and ideas described in the book, only the right to exclude reproduction of the material in the book.[310]

Thus, to enable the creation and dissemination of knowledge according to Justice Yates, Lord Camden and Justice Bradley in *Baker*, the importance of ideas cannot be disputed. Ideas ought not to be matters of private property but instead free for use – men should not be allowed to 'be niggards to the world, or hoard up for themselves the common stock'.[311]

These viewpoints are consistent with Locke's theory of Knowledge. According to this theory, knowledge, that is creativity, arises when simple ideas are

[308] ibid 999.
[309] ibid 997.
[310] *Baker v Selden* 101 U.S. 99 (1879).
[311] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950, 999 (1774). (Lord Camden).

combined together.[312] Simple ideas are the 'materials of all our knowledge'[313] and thus the building blocks of creativity. Locke was an Empiricist.[314] The central claim of Empiricism is that knowledge derives solely from experience.[315] Thus, within the Empiricist framework one would come to have simple ideas in one's mind by experiencing them. In order for one to be able to experience these ideas then they would have to be free and readily available for use as mandated by the judges above.

5.5.3 Assessing the merits of structuring copyright law based on Locke's theory of knowledge

Structuring copyright law based on the theory of knowledge would lead to the harmonisation of copyright law's underlying premise and its key objective, the encouragement of creativity. As discussed above the primary argument put forward for the proposition that copyright law's key objective is the encouragement of creativity is the fact that the foundations of UK and US copyright law laid emphasis on this role. However, it has been noted that these foundational statements were not very clear in their own right. Indeed, the reason for copyright's existence has often been argued as being uncertain.

This uncertainty led Hopkinson J in the lower court opinion in *Wheaton*,[316] to query, 'What is its history? - Its judicial history? It is wrapt in obscurity and

[312] Locke (n1) Book IV, Chapter II, § 1
[313] ibid Book II, Chapter I, § 2.
[314] Locke is normally regarded as the father of British Empiricism and was followed in his views by George Berkeley and David Hume. It has been noted that Empiricism is a loose term which may mean several things. However, when the term is utilised, particularly regarding British Empiricism, the general disposition is that it refers to the argument that human beings can have no knowledge of the world other than what they derive from experience. John Dunn, J. O. Urmson and Alfred Jules Ayer, *The British Empiricists* (Oxford University Press 1992) v.
[315] Robert G. Meyers, *Understanding Empiricism* (Routledge 2014) 2.
[316] 29 Fed. Cas. 862 (No 17486) (C.C.E.D. Pa 1832).

uncertainty'.[317] Similarly, as noted above, concerning the US Constitution's IP Clause, Patterson cautions that its wording, 'To promote the progress of science and useful arts' is so general that it is not possible to infer any one theory of copyright alone from the language.[318] It is argued that a strong advantage of structuring copyright law in line with the theory of knowledge would clarify these positions.

It is the recognition of the importance of re-use of knowledge and ideas that has motivated scholars to advocate for the introduction of specific rights for users. As one academic has urged, 'We propose to give specific, "Users' Rights" to reproduce and communicate to the public copyrighted works in order to engage in: democratic use, information use, transformative use, personal use and reasonable commercial use'.[319] It is vital that the law recognises the rights of copyright users together with the rights of copyright owners and has a mechanism that encourages the key role that creators play within copyright. The proposed reforms would not limit the rights of copyright owners but would be advantageous to the balance between the public and rights holders.

Having put forward a theoretical framework under which copyright law can encourage creativity what remains is to flesh out its application, particularly in the Kenyan context. This is done in the chapters that follow.

[317] ibid, 871.
[318] Patterson (n10) 195.
[319] Jens Schovsbo, 'Integrating Consumer Rights into Copyright Law: From a European Perspective' (2008) 31(4) Journal of Consumer Policy 393, 405. For a recent in-depth study on the rights of users see Graham Greenleaf and David Lindsay, *Public Rights: Copyright's Public Domains* (Cambridge University Press 2018), the authors of this book offer a unique consideration of the public domain, looking at it as offering a number of positive rights to users to enjoy and use copyright works freely, they term these rights "public rights".

5.6 Conclusion

Following the enactment of TRIPs, the economic domain's dominance over copyright law is clearly witnessed through an overt policy agenda that ties in IP matters with global trade objectives.[320] However, the economic domain's influence over copyright law could be seen as early as with the Statute of Anne. The Romantic ethic of the author-genius informed copyright legislation from that early stage in 1710 and continues to do so in the present-day. However, Romantic authorship is merely a stalking horse for economic interests that have been, as a tactical matter, better concealed than revealed.[321] The case is the same with the copyright devices of originality and the work.

This chapter considered copyright law's understanding and provision of creativity. It was seen that copyright law maintains a view of creativity as an action that is carried out by an author-genius, even with regard to modern digital technologies such as P2P and computer software; whereas the true nature of creativity is that it is a derivative process that draws on existing ideas and concepts. The Romantic concept of the author-genius is a device of the economic domain. Thus, even in its "purest" form, copyright law has been dominated by the economic domain. It was argued that copyright law's failure to understand and provide for the true nature of creativity has led it to fail in obtaining its key objective, the encouragement of creativity. Therefore, so as to enable copyright law to better encourage creativity a conceptualisation of creativity based on Locke's theory of knowledge was urged.

[320] Macmillan (n62).
[321] Jaszi (n7) 500.

This structure finds sustenance in the theory of social three-folding. Drawing on social three-folding, this framework advocates for the focus of copyright law to be on encouraging creativity to arise, free from the domination of the economic domain, in line with its own precepts. It is recognised that the true nature of creativity is that it is a derivative process, which borrows from existing ideas and concepts.[322] Therefore, ideas, the building blocks of creativity, ought to be readily and freely availed for use by potential creators.

The next chapter begins to flesh out the application of Locke's theory of knowledge for the reform of copyright law, particularly, Kenyan copyright law. It focuses on how ideas can be made readily and freely available for use by potential creators. It is noted that copyright law's key mechanism in this regard, the idea/expression dichotomy, is in turmoil. The doctrine has not been formulated and interpreted in a principled way and it is argued that this has led to a chilling effect on creativity.[323] Therefore the doctrine would have to be reviewed and reformulated to enable Kenyan artists to adequately utilise copyright law to draw on ideas, particularly, arising within TCEs to create new work

[322] Locke (n1) Book II, Chapter XII; Reckwitz (n126) 102 – 103; Daniel Dennet, 'Collision, Detection, Muselot, and Scribble: Some Reflections on Creativity' in David Cope (ed), *Virtual Music: Computer Synthesis of Musical Style* (MIT Press 2001) 283; Karl Popper and John C. Eccles, *The Self and Its Brain: An Argument for Interactionism* (Routledge 1983) 14; Keith Sawyer, 'Creativity, Innovation and Obviousness' (2008) 12(2) Lewis & Clark Law Review 461, 464; Barthes (n144) 160.

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

CHAPTER SIX

REFORMULATING AND REINTERPRETING THE IDEA/EXPRESSION DICHOTOMY TO ENCOURAGE CREATIVITY: A COMPARATIVE REVIEW

6.1 Introduction

The previous chapter brought to light the disconnect between the true nature of creativity and how copyright law has understood and responded to it. With a focus on the copyright laws of the United Kingdom ("UK") and the United States ("US") it was seen that copyright law has been dominated by economic concerns particularly since the coming into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").[1]

However, even as early as with the Statute of Anne of 1710 copyright law was still influenced by economic concerns[2] and this influence carried on with the several artefact-specific Acts that followed the Statute of Anne;[3] leading to the homogenous "work" becoming the element that copyright protected, first under the Copyright Act 1911 which repealed and codified these artefact-specific

[1] Fiona Macmillan, 'Love is Blind and Lovers Cannot See: Resisting Copyright's Romance' in Hanns Ullrich, Peter Drahos and Gustavo Ghidini (eds), *Kritika: Essays on Intellectual Property* (Edward Elgar 2018) vol 3, 6 -10.

[2] John Feather, 'The Book Trade in Politics: The Making of the Copyright Act of 1710' (1980) 8 Publishing History 37; Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 42 – 43. Deazley rejects Feather's and Patterson's view and maintains that the Statute of Anne was primarily concerned with the continued production of books. Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Hart Publishing 2004) 45. On the whole, it is accepted that before the enactment of the Statute of Anne and the protection for authors that it offered, copyright was purely a right for entrepreneurs – book binders, printers and publishers, as was seen with the printing patent, the "common law copyright" and the "stationer's copyright" of the Stationers' Company.

[3] These Acts, no fewer than twenty-two, were passed at different times between 1735 and 1906 and included the Engravers' Copyright Act 1735 and the Sculpture Act 1814.

regimes, and in subsequent Copyright Acts thereafter.[4] Progressively since then copyright has become a property right, which also protects the intangible property within the copyright work.[5]

Additionally, the devices of originality and authorship clearly demonstrate the economic domain's influence over copyright law,[6] particularly, with copyright law's emphasis of viewing the deserving creator as one who is a genius; notwithstanding the fact that creativity is a highly derivative process.[7]

All in all, it was seen that copyright law's current formulation, dominated by economic concerns, has led to a failure of it to adequately obtain its key objective, the encouragement of creativity.[8] To remedy this scenario it was proposed that copyright law ought to be structured so as to enable creativity to arise autonomously, free from the dictates of the economic system, in line with Rudolf Steiner's theory of social three-folding.

Steiner's theory of social three-folding contends that the economic domain has dominated the other two domains of society, that is, the cultural domain, wherein the products of creativity arise, and the political domain to the

[4] Brad Sherman and Lionel Bentley, *The Making of Modern Intellectual Property Law: The British Experience, 1760 – 1911* (Cambridge University Press 2003) 128. The Copyright Act 1911 is largely recognised as the first modern copyright law and provided, for the first time, for the protection of the work in homogeneous terms.
[5] James Griffin, 'Making a New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright' (2013) Intellectual Property Quarterly 69, 70.
[6] Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011) 14.
[7] ibid.
[8] Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) 14 – 16; Julie E. Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40(3) UC Davis Law Review 1151; Omri Rachum-Twaig, 'Recreating Copyright: The Cognitive Process of Creation and Copyright Law' (2017) 27(2) Fordham Intellectual Property, Media and Entertainment Law Journal 287, 288.

detriment of society.[9] As a cure to this problem Steiner argued that the three domains ought to be free to develop autonomously,[10] specifically, he emphasised, the importance of freeing the cultural domain.[11]

It is argued that copyright law can enable creativity to arise independently if it were to be structured with an understanding of the true nature of creativity as a derivative process. It is put forward that such a view of creativity may be based on Locke's theory of knowledge. Under this theory, knowledge arises when "simple ideas", which are the basic elements of creativity, are combined together.[12] It is argued that the process by which new knowledge emerges is equivalent to the process of creativity.[13]

The present chapter begins the discussion of how this thesis's theoretical framework, that is, the theory of social three-folding and Locke's theory of knowledge, can be put into practical use towards the reform of Kenyan copyright law. This implementation starts with a thorough consideration of the idea/expression dichotomy. It is argued that the idea/expression dichotomy is the key doctrine of copyright law that may encourage creativity. However, the current formulation and interpretation of the doctrine is indefinite and unprincipled, and this has prevented it from adequately encouraging the creative process.

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[9] Rudolf Steiner, *Basic Issues of the Social Question: Towards Social Renewal* (Frank Thomas Smith tr, Rudolf Steiner Press 1977) 58.
[10] ibid.
[11] ibid 47.
[12] John Locke, *An Essay Concerning Human Understanding* (T. Tegg and Son 1836) Book IV, Chapter II, § 1
[13] See the development of this argument in Chapter 4, parts 4.3.2.1 and 4.4.1.

This chapter aims to determine the best formulation and interpretation of the idea/expression dichotomy which would encourage creativity in Kenya. A consideration and comparison of how the doctrine is interpreted in Kenya, the UK and the US is undertaken. UK and the US are important to this discussion as they have developed rich arguments and jurisprudence on the doctrine.

Ultimately, the chapter argues for an adoption of a statutory-based provision of the doctrine by Kenya, akin to the position in the US and consistent with international copyright law; albeit taking into consideration the fact that the creative industries in Kenya are highly derivative of its culture, specifically its traditional cultural expressions ("TCEs").[14] This, it is contended would lead to a more principled interpretation of the idea/expression dichotomy and a negation of the chilling of creativity which has arisen due to uncertainty around the idea/expression dichotomy.

The idea/expression dichotomy is the fundamental axiom of copyright law.[15] Under this doctrine, only expressions of ideas and not ideas themselves receive copyright protection.[16] Ideas are the building blocks of culture, creativity,

[14] This contention is best evidenced by the discussion on Kenya's contemporary creative industries, which are heavily influenced by TCEs in Chapter 2, part 2.2.4. See also Michael Shally-Jensen, *Countries, Peoples and Cultures: Eastern and Southern Africa* (Salem Press 2015) 120 – 124; Kathire Kiiru and Maina wa Mutonya, 'Music, Dance and Social Change in Eastern Africa' in Kathire Kiiru and Maina wa Mutonya (eds), Music and Dance in Eastern Africa (Twaweza Communications 2018) 8 – 9.

[15] *Feist Publications v Rural Telephone Services Company* 499 U.S. 340, 344 (1991) (Justice O'Connor). Some commentators argue that in British copyright law aphorisms such as "there is no copyright in an idea" ought to be avoided, see *IBCOS Computers Ltd and Another v Barclays Mercantile Highland Finance Ltd and Others* [1994] FSR 275 (Ch) 289 (Jacob J). Others go to the extent of stating that there is no such rule as the idea/expression dichotomy in UK copyright law, see Mary Vitoria and others, *Laddie, Prescott & Vitoria*: *The Modern Law of Copyright and Designs* (4th edn, LexisNexis Butterworths, London 2011) [3.80]. These arguments are canvassed in parts 6.4.2 and 6.4.3.

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

communication, innovation and expression.[17] Ideally, the idea/expression dichotomy plays the important role of ensuring that potential creators are free to take from the "common stock" those ideas which they require to create new works - thus enhancing creativity.[18] However, the lack of a principled interpretation of the doctrine has negatively influenced the creation of new works.[19]

The next part of this chapter offers a background to the idea/expression dichotomy, noting its general formulation. It is quickly seen that there is disconcertion as to the doctrine's interpretation and even as to its efficacy thus, the underpinnings of the doctrine as well as the key rights and benefits that it promotes, emphasising the doctrine's role in the encouragement of creativity, are also considered. It is argued that the lack of clarity and exactness in the interpretation of the doctrine produces a chilling effect on creativity.

The overriding problem, it emerges, is how ideas have been construed. Accordingly, the third part of this chapter offers a discussion on the etymological and philosophical origins of the word idea. It will be noted that these considerations offer little clarity on what an idea is and instead compound the difficulties with its interpretation. This deliberation lays the basis for the comparative analysis of how ideas, within the context of the idea/expression dichotomy, have been construed in Kenya, the UK and the US which is

[17] This premise is deduced from Locke's theory of knowledge but is also put forward in Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009) 184; Graham M. Dutfield and Uma Suthersanen, 'The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) 8(4) Intellectual Property Quarterly 379, 398, among others.

[18] John Locke, *Two Treatises of Government: The Second Treatise* (P. Laslett ed, 2nd edn, Cambridge University Press, 1967) 14; Leslie Kurtz, 'Copyright: The Scènes à Faire Doctrine' (1989) 41(1) Florida Law Review 79, 86.

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

undertaken in the fourth part. Finally, a summary is tendered of the positive lessons that Kenya can learn from the UK and the US. In this regard it is contended that Kenyan lawmakers ought to enact a statutory provision of the doctrine, drawing on the position in the US and congruous with international copyright law.

6.2 Background

6.2.1 The general conceptualisation of the doctrine

Copyright law regulates the creation and use that is made of a wide range of cultural goods including songs, books and films among others.[20] In this regard, copyright protects original expressions which are embodied in some material form.[21] However, in most cases the scope of a work extends beyond its literal appearance[22] and may include its plot, story line, incidents and themes, depending on the nature of work in question.[23] As Griffith, and others contend, the copyright work is in actual fact an abstract "intellectual essence" that can be manifested in numerous concrete ways.[24]

From the above statement, that copyright law protects original forms of expression, flows two important tenets. First, copyright does not protect those elements of a work that are not original.[25] Second, and more relevant to the present discourse, is the tenet that copyright only subsists in expressions and

[20] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 32.
[21] Caddick, Davies and Harbottle (n16).
[22] Bently and Sherman (n20).
[23] ibid 178.
[24] Jonathan Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33(4) Oxford Journal of Legal Studies 767, 769; Oren Bracha, Owning Ideas: *The Intellectual Origins of American Intellectual Property, 1790–1909 (Cambridge University Press 2016)* 158; Griffin (n5).
[25] Bently and Sherman (n20) 180.

not in ideas.[26] This latter principle, 'the fundamental axiom of copyright law',[27] is often termed the "idea/expression dichotomy".[28] Evidently, this doctrine only applies to original works of authorship, that is, literary, dramatic, musical and artistic works as well as to films, and not to entrepreneurial works such as broadcasts, typographical arrangements of published editions and sound recordings.

There are a considerable number of statements on this doctrine stretching back over 100 years.[29] Today, most nations have expressed this principle in their national laws in various ways with the aim of achieving the same goal – to provide for the non-protection of ideas.[30] The non-protection of ideas has also been explicitly provided for in international treaties. For instance, TRIPS at article 9(2) states that, 'Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'. An almost verbatim reproduction of the TRIPS provision is made in the World Intellectual Property Organisation ("WIPO") Copyright Treaty ("WCT").[31]

There is little debate that the distinction between protected expressions and unprotected ideas, 'is at the essence of copyright'.[32] However, whereas the

[26] Catherine Colston and Jonathan Galloway, *Modern Intellectual Property Law* (3rd edn, Routledge 2010) 287.
[27] *Feist Publications* (n15).
[28] Caddick, Davies and Harbottle (n16) 2-09. Others have referred to the doctrine as the "idea-expression divide" or the "idea-expression distinction". See, Patricia Loughlan, 'The Market Place of Ideas and the Idea-Expression Distinction of Copyright Law' (2002) 23(1) Adelaide Law Review 29.
[29] Laddie, Prescott & Vitoria (n15) 3.74.
[30] Mark Van Hoorebeek, *Law, Libraries and Technology* (Chandos Publishing 2005) 43. It should be noted that whereas copyright law does not protect ideas, other areas of law such as contract law may provide protection for ideas. See *Nimmer on Copyright*, vol 5, chapter 19D.02 (R 99-6/2016).
[31] Article 2.
[32] *Harper & Row Publishers v Nation Enterprises* 471 U.S. 539, 589 (1985) (Brennan, J., dissenting). However, some commentators have strongly criticized the dichotomy arguing that its continued recognition is neither justified nor helpful in deciding cases. See, for instance,

pervasiveness of the doctrine is generally accepted, what has not been expressed as lucidly is where the distinction between an idea and an expression lies. It has been noted there is a very thin line between an "idea" and an "expression"[33] and classifying something as one or the other may often be a very difficult endeavour indeed.[34]

The arduousness of distinguishing between ideas and expressions has led some to term the idea/expression dichotomy, "confusing",[35] "obscure",[36] "suspect",[37] "strange",[38] "amorphous",[39] "a semantic and historic fallacy",[40] "manifestly unclear",[41] "mysterious"[42] among other such terms. In the US, Justice Learned Hand in *Nichols v Universal Picture Corporation*[43] went as far as proclaiming that nobody will ever be able to distinguish between ideas and expressions.[44]

What has been noted as being the key issue with regard to the doctrine is how ideas are interpreted.[45] As stated aptly by Lord Hailsham in *LB (Plastics) Ltd v*

Robert Yale Libott, 'Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*'* (1966-1967) 14(3) UCLA Law Review 735. Nevertheless, it has been noted that this sort of criticism often relates to the application of the dichotomy and not to the existence and relevance of the dichotomy itself. As was put forward in *Sid & Marty Krofft Television Productions Inc. v McDonald's Corporation* 562 F.2d 1157, 1163 (9th Cir. 1977).

[33] Colston and Galloway (n26) 288.

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

[35] Laddie, Prescott & Vitoria (n15) 3.74.

[36] Ibid 3.76.

[37] ibid.

[38] Libott (n32) 736.

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

[40] Libott (n32) 736.

[41] Allen Rosen, 'Reconsidering the Idea/Expression Dichotomy (1992) 26(2) University of British Columbia Law Review 263.

[42] Cheng Lim Saw, 'Protecting the Sound of Silence in 4'33" - A Timely Revisit of Basic Principles in Copyright Law' (2005) 27(12) European Intellectual Property Review 467, 470.

[43] 45 F. 2d 119 (2d Cir. 1930).

[44] ibid 121.

[45] The meaning of "expression" and issues surrounding its interpretation within the idea/expression dichotomy have also been considered. See Steven Ang, 'The Idea-Expression

Swish Products Limited, 'it all depends on what you mean by "ideas"'.[46] The aim of this chapter is to consider how the idea/expression dichotomy has been interpreted in the UK and the US and see what positive lessons Kenya may learn for a better interpretation of the doctrine in furtherance of the overriding objective of copyright law – encouraging the creation of new works.

6.2.2 Underpinnings and benefits of the idea/expression dichotomy

Despite the widespread disconcertion on the application and efficacy of the idea/expression dichotomy, the principle has solid underpinnings as well as benefits which derive from it.

The doctrine may be considered through the lenses of the theories that are often employed in the justification of copyright law. One such view contends that the idea/expression dichotomy can be reflected on with reference to Locke's labour theory.[47] As discussed in the previous chapter, it is commonly maintained that Locke's labour theory underpins English copyright law.[48] In his eminent essay, *Two Treatises of Government (The Second Treatise)*[49] Locke argued that a person's labour is his, such that, 'when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property'.[50]

Dichotomy and Merger Doctrine in the Copyright Laws of the U.S. and the U.K.' (1994) 2(2) International Journal of Law and Information Technology 111.

[46] *LB (Plastics) Ltd v Swish Products Limited* [1979] RPC 551 (HL).

[47] An explication of the theories underlying copyright law generally, and Locke's labour theory specifically is found at Chapter 5, part 5.5.1.

[48] ibid 94.

[49] Locke (n18).

[50] Locke (n18) 11.

In other words, ‘Each person enjoys the natural right of self-ownership. One’s labour is a part of one’s self and so one owns one’s labour. Because one owns one’s labour, one owns the products of one’s labour’.[51] Although there is an assertion that the labour theory is premised on physical labour,[52] it can as well be applied to mental labour, justifying copyright as property over the production of the mental labour.[53] As Justin Hughes notes:

> Indeed, the Lockean explanation of intellectual property has immediate, intuitive appeal: it seems as though people *do* work to produce ideas and that the value of these ideas-especially since there is no physical component-depends solely upon the individual's mental "work”. [54]

Similarly, Zemer argues that under Locke’s theory, labour may be physical, creative or mental.[55] Others have even argued that Locke’s labour theory appears to apply more readily to intellectual property (“IP”) than to real property.[56]

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[51] Seana Valentine Shiffrin, ‘Lockean Arguments for Private Intellectual Property’ in Stephen R. Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 148. However, in this article Professor Shiffrin challenges these arguments and the traditional Lockean views on intellectual property that emphasise a natural right to intellectual property. Instead she argues that the conditions of effective use of common property together with the appeal to the right of subsistence, not labour, initially justify some appropriation out of the stock.

[52] Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate 1996) 47. See the discussion on the labour theory in Chapter 5, part 5.5.1.

[53] Deming Liu, ‘Reflections on the Idea/Expression Dichotomy in English Copyright Law’ (2017) 1 Journal of Business Law 71, 73. Locke himself did not expressly rule out mental labour from his conceptualization of labour.

[54] Justin Hughes, ‘The Philosophy of Intellectual Property’ (1988) 77(2) Georgetown Law Journal 287, 300.

