

Investigating Musical Copyright Infringement:
*Examining International Understandings of Musical Copyright
Infringement for Potential Adaptation into South African Copyright
Law*

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Abstract:

This thesis examines international approaches to musical work copyright infringement law for the purpose of establishing an approach that can be utilised effectively under the South African copyright infringement framework. In doing so, the importance of the various interactive elements of musical works is investigated as well as the modes of assessment in infringement scenarios. The findings are used to create a robust middle-ground approach to be adapted into the South African copyright infringement framework. Further considerations that impact infringement outcomes are addressed to the extent that they are contextually relevant. These include a discussion of research undertaken on the continent regarding the relationship between creators and the music-related copyright regime as well as the role that exceptions and limitations play in infringement outcomes.

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*Minor Dissertation as a prerequisite for completion of LLM in
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Research dissertation/ research paper presented for the approval of Senate in fulfillment of part of the requirements for the LLM in Intellectual Property Law in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM in Intellectual Property Law dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

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Chapter 1:

Introduction

1.1 Introductory Remarks

As is the case with many categories of work eligible for copyright protection in South Africa, a dearth of relevant case law plagues the subject of music related copyright infringement. The result is that the empowering legislation, The Copyright Act 98 of 1978, is interpreted and leaned on in the abstract with little concrete precedent available on the subject to aid potential litigants or encourage academic discourse.¹

General tests for copyright infringement exist in case law and remain applicable, but they are broadly constructed whilst music remains inherently complex and nuanced.² In the context of copyright alone, if one were to take any popular song, a three minute chart-topper that might be heard on the radio for example, and break it down into its constituent elements, they would find that the lyrics are capable of protection as a literary work; the sheet music and musical arrangements as a musical work; and the recording itself as a sound recording.³ Of these, the musical work is the element that forms the compositional core and is the element that will be scrutinized for potential similarity in a case of alleged infringement. It must be noted that the musical work, itself, is usually capable of being subdivided further into its own constituent parts.⁴

Foreign jurisdictions have toiled with how best to examine, evaluate, and compare musical works where infringement has been alleged. When considering what makes up an important part of a musical work, there has been conflicting precedent and jurisprudence from which two broad and divergent approaches have appeared. On the one side is the holistic approach, which proposes that musical works should be viewed as more than the sum of their combined elements, and on the other is the traditional approach, which proposes that individual compositional elements are of importance and, as such, should be considered separately from the unoriginal remainder. Beyond

¹ The Copyright Act, 98 of 1978.

² *Moneyweb (Pty) Ltd v Media 24 Ltd* 2016 3 All SA 193 (GJ) outlines the general tests; Paul M. Grinvalsky 'Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement' (1991) 28 *Cal. W. L. Rev.* 395 on musical complexity.

³ *Supra* note 1 at s2(1), s1.

⁴ Michael Mopas and Amelia Curran, 'Translating the Sound of Music: Forensic Musicology and Visual Evidence in Music Copyright Infringement Cases' (2016) 31 *Can. J.L. & Soc.* 25 at 28.

the broad approaches to understanding the important elements of musical works, the form of assessment is a relevant factor to the infringement enquiry. Musical works can be assessed aurally via playback or visually via notation assessment. These two modes of assessment play a critical role in the perception of the relevant musical works and must be examined.

Considering the above, this thesis undertakes, fundamentally, to determine the benefits and flaws of each approach and form of assessment and, based on that finding, to construct an approach applicable to the local framework.

Beyond the infringement test itself, other qualifiers play a role in the substantive operation of the broader infringement outcomes. Exceptions and limitations play a direct role in outcomes and, as such, should be evaluated for the role they can play in alleviating or burdening the infringement test. Furthermore, and on a separate plane, the law should be depicted within the context that it operates and, as such, it is forwarded that a discussion of music related copyright law as it has been treated in the African context is important. In pursuit of this objective, research conducted in Egypt regarding independent musicians and their interaction with copyright is analysed.⁵

1.2 Justification and Impact

There exists a gap in local law, as well as a lack of clarity internationally, on how to approach infringement of musical works and so, naturally, research seeking to fill that gap is pertinent. The local popular music context is particularly significant considering recent attempts by national broadcasters to increase local exposure through radio play quotas.⁶ Though the extreme nature of these quotas led to their end, they signalled an interest in expanding economic horizons for local musicians. Copyright in musical works and the attached economic rights naturally contribute to the economic benefits musicians derive from their music and so increased certainty regarding the extent to which their copyright is protected is preferable. It is submitted that the development of a robust approach to musical work infringement would stand creators in good stead going forward.