[55] Lior Zemer, ‘The Making of a New Copyright Lockean’ (2006) 29(3) Harvard Journal of Law and Public Policy 891, 916.

[56] Shiffrin (n51) 139 – 140.

Locke, however, provides a proviso to his theory, noting that 'Nothing was made by God for man to spoil or destroy'.[57] - the "no spoilage" proviso.[58] It is argued that this proviso leaves ideas outside the scope of property as the ownership of ideas would harm later creators by denying them an opportunity to draw, 'upon the pre-existing cultural matrix and scientific heritage'[59] for further creative endeavours.

Whereas Locke's Labour theory is most widely cited in discussions on justifications for IP law, as noted in the introduction to this chapter and explicated in Chapter four,[60] Locke also developed a theory of knowledge.[61] This theory, derived from Locke's *An Essay Concerning Human Understanding,*[62] provides that by combining "simple ideas" together society can gain new knowledge (this thesis interprets this process as being how creativity arises).[63] Locke was an Empiricist.[64] The central claim of Empiricism is that knowledge derives solely from experience.[65] Locke opposed the view that

[57] Locke (n18) 12.
[58] Liu (n53) 73. Similarly, Locke's thesis provides what is known as the "sufficiency proviso" according to which the acquisition of natural property rights only occurs if one has left as much and as good for others.
[59] Wendy Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102(7) Yale Law Journal 1533, 1563–1564.
[60] See Chapter 4, parts 4.3.2.1 and 4.4.1
[61] Whereas Locke's formulation of the theory of knowledge is the most prominent and influential and is highlighted in this thesis, other important theorists also advanced theses regarding knowledge. In this regard one may consider: George Berkeley, *The Principles of Human Knowledge* [1710] (Collins 1962); Étienne Condillac, *Essay on the Origin of Human Knowledge* [1746] (Hans Aarsleff tr, Cambridge University Press 2001); David Hume, *An Enquiry Concerning Human Understanding* [1748] (Hackett 1993).
[62] Locke (n12).
[63] ibid Book IV, Chapter II, § 1. For Locke, simple ideas are the basic elements of creativity.
[64] Locke is normally regarded as the father of British Empiricism and was followed in his views by George Berkeley and David Hume. It has been noted that Empiricism is a loose term which may mean several things. However, when the term is utilised, particularly with regard to British Empiricism, the general disposition is that it refers to the argument that human beings can have no knowledge of the world other than what they derive from experience. John Dunn, J. O. Urmson and Alfred Jules Ayer, *The British Empiricists* (Oxford University Press 1992) v.
[65] Robert G. Meyers, *Understanding Empiricism* (Routledge 2014) 2.

knowledge is innate, as had been put forward by Plato[66] and Descartes[67] among other proponents of Innatism[68] who argued that knowledge is inborn, belonging to the mind from its birth.[69]

According to Locke, a simple idea is one that, 'contains in it nothing but one uniform appearance, or conception in the mind, and is not distinguishable into different ideas'.[70] The mind is passive in the reception of these ideas and can neither make one on its own nor have any idea which does not consist of a simple idea.[71] Thus, new knowledge, or creativity, can only be achieved if one were to have access to simple ideas. The idea/expression dichotomy facilitates the legal access to such ideas by denying them copyright protection.

One can also reflect on the idea/expression dichotomy through the personality theory or what may be termed as the "Kantian/Hegelian justification" for copyright law.[72] The personality theory is best put forward in Hegel's theory of property.[73] Under this theory property is described as an expression of the

[66] See, G.A.J. Rogers, 'Locke, Plato and Platonism' in Douglas Hedley and Sarah Hutton (eds), *Platonism at the Origins of Modernity: Studies on Platonism and Early Modern Philosophy* (Springer 2010) 193.
[67] See, Rene Descartes, 'Meditations on First Philosophy: Third Meditation' in John Cottingham (ed), *Descartes: Selected Philosophical Writings* (John Cottingham and others trs, Cambridge University Press, 1988).
[68] As with Empiricism, Innatism is a wide philosophical and epistemological doctrine which may refer to a variety of specific meanings. However, its basic doctrine is that the mind is born with ideas/knowledge and is therefore not a "blank slate" at birth as contended by Locke and other Empiricists. Simon Blackburn, *Oxford Dictionary of Philosophy* (3rd edn, Oxford University Press) 245 - 246.
[69] J. Radford Thomson, *A Dictionary of Philosophy: In the Words of Philosophers* (R.D. Dickinson 1887) 102.
[70] Locke (n12) Book II, Chapter II, § 1.
[71] ibid Book IV, Chapter II, § 1
[72] Hughes (n54) 288. See Chapter 5, part 5.4.1 for an in-depth discussion on the personality theory.
[73] See G W F Hegel, *Philosophy of Right* (T M Knox tr, Clarendon 1952). Kant's ideas on personhood have also been drawn on together with Hegel's in this regard. See Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (Thomas Abbot tr, 1949). For an in-depth exposition of both Kant's and Hegel's theories within the personality/personhood justification see William Fisher, 'Theories of Intellectual Property' in Stephen R. Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 168 – 199.

self.[74] In order for this theory to be valid, it is averred that a differentiation must be made between the aspects of a work which embody an author's personality and those which do not.[75] One way of doing so, it has been suggested, is to divide the creation of a work into phases.[76] First, is the phase of selecting relevant ideas from the existing pool of ideas (the *inventio* of classical rhetoric); second is the arranging of those ideas (*dispositio*); and third is wording them (*electio*).[77] As the pool of ideas is pre-given in the first stage, no imprint of the author's personality occurs here (but may arise at the *dispositio* or *electio* stages) and thus an author cannot have property of these ideas.[78]

In addition to these theoretical justifications of the doctrine, copyright law scholars including Masiyakurima, Liu and Kurtz among others; together with scholars from other disciplines such as economists Landes and Posner, argue that the idea/expression dichotomy promotes key social, legal and economic rights and benefits. These rights and benefits are – the promotion of free speech,[79] determining copyright infringement,[80] enhancing competition,[81] and encouraging creativity.[82]

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[74] Hughes (n54) 288.
[75] Daniel Burkitt 'Copyrighting Culture - The History and Cultural Specificity of the Western Model of Copyright' (2001) 2 Intellectual Property Quarterly 146, 167.
[76] ibid.
[77] ibid.
[78] ibid.
[79] Loughlan (n28) 33. See also for instance, the judgement of the US Court of Appeals for the Second Circuit, in *Harper & Row Publishers v. Nation Enterprises* (723 F2d 195, 203 (2nd Cir, 1985) (Judge Irving R. Kaufman)) where it was noted that copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression'. a position which was upheld by the Supreme Court (471 U.S. 539, 556 (1985)).
[80] Patrick Masiyakurima, 'The Futility of the Idea/Expression Dichotomy in UK Copyright Law' (2007) 38(5) International Review of Intellectual Property and Competition Law 548, 563; Liu(n53) 88.
[81] Leslie A. Kurtz, 'Speaking to the Ghost: Idea and Expression in Copyright' (1992-1993) 47(5) University of Miami Law Review 1221, 1224; William M. Landes and Richard A. Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) Journal of Legal Studies 325, 350.
[82] Masiyakurima (n80) 558.

This chapter emphasizes how the idea/expression dichotomy may be formulated and interpreted to encourage creativity. This aspect of the doctrine is highlighted below.

6.2.2.1 The idea/expression dichotomy as a tool for encouraging creativity

Ideas are the basic building blocks of creativity. When properly formulated and interpreted, the idea/expression dichotomy makes these building blocks available to authors who have encountered them in another work.[83] The lack of precision regarding the distinction between ideas and their expressions has led to a negation of the transformative and derivative uses of existing cultural works and thus a reduction of creative activity.[84]

It is a widely held contention that all authors draw on the works of their predecessors.[85] Authorship is one of the most central and resonant of the foundational concepts associated with Anglo-American copyright doctrine.[86] However, what authorship actually is, is something that has been debated for centuries. As the French philosopher Michel Foucault asked – what is an author?[87]

As discussed in Chapter four, literary theorists and copyright law scholars, most notably Martha Woodmansee and Peter Jaszi, have produced influential texts on the development of the modern concept of authorship in the eighteenth

[83] Kurtz (n81).
[84] Masiyakurima (n80) 559.
[85] It is the contention of this thesis that creativity is a derivative process. See Chapter 4, part 4.4.
[86] Peter Jaszi, 'Toward A Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455.
[87] Michel Foucault, 'What is an Author?' In James D. Faubion (ed) *Aesthetics, Methods and Epistemology* (Robert Hurley and others tr, The New Press) 205.

century and its impact on copyright law.[88] These examinations reveal the extent to which the modern concept of the author as the sole independent creator of an original work has pervaded literature and copyright law. The Woodmansee-Jaszi tandem argues that the dominant doctrinal structures of British and American copyright law emerged around the same time as the Romantic conception of authorship at the end of the eighteenth century.[89] Under the Romantic model of authorship, an author created works extempore using his creative genius thus, leading to the production of utterly new and unique expressions.[90]

In today's post-modern culture[91] epitomised by remarkable advancements in digital technologies, it is difficult to continue to conceive of a creator as an "author-genius".[92] The creative process is highly derivative.[93] The process of authorship is more equivocal than what the Romantic model admits.[94] Digitization has greatly enhanced the ability to appropriate or rewrite cultural works. Acts such as the sampling of music find a newly prominent role in post-

[88] See Chapter 4 part 4.4.2.2; Jaszi (n86); Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author' (1984) 17(4) Eighteenth-Century Studies 425.

[89] Jaszi (n86); Woodmansee (n88). It is worth noting that Woodmansee's and Jaszi's viewpoint has not received universal acceptance. Rahmatian, for instance, decries its focus on literary copyright and lack of consideration of other cultural works such as the visual arts and music, Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 156 -159. For other criticism, see Lionel Bently, 'Review Article: Copyright and the Death of the Author in Literature and Law' (1994) 57 The Modern Law Review 973, 977; Mark Lemley, 'Romantic Authorship and the Rhetoric of Property' 75 Texas Law Review 873, 876-7, 879-95; Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright' (2008) 118 The Yale Law Journal 186, 192-2.

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

[91] See an in-depth discussion on post-modernism and the contention that today's culture can be appropriately classified as post-modern in the introductory chapter, part 1.5.3.

[92] See Woodmansee (n88) 428-30 detailing the Romantic conviction that the "author-genius" was someone who created something entirely new and unprecedented. See also an explication on Romantic authorship and the concept of the author as genius as particularly put forward by Woodmansee and Jaszi in Chapter 4, part 4.4.2.

[93] Keith Sawyer, 'Creativity, Innovation and Obviousness' (2008) 12(2) Lewis & Clark Law Review 461, 464.

[94] Litman (n90).

modern society.[95] This has led to the creation of new works often termed "derivative" or "transformative" works.[96] In actual fact, most cultural works identified as post-modern such as appropriation art are by their very definition derivative works.[97] Other examples of expressions of post-modernism are parody and pastiche.[98]

A derivative work is a creative expression that is based on an earlier copyright work in some way.[99] It is a second, separate work independent in form from the first.[100] In such cases whether a new copyright work is created will depend on whether sufficient skill, labour and judgment was expended in its creation; if it was, the person who was responsible for that skill, labour and judgment will be the author of the new work.[101]

The right to create a derivative work is generally reserved for the owner of the copyright.[102] This right is known as the "derivative right".[103] The author of the derivative work must have the permission of the owner of the copyright in the underlying work, usually in the form of a licence or some other contractual or legal arrangement.[104] It is an infringement of copyright to make or sell a

[95] Giancarlo F. Frosio, 'A History of Aesthetics from Homer to Digital Mash-ups: Cumulative Creativity and the Demise of Copyright Exclusivity' (2015) 9(2) Law and Humanities 262, 293.
[96] Jacqueline D. Lipton & John Tehranian, 'Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation' (2014-15) 109(2) Northwestern University Law Review 383.
[97] Marci A. Hamilton, 'Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works' (1994-95) 42(2) Journal of the Copyright Society of the U.S.A. 93, 95.
[98] Sotiris Petridis, 'Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche' (2015) 32(8) Quarterly Review of Film and Video 728, 733.
[99] Peter Groves, *A Dictionary of Intellectual Property Law* (Edward Elgar 2011) 91.
[100] ibid.
[101] Caddick, Davies and Harbottle (n16) 4-24.
[102] Lipton and Tehranian (n96) 385.
[103] Michael Abramowicz, 'A Theory of Copyright's Derivative Right and Related Doctrines' (2005-2006) 90(2) Minnesota Law Review 317, 318
[104] Craig Joyce and others, *Copyright Law* (10th edn, Carolina Academic Press) 229. This is subject to the fair use or fair dealing defences as discussed below.

derivative work without such permission.[105] Evidently, if the derivative right were not controlled by the copyright holder, other people could use the copyright holder's work to the copyright holder's economic and moral detriment.[106] Technically, any person intent on transforming or adapting a work in any way ought to seek the copyright holder's permission.[107]

However, the idea/expression dichotomy ought to play the positive role of allowing potential creators to borrow ideas from existing works and create their own new works without having to seek the permission of the owner of the underlying work. This is the hallmark of the idea/expression dichotomy and this function is accentuated in today's post-modern culture, propelled by digital technologies and the internet, where derivative works are the norm.

Yet copyright holders continue to benefit from the whims of copyright law to the detriment of the general public.[108] There is a lack of clear principles to determine whether any new work will infringe a copyright work.[109] The reprieve which ought to be given by the idea/expression dichotomy is wanting due to the lack of clarity in the interpretation and application of the doctrine.

For instance, since the creation of new works can easily be argued as having borrowed from expressions rather than ideas, subsequent creators may be deterred from making such new works, particularly when they realise that they

[105] Joyce (n104). Fair use and fair dealing doctrines offer a defence from infringement liability arising in this regard.
[106] An author's "moral detriment" is in reference to "moral rights", particularly the right to integrity which is recognized in almost all jurisdictions with copyright laws. For a comprehensive exposition on the right to integrity and other moral rights see Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011).
[107] Joyce (n104).
[108] Lipton and Tehranian (n96).
[109] ibid.

might be sued for infringement.[110] This produces the chilling effect that creativity will decrease, or will be considered unlawful, if indeed not deterred completely.[111] Similarly, potential authors may incur high transaction costs if they have to seek legal advice or litigate issues on the idea/expression dichotomy.[112] To avoid such high transaction costs arising from the uncertainties flowing from the idea/expression dichotomy authors may seek to unnecessarily obtain licences from copyright owners;[113] whereas this may not be necessary as what they intend to borrow falls on the idea side of the divide.

Additionally, rights holders may wrongly, though successfully, sue authors who have only taken from their works what ought to be an idea and thus unprotectable. Such actions may stop the creation of works as well as have other unforeseen consequences.

A good example of the ramifications of the misinterpretation of the idea/expression dichotomy can be seen in the case of *Temple Island Collections Limited v New English Teas Limited.*[114] Here, the court extended copyright protection to a black and white photograph of a red bus travelling across Westminster Bridge created by the claimant.[115] The defendant produces tea, they asserted that their best-selling packs of tea included tins and cartons bearing images of English landscapes.[116] The claimant claimed that one of these images had infringed on their photograph.

[110] Khaosaeng (n19).
[111] ibid.
[112] Masiyakurima (n80) 564.
[113] Timothy Endicott and Michael Spence, 'Vagueness in the Scope of Copyright' (2005) 121(4) Law Quarterly Review 657, 665.
[114] [2012] EWPCC 1, [2012] ECDR 11.
[115] ibid.
[116] ibid [8].

It is argued that in granting the claim, the Patents County Court erroneously extended copyright protection to a photograph depicting a common place scene which ordinarily ought to fall on the ideas side of the divide, thus, effectively preventing the defendant from continuing to sell its best-selling packs of tea in that format.[117]

It is argued that a principled interpretation of the doctrine must be strived for so as to reasonably allow and indeed promote the existence and emergence of new creativity. To be sure, other mechanisms of copyright, particularly fair dealing and fair use may as well be means of encouraging creativity.[118] However, by focusing on the idea/expression dichotomy an *ex ante* approach which deals with copyright subsistence is taken; as opposed to an *ex post* approach which the exceptions offer.[119] In similar vein the public domain, which conceptually would offer fodder for creative endeavours, is not considered owing to its very broad formulation.[120] It is therefore maintained that the discussion on reforming copyright law for the encouragement of creativity is

[117] This decision may be contrasted with with the one rendered by the US District Court for the Southern District of New York in *Bill Diodato Photography v Kate Spade* 388 F.Supp.2d 382 (2005) where the court rejected a similar claim over copyright in a photograph depicting common place elements.

[118] Julie E. Cohen, 'Intellectual Property and Public Values: The Place of the User in Copyright Law' (2005) 74(2) Fordham Law Review 347, 374.

[119] Seagull Haiyan Song, *New Challenges of Chinese Copyright Law in the Digital Age: A Comparative Copyright Analysis of ISP Liability, Fair Use and Sports Telecasts* (Wolters Kluwer 2011) 61.

[120] In lay terms the public domain contains works free from copyright. Litman (n90) 975. In technical terms the public domain arises in two general instances. First, works for which the term of copyright has expired. Second, works that are categorically excluded from copyright protection; these are, primarily, public documents, such as judicial opinions and legislative enactments. Edward Samuels, 'The Public Domain in Copyright Law' (1993) 41(2) Journal of the Copyright Society of the USA 137, 151. Samuels however, notes that no concrete "theory of the public domain" has emerged owing to the diverse public policy objectives that underlie the doctrine. This has led to the doctrine being conceptualised and defined in various ways. For instance, Litman defines the public domain as a 'commons that includes those aspects of copyrighted works which copyright does not protect'. These include, 'ideas, methods, systems, facts, utilitarian objects, titles, themes, plots, scènes à faire, words, short phrases and idioms, literary characters, style, or works of the federal government'. Litman (n90) 965, 968, 992 – 993.

rightly focused on copyright law's "fundamental axiom", the idea/expression dichotomy.[121]

As has been noted above, the real problem regarding the doctrine is the interpretation of ideas.[122] This chapter now turns to the etymological and philosophical origins of the word idea. What emerges from this discussion is that there are diverse definitions, acceptations, descriptions and conceptualisations of what ideas are. Such differences have compounded the difficulties with the idea/expression dichotomy's interpretation, this would invariably have led to a chilling of creative endeavours a problem which this chapter seeks to prescribe a cure to.

6.3 Etymological and philosophical origins of the word "idea"

6.3.1 Origins of the word "idea"

The word idea although commonplace is rarely used with a clear sense of its meaning.[123] Idea is a transliteration of the Greek word *idein,* the root meaning of which is "see".[124] The word is said to have entered the English language in the seventeenth century,[125] and possessed two meanings.[126] The first was the Platonic conception of an idea as a perfect exemplar or paradigm.[127] The second meaning, which probably has its origin with Descartes, viewed an idea

[121] *Feist Publications* (n15).
[122] Recall Lord Halisham's words in *LB (Plastics)* (n46) that the distinction between ideas and their expressions 'all depends on what you mean by "ideas"'.
[123] Amaury Cruz, 'What's the Big Idea Behind the Idea-Expression Dichotomy? Modern Ramifications of the Tree of Porphyry in Copyright Law' (1990-1991)18(1) Florida State University Law Review 221.
[124] Paul Edwards (ed*), Encyclopedia of Philosophy,* vol 4 (Macmillan 1967) 118.
[125] ibid 118 -119.
[126] Cruz (n123) 223.
[127] ibid.

as a mental concept or image.[128] Oxford's unabridged dictionary offers thirteen main acceptations and many subcategories for the definition of idea.[129]

The principal acceptations are divided into three classes, these are; first, senses relating to or derived from the Platonic concept of general or ideal form as distinguished from its realization in individual instances; second, senses denoting a perceptible form or figure; and third, senses relating to the mind without necessarily implying an external manifestation.[130] The general definition of the word in the Oxford dictionary is, 'any product of mental apprehension or activity, existing in the mind as an object of knowledge or thought; an item of knowledge or belief; a thought, a theory; a way of thinking'.[131]

Plato was one of the earliest commentators to provide a detailed discussion of ideas.[132] A central claim of Plato's philosophy is that man's knowledge is innate.[133] Descartes as well propounded innatism. Locke, an Empiricist, rejected this view arguing instead that knowledge derives solely from experience.[134] Innatism and empiricism, thus, being the key schools of thought on ideas,[135] are highlighted in the discussion below. As Plato, Descartes and Locke are the principal thinkers in respect of these viewpoints their thoughts are

[128] Kurtz (n81).
[129] Oxford English Dictionary Online <http://www.oed.com/search?searchType=dictionary&q=idea&_searchBtn=Search> accessed 22nd May, 2017.
[130] ibid.
[131] ibid.
[132] David Ross, *Plato's Theory of Ideas* (Oxford Clarendon Press 1951) 12.
[133] Rogers (n66). Innatism may be viewed as a part of the wider school of thought known as Rationalism which in general argues that our concepts and knowledge are gained independently of sense experience. See, John Cottingham, *The Rationalists* (Oxford University Press 1988).
[134] Locke (n12) Book II, Chapter I, § 2.
[135] Janice Thomas, *The Minds of the Moderns: Rationalism, Empiricism and Philosophy of Mind* (Routledge 2014) 1.

underscored. Additionally, recent views from the "History of Ideas" are also discussed so as to offer a contemporary consideration of ideas.

6.3.2 Innatism

6.3.2.1 The Platonic concept of ideas

As noted above, one of the first thinkers to offer an exposition on ideas was Plato.[136] The Ancient Greek thinker's philosophy centres on the theory of ideas.[137] Plato's discussions on the word occurred mostly in his "dialogues"[138] including the *Euthyphro*, the *Phaedo*, the *Republic* and later in the *Timaeus*.[139] It is in the dialogue *Euthyphro* that the word *ἰδέα* (idea) probably first appears.[140]

The Platonic idea is metaphysical, it is a model or archetype of created things which dwell eternally in the "divine mind".[141] Therefore, for Plato one's subjective understanding of say a chair is not the same as the idea of a chair because the idea is an objective reality that is not the property of the individual mind.[142] The Platonist Plutarch in his collection of essays, *The Moralia*, offers a summary of this school of thought, noting:

> Idea is a bodilesse substance, which of it selfe hath no subsistence, but giveth figure and forme unto shapelesse matters, and becommeth the very cause that bringeth them into shew and evidence. Socrates and Plato suppose, that these Ideae bee substances separate and distinct from Matter, howbeit,

[136] Ross (n132).
[137] Friedrich Ueberweg, *History of Philosophy: From Thales to the Present Time* (George S. Morris tr, Charles Scribner's Sons 1889).
[138] Plato's wrote extensively in the form of dialogues, where characters argue a topic by asking questions of each other.
[139] See Ross (n132).
[140] ibid.
[141] Alexander H. Everett, 'History of Intellectual Philosophy' 29(64) The North American Review (1829) 67,110.
[142] Anthony Kenny, *A New History of Western Philosophy* (Clarendon Press, Oxford 2007) 46.

> subsisting in the thoughts and imaginations of God, that is to say, of Minde and Understanding. Aristotle admitteth verily these formes and Ideæ, howbeit, not separate from matter, as being the patterns of all that which God hath made. The Stoicks such as were the scholars of Zeno, have delivered, that our thoughts and conceits were the Ideæ.[143]

6.3.2.2 The Cartesian concept of ideas

Thus, under the Platonic conception, the word is used to express the real forms of the intelligible world, in contrast to the unreal images of the sensible.[144] The term "was lowered" by Descartes, who extended it to the objects of our consciousness in general.[145] The Cartesian conception of an idea is one whereby ideas in the mind represent objects outside the mind by resembling them. Descartes notes, 'Some of my thoughts are as it were the images of things, and it is only in these cases that the term "idea" is strictly appropriate - for example, when I think of a man, or a chimera, or the sky, or an angel, or God'.[146] Descartes affirms three sorts of ideas in one's mind, first, adventitious ideas which come to a person from without through the agency of the senses; second, there are factitious ideas which one constructs out of the materials furnished by sense; and last are innate ideas which one is born with.[147]

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[143] Plutarch of Chæronea, *The Philosophie, Commonlie Called, The Morals* (Philemon Holland tr, Arnold Hatfield 1603) 813.
[144] Everett (n141).
[145] William Hamilton, *Discussions on Philosophy and Literature, Education and University Reform* (Harper & Brothers Publishers 1861) 75. For a discussion on Aristotle's views on ideas within the context of the idea/expression dichotomy see Amy B. Cohen, 'Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements' (1990) 66 (1) Indiana Law Journal 175, 198-199
[146] Descartes (n67) 74.
[147] Francis Bowen, *Modern Philosophy: From Descartes to Schopenhauer and Hartmann* (Scribner, Armstrong & Company 1877) 28.

6.3.3 Empiricism

On their part the primary Empiricists of the seventeenth century, Locke and his eighteenth-century counterparts Hume and Berkeley aver that ideas refer to any of the contents of the mind. Precisely, Hume's conception of ideas was that they are 'the faint images of these [impressions] in thinking and reasoning'.[148] While for Berkeley ideas are whatever one is directly conscious of, be it a real or a mental representation of a sensation, a passion or operation of the mind.[149]

6.3.3.1 The Lockean concept of ideas

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

> that term which, I think, serves best to stand for whatsoever is the object of the understanding when a man thinks, I have used it to express whatever is meant by phantasm, notion, species, or whatever it is which the mind can be employed about in thinking; and I could not avoid frequently using it.[150]

For Locke, an idea therefore represents the most basic unit of human thought, incorporating under this term every kind of mental content. He argues that every idea is derived from experience, through either one of two sources - sensation or reflection.[151] Thus, propagating his famous *tabula rasa* (blank slate) argument according to which at birth the mind is a *tabula rasa*, a perfectly blank surface, on to which sensations are projected.[152] In this regard Locke's

[148] David Hume, *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects* (London, John Noon 1739) 7.
[149] Alexander Campbell Fraser, *Selections from Berkeley* (Clarendon Press Oxford 1899) 30.
[150] Locke (n12) Book I, Chapter I, § 8.
[151] ibid Book II, Chapter I, § 2.
[152] Frederick Ryland, *A Students Handbook of Psychology and Ethics* (W. Swan Sonnenchein Allen 1880) 98.

approach is divergent to that of Descartes and other proponents of Innatism who argue in favour of innate ideas which are inborn, belonging to the mind from its birth.[153]

Locke continues, distinguishing between two sub-sets of ideas that he calls "simple" and "complex".[154] A simple idea is one that, 'contains in it nothing but one uniform appearance, or conception in the mind, and is not distinguishable into different ideas'.[155] The mind is passive in the reception of these ideas and can neither make one on its own nor have any idea which does not consist of a simple idea.[156] Complex ideas arise when the mind 'exerts its powers over simple ideas' by combining, comparing or abstracting.[157]

Hume reiterated Locke's argument noting on his part:

> There is another division of our perceptions, which it will be convenient to observe, and which extends itself both to our impressions and ideas. This division is into simple and complex. Simple perceptions or impressions and ideas are such as admit of no distinction nor separation. The complex are the contrary to these, and may be distinguished into parts.[158]

6.3.4 The "History of Ideas"

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

[153] Thomson (n69).
[154] Locke (n12) Book II, Chapter II, § 1.
[155] ibid Book II, Chapter II, § 1.
[156] ibid Book IV, Chapter II, § 1
[157] ibid Book IV, Chapter II, § 1. The process by which complex ideas emerge is similarly the process by which new knowledge arises, as noted above.
[158] Hume (n61) Book I, Part I, § 1.

geographical, social, cultural and historical contexts.[159] The discipline can be dated to the work of Professor Arthur O. Lovejoy and his colleagues at Johns Hopkins University.[160]

For Lovejoy, the History of Ideas involves the identification of "unit-ideas", which are the component elements on which other ideas are built.[161] Lovejoy's study of the History of Ideas was an essential part of his philosophical effort to create a rational and intelligible account of the world.[162] Towards this end, he conceptualized the notion of the *Great Chain of Being*, by which the universe is seen as a rational place where all organisms are linked in a great chain extending from God through the angels to humans down to the least-complicated life-forms.[163] Lovejoy stopped short of defining or providing an explicit characterization of what he meant by an idea or unit-idea.[164]

Nevertheless, a former editor of *The Dictionary of the History of Ideas*, Professor Philip Wiener, offers a rather comprehensive discussion of what he views an idea as. He notes that the word idea has many meanings and each of these has its own history.[165] He offers four such meanings of the word. First, ideas mean whatever is seen by the mind in the original Greek sense of *idein*.[166] Second, whatever confronts the mind when it perceives or thinks.[167]

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[159] See, Mark Bevir, *The Logic of the History of Ideas* (Cambridge University Press 1999).
[160] Richard Macksey, 'The History of Ideas at 80' (2002) 117(5) Modern Language Notes 1083.
[161] Arthur O. Lovejoy, *The Great Chain of Being: A Study of the History of An Idea* (Harvard University Press 1936) 3.
[162] Daniel J Wilson,' Arthur O. Lovejoy and the Moral of The Great Chain of Being' (1980) 41(2) Journal of the History of Ideas 249, 250.
[163] Peter Watson, *Ideas: A History of Thought and Invention, From Fire to Freud* (HarperCollins 2005) 78.
[164] Louis O. Mink, 'Change and Causality in the History of Ideas' (1968) 2(1) Eighteenth-Century Studies 9.
[165] Philip Wiener, 'Some Problems and Methods in the History of Ideas' (1961) 22(4) Journal of the History Ideas 531, 532.
[166] ibid.
[167] ibid.

Wiener noted that this included sensations of qualities, feelings, impressions, memory images, or compounds of these.[168] It has been contended that this category is the largest in meaning and stretches from the tangible such as a table to the abstract such as beauty.[169] Third, is what Wiener terms “ideals”, by this he means ideas in the Platonic mode of an archetype of a created thing.[170] Last, is beliefs or judgments for instance ‘the idea of the primitive goodness of man before he was spoiled by civilization, the idea that progress is inevitable, or that all history is class struggle’.[171]

Wiener went on to explain his categorization in further detail noting that the third and fourth conception of idea above as ideal and as belief respectively, are opposed to conceptualisations one and two of ideas above epistemologically, because one and two, intuitions and images, respectively, refer to immediate experience whereas three and four, the desired ideal and the hypothetical belief, are more mediated by abstract symbols or concepts.[172] Wiener’s four-pronged typology has been viewed as useful in determining what an idea is. [173]

6.3.5 Other views

Additionally, other contemporary scholars and commentators have extended their views on ideas. One has said that ideas are products of forms of discourse or languages conceived as social constructs.[174] Another takes the view that ideas express beliefs or desires conceived as the properties of individuals.[175]

[168] ibid 533.
[169] Thomas Bredsdorff, ‘Lovejoy's Idea of "Idea"’ 8(2) New Literary History 195, 197.
[170] Wiener (n165) 532.
[171] ibid.
[172] ibid.
[173] Bredsdorff (n169).
[174] Mark Bevir, ‘Mind and Method in the History of Ideas’ (1997) 36(2) History and Theory 167.
[175] ibid.

Courts on their part have traditionally shied away from offering a precise definition of idea.[176] It is argued in this chapter that this is in fact one of the difficulties with the interpretation of the idea/expression dichotomy. Despite this general reluctance, one court has defined an idea as 'any conception existing in the mind as a result of mental understanding, awareness, or activity'.[177]

All in all, what is clear from the above discussion is that there are varied viewpoints on what ideas are. Such differences would have invariably made the idea/expression dichotomy's interpretation more difficult and this would have led to a chilling of creativity, a problem which this chapter seeks to offer a cure to.

6.4 National approaches to the idea/expression dichotomy

6.4.1 Curing the Problem

This chapter argues for a principled interpretation of the idea/expression dichotomy which would adequately avail ideas – the basic building blocks of creation – to potential authors for further creation. It is contended that an arbitrary construction of the doctrine is detrimental to the creation of new works.[178] For instance, potential authors may shy away from creating new works as it can be argued that they have borrowed from expressions rather than ideas thus exposing themselves to law suits for copyright infringement.[179] Also, expenses such as those involved in seeking legal advice or in the litigation of issues revolving around the idea/expression dichotomy are detrimental to the creation of new works.[180] These issues arise not from the doctrine in its own

[176] K.P. Abinava Sankar and Nikhil L.R. Chary, 'The Idea-Expression Dichotomy: Indianizing an International Debate' (2008) 3(2) Journal of International Commercial Law and Technology 129.
[177] *Gund, Inc. v Smile International, Inc.* 691 F. Supp. 642, 644 (E.D.N.Y. 1988).
[178] Khaosaeng (n19).
[179] ibid.
[180] Masiyakurima (n80) 564.

right, rather from its deployment.[181] In this regard what has been noted to be the key issue is how ideas are interpreted.[182]

The following discussion exposes how ideas have been construed, within the context of the doctrine in Kenya, the UK and the US. It will be noted that "idea" as construed by the law is markedly different from the ordinary English and philosophical meaning of idea as discussed in the foregoing part. This, it is argued, has aggravated the problem of finding a proper interpretation of the word and accordingly the bona fide divide between ideas and expressions. As a cure to these problems it is argued that Kenya would benefit from a statutory provision, similar to that of the US, clearly demarcating those elements of a work that do not receive copyright protection under the rubric of "ideas" albeit taking into consideration the fact that the creative industries in Kenya are highly derivative of its culture, specifically its TCEs.[183]

This would proffer simplicity and clarity in the interpretation of the doctrine and protect the "field of ideas"[184] for the use of creators. As seen from the discussion on the etymological and philosophical origins of the word idea above, there is little clarity on what it actually means and therefore a statutory provision setting out the scope of the idea/expression dichotomy's application is a welcome practical reform.

[181] Colston and Galloway (n26) 288.
[182] As aptly stated by Lord Hailsham 'it all depends on what you mean by "ideas"" *LB (Plastics)* (n46).
[183] See note 14.
[184] Hughes (n54) 315.

6.4.2 Kenya

In Kenya the idea/expression is not provided for explicitly in legislation.[185] Commentators on Kenyan copyright law have however, argued that for a work to be copyrightable or, in the language of the Kenya Copyright Act 2001 ("Kenya Copyright Act"), 'eligible for copyright',[186] it must be original; and it is the expression, not the idea, which ought to be original.[187] IP rights receive explicit mention in Kenya's Constitution. Under article 11(2)(c) the State is required to, *inter alia*, 'promote the intellectual property rights of the people of Kenya'.[188] Kenya's Constitution contains a rather elaborate Bill of Rights in which the Freedom of Expression is provided for. It states:

> Every person has the right to freedom of expression, which includes -
>
> (*a*) freedom to seek, receive or impart information or ideas;
>
> (*b*) freedom of artistic creativity; and
>
> (*c*) academic freedom and freedom of scientific research.[189]

As has been noted above one of the benefits of the idea/expression dichotomy is that it promotes freedom of expression.[190] Article 33 (1) (a) of the Constitution, cited above, explicitly requires the State to grant to persons the right 'to seek, receive or impart information or ideas'. The idea/expression

[185] See generally the Kenya Copyright Act, Act No. 11 of 2001

[186] Section 22 (3) (a). In *Sapra Singh v Tip Top Clothing* [1971] EA 489 the Kenyan court confirmed that the phrase 'eligible for copyright' conferred copyright on works.

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

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

[189] Constitution of Kenya, article 33(1).

[190] See, for instance, McGinty (n34) 1113 denoting the argument that although the idea/expression dichotomy is not explicitly required by the U.S Constitution there is a First Amendment right (A right to the freedom of speech/expression) to express any particular idea even if someone else has said that idea first.

dichotomy "breathes life into" the right to information, allowing for creative re-use of content.[191] Similarly, the freedom of artistic creativity, academic freedom and freedom of scientific research can only be furthered by the non-protection of ideas.[192] Additionally, Kenya is a party member of TRIPS[193] and has also all signed the WCT.[194] As noted above both of these instruments provide for the doctrine explicitly thus providing a further basis for the application of the dichotomy in the country.

A recent amendment to Kenya's Copyright Act, the Kenya Copyright (Amendment) Act 2019,[195] introduced a provision that may be construed as containing the undertones of the idea/expression dichotomy, or perhaps even a statement of the doctrine itself. Regarding works of architecture, the Kenya Copyright Act now provides that:

> Copyright in a work of architecture shall also include the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form or in any form recognizably derived

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

[192] See Bently and Sherman (n20) 183 – 184 wherein it is noted that, 'The rule on non-protection of ideas is thus primarily directed at leaving free from monopolization the building blocks of culture, communication, innovation, creativity and expression'. See also Henry Nampandu, 'Using Copyright Law to Enhance Education for Economic Development: An Analysis of International and National Educational Exceptions, With Specific Reference to Uganda (Doctorate, University of London 2015) 179 specifically making the argument that the idea/expression dichotomy is important in the promotion of access and utilisation of education materials especially in resource constrained less developed countries.

[193] (WIPO website) <http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22> accessed 15 January, 2019.

[194] (WIPO website) <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16> accessed 15 January 2019. Although the treaty has yet to be ratified in the country.

[195] The Kenya Copyright Act was recently amended by the Kenya Copyright (Amendment Act) 2019 which came into force in October 2019. The primary purposes of this amending Act is to provide digital copyright reform, strengthen the collective management of copyright works and implement the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. The Amendment Act also provides numerous amendments to the definitions of various words and terms. The 2001 Act remains the principal law.

> from the original; but the copyright in any such work shall not include the right to control the reconstruction of a building to which that copyright relates in the same style as the original.[196]

The word "style" as used in the provision above may be related to the word idea within the context of the idea/expression dichotomy. This has been seen in the UK where the High Court in *IPC Media v Highbury-Leisure Publishing*[197] noted that 'The law of copyright has never gone as far as to protect general themes, styles or ideas'.[198] Similarly in *Norowzian v Arks*[199] the Court of Appeal held that there is no copyright in filming and editing styles and techniques. As is elaborated below in the discourse on the doctrine in the UK and the US, the construction of idea as meaning numerous related concepts is the current interpretation of the word within the doctrine. Whereas the above provision is limited to architectural works it is indicative of the fact that the copyright law of Kenya is appreciative of the idea/expression dichotomy.

Similarly, the doctrine has been recognised in case law.[200] To begin with, the Supreme Court, which is the highest judicial organ in the country,[201] and which was established in 2011 after the enactment of the country's new Constitution in August 2010, has neither dealt with a case on the idea/expression dichotomy nor made any pronouncement on the doctrine. However, in the only case in which the Supreme Court has substantially considered issues of copyright, the

[196] Kenya Copyright Act, section 26(2) (emphasis added).
[197] [2004] EWHC 2985 (Ch), [2005] FSR 20.
[198] ibid [14] (Laddie J).
[199] [1999] EWCA Civ 3018, [2000] FSR 363.
[200] Records of the Kenyan cases highlighted herein are obtained from the Kenya Law Reports, which is the most comprehensive compilation of case law in Kenya. The Kenya Law Reports, available online at <www.kenyalaw.org> accessed 4th November, 2019, are prepared and presented by the National Council for Law Reporting – Kenya, a semi-autonomous state corporation in the Judiciary.
[201] Article 163 (7).

court re-emphasised the relationship between the freedom of expression and the right of information. This was in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*[202] where the Supreme Court declared that 'The freedom of expression gives boost or impetus to the public right to information'.[203]

The High Court has provided more express pronouncements on the doctrine, albeit, in significantly less elaborate terms than the courts in the UK and US. This is seen, for instance, in the High Court case of *Hoswell Mbugua Njuguna T/A Fischer and Fischer Marketing Concepts v Equity Bank Limited & another*[204] where the court declared:

> Copyright protects the process in which an idea comes to fruition. It does not protect the idea itself. It is the copying of the process of attaining that idea which is protected…. Indeed, different people have similar ideas in respect of or about similar issues. It would be creating a dangerous precedent if a person who thinks of an idea seeks to restrain others from entertaining a similar idea in their minds where different methods could be utilised to conceptualise that idea. [205]

Similarly, in *Dedan Maina Warui & Another v Safaricom,*[206] citing the English decisions of *Baigent v Random House Group Limited*[207] and *Designers Guild*

[202] [2014] eKLR, Petition No. 14 of 2014.
[203] ibid 2014 [396] (Rawal DCJ).
[204] [2015] eKLR, Civil Suit No 599 of 2010. On the whole, the Court of Appeal appears not to have offered any exposition on the doctrine. During the appeal of this particular case, the Court of Appeal merely quoted the trial court's formulation of the doctrine.
[205] ibid [36], [37] (Kamau J).
[206] [2014] eKLR, Misc. Civil Application No. 292 of 2013.
[207] [2007] EWCA Civ 247, [2007] FSR 24.

Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC),[208] the Kenyan court noted:

> That brings me to the point where I should recognize the dichotomy in opinion which exists on the concept of ''idea expression''; where the copyright law only seeks to protect the expression of an idea and not the underlying idea itself, method or process. See the case of *Baigent v Random House Group Limited* (2007) FSR 24 and *Designers Guild Limited v Russell Williams (Textiles) Limited* (2001) FSR 11. It could be said that copyright seeks to protect the author's actual expression and not the ideas, and it does not therefore forbid independent creation.[209]

The doctrine was also recognised in *Alternative Media Limited v Safaricom Limited*[210] but again without much exposition.

The doctrine is therefore not well developed in Kenyan copyright law. Whereas the courts acknowledge its existence and have introduced it into Kenyan law through their pronouncements, there are little, if any, discussions on how it ought to be applied.

This lack of clarity and principled approach has impacted the determination of cases. For instance, in *Nonny Gathoni Njenga v Catherine Masitsa*[211] the court allowed a temporary injunction restraining the defendant from infringing the plaintiff's "literary" copyright in the running order of a television show 'Weddings

[208] [2000] UKHL 58, [2000] 1 WLR 2416.
[209] *Dedan Maina Warui* (n335) [19] (Gikonyo J). It is noteworthy that this dictum also derives from an application for interim injunction and there is no record of the matter having proceeded to trial or having been determined.
[210] [2004] eKLR, Civil Case 263 of 2004.
[211] [2015] eKLR, Civil Case 490 of 2013.

with Nonny Gathoni'.[212] Generally, television show formats are not regarded as being protected by copyright law,[213] and plausibly they fall on the ideas side of the dichotomy.[214] The leading authority on this is the majority decision of the Privy Council in *Green v Broadcasting Corp of New Zealand.*[215] Thus, the Kenyan court's ruling, without much justification, has effectively extended copyright protection to television show formats as literary works. This decision may have the effect of denying prospective producers of similar television shows an opportunity to produce such shows.

6.4.3 United Kingdom

The long-established principle that copyright protection is not granted to the ideas which are embodied in or which may have inspired a work has never received explicit expression within the legislative framework in the UK.[216] Instead, it is noted that the doctrine emerged from the eighteenth century discussions on common law property.[217] This was seen in particular in *Millar v Taylor*[218] where the court infamously held that there is a perpetual common law

[212] This appears to have been the only category for the Plaintiff to have claimed under as until the recent amendments to the Kenya Copyright Act through the Kenya Copyright (Amendment) Act of 2019, Kenya copyright law did not make provision for the protection of dramatic works; which was the category claimed under in the seminal case on copyright protection of television show formats, *Green v Broadcasting Corp of New Zealand* [1989] RPC (CANZ), 477.
[213] Bart Jan Gorissen, Joao Cunha and Caroline Freire, 'Television Format Protection: Global Issues under the Spotlight in Brazil' (2015) 26(8) Entertainment Law Review 281. However, following the recent decision in *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd & Anor* [2017] EWHC 2600 (Ch) television show formats may be eligible for copyright protection as dramatic works under UK law upon the obtaining of certain minimum standards.
[214] Ute Klement, 'Protecting Television Show Formats under Copyright Law – New Developments in Common Law and Civil Law Countries' (2007) 29(2) European Intellectual Property Review 52, 53.
[215] [1989] 2 All ER 1056 (PC).
[216] Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006) 112. However, as the non-protection of ideas is specifically provided for under article 1(2) of the European Union "Computer Programs Directive" (Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, it is arguable that the principle does in fact have statutory application in the UK. However, it is clear that in its implementation of the Directive the UK did not transplant the said article 1(2) into the UK Copyright, Designs and Patents Act 1988 ("UK CDPA 1988").
[217] Bently and Sherman (n20) 181.
[218] (1769) 4 Burrow 2303, 98 ER 201

copyright. In this case Yates J., dissenting, noted that, 'Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion'.[219] Judge Yates argued that once the author has set his "birds" (ideas) at liberty, he cannot prevent another from claiming them.[220]

Five years later the House of Lords, effectively, reversed the *Millar* decision in *Donaldson v Beckett.*[221] Regarding ideas, Lord Camden agreed with Yates J. noting that the common law provided no remedy for the recovery of incorporeal ideas independent of the material to which they are affixed.[222]

Similarly, one commentator of this period noted that:

> [H]e who obtaineth my copy may appropriate my stock of ideas, and by opposing my sentiments, may give birth to a new doctrine; or he may coincide with my notions, and by employing different illustrations, may place my doctrine in another point of view: and in either case he aquireth an exclusive title to his copy, without invading my property: for though he may be said to build on my foundation, yet he rears a different superstructure.[223]

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[219] ibid 2356.
[220] Libott (n32) 737.
[221] The Hansard Report of *Donaldson* v *Beckett* , reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950 (1774).There's however, discontent as to whether *Donaldson* did in fact repudiate common law copyright; the argument being that the actual holding of the case was that the author's common-law right to the sole printing, publishing and vending of his works, a right which he could assign in perpetuity is taken away and supplanted by the Statute of Anne. The judges did not use the terms "copy" or "copyright" but spoke instead of the right of "printing and publishing for sale." Patterson (n2) 173 – 174.
[222] The Hansard Report of *Donaldson* v *Beckett,* reported as 'Proceedings in the Lords on the Question of Literary Property', 14 Geo III 1st Ser. 17 950, 954, 997 (1774).
[223] Anon., *A Vindication of the Exclusive Right of Authors, to their own works: A subject now under consideration before the 12 judges of England* (London, Griffiths 1762).

These observations were made in essence as a response to complaints that copyright, and in particular common law copyright, creates a monopoly in knowledge.[224] In 1735, some years before *Millar* and *Donaldson* a small group of artists and engravers put a petition before the House of Commons concerning '[t]he case of designers, engravers, etchers &c'.[225] Their lobbying efforts were a response to the enactment of the Statute of Anne in 1710 which offered copyright protection only to literary works, particularly books.[226] The outcome of their labours was the Engravers' Act 1735.[227] In their petition, the engravers sought to make a case as to why they should be offered protection for their designs.[228] They argued that it was the artists' skill and labour that gave value to a work of art.[229] Central to their argument was the contention that everyone undoubtedly had an equal right to every right.[230]

However, as a foreshadowing of the idea/expression dichotomy, they noted that whereas two different artists may take the same subject, they would produce different works wherein the form in which each was rendered would vary so greatly as to easily denote each work as original.[231] It was self-evident to the engravers that one person's design, though he may take the same subject, that is, idea, as another, would be just as unique and original as his handwriting.[232]

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[224] Bracha (n24) 170.
[225] The artists and engravers responsible for the petition were a small group led by William Hogarth.
[226] Ronan Deazley 'Commentary on the Engravers' Act (1735)', in L. Bently & M. Kretschmer *(eds) Primary Sources on Copyright (1450-1900)* <http://www.copyrighthistory.org> accessed 15 January, 2019.
[227] The full title of the Engravers' Act is "An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein mentioned" 1735, 8 Geo.II, c.13.
[228] Deazley (n226).
[229] ibid.
[230] ibid.
[231] ibid.
[232] ibid.