⁵ Nagla Rizk 'From *De Facto* Commons to Digital Commons? The Case of Egypt's Independent Music Industry' in De Beer, Armstrong, Oguamanam & Schonwetter (ed) *Innovation and Intellectual Property, Collaborative Dynamics in Africa* (2014) 171.

⁶GN 344-355 GG 39844 of 23 March 2016; 'SABC radio introduces 90% South African music quota' at <http://www.bbc.com/news/world-africa-36275487> accessed 8 April 2018.

As an additional justification, the lack of local case law should prompt any researcher to ask whether South African copyright law is congruent with the aspirations of creators of musical works. It is hoped that through the establishment of a robust test and the contextual analysis of musical copyright interaction on the continent, some clarity can be gained regarding both infringement and the perceptions creators have of the copyright system.

1.3 Research Questions

Considering key lessons learnt from international approaches to the subject, how should musical works be evaluated and compared in local copyright infringement cases?

1. Which elements of a musical work are substantially important in an infringement scenario?
 - 1.1. Are traditional approaches, which emphasise the importance of certain elements, such as melody, acceptable?
 - 1.2. Alternatively, must the constituent elements of a musical work be considered together as more than the sum of their parts in order to determine what is important?
 - 1.2.1. Which parts are relevant to this enquiry?
2. Are musical works better evaluated aurally or visually via written notation?
3. Is there a viable middle ground between the various approaches and forms of assessment, and could this plausibly be applied within the local framework?
4. Beyond the application of the lessons learnt from foreign jurisdictions to the local system, what other factors can be considered?
 - 4.1. How have musicians interacted with music copyright law in the African context and how should their experience shape development?
 - 4.2. How are the relevant exceptions and limitations and their expected development relevant to the suggested infringement approach?

1.4 Methodology

Research in this topic was primarily completed through desktop research, comparing and contrasting decisions in foreign jurisdictions and academic writing thereon with our legislation, given that local case law is absent. Similarly, the examination of how musicians on the continent interact with copyright law was completed via desktop research.

1.5 Thesis Structure

The structure of the remainder of this thesis is set out as follows:

Chapter 2: Musical Theory and Music as a Legal Concept

This chapter is geared towards setting up a foundation for the chapters to follow. The basics of conventional music theory are outlined and contextualised within the state of popular music today. Following this, the development of music as a legal concept and the distinction of the various legal rights relating to music are discussed.

Chapter 3: The Fundamentals of International Approaches to Copyright Infringement

This chapter focuses on establishing the fundamental international approaches to infringement and how they have dealt with musical works. In particular, the traditional approaches are contrasted with the holistic approach, and analysis of the two broad modes of assessment, aural and notation assessment, is undertaken.

Chapter 4: Finding a Middle Ground and Application to the Local Framework

This chapter focuses on constructing a middle ground approach from the international approaches and discusses how such an approach might fit under the local construction of music copyright law.

Chapter 5: Other Considerations

This chapter examines two key considerations which fall outside of the infringement test to establish a contextualised view of the musical copyright framework. Firstly, empirical work relating to independent musicians in Egypt and their relationship with musical copyright law is discussed in an attempt to better understand the interaction on the continent.⁷ Secondly, the relevance of exceptions and limitations and their potential amendment are discussed to determine the impact they could have on infringement outcomes.

Chapter 6: Conclusions

⁷ Op cit note 5.