Today, the principle has been recognised at the highest level, with the House of Lords describing it as "trite law"[233] and subsequently with the Court of Appeal upholding the doctrine as a 'a cliché of copyright law'.[234] It has also been expressly provided for in international and regional instruments which the UK applies including TRIPS,[235] WCT[236] and the Computer Programs Directive,[237] therefore providing a further argument for the doctrine's application in the UK.

However, to be sure, some have argued that in UK copyright law, aphorisms such as "there is no copyright in an idea" ought to be avoided.[238] Others have even gone to the extent of stating that there is no such rule as the idea/expression dichotomy in UK copyright law.[239] The general contention of these commentators is that an idea is not the subject of copyright, not because there is any special rule to that effect – the UK Copyright, Designs and Patents Act 1988 mentions no such rule – but because a mere concept in someone's head is not a "work" at all;[240] or that they are not original and the task for courts in the UK is to protect original works.[241]

All the same, it is submitted that the numerous statements propounding the doctrine including, by the House of Lords and the Court of Appeal; in international and regional treaties and conventions that the UK is a party to; and by leading UK copyright law scholars all persuasively demonstrate an existence

[233] *LB (Plastics)* (n46) 160 (Lord Halisham).
[234] *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482, [2015] ECDR 17, [20] (Lewison LJ).
[235] Article 9(2).
[236] Article 2.
[237] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs ("Computer Programs Directive", article 1(2).
[238] *IBCOS Computers Ltd and Another* (n15).
[239] See, Laddie, Prescott & Vitoria (n15) 3.80.
[240] ibid 4.52.
[241] ibid 3.74.

and a general acceptance of the doctrine as a distinct feature of UK copyright law.

Whereas the principle's existence and applicability is now commonly accepted, what has proven to be rather difficult is its actual application.[242] The difficulty has been in classifying a thing as either an idea or as an expression of an idea.[243] It has been argued that there is a very thin line between an idea and an expression and that indeed nobody will ever be able to distinguish between the two.[244] Others note that no clear principle can be laid down in drawing the line between idea and expression.[245] The House of Lords has on its part declared that the distinction lies in what is meant by ideas.[246]

Courts have construed the doctrine in a number of ways, dating back to more than a hundred years.[247] In *McCrum v Eisner*[248] the court noted that 'Copyright, however, does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression'.[249] This conceptualisation of the doctrine was offered almost verbatim in *Harman Pictures v Osborne*[250] where the court noted that 'there is no copyright in ideas or schemes or systems or methods: it is confined to their expression'.[251] In *Baigent v The Random House Group*[252] it was held that it was not an infringement to 'replicate or use items of information,

[242] McGinty (n34) 1113.
[243] ibid.
[244] *Nichols v Universal Picture Corporation* 45 F. 2d [119], [121] (2d Cir. 1930) (Justice Hand).
[245] Liu (n53) 96.
[246] *LB (Plastics)* (n46).
[247] Laddie, Prescott & Vitoria (n15) 3.74.
[248] [1917] 87 LJ 99 (Ch).
[249] ibid 102 (Peterson J).
[250] [1967] 1 WLR 723 (Ch).
[251] ibid 728 (Goff J).
[252] [2006] EWHC 719 (Ch).

facts, ideas, theories, arguments, themes and so on derived from the original copyright work'.[253]

In *Norowzian v Arks*[254] the Court of Appeal held that there is no copyright in filming and editing styles and techniques. The High Court on its part held in *IPC Media v Highbury-Leisure Publishing*[255] noted that 'The law of copyright has never gone as far as to protect general themes, styles or ideas'.[256] Similarly, in *Sawkins v Hyperion Records*[257] the Court of Appeal stated that copyright 'does not prevent use of the information, thoughts or emotions expressed in the copyright work'.[258] In *Ravenscroft v Herbert and New English Library Limited*[259] the court noted that there was no copyright in historical facts. Whereas in *Springfield v Thame*[260] Joyce J noted *obiter* that '…there is no copyright in news, only in the manner of expressing it'.[261] Thus, courts have viewed the non-protected aspect of the dichotomy as including – ideas, schemes, systems, methods, information, facts (including historical facts), theories, arguments, themes, styles, news of the day, thoughts and emotions among others.

The doctrine received elaborate consideration in the House of Lords' decision in *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC).*[262] Here, Lord Scott recognised the principle by stating that, 'It is not a breach of copyright to borrow an idea, whether of an artistic, literary or musical nature,

[253] ibid [146] (Mummery LJ).
[254] [1999] EWCA Civ 3018, [2000] FSR 363.
[255] [2004] EWHC 2985 (Ch), [2005] FSR 20.
[256] ibid [14] (Laddie J).
[257] [2005] EWCA Civ 565, [2005] 1 WLR 3281.
[258] ibid [29] (Mummery LJ).
[259] [1980] RPC 193 (Ch).
[260] [1903] 89 LT 242 (Ch).
[261] ibid.
[262] [2000] UKHL 58, [2000] 1 WLR 2416.

and to translate that idea into a new work'.[263]. However, Lord Scott did not offer more commentary with regard to the principle's application; this task was taken up eruditely by Lord Hoffmann who offered what is arguably the leading UK pronouncement on the idea/expression dichotomy. Lord Hoffmann began his premise by agreeing that indeed there is no copyright in ideas which are merely in one's head and have not been expressed in copyrightable form, however, he noted, the distinction between ideas and expression cannot be as trivial as this.[264]

To elaborate on where the distinction lies, he put forward two prepositions. First, certain ideas in a copyright work may not be protected because they do not have any connection with the literary, dramatic, musical or artistic nature of the work.[265] For instance, Lord Hoffman noted, there would be no copyright protection for a system or invention arising out of a literary work which describes such system or invention.[266] The same is true, he went on, of an artistic work that expressed an inventive concept – others would be free to express it in works of their own in the absence of patent protection.[267] On this point he gave the specific example of the case of *Kleeneze Ltd v DRG (UK) Ltd*[268] where the court had found no copyright infringement in a drawing of a letterbox draught excluder as the defendant had merely taken the concept of the draught excluder.

[263] ibid 2432.
[264] ibid 2422.
[265] ibid 2423.
[266] ibid.
[267] ibid.
[268] [1984] FSR 399 (Ch).

Second, ‘certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work’.[269] For this preposition Lord Hoffmann offered the example of the case of *Kenrick v Lawrence*,[270] where the court held that the owner’s copyright in the drawing of a hand holding a pencil, and drawing a cross into a square could not prevent others from making similar drawings.[271] Lord Hoffmann closed this argument with the parable, ‘Copyright law protects foxes better than hedgehogs’.[272] In other words, the more abstract and simple an idea is the less likely it is to represent a substantial part of the allegedly copied work.[273]

On close scrutiny Lord Hoffmann’s two prepositions can be open to criticism. With regard to his first preposition, Lord Hoffmann’s exposition seems to be incomplete in that it disregards “other” aspects of a work, which as noted above are not protected including – techniques, styles and methods among others.[274] On the second preposition it has been argued that Lord Hoffmann apparently meshes the distinction between ideas and expressions with the test of originality.[275] This is unwarranted as originality in copyright law is only related to the expression of ideas rather than to ideas themselves.[276] This was the holding of the court in *University of London Press Ltd v University Tutorial Press Ltd*[277]

[269] *Designers Guild Limited* (n208) 2423.
[270] [1890] 25 QBD 99.
[271] ibid 106.
[272] *Designers Guild Limited* (n208) 2423. It is generally assumed that Lord Hoffmann had in mind the essay by Isaiah Berlin, entitled *The Hedgehog and the Fox* (1953) in stating this parable. Meaning, in effect, that it is easier to recognise originality in detail than in a basic concept. See, L T C Harms, ‘‘The Hedgehog, the Fox and Copyright - A Diversion’ (2013) (3) Journal of South African Law 513 for an analysis of the history of the parable of the fox and the hedgehog through literature, science and philosophy.
[273] *Designers Guild Limited* (n208) 2423.
[274] Bently and Sherman (n20) 181.
[275] Liu (n53) 80.
[276] ibid 79.
[277] [1916] 2 Ch 601.

where Peterson J observed that, 'Copyright Acts are not concerned with the originality of ideas, but with the expression of thought…The originality which is required relates to the expression of the thought'.[278]

Overall, Lord Hoffmann's articulation of the doctrine has been viewed as being helpful particularly as it recognises that the vagueness of the concept of ideas is likely to lead to misinterpretation of the nature and scope of the exclusion.[279] Indeed, the exclusion is quite narrow and does not encompass everything that might be referred to, in everyday speech, as an idea.[280] However, subsequent cases indicate that lower courts have opted for a wider exclusion as a tool for dismissing speculative claims.[281]

This was seen, for instance, in *Baigent v Random House*[282] where the Court of Appeal, upheld the decision of the High Court, in ruling that the popular novel *The Da Vinci Code* did not infringe the claimants' book, *The Holy Blood and the Holy Grail.* Mummery LJ in particular noted that copyright protection does not allow persons to, 'monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material, theories propounded, general arguments deployed, or general hypotheses suggested (whether they are sound or not) or general themes written about'.[283]

In this regard it has been opined that Lord Hoffmann as well as other judges have failed to recognise that the idea/expression dichotomy is in fact based on

[278] ibid 608.
[279] Bently and Sherman (n20) 183.
[280] ibid.
[281] ibid 184.
[282] [2007] EWCA Civ 247, [2007] FSR 24.
[283] ibid [156].

public policy.[284] Indeed, it has been argued that ever since the enactment of the Statute of Anne in 1710 for the 'encouragement of learning'[285] copyright law has propagated political goals.[286] Thus, the argument goes, the exclusion of ideas from the realm of copyright protection, is but a judicial technique in the furtherance of these public policy goals that offers a balance between the competing interests of copyright holders and the public.[287]

6.4.4 United States

In the US, the idea-expression dichotomy is said to have originated in the leading Supreme Court case of *Baker v Selden.*[288] Here, in ruling for a defendant accused of reproducing from the plaintiff's book, forms necessary for the use of a bookkeeping system, Justice Bradley stated that:

> Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way….Now whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein.[289]

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[284] Bently and Sherman (n20) 183.
[285] The full title of the Statute of Anne, also known as the Copyright Act 1710, is, 'An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned'. The preamble of the Act made a long reference to the goal of the 'encouragement of learned men to compose and write useful books'. 8 Anne, c. 21.
[286] Bracha (n24) 170.
[287] Bently and Sherman (n20) 183.
[288] 101 U.S. 99 (1879). To be sure, the relationship between *Baker* and the doctrine is more complex than intimated. The court did not distinctly discuss what we now know as the precepts of the doctrine. In this regard Nimmer argues that the decision in *Baker* did not in fact put forward the idea/expression dichotomy but rather was an inquiry as to whether the defendant's works were substantially similar to the plaintiff's. According to Professor Nimmer, this limited explanation is the true holding of *Baker*, with the other explanations representing expansions by later courts. All the same, Nimmer acknowledges the importance and validity of the idea-expression dichotomy generally. *Nimmer on Copyright*, vol 1, paras 2.18[B], 2.18[C] (1988).
[289] ibid 100-101

Since *Baker* numerous other courts have upheld copyright's non-protection of ideas.[290] Today, the idea/expression dichotomy is codified in section 102 (b) of the US Copyright Act of 1976 ("US Copyright Act") which provides that:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[291]

On the whole, it has been argued that the situation of the idea/expression dichotomy in section 102 (b) of US Copyright Act has aided in its interpretation.[292] However, it is clear from commentators and courts alike that the codification of the doctrine has not been a panacea for the controversies surrounding it.[293] The courts have been criticised for not clearly defining the terms ideas and expressions thus, facing difficulties in the application of the doctrine.[294] Such criticism notwithstanding the courts in the US have devised noteworthy devices for the application of the doctrine, key of which are, the merger doctrine, *scènes à faire* and the abstractions test.

The merger doctrine notes that where an idea can only reasonably be expressed in one or very few ways, such an expression will not be protected by

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[290] For instance, *Holmes v Hurst* 174 U.S. 82 (1899); *Nichols v Universal Pictures Corporation* 45 F.2d 119 (2d Cir. 1930); *Harper & Row v Nation Enterprises* 471 U.S. 539 (1985); *Feist Publications v Rural Telephone Services Company* 499 U.S. 340 (1991); *Mazer v Stein 347 U.S. 201 (1954); Golan v Holder* 565 U.S. 302 (2012) and recently *Folkens v Wylands Worldwide* (9th Cir. 2018).

[291] As highlighted below, it has been argued that this provision actually goes beyond the idea/expression dichotomy. Pamela Samuelson, 'Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection' (2005-2006) 85(7) Texas Law Review 1921, 1922.

[292] Masiyakurima (n80) 570.

[293] ibid.

[294] Richard H. Jones, 'The Myth of The Idea/Expression Dichotomy in Copyright Law' (1990) 10(3) Pace Law Review 551, 569.

copyright.[295] The reasoning behind this rule is that where the idea and expression cannot be separated, protecting the expression amounts to protecting the idea, an unacceptable outcome.[296] In other words, in such situations, the idea and its expression will merge, leaving behind no protectable expression in copyright.[297]

Scène à faire is a French phrase which literally means “scene for action”.[298] As a concept in copyright law it refers to, ‘standard or general themes that are common to a wide variety of works and are therefore not copyrightable’.[299] The Court of Appeals for the Ninth Circuit in *Ets-Hokin v Skyy Spirits*[300] declared that under the doctrine of *scènes à faire,* ‘courts will not protect a copyrighted work from infringement if the expression embodied in the work necessarily flows from a common place idea; like merger the rationale is that there should be no monopoly of the underlying unprotectable idea’.[301]

Justice Learned Hand proposed the "abstractions" test[302] in the Court of Appeals for the Second Circuit case of *Nichols v Universal Picture Corporation.*[303] He propounded that:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left

[295] Joyce (n104) 122.
[296] Stephen M McJohn, *Copyright: Examples and Explanations* (4th edn, Wolters Kluwer 2015) 116.
[297] Saw (n42).
[298] Jennifer Speake and Mark LaFlaur*, The Oxford Essential Dictionary of Foreign Terms in English* (Oxford University Press 2002) <http://www.oxfordreference.com> accessed 15 January 2019.
[299] Bryan A. Garner (ed), ***Black’s Law Dictionary*** (Thomson Reuters 2009) 1462.
[300] 225 F. 3d 1068 (9th Cir. 2000).
[301] ibid 1075 (Circuit Judge McKeown).
[302] Liu (n53) 77.
[303] 45 F. 2d 119 (2d Cir. 1930).

> out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended."[304]

Evidently the debate on the idea/expression dichotomy and particularly how ideas may be differentiated from expressions is a robust one.[305] As seen above judges and commentators have offered their views in the hope of clarifying issues. In spite of such erstwhile efforts no principled approach of delineating ideas *vis-à-vis* expressions has emerged.

This general lack of clarity has led to the presumption that courts often distinguish between ideas and expressions intuitively as they seek the most fruitful competitive balance.[306] This chapter argues that the lack of clarity and exactness in the interpretation of the dichotomy produces the chilling effect of a decrease in creativity.

6.5 A way forward

Whereas the idea/expression dichotomy is indeed a mainstay of copyright law, recognised and applied in each of the three jurisdictions discussed above, and in actual fact in almost all jurisdictions with copyright laws,[307] its formulation and

[304] ibid 121.
[305] For instance, one commentator, Allen Rosen, has offered a four-pronged typology for assessing different ways of interpreting this dichotomy. These four approaches are (i) The Style/Content Contrast (ii) Fixed/Unfixed Ideas (iii) Ideas and Language (iv) General and Specific Ideas. Rosen (n41).
[306] Alan L. Durham, 'Speaking of the World: Fact, Opinion and the Originality Standard of Copyright' in Robert F. Brauneis (ed), *Intellectual Property Protection of Fact-based Works* (Edward Elgar 2009) 155.
[307] Eleonora Rosati, *The Idea/Expression Dichotomy at Crossroads: Past and Present of a Concept* (Lambert Academic Publishing) 13.

interpretation is wanting.[308] The issue of contention is how to identify ideas or rather what ideas are. As summarised aptly by Lord Hailsham, 'it all depends on what you mean by "ideas"'.[309]

In light of this disconcertion, it is argued that Kenya would benefit from a statutory provision clearly delineating what copyright law does not protect, under the rubric of "ideas". In this regard, the position in the US is attractive. It has been contended that the rooting of the doctrine in statute, has enabled the US to be more vigilant than the UK in preserving the dichotomy.[310] As seen, section 102(b) of the US Copyright Act states:

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

While it has been argued that this section goes beyond the "idea/expression dichotomy" strictly,[311] it is argued that such a "wide" provision would be a viable and welcome reform to Kenyan copyright law for the encouragement of creativity. However, the Kenyan provision would have to take cognisance of the importance of TCEs on creativity in Kenya.

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[308] Colston and Galloway (n26) 288.
[309] *LB (Plastics)* (n46).
[310] Noam Shemtov, 'Circumventing the Idea/Expression Dichotomy: The Use of Copyright, Technology and Contract to Deny Access to Ideas' in Guido Westkamp (ed), *Emerging Issues in Intellectual Property: Trade, Technology and Market Freedom: Essays in Honour of Herchel Smith* (Edward Elgar 2007) 93.
[311] Samuelson (n291).

It will be recalled that in Chapter two it was noted that TCEs heavily influence contemporary art in Kenya.[312] Currently TCEs are regulated under a *sui generis* Act, the Protection of Traditional Knowledge and Cultural Expressions Act 2016 ("TCEs Act"). It was argued that the TCEs Act locks-in ideas and strongly protects existing property rights.[313] By doing so, the Act panders to the dictates of the economic domain, as conceptualised under the theory of social-threefolding.

Thus, so as to improve the regulation of TCEs, particularly their protection on the one hand and the encouragement of creativity on the other, it was argued that the regulation of TCEs in Kenya ought to be brought under the Kenya Copyright Act. This would subject TCEs to copyright's fundamental doctrine's, primarily, the idea/expression dichotomy, enabling creators to borrow ideas from the TCEs for their own creations.

However, as TCEs do not readily fit in well with other categories of copyright works particularly as they do not always ascribe to the requirements of copyright protection it was proposed that TCEs ought to be a separate category of copyright work.[314] As a separate category of work, TCEs would receive the same level of protection as other copyright works and also have the doctrines of copyright law, importantly, the idea/expression dichotomy apply to them.

Taking this into consideration therefore, it is proposed that the Kenyan statutory provision on the idea/expression dichotomy would provide that:

[312] Chapter 2, part 2.2.4.
[313] Chapter 2, parts 2.5.2.1 and 2.5.2.2.
[314] Chapter 3, part 3.4.

> Copyright protection shall not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in an original work of authorship or traditional cultural expression.

As stated, this provision may be argued as going beyond the idea/expression dichotomy when the doctrine is considered as a distinction strictly between "ideas" and "expressions" but due to difficulties in defining an idea with precision and clarity this approach is recommended and in fact represents the appropriate interpretation of what the idea/expression dichotomy is. As Goldstein argues, both "idea" and "expression" should be understood as metaphors for aspects of works that are either not protected by copyright or are.[315] That is, idea is a metaphor for that which is unprotectable by copyright law, while expression is a metaphor for that which is within the scope of copyright protection.[316]

This approach is supported by the above discussion on the word idea's etymological and philosophical origins which showed diverse definitions, acceptations, descriptions and conceptualisations, a fact which would make offering a precise definition for the word a practical impossibility. It is owing to these extreme difficulties in coming up with a precise and comprehensive definition of idea that it is not proposed that Kenya seeks to define the word in the Kenya Copyright Act; but instead adopts an approach whereby non-protection ought to be afforded to all those elements which as stated in the proposed provision would reasonably fall under the rubric of "ideas".

[315] Paul Goldstein, *Goldstein on Copyright*, vol 1 (Wolters Kluwer 2006) § 2.3.1.
[316] Samuelson (n291).

In this regard the doctrine's worth may be called to question. If we are to accept that the words idea and expression are merely metaphors for what copyright does not protect and does protect respectively then the necessity of the doctrine may be queried. Indeed, as seen above Lord Hoffman in *Designers Guild*[317] incorporates the inquiry on whether an element of a work is an idea or not with the assessment of originality.

However, upon review such disapproval of the doctrine does not stand. Whereas in some instances a court's inquiry on whether what has been borrowed from a work is an idea will overlap, either improperly or incidentally, with an investigation of originality, infringement or even fair use or fair dealing, the idea/expression dichotomy is a distinct principle of copyright law separate from the rules governing originality and other aspects of copyright.

An easy demonstration of this is the fact that an idea does not receive copyright protection regardless of whether it is original or not. In many cases where the idea/expression is conflated with other principles of copyright law such as originality and infringement the proper question that ought to be before the court is whether what has been alleged to be copied is an idea or an expression.[318] Because ideas do not receive copyright protection, indeed, under any circumstances, a court ought to finish its deliberations upon the consideration of

[317] [2000] UKHL 58, [2000] 1 WLR 2416.

[318] See, for instance, *Baigent v Random House* [2007] EWCA Civ 247, [2007] FSR 24 where the court inappropriately applied the idea/expression dichotomy to an inquiry of infringement whereas the question that ought to have properly been before the court was whether what was said to be copied was an idea or an expression. Similarly, in the recent decision of the Intellectual Property Enterprise Court (IPEC) in *Ashley Wilde Group Limited v BCPL Limited* [2019] EWHC 3166 (IPEC) the court focused its inquiry on whether there had been copyright infringement, and in this regard emphasised the "quality test" of infringement; whereas, it is argued, the correct primary inquiry for the court was whether what was "copied" was an idea or an expression and only if found to be the latter would the court proceed to consider the question of infringement.

this point; and only ought to proceed to consider questions of infringement if found that was has been borrowed or "copied", as the case may be, falls on the expression side of the divide.

Overall, the statutory provision of the idea/expression dichotomy proposed would be useful for Kenya for several reasons. First, providing for the doctrine in statute would make judges more acutely aware of the doctrine's existence. It has been argued that written law as in the case of a statute, for instance, is easier to distinguish.[319] Indeed having such a statutory provision would aid in insulating the doctrine from the idiosyncrasies of individual judges.[320] This argument is even more pertinent in relation to the highly technical and complex subject that copyright law generally is,[321] and that the idea/expression dichotomy particularly is.[322]

For instance, although Kenya has had a Copyright Act since 1966 and recognised copyright laws before independence,[323] it has been noted that in some instances Kenyan judges are not aware of basic features of copyright

[319] Niklas Luhmann, *Law as a Social System* (Klaus A. Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 241.
[320] This is in line with the argument put forward by American jurist Jerome Frank in his book *Law and the Modern Mind* (Brentano's Publishers 1930) which argued that judicial decisions were more influenced by psychological factors than by objective legal premises. See also Alfred Yen, 'A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel' (1989) 38(1) Emory Law Journal 393 for the argument that judges decide cases based on the idea/expression dichotomy solely on instinct.
[321] As Justice Joseph Story famously remarked, 'Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the meta-physics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent'. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).
[322] Edward Samuels, 'The Idea-Expression Dichotomy in Copyright Law' (1988-89) 56(2) Tennessee Law Review 321, 324.
[323] Sihanya (n187) 190. Copyright law began in Kenya with the application of the UK Copyright Acts of 1842, 1911 and 1956 together with the English common law of copyright by virtue of the reception clause under the East African-Order-in-Council 1897, later re-enacted under the Kenya Judicature Act, 1967, Chapter 8 of the Laws of Kenya

law.[324] The overall effect of a statutory provision would be better judicial decisions, advancing the primary objective of common law copyright – the production of more works.

Second, in similar vein, a clear statutory provision would make the law more accessible to potential authors as well, thus, lowering their transaction costs and uncertainty over whether they may be possibly infringing another person's copyright. As noted above, potential authors may incur high transaction costs if they have to seek legal advice or litigate issues on the idea/expression dichotomy.[325] To avoid such high transaction costs arising from the uncertainties flowing from the idea/expression dichotomy authors may seek to unnecessarily obtain licences from copyright owners;[326] whereas this may not be essential as what they intend to borrow falls on the idea side of the divide.

Third, despite having the doctrine explicitly delineated in statute, over time judges would still be able to develop further principles to guide its interpretation. This is a response to the argument that the non-demarcation of the principle in statute offers judges some degree of desirous flexibility in its application to new and unforeseen circumstances.[327] Judges not only interpret statutes created by the legislature they also "create" law.[328] The American position offers a perfect example of this. Despite a delimitation of the doctrine in statute, judges have over time developed principles regarding its general interpretation which, as highlighted above, are *scènes à faire*, the merger doctrine and the abstractions

[324] Ben Sihanya, 'Copyright Law in Kenya' (2010) 41(8) International Review of Intellectual Property and Competition Law 926, 944.
[325] Masiyakurima (n80) 564.
[326] Endicott and Spence (n113) 665.
[327] Masiyakurima (n80) 570.
[328] Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 155.

test.[329] A statutory footing for the doctrine would also put paid to arguments that the doctrine does not exist, as it is not found in any Act of Parliament.[330]

Finally, a statutory footing for the doctrine would be consistent with international copyright treaties, particularly TRIPs and the WCT, of which as noted above Kenya is a member party of and a contracting party to, respectively. Both of these instruments expressly provide for the non-protection of ideas. As noted above, article 9(2) of TRIPs, which sets minimum standards for member parties states that, 'Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'.

However, the US provision may be deemed broader than the TRIPs and WCT provisions providing for the non-protection of - ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. A wide subject matter exclusion, it has been argued, is recommended for developing countries; allowing them greater access to knowledge which is important for economic development.[331]

On the whole, it is argued that a statutory provision setting forth elements of works which are not protected by copyright as indicated above, would be advantageous for a better interpretation of the dichotomy and accordingly enhance the creation of new works. Evidence of this outcome may be had by considering that the US is one of the world leader's in the creative industries.[332]

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[329] These principles are discussed in detail earlier in this chapter.
[330] See Laddie, Prescott & Vitoria (n15) 3.74.
[331] Jerome H Reichman, 'Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?' (2009) 46(4) Houston Law Review 1115, 1154 and 1184.
[332] John P. Synott, *Global and International Studies: Transdisciplinary Perspectives* (Thomson 2004) 362.

The US has developed a "charismatic domination"[333] through its creative industries seen in, for instance, Hollywood and popular fashions in music, clothing and consumer lifestyles.[334] It has been argued that copyright law has been critical to the development of these dominant businesses within the creative industries.[335] The US position on the doctrine has not disadvantaged the growth of its creative industries and therefore cannot be a bad model for itself or for other countries to adopt.

When properly construed, the idea/expression dichotomy makes ideas - the basic building blocks of creation - available to authors who have encountered them in another work.[336] Whilst it is appreciated that the US position is itself not perfect and contains some inadequacies;[337] nonetheless it is argued that an explicit statutory provision, of the US sort, would enhance a principled interpretation of the dichotomy and this would in turn encourage the creation of cultural works in Kenya.

6.6 Conclusion

In this chapter the idea/expression dichotomy within the copyright laws of the UK, the US and Kenya was analysed. What has come to be commonly termed the idea/expression dichotomy is the notion that copyright law does not protect ideas and only protects the expression of ideas. As seen, this is a concept that

[333] The metaphor of charismatic domination is adopted from Max Weber's "charismatic authority" explicated in the text *Economy and Society*. See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Ephraim Fischoff and others trs, Guenther Ross and Claus Wittich eds, University of California Press 1978). Charismatic authority is a concept of leadership in which authority derives from the charisma of the leader. This stands in contrast to two other types of authority: legal authority and traditional authority.
[334] Synott (n322).
[335] Ruth Towse,' Cultural Economics, Copyright and the Cultural Industries' (2000) 22(4) Society and Economy in Central and Eastern Europe 107, 123.
[336] Kurtz (n81).
[337] Rosen (n41) 263.

is widely accepted and applied in most jurisdictions with copyright laws including those considered in this chapter. Of the three jurisdictions discussed in this chapter only the US has a statutory provision for the doctrine, provided for in section 102 (b) of the US Copyright Act. All the same, the other two jurisdictions, Kenya and the UK, recognise and apply the principle by virtue of judicial decisions and international copyright law such as TRIPS and the WCT wherein the principle is explicitly provided.

What emerged from the comparative analysis of the idea/expression dichotomy in the three jurisdictions is that it has been extremely difficult for courts and commentators alike to provide a principled way of interpreting the doctrine. This is due to the near impossibility, as it has been suggested by some, of distinguishing an idea from its expression. The basis of this real problem, this chapter contends, is the lack of clarity regarding what is meant by an idea.

Before, the comparative analysis of the doctrine was undertaken, the etymological and philosophical origins of the word idea were considered. This discussion exposed that there are diverse definitions, acceptations, descriptions and conceptualisations of the word. Perhaps it is owing to such diverse views that judges as well appear to define idea on a whim to encompass all those elements of a work that they at a particular instance deem ought not to be protected such as ideas, schemes, systems, methods, information, and facts among others.

The core argument in this chapter is that this lack of principled interpretation of the doctrine has chilled creative activity. For instance, rights holders may

improperly, but successfully, sue authors who have only taken from their works what ought to be an idea and thus unprotectable. Such actions may stop the creation of works as well as have other unforeseen negative consequences as discussed in the *Temple Island Collections*[338] case.

A key aspect of creative works is their derivative nature. A derivative work arises when a new work is created based on an existing work. Today's post-modern society is exemplified by derivative cultural works such as appropriation art and remixed music. Digital technologies have greatly enhanced the ability of potential authors to create derivative works by making it significantly easier to add, share, edit and mash up content. Failing to interpret the idea/expression dichotomy appropriately would potentially lock out such works from copyright protection.

It has been argued in this chapter that a properly interpreted idea/expression dichotomy ought to allow for 'the building blocks of creativity' to be readily available for use by potential creators whilst at the same time offering adequate protection for rights holders. This it has failed to do. It is contended that for Kenya, a statutory footing for the doctrine, adapted from the US provision in section 102(b) of the US Copyright Act and taking into consideration the fact that the creative industries in Kenya are highly derivative of its culture, specifically its TCEs would be a welcome reform for Kenya in this area of the law. Such a statutory provision would clearly denote those elements of a work that are not protected by copyright protection under the rubric of "ideas". It has been seen that an explicit statutory provision would have numerous benefits.

[338] [2012] EWPCC 1, [2012] ECDR 11.

With this chapter having proposed how the idea/expression dichotomy may be reformulated and reinterpreted so as to encourage creativity, the next chapter continues the discussion of how a copyright theory and law formulated for the encouragement of creativity can be put into practical use in Kenya. Specifically, it is put forward that an online database of TCEs ought to be implemented which would provide indicative statements of those elements of a TCE which are protected and those that are not, that is, ideas, which can be freely utilised by other creators.

CHAPTER SEVEN

BRINGING A COPYRIGHT LAW FOR THE ENCOURAGEMENT OF CREATIVITY IN KENYA TO LIFE: THE PROPOSED DATABASE FOR TRADITIONAL CULTURAL EXPRESSIONS

7.1 Introduction

The previous chapter proffered a reconstruction of the idea/expression dichotomy with a focus towards encouraging creativity. A comparative review of the doctrine in the copyright laws of Kenya, the United Kingdom ("UK") and the United States ("US") was done. It emerged that the current formulation of the doctrine is unprincipled, and this has had a chilling effect on creativity.[1]

The problem, it was seen, is the interpretation of ideas. Copyright law chooses what an idea is whimsically. In this regard it was argued that Kenya would benefit from an express statutory provision of the doctrine, akin to the position in the US and consistent with international copyright law stating explicitly what copyright does not protect under the rubric of "ideas", thus, aiding in the doctrine's interpretation; all the while taking into consideration the fact that the creative industries in Kenya are highly derivative of its culture(s), specifically its traditional cultural expressions ("TCEs").[2]

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

[2] This contention is best evidenced by the discussion on Kenya's contemporary creative industries, which are heavily influenced by TCEs in Chapter 2, part 2.2.4. See also Michael Shally-Jensen, *Countries, Peoples and Cultures: Eastern and Southern Africa* (Salem Press 2015) 120 – 124; Kathire Kiiru and Maina wa Mutonya, 'Music, Dance and Social Change in Eastern Africa' in Kathire Kiiru and Maina wa Mutonya (eds), Music and Dance in Eastern Africa (Twaweza Communications 2018) 8 – 9.

Indeed, the nature of creativity is that it is derivative. This contention was put forward and explicated in Chapter four, whereby emphasis was placed on a view of creativity based on Locke's theory of knowledge. Under this theory, creativity arises when the mind "exerts its powers" over "simple ideas", which are the basic elements of creativity.[3]

Copyright law has however failed to understand and provide for creativity in accordance with its true nature. Copyright law instead valorises the Romantic "author-genius", a rhetoric which has been a stalking horse for the furtherance of economic considerations.[4] According to this formulation, an author creates works extemporaneously using his creative genius thus, leading to the production of utterly new and unique expressions.[5]

Accepting that creativity is a derivative process then this chapter elucidates reform to the structure of Kenyan copyright law which would enable it to be properly aligned with the true nature of creativity. As the key objective of copyright law is the encouragement of creativity[6] then it ought to be able to properly play this role, which so far it has not. Instead copyright law has been dominated by economic concerns and largely protects products of creativity which fit within this framework.

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[3] John Locke, *An Essay Concerning Human Understanding* (T. Tegg and Son 1836) Book IV, Chapter II, § 1. See Chapter 4, part 4.4.1.

[4] Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author' (1984) 17(4) Eighteenth-Century Studies 425, 426; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455, 500.

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

[6] See the arguments in the regard in Chapter 5, part 5.3. See also, Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) 14 – 16; Julie E. Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40(3) UC Davis Law Review 1151; Omri Rachum-Twaig, 'Recreating Copyright: The Cognitive Process of Creation and Copyright Law' (2017) 27(2) Fordham Intellectual Property, Media and Entertainment Law Journal 287, 288.

Rudolf Steiner explored this scenario in his theory of social three-folding. He contended that the economic domain had dominated the other two domains of society, that is, the cultural domain, wherein the products of creativity arise, and the political domain to the detriment of society.[7] As a cure to this "problem" Steiner argued that the three domains ought to be free to develop autonomously,[8] specifically, he emphasised, the importance of freeing the cultural domain.[9]

The thesis of this research, that is, Kenyan copyright law can be reformed so as to encourage creativity, is considered through the lens of the theory of social three-folding. It is contended that in order for Kenyan copyright law to adequately encourage creativity it ought to promote the creative process to arise in its own precepts. Towards this end it is asserted that Kenyan copyright law must give effect to the ready and easy utilisation of ideas, the building blocks of creativity.[10]

As creativity in Kenya draws heavily on its culture, particularly, its TCEs, I propose that Kenyan copyright law be reformed to put forward a system whereby ideas, particularly within TCEs, would be readily identifiable and made available for use by creators. This system would be implemented online and would provide indicative statements of those elements of a TCE which are protected and those that are not, that is, ideas, which can be freely utilised by

[7] Rudolf Steiner, *Basic Issues of the Social Question: Towards Social Renewal* (Frank Thomas Smith tr, Rudolf Steiner Press 1977) 58.
[8] ibid.
[9] Ibid 47.
[10] This premise is deduced from Locke's theory of knowledge. Locke (n3) Book II, Chapter XII, § 2. See also, Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009) 184; Graham M. Dutfield and Uma Suthersanen, 'The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) 8(4) Intellectual Property Quarterly 379, 398.

others. This system would be effectuated within the copyright regime, pursuant to Chapter three's proposals for the copyright protection of TCEs in Kenya. This chapter sets out and defends the tenets of this system.

7.2 Moving away from copyright exploitation

The essence of copyright law is that it grants to the first owner of copyright certain exclusive rights over the exploitation of the work.[11] The rights are capable of being exploited in a number of ways. Most pertinently, these rights enable the owner of copyright to control the sale and use of both the original work and copies thereto.[12] However, few authors have the financial ability, economic acumen or the willingness to copy and sell their own works.[13] Accordingly, the law treats copyright as a form of personal property that can be exploited in a number of ways, most importantly by assignment and licensing.[14] This enables copyright to be transferred to those who can exploit it most profitably.

An assignment is the transfer of ownership of copyright.[15] The result of an assignment is that the assignee stands in the shoes of the assignor and is free to deal with the copyright as she chooses.[16] A licence, on the other hand, is merely permission to do an act that would otherwise be prohibited without the consent of the proprietor of the copyright.[17] An author can only assign or license her economic rights in a copyright work; her moral rights cannot be assigned or

[11] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 292.
[12] ibid.
[13] ibid.
[14] ibid. In addition to assignment and licensing the Kenya Copyright Act 2001 also provides for the transmission of copyright by way of testamentary disposition and by 'operation of the law as movable property'. Kenya Copyright Act 2001, section 33(1).
[15] Bently and Sherman (n11) 293.
[16] ibid.
[17] ibid 295.

licensed *inter vivos,* but may pass to one's beneficiaries, by testamentary disposition or by operation of the law, upon her death.[18]

Unlike other forms of property where the tendency is to have simple transfers in which the ways that rights can be divided up are limited, copyright law takes a liberal view of what may be assigned.[19] Specifically, copyright law allows partial assignments in reference to times, territories and classes of conduct.[20]

As an assignment is the transfer of ownership of copyright, licenses tend to be more commonly employed by copyright owners. A license enables the licensee to use the work without infringing, provided that the use falls within the terms of the license, it gives the licensee immunity from action by the copyright owner.[21] In contrast with an assignment, where the assignor relinquishes all interest in the copyright, the licensor retains an interest in the copyright.[22] No proprietary interest is passed under a license.[23] Like an assignment a license can also be limited geographically, temporally and in relation to specific modes of exploitation of the copyright.[24] In this regard, for instance, licenses (as well as assignments) can be granted or made in respect of a future work, or an existing work in which copyright does not yet subsist.[25]

Whereas the essential nature of a license is that it is a mere permission, copyright law has developed a sophisticated repertoire of ways in which a work

[18] Adrian Speck and others, *Laddie, Prescott and Vitoria: The Modern Law of Copyright* (5th edn, LexisNexis Butterworths 2018) [38.55]; Kenya Copyright Act, section 32(2).
[19] Bently and Sherman (n11) 293.
[20] ibid; Kenya Copyright Act, section 33(2).
[21] Bently and Sherman (n11) 295.
[22] ibid.
[23] ibid.
[24] ibid.
[25] ibid 292.

may be licensed. These include by way of exclusive license and non-exclusive license.[26] An exclusive license is an agreement under which the copyright owner grants permission to the licensee to use the copyright work and promises not to grant any other licenses regarding the work or to exploit the work herself.[27] A non-exclusive license on the other hand, grants to the licensee the right to use the copyright work, however, the licensor remains free to allow any number of other licensees to also exploit the same work or to exploit the work herself.[28]

Generally licences are granted voluntarily but in exceptional circumstances the law forces the copyright owner to license the work and requires the licensee to pay a fee.[29] The Kenyan Copyright Act 2001 ("Kenya Copyright Act") does not contain an explicit provision on compulsory licensing; in contrast with the position in the UK[30] and the US.[31]

One of the characteristics of the intangible property protected by copyright is that it has the potential to be used by a range of different people at the same time. Indeed, owing to the rapid increase of digital technologies and the internet the role of licensing and assignment has become ever more important.[32] In

[26] ibid 295; Kenya Copyright Act, section 33(3) and (4).
[27] Bently and Sherman (n11) 295.
[28] ibid 296.
[29] Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (17th Ed. Sweet and Maxwell 2016) 28 – 02.
[30] Under the UK Copyright, Designs and Patents Act 1988 ("UK CDPA 1988") compulsory licenses are granted in a number of instances for example where the work is a sound recording, and it is proposed to broadcast it or include it in a cable programme – section 135A-H. For a full review see, Caddick, Davies and Harbottle (n29) chapter 28.
[31] Under the US Copyright Act of 1976 ("US Copyright Act") compulsory licenses are mandated in among other instances for non-dramatic musical works - section 115 and for secondary transmission by cable systems – section 111(d). For more insight see, Midge M. Hyman, 'The Socialization of Copyright: The Increased Use of Compulsory Licenses' (1985) 4(1) Cardozo Arts & Entertainment Law Journal 105.
[32] In this regard, technological protection measures such as encryptions have emerged and are enforced side by side with copyright protection. See, Bently and Sherman (n11) 303 – 305. A

some circumstances the copyright owner will be able to assign or license the use of the work directly. In other instances, as is explicated below,[33] owner-user relations are mediated by a collecting society, or collective management organisation ("CMO") per the nomenclature of the Kenya Copyright Act.[34]

The online boom has presented new challenges and opportunities for copyright exploitation. This has witnessed the rise of legitimate forms of digital exploitation including the popular "open access" modes of distributing works, that is, the use of standardised licenses to allow for particular reuses of works by any member of the public.[35] These include, the "General Public License" in relation to computer programs and the "Creative Commons" movement which has developed standard open licenses for other types of works.[36]

All in all, assignments and licenses entrench and enforce private property rights. Private property rights are the mainstay of the economic domain of society. A copyright law that is structured with the objective of encouraging creativity ought to allow Kenyan creators to sidestep economic considerations altogether and utilise ideas within existing works, specifically, TCEs for their new creations. Copyright law scholars have recognised the need to free creative activity from economic considerations and proposed new systems of copyright in this regard.

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recent amendment of the Kenya Copyright Act, the Kenya Copyright (Amendment) Act 2019 (the Copyright Act 2001 remains the principal law) strengthened technological protection measures in the country. Kenya Copyright Act, sections 2 and 35(3).

[33] See the discussion in part 7.3.4 on collecting societies in the Kenyan context.

[34] Kenya Copyright Act, sections 2 and 46.

[35] Bently and Sherman (n11) 297.

[36] ibid.

In the UK, Griffin has put forward a "New Copyright Economy", which would work side by side with traditional copyright.[37] Like my proposed system, Griffin's system decries the domination of the economic domain over the cultural domain; which domination manifests itself most vividly in the notion of copyright as a property right.[38] Also, Griffin like me recognises that the current model of copyright has been challenged with the ease that digital technologies and the internet avail to potential creators to create.[39]

Griffin argues that right holders feel that the current copyright system insufficiently protects their economic interests; while copyright recipients consider that the system is overbroad and limits their cultural freedom.[40] As a response to this failure Griffin proposes that a new system which would run parallel to the existing copyright system should be instituted.[41]

Griffin's system is based on directly encouraging the making of new works. He contends that the State ought to administer a financial fund for those making works capable of copyright protection.[42] A maker of such a work would then, pertinently, under a privilege and not a right, receive a proportion of the funds in relation to their previously produced works.[43] Once works were made within this system, they could further be exploited under the existing copyright system.[44] In

[37] James Griffin, 'Making A New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright' (2013) 1 Intellectual Property Quarterly 69. More recently Griffin has proposed new systems to govern the regulation of creativity and the exploitation of copyright works separately. See James Griffin, *The State of Creativity: The Future of 3D Printing, 4D Printing and Augmented Reality* (Edward Elgar 2019).
[38] William W. Fisher, *Promises to Keep: Technology, Law and the Future of Entertainment* (Stanford University Press 2004) 203.
[38] Griffin (n37) 74.
[39] ibid 70.
[40] ibid 70.
[41] ibid 82 – 86.
[42] ibid 83.
[43] ibid.
[44] ibid 86.

this way Griffin's new parallel system would therefore counterpoise the existing system that protects copyright exploitation. It would provide stronger support to those who make copyright works, while at the same time strengthening the proprietary exploitation of such works.

In the US context, Fisher has proposed an "Administrative Compensation Scheme", particularly regarding digital audio and video recordings, which would work in tandem with copyright to ensure that creators of these entertainment products were fairly compensated, and that the public reaped the advantages of new technologies.[45] One of the benefits of this system, Professor Fisher argues, is that it would encourage creativity.[46] Under Fisher's proposed system the owners of copyright in audio and video recordings wishing to be compensated for the use of their works, would register them with the Copyright Office and in return would receive a unique file name which then would be used to track the work's distribution, consumption and modification.[47]

Copyright owners would be compensated through a tax levied on devices and services that consumers use to gain access to digital entertainment.[48] A government agency would estimate the frequency with which each song and film was listened to or watched. The tax revenues would then be distributed to copyright owners in proportion to the rates with which their registered works were being consumed.[49] Once this alternative regime were in place, copyright law would be reformed to eliminate most of the current prohibitions on the unauthorized reproduction and use of published recorded music and films.

[45] Fisher (n38) Chapter 6.
[46] ibid 203.
[47] ibid 202.
[48] ibid.
[49] ibid.

Thus, music and films would be readily available legally and for free.[50] The social advantages of such a system, Fisher argues would be *inter alia*, consumer convenience; radical expansion of the set of creators who could earn a livelihood from making their works available directly to the public; reduced transaction costs and a boost to consumer creativity caused by the abandonment of encryption.[51]

Fisher's system focuses more on reforming the compensation of entrepreneurs more than on encouraging creativity. He argues that by streamlining the compensation of owners of copyright in audio and video recordings and the access to their works online then creativity would be encouraged as, presumably, there would be more songs and movies to listen to and to watch and more people to actually listen to and watch them. Whereas this may not be an inaccurate supposition, for the encouragement of creativity, wouldn't it be better still to have a system that focuses on creativity itself?

It is proposed that such a system ought to circumvent economic considerations and allow creators to freely and readily utilise ideas, the building blocks of creativity, for their new creations.

7.3 The proposed database for traditional cultural expressions

7.3.1 Overview

In order for Kenyan copyright law to adequately encourage creativity I propose implementing a new system. This system, which would be established by the

[50] ibid.
[51] ibid 203.

Kenya Copyright Board, would be an online database[52] listing TCEs currently in existence in Kenya.[53] Moreover, the Kenya Copyright Board would state with reasonable clarity what the TCE that is protected comprises of and offer guidance, in line with the reformed idea/expression dichotomy provision, on what aspects of the TCE the law deems as an idea and are therefore readily and freely available for use by other artists and creators.

The Kenya Copyright Board is established under the Kenya Copyright Act and was launched in July 2003.[54] It is a semi-autonomous government agency functionally under the Office of the Attorney General & the Department of Justice. Its overall mandate is the administration and enforcement of copyright and related rights. Pursuant to this mandate the Kenya Copyright Board has the following functions, it is responsible for – implementing copyright laws including the provisions of international treaties; licensing and supervising the activities of CMOs; facilitating training and awareness creation on copyright; updating copyright legislation; maintaining an effective database on authors and their

[52] A database, within computer science and the law, generally refers to a body of information held within a computer system. Andrew Butterfield, Gerard Ekembe Ngondi, and Anne Kerr (eds), *A Dictionary of Computer Science* (7th edn, Oxford University Press 2016) 110; Jonathan Law (ed), A Dictionary of Law (9th edn, Oxford University Press 2018) 152.

[53] As it is proposed that TCEs would fall under copyright protection then it is put forward that their administration ought to be carried out by the State agency in charge of the administration of copyright which is the Kenya Copyright Board. It bears emphasis that it is not proposed that a separate agency be established to administer TCEs. This is currently the situation in Ghana, as an example, where TCEs, although considered copyright works, albeit of a special categorisation, are administered by the National Folklore Board which is a separate agency to the Copyright Office which administers copyright generally. It is argued that this may not be a desirable path for Kenya to follow. First, owing to the obvious cost implications involved in establishing a separate agency – the realities of insufficient and inadequate human, technical and financial resources that have plagued the enforcement of copyright in Kenya over the years cannot be gainsaid (Ben Sihanya, 'Copyright Law in Kenya' (2010) 41(8) International Review of Intellectual Property and Competition Law 926, 945). Second, it would be important to buttress TCEs as part of copyright's edifice and thus, the administration of TCEs by the Kenya Copyright Board would be apt.