Chapter 2:

Musical Theory and Music as a Legal Concept

To understand aspects of this thesis it is necessary to have at least a rudimentary grasp of music theory and the components of a musical composition from a non-legal perspective. The establishment of the fundamental tenets of musical composition creates a starting point from which an understanding of the relevant legal rights can flow. It is incredibly important to keep a bearing on the nature of music from a non-legal perspective as this can inform the reasoning of the legal approaches which seek to identify the most important elements of musical works. This chapter endeavours to briefly explain the fundamentals of music theory as well as the legal nature of music protection in the form of copyright.

2.1 Music Theory

Musical composition is understood through the lens of fundamental music theory which is set out in this section in the form of a high-level summary.

Staff or stave notation is commonly used as the language to convey compositional elements of music.⁸ Western music theory divides an octave into twelve discrete tones, the interval between each being one semitone.⁹ From the set of twelve tones, the intervals can be adjusted between semitones and whole tones to create scales.¹⁰ Tones can be set up successively to create tension resolving melodies.¹¹ Chords (harmonic sets of three or more notes) can be set up in series to support a melody and add to the harmony between all of the notes being utilised.¹² The sequential arrangement of sound and silence in time creates a rhythm within a composition.¹³ Melody, harmony, and rhythm are often touted as being of particular importance with respect to the core composition of a song and are the elements most often mentioned in infringement.¹⁴ As such, they warrant further detailed explanation.

⁸Robert Brauneis 'Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance' (2014) 6 -7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400170.

⁹Music theory is well established, and its fundamentals can be found in a variety of places. Wikipedia Contributors' 'Music Theory' in *Wikipedia, The Free Encyclopedia* available at https://en.wikipedia.org/wiki/Music_theory is a perfectly acceptable source.

¹⁰Ibid.

¹¹Ibid.

¹²Ibid.

¹³Ibid.

¹⁴*Northern Music Corp. v King Record Distributing Co.* 1952 105.

2.1.1 Melody

A definition of ‘melody’ offered by the Oxford English Dictionary describes it as ‘a series of single notes arranged in a musically expressive or distinctive sequence; a tune; (*Music*) the tune around which a polyphonic composition is constructed, or which constitutes the predominant part of a piece, to which other parts serve as accompaniment.’¹⁵ It is the linear succession of tones, combining pitch and rhythm, perceived as a single entity by the listener.¹⁶ It often consists of one or more musical phrases or motifs and can be the subject of repetition throughout a composition’s duration.¹⁷ If one were to whistle the catchy chorus of a popular song to themselves they would almost certainly be echoing the melody of that chorus. In popular music the melody will often be found in the vocal line, but other instruments may have their own significant melodies within a composition.¹⁸ As will be seen, melody is of crucial importance in the realm of infringement because it has traditionally been cited as a key component of composition.

2.1.2 Harmony

The Oxford English Dictionary defines ‘harmony’, with respect to music, as ‘The combination of musical notes, either simultaneous or successive, so as to produce a pleasing effect; melody; music, tuneful sound.’ or ‘The combination of (simultaneous) notes so as to form chords; that part of musical art or science which deals with the formation and relations of chords; the structure of a piece of music in relation to the chords of which it consists.’¹⁹ The study of harmony involves the understanding of chords and their progressions on the basis of principled rules.²⁰ Some traditions have specific rigorous rules whilst others are less adherent to a set framework.²¹

There is far more to be learnt about harmony from a music theory perspective, but some useful points can be distilled from the above descriptions. Harmony is the result of multiple notes

¹⁵*The Oxford English Dictionary Online*, Oxford University Press (2018), www.oed.com/view/Entry/116237. Accessed 27 June 2018.

¹⁶‘Melody’ in *Wikipedia, The Free Encyclopedia* available at <https://en.wikipedia.org/wiki/Melody>.

¹⁷ *Ibid.*

¹⁸Gino Stefani, ‘Melody: A Popular Perspective’ (1987) *Popular Music* Vol. 6, No. 1 21-35 at 24.

¹⁹*The Oxford English Dictionary Online*, Oxford University Press (2018), www.oed.com/view/Entry/84303. Accessed 27 June 2018.

²⁰ ‘Harmony’ in *Wikipedia, The Free Encyclopedia* available at <https://en.wikipedia.org/wiki/Harmony>.