[54] Kenya Copyright Act, section 3. Under the previous substantive Copyright Act, the Copyright Act 1966, Chapter 130 of the Laws of Kenya, copyright was administered directly by the Attorney General.

works; liaising with national, regional and international organisations on copyright matters; and advising the government on copyright matters.[55]

The day-to-day operations of the Kenya Copyright Board are undertaken by officers and staff headed by an executive director, additionally, there is a non-executive board of directors that oversees the operations of the board's officers and staff.[56] A recent amendment of the Kenya Copyright Act reset the structure of the board of directors to a smaller and more focused composition. The previous non-executive board was made up of a bloated membership of a total of sixteen people drawn from both the public and private sectors. The current board comprises of nine members – a Chairperson appointed by the President; the Principal Secretary[57] in the Ministry of Finance; the Principal Secretary in the Ministry of Sports, Culture and Arts; the Principal Secretary in the Ministry of Information; and the Attorney General; three persons, appointed by the Attorney General, each nominated by associations recognised by the Government as representing stakeholders in music, film and publishing respectively; and the Executive Director.[58]

Whereas the heavy presence and influence of government officers in the composition of the non-executive board of directors may be decried, the current composition of the board of directors is smaller and more focused and is indeed a positive response to the real realities of insufficient and inadequate human,

[55] Kenya Copyright Act 2001, section 5; Kenya Copyright Board website <https://www.copyright.go.ke/about-us/who-we-are.html> accessed 29th April 2019.
[56] Kenya Copyright Act, section 12.
[57] A Principal Secretary is the chief civil servant in a ministry and in hierarchical terms, is a rank below a Cabinet Minister. Under Kenya's Constitution (2010), Cabinet Ministers, or Cabinet Secretaries according to the nomenclature of the Constitution, are not Members of Parliament, a distinct shift from the previous Constitution (1963).
[58] Kenya Copyright Act 2001, section 6.

technical and financial resources that have plagued the enforcement of copyright in Kenya over the years.[59]

However, it is proposed that a representative of an association dealing with TCEs ought to be introduced into the board, in line with the recognition of the influence of TCEs on creativity in Kenya. Furthermore, as the board of directors conducts a non-executive, steering, role, the Kenya Copyright Board as an organisation should undertake to hire and recruit the appropriate professionals in the copyright sector generally and more specifically with adequate training on TCEs, who shall carry out the organisation's day-to-day business. A stronger secretariat would move the Kenya Copyright Board in the direction of the US Copyright Office, the US government body that administers the copyright system, which only comprises of officers and staff and does not have an overseeing board.[60]

The argument put forward in Chapter three is that TCEs ought to be regulated under copyright law. Within the copyright edifice, there would be adequate protection for traditional communities over their TCEs and at the same time potential creators would enjoy the creative benefits arising from copyright's device of the idea/expression dichotomy. This move is on the backdrop of the recognition of the pertinent and characteristic fact that Kenyan creativity is largely derived from its culture and its modern creative industries borrow heavily from its TCEs. Thus, it is argued, a system which readily and freely avails ideas

[59] Sihanya (n53) 945.
[60] The US Copyright Office is part of the Library of Congress, the research library that officially serves the United States Congress and *the de facto* national library of the United States. On its part, the UK Intellectual Property Office, the UK government body responsible for intellectual property rights, has a steering board. UK Intellectual Property Office, 'Framework Document' (2015) 11.

within TCEs, for use by other creators, would substantially aid in the encouragement of creativity.

The proposed system is especially relevant in the digital age due to the ease of actions such as copying and pasting and remixing existing works. Implementing this system would free the cultural domain from the domination of the economic domain and offer freedom from the conventions of property and an over emphasis on the right holder. However, whereas the system's focus is on advocating the free and ready use of ideas, the system would also provide additional exposure to existing TCEs thus offering a potential revenue stream for the traditional communities through licensing.[61]

As noted above the realities of insufficient and inadequate human, technical and financial resources that have plagued the enforcement of copyright in Kenya over the years cannot be gainsaid.[62] In this regard, it is proposed that the Kenya Copyright Board receives adequate funding to implement this system from the exchequer through the ordinary processes of direct taxation.[63]

To be sure, the Kenya Copyright Board, in accordance with its mandate under the Kenya Copyright Act,[64] has already implemented an online database for copyright works. "The Kenya Copyright Board Database of Authors and their Works" contains information regarding - the title of a work, a work's registration number, its category, the right holder, the author and the date of

[61] In order to guarantee the rights of members of a traditional community regarding their TCEs it would be important for the Kenya Copyright Act to provide that TCEs cannot be assigned.
[62] Sihanya (n53) 945.
[63] As noted above, Fisher as well proposes that his proposed system be funded through taxation. Fisher (n38) chapter 6.
[64] The Kenya Copyright Act, section 5 (f) mandates the Kenya Copyright Board to 'maintain an effective data bank on authors and their works'.

registration.[65] There are currently about five thousand works provided for on this database.[66]

It is proposed that Kenya through the Kenya Copyright Board implements a separate online database with regard to TCEs. In addition to the general information provided for by the existing database as noted above,[67] the TCEs database would provide guidance on those elements of a particular TCE that may be considered ideas and freely available for use. This guidance would take the form of statements guiding users on the aspects of a TCE that they may freely borrow. These statements would be based on the reformed idea/expression dichotomy, which as highlighted in Chapter six, would explicitly denote those aspects of a work that are not protected.[68]

It will be recalled that Chapter six argued for an explicit provision regarding the idea/expression dichotomy to be added to the Kenya Copyright Act. This provision, it was advanced, would provide that:

> Copyright protection shall not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in an original work of authorship or traditional cultural expression.

[65] Kenya Copyright Board website <http://register.copyright.go.ke:8095/kecobo/details.php> accessed 30th July, 2019.
[66] ibid.
[67] Chapter three argued that in Kenya TCEs ought to be regulated under the Kenya Copyright Act, with the aim of encouraging creativity. To this end it was proposed that TCEs ought to be a special category of copyright work with specific allowances regarding the copyright doctrines of authorship, ownership, originality, the public domain, tangibility and duration to enable TCEs to fit within copyright's edifice. Chapter 3, parts 3.3 and 3.4
[68] See Chapter 6, part 6.5.

An example of the type of guiding statement that the Kenya Copyright Board can offer regarding the use of ideas can be offered with regard to the *Isukuti* dance. The *Isukuti* dance, is a popular celebratory performance practised among the Isukha and Idakho communities of Western Kenya.[69] The *Isukuti* takes the form of a fast-paced, energetic and passionate dance accompanied by drumming and singing.[70] It permeates most occasions and stages in life including childbirths, initiations, weddings, funerals, commemorations, inaugurations, religious festivities, sporting events and other public congregations.[71] The dance derives its name from the drums used in the performance, played in sets of three – a small, medium and big drum – and normally accompanied by an antelope horn and assorted metal rattles.[72] A soloist leads the dance, singing thematic texts in tandem with the rhythm of the drumbeats and the steps of the dancers, arranged in separate rows for men and women.[73]

From this description, the guiding statement on the ideas part of the *Isukuti* dance would provide that the aspect of this work which may freely be borrowed is, 'a dance performed together with musical instruments lead by a soloist singing thematic texts'.

The database and particularly the guiding statement on ideas would be helpful to an author who seeks to create a work "inspired" by a TCE as she would be able to identify, with reasonable certainty, what elements of the TCE may be

[69] United Nations Educational, Scientific and Cultural Organization ("UNESCO") website <https://ich.unesco.org/en/USL/isukuti-dance-of-isukha-and-idakho-communities-of-western-kenya-00981> accessed 30th July, 2019.
[70] ibid.
[71] ibid.
[72] ibid.
[73] ibid.

utilised in her own creation. For instance, turning back to the example of the *isukuti* dance, with the help of the database, a creator would know that they could borrow what may be termed the "trope" of, as noted above, 'a dance performed together with musical instruments lead by a soloist singing thematic texts'.

In this regard a work inspired by a TCE, is differentiated from one that is derived from a TCE. The distinction between these two instances is gleaned by reference to the idea/expression dichotomy in that, inspiration refers to borrowing ideas whereas derivative works borrow from the expression itself and the creation of derivative works is not freely allowed under copyright law.[74]

It is argued that such a guiding statement on the ideas part of TCEs ought not to be put forward for other original copyright works and is in fact not required. As noted above, a characteristic fact of Kenyan creativity is that it is largely derived from its culture and its modern creative industries borrow heavily from its TCEs. Thus, a good number of the other original copyright works have themselves borrowed elements of TCEs. It would therefore be almost impossibly difficult to describe with any form of clarity what may be deemed an idea with regard to such works. A guiding statement on ideas in respect of TCEs would suffice to offer guidance on ideas in other original copyright works as well.

[74] Under the Kenya Copyright Act, section 26(1)(e) the right to create derivate works vests in the author of a work.

Whereas it can be contended that the TCEs database would lead to a registering of TCEs, and in fact the offering of certificates as proof of such registration,[75] thus, emphasising property rights; the truly unique aspect of the proposed TCEs database is the guiding statement on what may be deemed an idea within a particular registered TCE. By offering this guiding statement the database would propound a structure for copyright law which encourages creativity. All the while, the database, allows and facilitates property rights for existing and new TCEs, demonstrating a useful and important balancing of the rights of creators and the rights of rights owners.

7.3.2 Similar systems that the database can learn from

There are other similar databases proposed and operationalised that the TCEs database can additionally learn from. Whilst it is proposed that the protection and promotion of TCEs in Kenya ought to be set within copyright law; the legal framework currently governing TCEs, the *sui generis* Traditional Knowledge and Cultural Expressions Act 2016 ("TCEs Act") provides a blueprint of how an online TCEs database can be implemented. The TCEs Act calls on the Kenya Copyright Board to establish and maintain the "Traditional Knowledge Digital Repository" which is to be a digital database that shall contain information relating to both traditional knowledge ("TK") and TCEs that have been documented and registered by county governments.[76]

[75] The Kenya Copyright Board gives certificates as proof of registration of all copyright works registered. Kenya Copyright Regulations 2004, regulation 8(9).

[76] TCEs Act, sections 5(a) and 8(3). Kenya has a two-tier governance structure comprising the national government and the county governments. The counties of Kenya are forty-seven geographical units created by the Constitution of Kenya (2010), article 176, as the units of devolved government. Each country has a county government consisting of a county assembly and a county executive.

County governments on their part are required to be the primary registry of TK and TCEs within their specific counties.[77] To date the Kenya Copyright Board has yet to effect this provision of the TCEs Act. It is argued that as it is proposed that the Kenya Copyright Act ought to be amended to bring the regulation of TCEs under copyright law, then the Kenya Copyright Board ought to implement a database of TCEs in Kenya within the framework of copyright law.[78]

A good example of a similar system in operation is seen in India. In India the Council of Scientific and Industrial Research has developed a digital database, the "Traditional Knowledge Digital Library" which captures information on India's existing TK.[79] The information in the Traditional Knowledge Digital Library is used, in among other ways, by patent offices to verify applications based on Indian TK, especially in the area of pharmaceuticals.[80] This database's model is currently under investigation by Kenyan government agencies.[81] The Kenya Copyright Board ought to mimic the Indian effort with regard to TCEs.

The online TCEs database could also borrow from the lists established by the United Nations Educational, Scientific and Cultural Organization ("UNESCO") regarding intangible cultural heritage. Kenya is a party to the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003. This

[77] TCEs Act, section 4(1)(a).

[78] It was noted in Chapter 3, part 3.3 that whereas it is proposed that TCEs ought to be regulated under copyright law, the same is not proposed for TK. While TCEs may be considered a part of TK, TCEs and TK are conceptually different. TK effectively refers to traditional "know-how". Therefore, it is argued, the nature of TK is far removed from the nature of the types of works that copyright offers protection to . Accordingly, the specific proposal for reform that this chapter and thesis explore is a return to copyright protection for TCEs, without further in-depth consideration of TK protection under the TCEs Act.

[79] India CSIR Website < http://www.csir.res.in/documents/tkdl> accessed 2nd May 2019.

[80] ibid.

[81] Marisella Ouma, 'The Policy Context for a Commons-Based Approach to Traditional Knowledge in Kenya' in Jeremy de Beer and others (eds), Innovation and Intellectual Property: Collaborative Dynamics in Kenya (UCT Press 2014) 134.

Convention sets out provisions for the safeguarding of intangible cultural heritage at the national[82] and international levels.[83]

Additionally, the Convention establishes two lists of intangible cultural heritage – the Representative List of the Intangible Cultural Heritage of Humanity[84] and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding.[85] These lists are published and maintained by the Committee to the Convention and are available on UNESCO's website.[86] These lists provide detailed descriptions of the cultural heritage contained therein including pictorial, audio and visual representations.[87]

The Committee has published three of Kenya's nominations to the List of Intangible Cultural Heritage in Need of Urgent Safeguarding. These are - Enkipaata, Eunoto and Olng'esherr, three male rites of passage of the Maasai (ethnic group inhabiting northern, central and southern Kenya) community (inscribed in 2018); Isukuti dance of Isukha and Idakho communities of Western Kenya (inscribed in 2014); and Traditions and practices associated with the Kayas in the sacred forests of the Mijikenda (inscribed in 2009).[88] The Kenya Copyright Board can learn from the detailed descriptions of cultural heritage in these lists particularly the pictorial, audio and visual representations and implement the same for TCEs.

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[82] Part III.
[83] Part IV.
[84] Article 16.
[85] Article 17.
[86] UNESCO website <https://ich.unesco.org/en/lists> accessed 27th March 2019.
[87] UNESCO Website <https://ich.unesco.org/en/lists?text=&country[]=00115&multinational=3&display1=inscriptionID#tabs> accessed 31st October, 2019.
[88] UNESCO Website <https://ich.unesco.org/en/lists?text=&country[]=00115&multinational=3&display1=inscriptionID#tabs> accessed 27th March 2019.

In the UK the Intellectual Property Office has implemented an online database of orphan works which Kenya may learn from.[89] An orphan work is one the copyright owner of which either does not exist or cannot be located.[90] 'The orphan works database offers a good platform through which these works may be licensed. Particularly, it contains a detailed description of works in written form, known as the "full description". Kenya may adopt the format of the said full description when implementing its guiding statement on ideas within TCEs.

The UK is also in the process of implementing a "digital copyright exchange" ("DCE"). This follows the recommendations of the Hargreaves Review,[91] wherein a DCE was proposed as an automated electronic commerce website or network of websites which allow licensors to set out the rights that they wish to license and acquire those rights from the licensors.[92]

The DCE, which is now called the Copyright Hub following further recommendations on its implementation by Richard Hooper,[93] is industry-led and not-for-profit.[94] The Copyright Hub though still nascent is a good example of how an online database of copyright works can be instituted. However, it differs from the proposed online TCEs database in a number of significant ways. To

[89] UK government website <https://www.gov.uk/guidance/copyright-orphan-works> accessed 5th August, 2019.
[90] Bently and Sherman (n11) 330.
[91] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf> accessed 24th June 2019.
[92] ibid 33.
[93] Richard Hooper, 'Rights and Wrongs: Is Copyright Licensing Fit for Purpose for the Digital Age? (Intellectual Property Office 2012); Richard Hooper and Ros Lynch, 'Copyright Works: Streamlining Copyright Licensing for the Digital Age' (Intellectual Property Office 2012).
[94] Copyright Hub website <http://www.copyrighthub.org/organisation/> accessed 7 February 2020.

begin with it is run by a non-profit organisation, albeit with significant UK government funding.[95]

As elaborated below, it is proposed that the online TCEs database be wholly implemented by the Kenyan State. Pertinently, the Copyright Hub's key focus is enabling the easy, transparent licensing of copyright works within its repository.[96] The proposed online TCEs database would not go to the extent of acting as a repository of TCEs or facilitating their licensing. Instead, the online TCEs database's key focus is to provide a guiding statement on what may be deemed as ideas in a particular TCE, thus, it is argued, facilitating the creative process.

7.3.3 Other pertinent considerations for the database

In implementing the TCEs database the Kenya Copyright Board ought to also be alive to the fact that information regarding the use of copyright works is progressively becoming a form of commodity of commercial value.[97] Whereas, the focus of the TCEs database would be on readily and easily availing ideas for use by creators; it would also invariably offer a platform through which people would come to know of the existence of TCEs and this may lead to licensing arrangements. Therefore, both information regarding the use of ideas within TCEs and the use of the TCEs themselves would be valuable. Copyright holders increasingly want protection of information about use, which reveals the

[95] Other funding has been received from the creative industries in the UK, the US and Australia and the tech company Google. Richard Hooper, 'UK's Copyright Hub: A License to Create' (2016) 2 WIPO Magazine, available at WIPO website <https://www.wipo.int/wipo_magazine/en/2016/02/article_0007.html> accessed 7th February 2020.

[96] Richard Hooper and Ros Lynch, 'Copyright Works: Streamlining Copyright Licensing for the Digital Age' (Intellectual Property Office 2012) 2.

[97] James G.H. Griffin, 'A Call for a Doctrine of "Information Justice"' (2016) 1 Intellectual Property Quarterly 44, 45.

need for protection to exist also around information flows.[98] Whereas such information has not come to be protected under copyright yet, it would do the Kenya Copyright Board good to be aware of the value of the information on use and advocate for its protection.

Additionally, the database itself would be liable to receive copyright protection as a "compilation of data", which is a literary work, under the Kenya Copyright Act. Under the Act a literary work is defined to include 'tables and compilations of data including tables and compilations of data stored and embodied in a computer or a medium used in conjunction with a computer'.[99]

Moreover, the proposal put forward is for the Kenya Copyright Board, a State agency, to be the implementer of the proposed system. It is appropriate for the proposed TCEs database to be implemented by the State, as the State is the ultimate custodian of resources owing to its legitimate monopoly of power.[100] In implementing the TCEs database, it would be important for the State not to become side-lined with bureaucratic inefficiencies that may limit the goal of

[98] ibid.

[99] Kenya Copyright Act, section 2. UK Copyright law in addition to tables and compilations has databases a distinct literary works. (UK CDPA 1988, section 3A). Additionally, the Copyright and Rights in Databases Regulations 1997 which implemented in the UK the Legal Protection of Databases Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 created a *sui generis* database right as a property right subsisting in a database 'if there has been a substantial investment in obtaining, verifying or presenting the contents of the database'. (Copyright and Rights in Databases Regulations 1997, regulation 13(1)). In the US a database may only be protected as a "compilation" which is defined as 'a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship'. (US Copyright Act, §101). It has been argued that this provision limits the copyright protection of electronic databases. Yujin Tian, *Rethinking Intellectual Property: The Political Economy of Copyright Protection in the Digital Era* (Routledge-Cavendish 2009) 257. However, the anti-circumvention provisions of the Digital Millennium Copyright Act of 1998 (DMCA) create substantial protection for electronic databases. Section 1201(a) of the DMCA prohibits the circumvention of devices or technologies that are used to control access to a copyrighted works. In addition, section 1201(b) of the DMCA imposes liability on manufacturers and suppliers of instruments designed to circumvent access control devices.

[100] Max Weber, 'Politics as a Vocation' [1919] in David Owen and Tracy B. Strong (ed), *The Vocation Lectures* (Hackett Publishing 2004) 32ff.

developing creativity.[101] Thus, the State ought to play its role aptly and by doing so, it is maintained, the proposed system would lead to encouraged creativity.

7.3.4 How the database would be populated

Whereas the Kenya Copyright Board would establish and set up the TCEs database it would largely be incumbent on traditional communities and the owner(s) of the copyright in a particular TCE to seek registration of that TCE.[102] One of the hallmarks of copyright law is that it arises automatically, without the requirement of formalities, specifically, registration.[103] Therefore, the creators of TCEs, once they are regulated under copyright law, would automatically acquire copyright in them. There would be no requirement for them to register them or to seek to have them listed on the TCEs database or even to inform the Kenya Copyright Board of the existence of a particular TCE.

This may pose a potential practical challenge to the implementation of the online system. As an immediate response, it could be argued that Kenya may not require the registration of TCEs, under the precept that TCEs, as is proposed in Chapter three, would fall under a separate category of copyright work and therefore would not be under the operation of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") as regards formalities.[104] The guarantee of automatic protection applies only to those rights claimed under the Convention and is independent of any protection that a work

[101] James Griffin, *The State of Creativity: The Future of 3D Printing, 4D Printing and Augmented Reality* (Edward Elgar 2019) 239.
[102] The reform proposed in Chapter 3, parts 3.3 and 3.4 urges for TCEs to be a separate category of copyright work, which would be owned by a member of the community, nominated by the community in accordance with its customary laws, who would hold the copyright in the TCE in trust on behalf of other community members and shall be limited in his interaction with the TCE without the community's consent.
[103] Berne Convention, article 5(2).
[104] See the discussion in Chapter 3, parts 3.3 and 3.4

enjoys in its own country.[105] Contracting states remain free to impose conditions and formalities on the existence or exercise of rights within their territories.[106] As the Berne Convention provides primarily for the protection of literary, artistic, dramatic and musical works then it could be argued that TCEs do not fall under its scope.[107]

However, this may be a dangerous approach. As a moot point, it could be argued that some TCEs, for instance, folk tales are literary works and therefore, their protection is indeed under the scope of the Berne Convention. Therefore, the country may stand the risk of exposing itself to "sanctions" under the dispute settlement mechanism of TRIPs, which annexes the Berne Convention.[108] Additionally, it would not be advisable for the country to break the comity that it enjoys with other nations for its own benefit.

Perhaps a better approach of ensuring the registration of TCEs under the proposed TCEs database would be for the Kenya Copyright Board to carry out extensive stakeholder engagement in line with its mandated function, to carry out awareness creation and training on copyright.[109] In this regard the Kenya Copyright Board would explain to the traditional communities and owners of

[105] Caddick, Davies and Harbottle (n29) 2-05.
[106] ibid.
[107] Berne Convention, article 2(1).
[108] TRIPS, articles 9(1) and 64. Additionally, it is worth noting that there had been logical and persuasive reasons to remove the requirement of formalities in the first place including the fact that a number of formalities were difficult to comply with, and many works were thus accidentally unregistered or registered incorrectly. Also, the expense of complying with formalities was not altogether negligible. Daniel Gervais and Dashiell Renaud, 'The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It' (2013) 28(3) Berkeley Technology Law Journal 1459, 1461.
[109] Kenya Copyright Act. section 5(c) provides that one of the functions of the Kenya Copyright Board shall be to 'devise promotion, introduction and training programs on copyright and related rights, to which end it may co-ordinate its work with national or international organisations concerned with the same subject matter'.

TCEs the operation of the system and administer the uploading of information on the TCEs onto the database.

A key point that the Kenya Copyright Board ought to emphasis is how the system may be of benefit to the traditional communities and owners of TCEs. Whereas the system is proposed with the benefit of users in mind, the TCEs database would also be advantageous to rights holders. They would have the benefit of having their TCE recorded for prosperity, thus, avoiding the real risk that it may become lost forever. Similarly, when users seek to utilise elements of the TCEs that are not ideas and thus, are expressions, then the traditional communities would be compensated for the use of their copyright.

It was contended in Chapter three[110] that as a special category of copyright works, TCEs would receive copyright protection for a period of fifty years after being lawfully made available to the public. This provision borrows from the Berne Convention's provision regarding anonymous and pseudonymous works (article 7(3)) and draws from the fact that the Berne Convention's provision on ownership of anonymous works (article 15(4)) was enacted specifically to provide protection to TCEs which have no identifiable author. Pertinently it was argued that a public domain for TCEs has merit as the public domain works in tandem with the idea/expression dichotomy for the encouragement of creativity.

To further facilitate the operation of the database a CMO for TCEs is proposed. This CMO would administer the copyright in TCEs on behalf of the respective traditional communities as the copyright owners of the TCEs.[111] One of the key

[110] Chapter three, part 3.4.4.
[111] See note 102.

issues that face copyright owners who wish to exploit their works is how they shall monitor or police infringements.[112] When the main focus of copyright was the book and the main mode of exploitation was the sale of printed copies then this oversight, typically done by a publisher, was ad hoc and depended on monitoring activities in the marketplace.[113] However, as copyright expanded to encompass a larger array of subject matter and specifically ephemeral uses, the issues of monitoring copyright have changed.[114] The main mechanism that developed to aid copyright owners to monitor infringement is the CMO.[115] A CMO is an organisation that engages in the administration of particular rights on behalf of and for the benefit of copyright owners.[116]

The Kenya Copyright Act permits the establishment of and sets out the substantive and procedural requirements for the registration of a CMO.[117] The Kenya Copyright Board receives applications for registration of a CMO and approves or refuses such applications.[118] The Kenya Copyright Board ought to encourage the setting up of a TCEs' CMO. Under the Kenya Copyright Act, the Kenya Copyright Board may, where it finds it expedient, assist in establishing a CMO for any class of copyright owners.[119]

There are currently four registered CMOs in Kenya - The Reproduction Rights Society of Kenya (KOPIKEN – collects and distributes royalties for authors and publishers in Kenya for their copyrighted literary materials); Kenya Association of Music Producers (KAMP – collects and distributes royalties for the producers

[112] Bently and Sherman (n11) 305.
[113] ibid.
[114] ibid.
[115] ibid.
[116] ibid.
[117] Kenya Copyright Act 2001, section 46, Kenya Copyright Regulations 2004 regulation 15.
[118] ibid, section 46(2).
[119] ibid, section 46(6).

of sound recordings); Music Copyright Society of Kenya (MCSK - collects royalties in public performances and broadcasts of musical works) and the Performers Rights Society of Kenya (PRiSK - represents performers in musical and dramatic works).[120]

The proposed TCEs' CMO, which perhaps may be styled the "Traditional Cultural Expressions Society of Kenya" ("TCESK") would administer the copyright in TCEs on behalf of the respective traditional communities as the copyright owners of the TCEs.[121] TCESK's primary role in this regard would be to license the use of TCEs primarily to modern artists and to collect royalties in this regard. This would, however, only be one role of TCESK. Just as pertinently TCESK would be required to furnish the Kenya Copyright Board with a list of all the TCEs in its repertoire for publishing on the online TCEs database.

7.3.5 Resolving disputes arising out of the use of the database

Any dispute arising out of the use of an idea contained in a TCE would be handled by the Copyright Tribunal. Such issues would encompass instances where the owner of the copyright in a TCE believes that what has been borrowed from his TCE in the making of another work goes beyond an idea. The Copyright Tribunal would therefore act as a tribunal of first instance towards the resolution of such disputes. Parties, would then have recourse to the court system should they choose to appeal the authority's decision.[122]

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[120] Kenya Copyright Board website <https://www.copyright.go.ke/8-program/4-cmo.html> accessed 24th July, 2019.
[121] See note 102.
[122] See Chapter 2, part 2.5.1 for a discussion on the resolution of disputes, both national and cross-border, on the ownership of TCEs.

The Kenya Copyright Tribunal's mandate and structure are similar to those of the UK Copyright Tribunal.[123] The Kenya Copyright Tribunal currently has the mandate to hear and resolve disputes in instances where – there is a dispute over the registration of copyright; the Kenya Copyright Board is unreasonably refusing to grant a certificate of registration in respect of a CMO; the Kenya Copyright Board is imposing unreasonable terms or conditions on the granting of such a certificate; a CMO is unreasonably refusing to grant a licence in respect of a copyright work; or a CMO is imposing unreasonable terms or conditions on the granting of such a licence.[124]

It is proposed that the Copyright Tribunal has its mandate expanded to act as an arbiter where there is a dispute arising out of the operation of the proposed online TCEs database, particularly, as to the nature of the borrowed element of a TCE, that is, whether it is an idea or an expression. Further, to accomplish this important role, the composition of the Tribunal ought to be reinforced with a requirement that the Chairperson of the Tribunal be a person with particular academic training or work experience in copyright law. The current composition of the Tribunal is:

> not less than three and not more than five persons, one of whom shall be an Advocate of not less than seven years standing or a person who has held

[123] See, UK Government website <https://www.gov.uk/government/organisations/copyright-tribunal/about> accessed 2nd November 2019. In the US, there is no equivalent organisation. The Copyright Royalty Board has the limited mandate of dealing with statutory licenses only. It determines rates and terms for copyright statutory licenses and makes determinations on distribution of statutory license royalties collected by the Copyright Office. Copyright Royalty Board website <https://www.crb.gov/> accessed 7th May 2019.
[124] Kenya Copyright, section 48(4).

judicial office in Kenya as Chairperson, appointed by the Chief Justice where any matters requires to be determined by the Tribunal.[125]

The law already requires that the Chairperson of the Copyright Tribunal be a lawyer. This role would be strengthened by a requirement that the Chairperson be a person with particular academic training or work experience in copyright law. Such training and experience would be important in the resolution of disputes on the onerous matter of how to identify ideas *vis-à-vis* expressions under the idea/expression dichotomy; an area which may present difficulties even after the enactment of an explicit provision setting out those elements of a work which cannot be protected as ideas, as proposed in Chapter six.

Additionally, Kenya may consider a specialised court for the resolution of intellectual property ("IP") or even, specifically, copyright law matters. This would be something for the country to comprehensively appraise having due regard to the requirements of implementing such a court including financial considerations and the necessary qualifications of magistrates and judges. If the country were to choose to go this way, then it can learn from the UK Intellectual Property Enterprise Court ("IPEC") which is a specialised albeit alternative venue to the High Court for bringing legal actions involving IP matters such as patents, registered designs, trade marks, unregistered design rights and copyright.[126] The small claims track of IPEC may be a particularly

[125] ibid, section 48(2).

[126] If the amount sought (damages) is under £500,000 then the case can also be heard by the Patents Court or the Chancery Division. These two courts will hear cases where the amount sought is over £500,000 unless all parties agree that IPEC may hear it. UK government website <https://www.gov.uk/courts-tribunals/intellectual-property-enterprise-court> accessed 5th May, 2019. The US on its part like Kenya does not have specialized IP courts dealing with IP disputes. Disputes concerning patents and copyrights are typically litigated in the federal courts. A trade mark dispute can additionally be heard by a state court in addition to the federal courts. However, the US Copyright Office has put forward the Copyright Alternative in Small-Claims

attractive model for the resolution of disputes concerning TCEs as it provides a forum with simpler procedures by which the most straightforward IP claims with a low financial value can be decided.[127]

7.3.6 Further administrative issues to be addressed

The system proposed is an online database of TCEs in Kenya. This system would be implemented by the Kenya Copyright Board. However, in order for the system to work the copyright board would need to work in tandem with other agencies, key of which would be the Communications Authority of Kenya. The Communications Authority of Kenya is the regulatory authority for the information and communication technology sector in Kenya. Established in 1999 by the Kenya Information and Communications Act, 1998, the Authority is responsible for facilitating the development of the information and communications sectors including, broadcasting, cybersecurity, multimedia, telecommunications, electronic commerce, postal and courier services.

The Authority's responsibilities are, pertinently, licensing all systems and services in the communications industry and managing the country's frequency spectrum and numbering resources.[128] As the system is to be implemented online then the Kenya Copyright Board would need to obtain the Authority's approval in order to do so.

Enforcement Act of 2019. This proposed legislation provides that instead of bringing claims in Federal District Court, a Copyright Claims Board would render decisions in small-claims copyright cases.

[127] However, claims regarding TCEs may not at all be straight forward particularly if a court were to be called on to delineate between ideas and expressions therein. All the same the simpler procedures of the IPEC small claims track that is trial - without the need for parties to be legally represented; without substantial pre-hearing preparation; without the formalities of a traditional trial and; without the parties putting themselves at risk of anything but very limited costs, would be appealing in the Kenyan context. HM Courts and Tribunals Services, 'Guide to the Intellectual Property Enterprise Court Small Claims Track' (February 2018) 3.

[128] Communications Authority of Kenya website <https://ca.go.ke/about-us/who-we-are/what-we-do/> accessed 6th May 2019.

7.3.7 Implementing an online system in Kenya

Also, it cannot be ignored that a key concern would be the practicability of implementing such an online system in Kenya. As noted above the Kenya Copyright Board has already implemented an online database of copyright works. The "Kenya Copyright Board Database of Authors and their Works" contains information regarding - the title of a work, a work's registration number, its category, the right holder, the author and the date of registration.[129] In truth this database is a rather basic repertoire. However, the proposed TCEs database would be more sophisticated, going beyond basic information on TCEs and additionally providing guiding statements regarding aspects of TCEs which can be considered ideas. Furthermore, as noted above, it is proposed that the TCEs database may contain pictorial, audio and visual representations of the works contained therein.

Online refers to the state of being connected to the internet.[130] The internet is a network which consists of a number of other networks connected together.[131] A major part of the internet is the World Wide Web: a collection of documents which are interlinked.[132] Developing countries, such as Kenya, generally have low levels of internet services.[133] Remarkably, Kenya has been able to buck this trend and today enjoys the best internet services in Africa with a reach of eighty-

[129] Kenya Copyright Board website <http://register.copyright.go.ke:8095/kecobo/details.php> accessed 30th July, 2019.
[130] Darrel Ince (ed), *A Dictionary of the Internet* (3rd edn, Oxford University Press 2013) 339.
[131] ibid 248.
[132] ibid.
[133] John A Daly, 'Studying the Impacts of the Internet Without Assuming Technological Determinism' in David Nicholas and Ian Rowlands (eds), *The Internet: Its Impact and Evaluation* (Taylor and Francis 2005) 68.

five percent of the population.[134] It is therefore, suggested that a sophisticated online system could be readily and successfully implemented in Kenya.

Currently, the country offers numerous government-to-citizen services online through the successful “e-citizen” platform. E-citizen is an advanced and interactive online system. Through this platform a significant amount of government services are rendered online, including, among others, the registration of businesses, the payment of taxes, the application for passports, the application for birth certificates, the application for national identification cards and the application for driving licenses.[135] Indeed, these and other related services are currently available only through the e-citizen platform, therefore all persons are required to apply for them online. Thus, the country does have experience in implementing advanced online platforms.

Still, one may be concerned of the ability of members of traditional communities to easily utilise computers and the internet. Accordingly, the Kenya Copyright Board and the proposed TCEs CMO would be required to actively aid in this regard.

Whereas, it is argued that the online TCEs database proposed herein is workable and attainable in the Kenyan context and would be the practical implementation of a copyright theory and law that seeks to encourage creativity, in order to effectuate this system specific reform to the law, particularly the Kenya Copyright Act and Copyright Regulations 2004 would be required. The necessary legislative and regulatory reform is discussed below.

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[134] Suman Mishra and Rebecca Kern-Stone, *Transnational Media: Concepts and Cases* (Wiley 2019) 44.

[135] See e-citizen website <https://www.ecitizen.go.ke/> accessed 6th May, 2019.

7.4 The necessary legal and regulatory reform required to implement the proposed database for traditional cultural expressions

7.4.1 The legislative process in Kenya

In modern democratic states the law-making process is generally undertaken by legislatures. In Kenya, the legislature, officially referred to as the "Parliament of Kenya", consists of the National Assembly and the Senate.[136] Kenya has a two-tiered governance structure that comprises of the national government and county governments. The counties of Kenya are forty-seven geographical units each with a county government consisting of a county assembly and a county executive.[137] The Senate represents the counties and serves to protect the interests of the counties and their governments.[138] The National Assembly comprises of Members of Parliament that represent the people of the constituencies and special interests in the National Assembly.[139] Under the Constitution, IP rights (IPRs) are a function of the national government and therefore the law making process with regard to IPRs is the preserve of the National Assembly.[140]

The National Assembly exercises its legislative power through Bills, draft legislation for consideration by the National Assembly, passed by the National Assembly and assented to by the President.[141] Upon being approved by the

[136] Constitution of Kenya, article 93(1).
[137] ibid, article 176(1).
[138] ibid, article 96(1).
[139] ibid, article 95(1).
[140] ibid, fourth schedule.
[141] The law-making process in the UK and the US has a similar general framework albeit of course with specific nuances. For instance, in the UK, Bills must be approved by both Houses of Parliament, that is, the House of Commons and the House of Lords and only become Acts of Parliament upon royal assent by the Sovereign. In the US, Bills must also be approved by both law-making bodies, collectively referred to as Congress which comprises of the House of Representatives and the Senate. See, Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press 2017); Susan Rose-Ackerman, Stefanie Egidy and James Fowkes, *Due Process of Lawmaking* (Cambridge University Press 2015). In Kenya, Bills only require the further approval

National Assembly and being assented to by the President a Bill becomes an Act of Parliament. With regard to IPRs generally and copyright specifically legislation would generally be enacted through a Public Bill. A Public Bill is a Bill which is intended to affect the public generally; whereas, the other main type of Bill, a Private Bill means any Bill, which is intended to affect or benefit some particular person, association or corporate body.[142]

Before a Bill is introduced into the National Assembly it has to be published, in the *Kenya Gazette*,[143] fourteen days before such introduction. It then has its first reading, which is a formal reading of the title of the Bill.[144] This is followed by a second reading, which is an occasion for debate on the general principles of the Bill, after which it is referred to a committee of the National Assembly for debate and discussion on the detailed provisions.[145] If the committee reports favourably to the Assembly, then the Bill has its third and final reading, where the debate, if any, is restricted to a general statement or reiteration of objections.[146] If approved, the Bill is ready for the Presidential assent, after which it becomes an Act of Parliament.[147]

Existing Acts of Parliament may also be amended. Where a Bill seeks to amend any provision of an existing Act, the text of the relevant part of such provision shall be printed and supplied as part of the Bill which is availed to members of the national assembly.[148] The Bill then goes through the ordinary stages of a

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of the Senate if they touch on matters concerning county governments. Constitution of Kenya, article 96(2).

[142] Kenya National Assembly Standing Orders, standing order 2.

[143] The Kenya Gazette is the official publication of the government of Kenya.

[144] Kenya National Assembly Standing Orders, standing order 126.

[145] Kenya National Assembly Standing Orders, standing order 128.

[146] ibid, standing order 139.

[147] ibid, standing order 153.

[148] ibid, standing order 115.

Public Bill as detailed above. It is common for minor amendments to an Act of Parliament such as remedying typographical errors or making updates in definitions of words to be implemented through an omnibus Statute Law (Miscellaneous Amendments) Bill. Such Bills are introduced in the National Assembly regularly and amend provisions of several Acts of Parliament at once. Whereas Miscellaneous Amendment Bills are generally for minor amendments they have also been utilised, inappropriately, to effect significant substantive changes to Acts of Parliament.[149]

Article 94(5) of the Constitution precludes all other persons or bodies, other than Parliament, from making provisions having the force of law in Kenya except under authority conferred by the Constitution or delegated by the Legislature through a Statute. The National Assembly may, therefore, delegate to any person or body the power to make subsidiary legislation, which require approval of the House before having the force of law. Subsidiary legislation made by persons or bodies other than Parliament are commonly known as statutory instruments. The manner, procedure and criteria for considering statutory instruments is detailed in the Statutory Instruments Act, 2013 and the Standing Orders of Parliament.

Section 2 of the Statutory Instruments Act, 2013 and the Standing Orders of Parliament define a statutory instrument as:

[149] For instance, a previous amendment to the Kenya Copyright Act 2001 resetting the composition of the board of directors of the Kenya Copyright Board was enacted through the Statute Law (Miscellaneous Amendments) Act 2018 which amended a total of fifty-two Acts of Parliament. Such an approach to law-making may be considered inappropriate as Article 118 of the Constitution requires Parliament to facilitate public participation and involvement in its legislative functions.

> Any rule, order, regulation, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

Statutory instruments are prepared by a Cabinet Secretary or a body with power to make them, for instance, a commission, authority or a board. Subsidiary legislation, also referred to as delegated legislation, must be consistent with the provisions of its parent Act.[150] Subsidiary legislation is considered necessary for a number of reasons: Parliament does not have the time available to debate all of the laws necessary, and as such other bodies are needed to make rules, and do so much faster than Parliament, therefore subsidiary legislation is often used for emergency and urgent problems where legislation is needed quickly and would take too long through Parliament.[151] Another reason is that some areas of legislation require technical knowledge, and Parliament may not have the expertise to create the necessary legislation.[152] Delegated legislation is used to provide specific details not included within the Act.

The Kenya Copyright Act empowers the Attorney General to make regulations generally for the better carrying into effect of the provisions of the Act.[153] Pursuant to this provision the Attorney General formulated and passed the Kenya Copyright Regulations 2004. These Regulations provide for how the

[150] Kenya Interpretation and General Provisions Act, section 31(b).
[151] Edward C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart Publishing 2001) 22 – 23.
[152] ibid 24 – 27.
[153] Kenya Copyright Act, section 49(1).

processes and procedures set out and required by the Kenya Copyright Act are to be carried out.[154]

7.4.2 Particular amendments required to Kenya's copyright law

It is proposed that the changes to Kenyan copyright law, suggested by this thesis, be implemented largely through amendments to the existing Kenya Copyright Act. To this end, the Kenya Copyright Board, in line with one of its stated functions – updating copyright legislation – should put forward the required amendments to the National Assembly with the aim of implementing the online TCEs database and with the ultimate objective of structuring the law for the encouragement of creativity. In total, the specific amendments of the law required are to:

- bring TCEs under the edifice of copyright law, away from the current *sui generis* TCEs Act.[155]
- create a separate category of copyright work under the Kenya Copyright Act for TCEs taking into consideration the specific nature and aspects of TCEs.[156]
- reform the TCEs Act to remove TCEs from its ambit.
- provide an explicit statutory provision of the idea/expression dichotomy expressly setting out those elements of a work that are not offered protection to under the rubric of ideas.[157]
- require the Kenya Copyright Board to set up an online database of TCEs which would indicate the name, description and ownership of the TCE

[154] For instance, the Regulations set out the processes of proceedings before the Copyright Tribunal. Kenya Copyright Regulations, regulation 17 and 18.
[155] Discussed in Chapter 3.
[156] See Chapter 3, parts 3.3 and 3.4.
[157] See Chapter 6, part 6.6.

and vitally offer guidance on what elements of a work would readily be usable as ideas.

- add onto the mandate of the Copyright Tribunal a particular function of hearing and resolving disputes arising from the operation of the online TCEs database, particularly, as to the nature of the borrowed element of a TCE, that is, whether it is an idea or an expression. Further, to aid in the accomplishment of this dispute resolution goal, the composition of the Copyright Tribunal ought to be reinforced with a requirement that the Chairperson of the Tribunal be a person with particular academic training or work experience in copyright law.

It is believed that these changes can be implemented largely through amendments to the Kenya Copyright Act by the National Assembly and would lead to the encouragement of creativity in Kenya's particular context. To tie all these amendments together and so as to buttress the vision of a copyright law and theory that seeks to encourage creativity it is also proposed that the Preamble to Kenya's Copyright Act ought to explicitly state that the goal of the Act is the encouragement of creativity by the ready and available utilisation of ideas especially in TCEs.[158]

At the end of the day legal rules ought to be focused on achieving developmental goals.[159] It is argued that the amendments to Kenyan law proposed herein would lead to the goal of encouraging creativity, particularly,

[158] Whereas Preambles to laws are often thought of as not being part of the substantive provisions of statutes, they play important roles in clarifying and offering meaning to statutes. See Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23(1) Melbourne University Law Review 184.
[159] Griffin (n101).

the type of creativity that copyright law seeks to develop, what may be termed "artistic creativity" or "cultural creativity".[160]

7.5 How the proposed database for traditional cultural expressions can impact other jurisdictions

7.5.1 International impact

Whereas the proposals herein are focused on copyright reform in Kenya, if successful, it is argued that this model can be utilised in other countries. TCEs are common in Africa, Asia and the Pacific, the Arab region, Latin America and the Caribbean.[161] As seen in Chapter two, Western countries - the UK, other European countries and the US, have not actively considered the protection of TCEs despite the fact that they may have works which could fit within the conception of TCEs.[162]

Internationally, there is a strong movement for the protection of TCEs under *sui generis* regimes, it being argued that TCEs do not readily fit in with the conventional forms of IPRs that is, patent, copyright and trade mark.[163] All the same, some countries like Ghana,[164] Tunisia,[165] Sri Lanka,[166] Canada[167] and

[160] See the discussion putting forward the conceptualisation of creativity employed in this research in Chapter 1, part 1.5.2; noting, specifically, that the focus of this thesis is as stated above artistic or cultural creativity or more particularly, the type of creativity that copyright law can protect.
[161] WIPO, 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore' (WIPO 2003) 7.
[162] See Chapter 2, part 2.2.3.
[163] Patricia L. Judd, 'The Difficulties in Harmonizing Legal Protections for Traditional Knowledge and Intellectual Property' (2019) 58(2) Washburn Law Journal 249
[164] Copyright Act 2005.
[165] Law No. 94—36 of February 24, 1994, on Literary and Artistic Property.
[166] Intellectual Property Act, No. 36 of 2003.
[167] In Canada, the Copyright Act 1985 has been used by a range of Aboriginal artists, composers and writers to protect their tradition-based creations. Examples include silver jewellery of Haida (ethnic group native to the Canadian archipelago Haida Gwaii) and sculptures of Inuit (ethnic group inhabiting the arctic region of Canada) artists. WIPO (n161) 106, note 103.

Australia[168] among others do protect TCEs under Copyright law. Indeed Kenya, initially protected TCEs under the Kenya Copyright Act 2001 before the enactment of the TCEs Act in 2016.

Overall, in Africa and other places where TCEs are prominently found, TCEs form a pertinent aspect of everyday life and would invariably have an impact on the type of creative works produced in those countries. In this regard, such countries may consider the reforms proposed in this thesis for the encouragement of their creativity. Many African and Asian countries follow the common law tradition, for their legal systems generally and for their copyright laws specifically.[169] Therefore, implementing such reforms would widely follow the pattern set out herein. Kenya's immediate neighbours Uganda[170] and Tanzania[171] already have explicit provisions for the idea/expression dichotomy in their copyright laws and may therefore be seen to be a step ahead of Kenya with regard to the implements necessary for the proposed system.

[168] See the cases of *Re Terry Yumbulul v Reserve Bank of Australia; Aboriginal Artists Agency Limited and Anthony Wallis* [1991] FCA 332; 21 IPR 481 and *George Milpurrurru and others v Indofurn Pty Ltd and others (the Carpets Case)* [1994] FCA 1544; 30 IPR 209 discussed in Chapter 2, part 2.3.4.3.

[169] Save for the countries where the civil law tradition is prominent such as the *francophone* (French-speaking) countries of Africa including – Senegal, Cameroon and Ivory Coast; *lusophone* (Portuguese-speaking) countries of Africa including Angola and Mozambique and the only *Hispanophone* (Spanish-speaking) country in Africa, Equatorial Guinea. See Charles M. Fombad, 'The Evolution of Modern African Constitutions' in Charles M. Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 13 – 57. In addition to continental Europe, the civil law tradition is also prominent in East Asia, in Latin America and in many parts of the Middle East. See John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007).

[170] Section 6 of the Ugandan Copyright and Neighbouring Rights Act, 2006 provides that 'ideas, concepts, procedures, methods or other things of a similar nature shall not be protected by copyright under this Act'.

[171] In Tanzania the Copyright and Neighbouring Rights Act, 1999, expressly provides for the doctrine at section 7(c) noting that copyright protection shall not extend to 'any idea, procedure, method of operation, concept principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work'.

7.5.2 Lessons that can be learnt by the UK and the US

Whereas the copyright laws of the UK and the US are undoubtedly more advanced and sophisticated than Kenyan copyright law in many respects; and indeed a part of the proposals for reform of Kenyan copyright law in this thesis are drawn from the copyright laws of these two jurisdictions, the proposed reform herein may aid UK and US copyright law in some distinct ways.