²¹ *Ibid.*

played simultaneously or the combination and interplay between notes. In that sense, harmony is an element that must be understood as the collective sum of its parts. This makes it an incredibly difficult element to decipher and difficult to discretely measure in isolation. In that sense it mirrors, on a smaller scale, infringement theories which call for evaluation of musical works as collective wholes.

As a final point on harmony, it is worthwhile to review the first definition offered above. It refers to the creation of a ‘pleasing effect’ – it is immediately clear that, despite the plethora of rules and the complex well-documented nature of harmony, it is an element that is measured or appreciated in the abstract. This serves as an early indicator of the complexity of music and the difficulties that arise in attempting to assess it.

2.1.3 Rhythm

Rhythm, in the musical sense, is defined as ‘The systematic grouping of musical sounds, principally according to duration and periodical stress; beat; an instance of this, a particular grouping or arrangement of musical sounds.’²² The beat is the basic unit of time fundamental to composition.²³ It is characterized by repeating sequences of stressed and unstressed beats.²⁴

A time signature in a composition will specify the number of beats contained in each bar, or measure, and which note value is equivalent to one beat.²⁵ Common time (4/4 time), for example, signals four beats per bar with each being the value of one quarter note (crotchet). Triple time (3/4) signals three beats per bar, with the value of each remaining at one quarter note. Metric levels describe the beat level and divisions or multiplications thereof. Division levels are faster than the beat level and multiple levels are slower.²⁶ For example, in common time the four crotchets that make up a bar could each be divided into two quavers (or eighth note), which additively account for one of the four beats.

Rhythm, as described thus far, is a relative concept in that the relationships between the notes are maintained regardless of the speed at which one runs through the composition. Ascribing

²²‘rhythm, n.’ The *Oxford English Dictionary Online*, Oxford University Press (2018) available at www.oed.com/view/Entry/165403 accessed 5 October 2018.

²³‘Beat (music)’ in *Wikipedia, The Free Encyclopedia* available at [https://en.wikipedia.org/wiki/Beat_\(music\)](https://en.wikipedia.org/wiki/Beat_(music)) .

²⁴ Ibid.

²⁵ ‘Time signature’ in *Wikipedia, The Free Encyclopedia* available at https://en.wikipedia.org/wiki/Time_signature .

²⁶ Supra note 22.

a tempo, measured in beats per minute, to a composition sets the speed of the *tactus* (the measure of how quickly the beat flows) and thus ensures that the duration of a composition remains consistent on repeat performance.²⁷

2.1.4 Other Elements and the Limitations of Music Theory

It must be noted that there are also other elements at play when considering the scope of musical compositions. These elements might include the dynamics of a composition, the attack times, timbre²⁸, spatial organisation, technological effects, and others.²⁹ Some of these elements are capable of representation through typical musical notation but with others this may not be possible, or the resulting representation may be vague.³⁰

These other elements have been offered, by some, as reasons to avoid simplifying musical compositions down to commonly referenced elements such as melody, rhythm and harmony.³¹ As will be explained in chapters to follow, the recognition of these elements is a source of tension between the different approaches to infringement.

Related to the recognition of marginalised elements is the fact that music theory is limited in its capability to accurately represent everything that is at play in a composition. For example, microtonal music deconstructs the typical Western tuning of twelve discrete tones separated by semitone intervals. It utilises tones that lie in between commonly recognised tones through intervals known as microintervals, which break the bounds of standard notation.³² As a separate but analogous point, other traditions or theories of music may have their own rules and principles, which may differ from Western music theory.

What must be understood is that the way that music theory is commonly construed and discussed is not necessarily the be all and end all. One should be willing to accept that a work may be capable of some originality beyond the limitations of the theory rules.

²⁷ Op cit note 23.

²⁸ The perceived sound quality of a musical note.

²⁹ See Aaron Keyt 'An Improved Framework for Music Plagiarism Litigation' (1988) 76 *CLR* 421 and Robert Brauneis op cit note 8.

³⁰ Op cit note 8 9.

³¹ Op cit note 29, Keyt.

³² 'Microtonal music' in *Wikipedia, The Free Encyclopedia* available at https://en.wikipedia.org/wiki/Microtonal_music.

2.2 Popular Music and Derivation

Music, like many artforms, is often a product of derivation and re-imagined influence. Creators of popular music are often guilty of re-using long established compositional motifs. If a work simply re-treads old ground this will inherently dampen the scope of protection for originality. It also happens that infringement in the realm of popular music is more likely to attract litigation because of the lucrative industry at play.³³ Accordingly, derivation may be particularly noticeable in matters which make their way to court. Signature elements of popular music include the repeated use of 4/4 time, and similar phrasing and melodic sensibility.³⁴ These generic traits of popular music are not a new phenomenon. Judge Learned Hand once noted that whilst there are an enormous number of note permutations available to a composer, few are pleasing to the ear and even fewer suit the ‘infantile demands’ of the popular ear.³⁵ A common example of rampant repetition in popular music is through use of chord progressions such as the I V vi IV progression, which is utilised in thousands of popular songs from ‘Let it Be’ by The Beatles to ‘Edge of Glory’ by Lady Gaga.³⁶

2.3 The Development of the Performance/Composition Distinction and Music as a Bundle of Legal Concepts.

Departing now from music theory, the focus shifts to music as a legal concept, or rather as a bundle of legal concepts. The earliest distinction came between musical compositions and their performances. During the nineteenth century and into the early twentieth century, dominant practice considered music a two-part art, separating composition from performance.³⁷ The distinction was maintained with relative ease for a prolonged period. The compositional aspect was restricted to a visually perceptible musical score, which inherently limited the extent to which other intangible elements could be considered as part of a composition.³⁸ Simultaneously, the performance aspect of music was downplayed. Performers were predominantly seen as neutral

³³ *Bright Tunes Music v Harrisongs Music* 1976 420 ESupp. 177 (S.D.N.Y), *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited* 2010 FCA 29, *Swirsky v. Carey* 2004 376 F.3d 841, 849 (9th Circuit) are just a handful of examples of many cases in which popular songs have been implicated.

³⁴ Joe Bennett ‘Wanna Write a Pop Song? Here’s a Fool-Proof Equation’ Washington Post, available at https://www.washingtonpost.com/posteverything/wp/2014/06/27/wanna-write-a-pop-song-heres-a-fool-proof-equation/?utm_term=.453d5a093598.

³⁵ Taylor Turville ‘Emulating vs. Infringement: The Blurred Lines of Copyright Law’ (2018) 38 *Whittier L. Rev.* 199 at 207.

³⁶ *Ibid.*

³⁷ *Op cit* note 8 7.

³⁸ *Ibid* 7-8.

media or mere vessels through which an authored composition was conveyed.³⁹ The distinction between the two has since been called into question with the development of modern recording technology. The nature of the overlap between the two in the modern era is evaluated further in Chapter 3.

With the development of copyright legislation, musical compositions have been recognised as protected works and are commonly classed today as ‘musical works’.⁴⁰ Performers’ rights are recognised separately and are generally much weaker. Rights in sound recordings, and to some extent in literary works, are also relevant and play some part in the understanding of music as a bundle of legal concepts. The following section discusses these rights as they exist in the South African context.

2.4 Music Related Intellectual Property Rights in South Africa

As a reminder, the Copyright Act 98 of 1978 (hereafter ‘the Act’) is the legislation that governs copyright in South Africa. The Act contains a closed list of categorised works eligible for copyright protection. Musical works, sound recordings, and literary works are the works of relevance and, as such, are discussed below. Performers’ rights, which fall outside of the domain of copyright law, are also discussed as they are relevant to understanding the bounds of musical works.