As argued in Chapter five the key objective of UK and US copyright law is the encouragement of creativity,[172] it would therefore be useful for these countries to reform their respective Copyright Acts to have preambulary statements to expressly provide for this. This would help courts in the resolution of disputes, whereby cases would be decided in line with a model of copyright law whose aim is the encouragement of creativity. In similar vein, the UK Copyright, Designs and Patents Act 1988 which like the Kenyan Copyright Act does not have an express provision for the idea/expression dichotomy could be reformed to explicitly provide for it. Further, so as to aid in the easy identification of ideas in works for further creative endeavours, the UK may consider implementing a database for its copyright works similar to the proposed TCEs database for Kenya.

As noted, the truly unique aspect of the proposed TCEs database for Kenya, is the guiding statement on what may be deemed an idea within a particular registered TCE. This guiding statement is targeted at TCEs owing to their significant influence over Kenyan creativity. Therefore, it was argued that a guiding statement on ideas for TCEs would a welcome and practicable way of encouraging creativity. A similar statement for other categories of copyright

[172] See Chapter 5, part 5.3.

works in Kenya would be superfluous as in most cases these works themselves would be derived from TCEs; however, this would not be the case for copyright works in the UK and the US.

In Chapter two it was noted that the UK and the US do not have TCEs *per se*.[173] Therefore, they may consider implementing a database similar to the proposed TCEs database for their copyright works. The US Copyright office currently implements an online database of registered copyright works containing information on the title of the work, name of the author, keyword and its registration number.[174] This could be updated to include a guiding statement on ideas as in the Kenyan model. In the UK, a totally new database would be required as the government currently does not maintain a database of copyright works.

However, as noted above, the UK Intellectual Property Office does have experience with implementing an online database with regard to orphan works.[175] This database contains detailed descriptions of works in written form, known as the "full description". Indeed, Kenya may adopt the format of the said full description when implementing its guiding statement on ideas within TCEs.

7.6 A final statement on encouraging creativity through the proposed database for traditional cultural expressions

The proposed system effectively implements a theoretical separation between the making of works and protecting and exploiting them. Its emphasis and focus

[173] See discussion in Chapter 2, part 2.2.3.
[174] US Copyright Office website <https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First> accessed 6th May 2019.
[175] UK government website <https://www.gov.uk/guidance/copyright-orphan-works> accessed 5th August, 2019.

are on ideas, the building blocks of creativity. The system is the embodiment of a copyright law and theory whose objective is the encouragement of the creation of new works.

The system is put forward in the Kenyan context. It is recognised that creativity is a highly derivative process. An important and distinct aspect of Kenyan creativity is that it is largely derived from its TCEs. Therefore, a good place to focus with regard to encouraging creativity in Kenya, would be its TCEs. In this regard, it was proposed that the protection and promotion of TCEs in Kenya ought to be brought within copyright law. This would enable TCEs to be conceived as copyright works, availing them to copyright law's fundamental axiom, the idea/expression dichotomy.

The idea/expression dichotomy is copyright law's key mechanism for regulating creativity. However, it has not been formulated and interpreted in a principled manner, this has led to a chilling effect on creativity. Owing to this it was proposed that Kenya could implement a statutory provision for the principle in its Copyright Act akin to the provision of the US Copyright Act of 1976, so as to help in the doctrine's interpretation. A well formulated and interpreted doctrine would aid in encouraging creativity, as elements in a work which are not protected, that is, ideas would be easier to demarcate. The proposed TCEs database leans heavily on a well formulated idea/expression dichotomy as it requires the Kenya Copyright Board to offer guiding statements of those aspects of a TCE which would not receive copyright protection, as ideas, and would thus, be available for use by other creators.

The proposed TCEs database by dealing directly with ideas and taking the bold step of offering guidance to creators on what an idea is within a work, avoids the challenge of being dominated by economic concerns. The system does not advocate for the improvement of the exploitation of the TCEs but rather for the use of ideas, which ought to be free for the use of all. Thus, this system does not deal with property rights but at the same time does not upset the property rights system, as once contemporary works are created based on the TCEs then they can be protected by copyright.

In this way, the proposed system aids in helping creativity (cultural domain) and copyright law (political domain) break free of the chains of capitalism and property (economic domain).

7.7 Conclusion

This chapter has set forth how a copyright law geared for the encouragement of creativity can be brought to life in Kenya. Building on the proposals to the idea/expression dichotomy made in the previous chapter, further specific and practical reform required of Kenyan copyright law for the encouragement of creativity was put forward. To this end it was proposed that an online database of TCEs be set up by the Kenya Copyright Board. This database would indicate the name, description and ownership of a particular TCE and pertinently, on the basis of the explicit provision of the idea/expression dichotomy, offer guidance on what elements of a work could readily be usable as ideas.

Particular reforms required to the law, that is the Kenya Copyright Act, and administrative organisations such as the Kenya Copyright Board and the

Copyright Tribunal were also discussed with the aim of implementing the system.

The next chapter will offer concluding comments on the thesis generally.

CHAPTER EIGHT

CONCLUDING PERSPECTIVES ON REFORMING KENYAN COPYRIGHT LAW FOR THE ENCOURAGEMENT OF CREATIVITY

8.1 Introduction

Each of the previous chapters addressed specific aspects of how copyright law may be reformed for it to achieve its stated objective of encouraging creativity. The focus of these disquisitions has been on the Kenyan scenario, although this context has been considered and examined *vis-à-vis* that in the United Kingdom ("UK") and the United States ("US"). This final chapter brings together and streamlines the proposals and conclusions made in all of the previous chapters and presents the main conclusions from the research.

There are five main parts to this chapter. First an overview of the research, then, a review of the research questions and the findings that where made with regard to the questions. The third part puts forward proposals for future research based on the thesis's findings. The fourth part notes how the research has created and interpreted new knowledge. Finally, the fifth and last part of this chapter offers closing comments on the research.

8.2 Thesis overview

This research has evaluated how Kenya's copyright law can be reformed to enable it to more adequately obtain its principal aim which it was put forward is the encouragement of creativity.[1] An examination, review, and comparison of

[1] Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) 14 – 16; Julie E. Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40(3) UC Davis Law Review

Kenya's copyright law with the more sophisticated copyright laws of the UK and the US reveal that these laws have not been appropriately structured for the encouragement of creativity. Instead of understanding that creativity is a derivative process copyright law valorises extempore creativity, a position which has been a stalking horse for economic considerations.[2]

Creativity in Kenya draws heavily on its traditional culture, particularly its traditional cultural expressions ("TCEs").[3] TCEs in the country are currently regulated by a *sui generis* law, the Protection of Traditional Knowledge and Cultural Expressions Act 2016 ("TCEs Act"). This Act emphasizes existing property rights over the promotion of creativity as its provisions preclude the use of ideas within TCEs, while at the same time providing for a right in TCEs in perpetuity.[4]

In doing so, the TCEs Act, much like the extant copyright law is seen to be dominated by economic factors to the detriment of creative activities. However, it was argued that copyright law presents a more appropriate regime for the encouragement of creativity owing to its tried and tested edifice. Pertinently, copyright law has an internal mechanism for the regulation of creativity, known as the idea/expression dichotomy, by which ideas are recognised as not being

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1151; Omri Rachum-Twaig, 'Recreating Copyright: The Cognitive Process of Creation and Copyright Law' (2017) 27(2) Fordham Intellectual Property, Media and Entertainment Law Journal 287, 288. See Chapter 5, part 5.3.

[2] Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author' (1984) 17(4) Eighteenth-Century Studies 425, 426; Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) 2 Duke Law Journal 455, 500.

[3] This contention was evidenced by the discussion on Kenya's contemporary creative industries, which are heavily influenced by TCEs in Chapter 2, part 2.2.4. See also Michael Shally-Jensen, *Countries, Peoples and Cultures: Eastern and Southern Africa* (Salem Press 2015) 120 – 124; Kathire Kiiru and Maina wa Mutonya, 'Music, Dance and Social Change in Eastern Africa' in Kathire Kiiru and Maina wa Mutonya (eds), *Music and Dance in Eastern Africa* (Twaweza Communications 2018) 8 – 9.

[4] TCEs Act, sections 2, 17, 18(2)(h) and 20(2). See the discussion on these contentions in Chapter 2, part 2.4.2.

able to receive copyright protection.[5] Ideas are of utmost importance to this discourse as they are the building blocks of creativity.[6] In this regard it was contended that TCEs ought to be regulated under copyright law, as a special category of copyright work, thus availing them to this elaborate structure.

Ultimately it was propounded that the contentions of the thesis for the encouragement of creativity can be brought to life thought the institution of a database for TCEs which pertinently would offer a guiding statement on what may be deemed an idea within a particular TCE.

8.3 Research findings

The thesis explored three key research questions, which were:

(i) how does the creative process occur?

(ii) how does copyright law understand and make provision for creativity?

(iii) how may Kenya's copyright law be reformed for it to achieve copyright law's stated objective of encouraging creativity?

These questions were considered and explored throughout the thesis and the following findings were made.

Chapter two put forward the thesis's focus on Kenya. It considered, within the Kenyan context, the thesis's first two questions, that is, how does the creative process occur? And how does copyright law understand and make provision for

[5] Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (17th Ed. Sweet and Maxwell 2016) [2-09]; *Laddie, Prescott & Vitoria: The Modern Law of Copyright and Designs* (4th edn, LexisNexis Butterworths, London 2011) [3.74].

[6] This premise is deduced from Locke's theory of knowledge explicated in Chapter 4, parts 4.3.2 and 4.4.1. See also, Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009) 184; Graham M. Dutfield and Uma Suthersanen, 'The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity' (2004) 8(4) Intellectual Property Quarterly 379, 398

creativity? It emerged that a characteristic aspect of creativity in Kenya is that it is significantly influenced by the country's traditional culture, specifically, its TCEs. TCEs have had a pervading influence on the country's modern creative industries. TCEs are currently protected in Kenya under, the TCEs Act. Whereas this law offers protection for TCEs it was argued that it does not encourage the creation of TCEs or promote the utilisation of TCEs or elements thereof for the creation of modern works.

The TCEs Act locks-in ideas, preventing their use for further creativity. . By doing so it was argued that the Act panders to the dictates of the economic domain by emphasising existing property rights and preventing further creativity to arise readily and easily. It was proposed that the appropriate legal regime required to govern TCEs should strike a proper balance between the protection of TCEs and the promotion of further development and dissemination of TCEs as well as the encouragement of modern creativity inspired by TCEs.

Chapter three continued the discussion in Chapter two by advancing that the appropriate regime for the regulation of TCEs in Kenyan ought to be copyright law. As such this chapter began to offer a response to the third research question that is, how may Kenya's copyright law be reformed for it to achieve copyright law's stated objective of encouraging creativity? The task of further responding to this research question was picked up, substantially, in chapters six and seven.

Chapter three noted that Kenya had enacted the TCEs Act in 2016 on the backdrop of a strong international movement that argued that TCEs do not

readily fit in with conventional forms of intellectual property rights, that is, patent, copyright and trade mark. Regarding copyright, whereas some TCEs do satisfy some or even all of the requirements for copyright protection, many more do not. The inherent limitations of protecting TCEs under copyright law were seen to lie in relation to matters of authorship, ownership, originality, the public domain, tangibility and duration of protection.

In response to these challenges, it was proposed, overall, that Kenyan copyright law ought to be reformed to create a separate category of copyright work for TCEs which would provide uniquely for the protection of TCEs. Specific responses were offered for the inherent challenges noted above. Pertinently, it was noted that TCEs within this framework would be able to be owned by traditional communities, through their chosen representative who would hold the copyright in the TCE in trust on behalf of other community members, and this would answer to copyright law's requirements on authorship. Furthermore it was put forward that the proposed protection for TCEs under the Kenya Copyright Act 2001 ought to provide that the protection that it offers to TCEs, applies to both existing TCEs and new TCEs. This would respond to queries on the public domain character of many existing TCEs.

Overall, moving TCEs under the regulation of copyright law would provide adequate protection for the TCEs and at the same time, importantly, avail TCEs, to copyright's tried and tested edifice; more so, its fundamental axiom, the idea/expression dichotomy. Modern Kenyan artists and creators would be able to readily utilise ideas within TCEs for their creations, additionally, other TCEs could also more easily be made in this way.

Chapter four, examined, with a focus on the UK and the US, the thesis's first research question, that is, how does creativity occur? As was seen in the Kenyan context it also emerged here that the true nature of creativity is that it is an incremental process that relies on pre-existing ideas. The discussion on creativity in Chapter four centred on a view of creativity as propounded in Locke's theory of knowledge. Under this theory it was seen that new knowledge arises when simple ideas, the material elements of knowledge, are combined together. It was urged that this process of coming up with knowledge can be equated with the process of creativity. Similarly creativity was considered within the main academic field dealing with the subject, creativity research. The zenith of these viewpoints is the rejection of *ex nihilo* (out of nothing) creativity and the acknowledgement of creativity as being a derivative process that draws on existing concepts and ideas.

Pertinently, Chapter four also discussed Rudolf Steiner's theory of social three-folding in detail. The arguments presented in this thesis were considered through the lens of social three-folding. In this theory Steiner proposed the autonomous development of society's economic, political and cultural domains, at the same time acknowledging their inevitable interdependencies, for economic and social prosperity. Steiner argued that an undesirable social state had been caused by the economic domain's dominance over the political domain and cultural domain. Key in resolving this "social problem", according to Steiner, was enabling the cultural domain to develop independently without the domination of economic and political considerations.

It was noted that the cultural domain is comprised of the artefacts of creativity such as literature, art, music and theatre. Copyright law is the key mechanism for the legal regulation of these areas. Whereas the main objective of copyright law is the encouragement of creativity, copyright law has in fact been dominated by economic concerns; thus, it has failed to adequately achieve its main aim. In response to this scenario Chapter four proposed that in order for copyright law to obtain its key objective of encouraging creativity, then it ought to focus on the creativity process itself, acknowledging the true nature of creativity as a derivative process and making adequate provisions to enable creative processes to occur autonomously without economic concerns guiding them.

Like Chapter four, Chapter five placed one of the thesis's main research questions in the Western context, that is, the UK and the US. Chapter five considered the thesis's second main research question; how does copyright law understand and make provision for creativity? In response to this it was seen that copyright law's consideration and understanding of creativity is not in line with the true nature of creativity as a derivative process. Copyright law valorises the Romantic "author-genius", that is, one who creates works extemporaneously, a viewpoint that is accentuated in the doctrines of authorship, originality and the work.

The Romantic ethic of the author-genius, exemplified in 'the image of the painter alone in the attic'[7], which may be viewed as the "purest" form of authorship, has been a stalking horse for economic interests that have been tactically concealed even as early as with the Statute of Anne of 1710 wherein

[7] William Fisher, 'CopyrightX Lecture 5.1 Authorship: Sole Authorship' Copyright X website < http://copyx.org/lectures/> accessed 1st June 2019.

the Stationers' Company advanced their own economic interests behind the veil of advocating for the rights of authors. It was emphasised that the economic domain's dominance over copyright law became overt and settled following the enactment of the Agreement on the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") which merged copyright law with global trade objectives.

Thus, the chapter noted the need to align copyright law with its main objective, the encouragement of creativity. In order to do so it was stressed that copyright law needed to move away from its current underlying premises, that is, the labour theory, the personality theory, the utilitarian theory and the cultural theory, and instead be based on a theory that endorses the encouragement of creativity as its main objective.

It was argued that if copyright law were to conceive of and provide for creativity within the precepts of Locke's theory of knowledge, that is, that creativity is a derivative process, then it would be better structured for the encouragement of creativity. Such a viewpoint urges for creativity to arise within its own precepts as opposed to the dictates of the economic domain, by readily and easily availing ideas, the building blocks of creativity, for use by new creators. The practical application of this viewpoint in the Kenyan context was proffered in the chapters that followed.

Chapters six and seven further explored the third research question, how may Kenya's copyright law be reformed for it to better enhance creativity?

Chapter six discussed the idea/expression dichotomy in detail. As noted above, the idea/expression dichotomy is the notion that copyright law does not protect ideas and only protects the expression of ideas. It emerged that the reason why the doctrine has not been properly interpreted is due to how the law construes ideas. To clarify this point the etymological and philosophical interpretations of the word idea were considered *vis-à-vis* the doctrine's interpretation by courts in Kenya, the UK and the US. This discussion exposed that there are diverse definitions, acceptations, descriptions and conceptualisations of what ideas are. Such differences have made the idea/expression very difficult to interpret. It was noted that this has had a chilling effect on creativity.

Therefore, in seeking a proper formulation of the doctrine it was proposed that an explicit statutory footing for the doctrine, similar to the US provision in section 102(b) of the US Copyright Act would be a welcome reform for Kenya. It was contended that such a statutory provision would clearly denote those elements of a work that do not receive copyright protection. In essence, this provision would go beyond the idea/expression dichotomy, as what would now be free for use are not merely "ideas" as the word is understood in English and philosophy but a motley of relatable elements including "ideas", schemes, systems, methods, information, facts among others.

It was argued that this explicit statutory provision would lead to a more principled interpretation of the doctrine and this would lead to an encouragement of creativity. Pertinently it was posited that the statutory provision on the idea/expression dichotomy ought to also explicitly provide that

copyright protection does not extend to “ideas” in TCEs, on the backdrop of the appreciation of the important role that TCEs play in Kenyan creativity.

To offer practical implementation to the thesis’s proposed reforms to Kenyan copyright theory and law for the encouragement of creativity, the thesis’s final substantive chapter, Chapter seven, put forward a new system – the online TCEs database.

Chapter seven proposed that an online TCEs database be set up by the Kenya Copyright Board. This TCEs database would indicate the name, description and ownership of a particular TCE and pertinently, on the basis of the new statutory provision of the idea/expression dichotomy, offer guiding statements on what elements of TCEs would be deemed to be ideas thus readily usable for further creativity. . By dealing directly in ideas, which cannot be owned, this system would remove queries on property rights from the creation narrative therefore eliminating the domination of economic concerns over creativity and thus, encouraging creativity to arise under its own precepts in line with Steiner’s theory of social three-folding and Locke’s theory of knowledge. The particular reforms required to the law and administrative organisations such as the Kenya Copyright Board and the Copyright Tribunal were also discussed with the aim of implementing the system.

8.4 Future research

It is proposed that this research could be furthered in the following ways.

First, an empirical examination could be done on the question of the extent to which the proposal of having TCEs regulated under copyright law in Kenya would indeed lead to an increase in the actual number of works created. Such a study would necessitate the incorporation of legal principles with statistical methods.[8] This work would require the identification of all the copyright works created or registered in the country during a particular period. This would then be weighed against the changes to copyright law to see whether there is a correlation or causation between such changes and the creation or registration of copyright works.

Another area for additional research would be including to the discussion, innovation as the other element of invention. As discussed in the introductory chapter, invention can be considered within two main categories – innovation and creation.[9] Innovation generally refers to the discovery, development, and commercialization of new and improved products and processes.[10] Thus, products of innovation, such as scientific inventions or medicinal advancements are generally protected under patent law and not copyright law. For a developing country such as Kenya the innovation discourse is highly vital. The most developed countries in the world including the UK and the US, witness the highest levels of innovation evidenced by the patents granted in these countries every year. Encouraging innovation would aid Kenya in its development agenda, therefore, this discourse could be furthered as well.

[8] Similar interdisciplinary studies have been undertaken. See, for instance, Raymond Shih Ray Ku, Jiayang Sun and Yiying Fan, 'Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty?' (2009) 62(6) Vanderbilt Law Review 1667.
[9] See Chapter 1, part 1.5.2.
[10] Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* (Oxford University Press 2009) 19.

8.5 The research's creation and interpretation of new knowledge

This thesis offers a unique contribution to the literature on copyright law as for the first time, the theory of social three-folding is applied to an evaluation on Kenyan copyright law. Whereas there have been previous applications of the theory of social three-folding to inquiries on culture and the creative industries as well as on copyright law, none have applied the theory specifically to the Kenyan context.

Joseph Beuys, the influential artist, applied social three-folding to the field of art.[11] Beuys was an influential artist who constantly pushed the boundaries of art. His work was grounded on concepts of sociology and philosophy.[12] Like Steiner, Beuys decried the domination of the economic domain over the cultural domain. He argued that in order to escape this "dead-end", society's focus ought to be on creativity.[13] He emphasised the need for the independent growth of the cultural domain, to develop a healthy interaction between the three domains of social life that he termed the 'three great strata or spheres of social forces'.[14] Beuys suggested that a separation of cultural domain from the economic domain would permit a more appropriate and accurate regulation of culture which would directly address the worth of the culture produced.

Griffin has proposed reform to UK copyright law based on the theory of social three-folding.[15] Griffin critiques the domination of the economic domain over the cultural domain; which domination he notes manifests itself most vividly in the

[11] Joseph Beuys, *What is Money?* (Isabelle Boccon-Gibod tr, Clairview Books 2012). See Chapter 4, part 4.2.4.2.
[12] Beuys (n29) 18.
[13] ibid 19.
[14] ibid.
[15] James Griffin, 'Making A New Copyright Economy: A New System Parallel to the Notion of Proprietary Exploitation in Copyright' (2013) 1 Intellectual Property Quarterly 69. See Chapter 7, part 7.2.

notion of copyright as a property right.[16] Griffin argues that this domination has encumbered creative endeavours.[17] As a response Griffin proposes "a new copyright economy" whereby a new system, running parallel to the existing copyright system, would remove the act of creativity from copyright law's traditional proprietary dialogue.[18]

By applying the theory of social three-folding to the Kenyan context this work is able to ventilate on critical issues on Kenyan society such as creativity and how it arises.

Additionally, the consideration, examination and comparison of the copyright laws of Kenya, the UK and the US, aspects of which are seen throughout the study, particularly, with regard to the discussion on creativity and the idea/expression dichotomy furthers the interpretation of new knowledge in the field of copyright law.

8.6 Conclusion

It is contended that the reforms proposed in this thesis would lead Kenyan copyright law to better encourage creativity. As Kenyan copyright law is currently structured, it has, in the terms of Steiner's social three-folding, been dominated by the economic domain. Indeed, the same is true of the copyright laws of the UK and the US. Copyright law's existing structure has therefore failed to encourage creativity, which is copyright law's key objective. Therefore, by focusing copyright law on how creativity arises and not on economic considerations then copyright law will be able to encourage creativity.

[16] Griffin (n33) 74.
[17] ibid 74 – 75.
[18] Griffin (n33) 82 – 86.

As seen through Locke's theory of knowledge, creativity is a derivative process and not one born of extemporary genius as the Romantic model advances. Copyright law has failed to appreciate the true nature of the creative process and instead aligns itself to Romanticism's author-genius ethic. This rhetoric is a stalking horse for the economic domain. The economic domain's dominance over copyright law has become an overt policy with the enactment of TRIPS which has brought copyright law into global trade objectives.

Modern Kenyan creativity is highly derivative of its culture, particularly its TCEs. Currently, TCEs in Kenya are protected under a *sui generis* law which locks-in ideas and precludes their creative re-use. . TCEs ought instead to fall under copyright law, as a special category of work, which answers to their unique aspects. .

By bringing TCEs under copyright law, Kenyan creativity would benefit as copyright law has a tried and trusted edifice, particularly, it contains an internal mechanism for the regulation of creativity, the idea/expression dichotomy.

Kenyan copyright law ought to adopt a clear statutory provision for this doctrine which would denote with clarity those elements of a work which are ideas and thus free for use by all. The thesis's proposals can be brought to life in Kenya through the implementation of an online TCEs database, through which creators would be able to know with reasonable certainty what would be deemed an idea within a TCE and thus what they can freely borrow for their own creative endeavours.

It is submitted that these reforms to Kenyan copyright law would aid in the encouragement of creativity.

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