2.4.1 Musical Works

A musical work is defined as a work consisting of music, exclusive of any words or action, intended to be sung, spoken or performed with the music.⁴¹ Note that this definition clearly excludes the verbal elements connected to a musical composition from protection as part of the musical work. Despite being relatively clear in expressing what does not form part of a musical work, the section does not offer a clear definition of what might constitute such a work.⁴² It has been argued that it could be defined as ‘any combination of melody or harmony or either’ based on a comparison with the now repealed British Musical (Summary Proceedings) Copyright Act of

³⁹ Mathilde Pavis, ‘Is There Any-Body on Stage? A Legal (Mis)understanding of Performances’ *Journal of World Intellectual Property* (2016) Vol. 19, no. 3–4, 99 at 101.

⁴⁰ See Copyright Act, 98 of 1978 (SA), Copyright, Designs and Patents Act 1988 (UK), Copyright Act of 1976 (US).

⁴¹ *Ibid.*

⁴² W Griffiths and E Du Plessis ‘Copyright’ in *The Law of South Africa* vol 10(3ed) (2017) at 115 in reference to the establishment title A.J.C Copeling ‘Copyright’ in *The Law of South Africa* (1978).

1902.⁴³ The lack of clarity contributes to the difficulty of evaluating works in an infringement context and demonstrates the need for analysis of foreign approaches when it comes to understanding the important elements of musical works.

2.4.2 *Sound Recordings*

A sound recording is defined by the Act as any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but it does not include a sound-track associated with a cinematograph film.⁴⁴ The exclusion of sound-tracks for cinematograph films is a consequence of their protection under the Act as part of the relevant cinematograph film.⁴⁵ Copyright in a sound recording subsists separately from copyright in the basic work (whether it is literary, artistic, or musical) and so copyright can exist in both the basic work and in a sound recording of said work simultaneously.⁴⁶ Interestingly, sound recordings are not recognised by the Berne Convention as being part of a separate category.⁴⁷ They are considered to be mere reproductions of literary or artistic works (which include musical works in terms of Article 2).⁴⁸ The stance outlined by the Berne Convention certainly makes for a less complex scenario when identifying the various works and factors to be considered in an infringement case given that an entire category of work is left out of the formulation.

2.4.3 *Performers' Rights*

Locally, performers are protected by the Performers' Protection Act.⁴⁹ They are limited to consent and royalty-based rights relating to fixations of their performances.⁵⁰ To understand how they differ from copyright it is best to compare the two. Performers' rights are limited to protecting a fixation, such as recording of a performance, and do not extend to instances where the internal content of the fixation is replicated. For example, imitating the actions exhibited by the performer in a recorded performance would not infringe on said performer's rights but reproducing the recording would.⁵¹ Copyright, however, extends protection beyond fixation to the compositional

⁴³ Ibid.

⁴⁴ Op cit note 1 s1.

⁴⁵ Ibid.

⁴⁶ Andries van der Merwe(ed) et al *Law of Intellectual Property in South Africa* 2 ed (2016) Chapter 22 at 197.

⁴⁷ Berne Convention for the Protection of Literary and Artistic Works of the World Intellectual Property Organisation (WIPO), as modified in Paris in 1976 Article 9.

⁴⁸ Ibid.

⁴⁹ The Performers Protection Act, 11 of 1967.

⁵⁰ Ibid s3 and s5.

⁵¹ Op cit note 35 105.

elements. Performers' rights are housed under a separate category of protection because of the difficulty in separating the underlying composition from the performance.⁵² It is acknowledged that performers can offer valuable creative input to the underlying work but one should always remain cognisant of the fact that it is unwise to award greater protection in instances where it is particularly difficult to determine with clarity whether any new identifiable element of originality has been added.

2.4.4 Literary Works

A literary work includes, irrespective of literary quality and in whatever mode or form expressed, a number of items including poetical works.⁵³ As has been discussed, the lyrical elements of a musical composition are excluded from protection as part of the musical work. However, they may garner protection as literary works. The lyrics paired with a musical work could find protection as 'poetical works' in terms of the above definition. Even if poetical works are considered an inadequate umbrella for lyrics, the literary work category is left open by the definition in s1. The tell-tale use in the legislation of the word 'including' is utilized here to suggest that other forms of literary creation could be protected as literary works.⁵⁴

Though they are not protected as part of musical works, literary works which are intentionally associated with musical works, in the form of song lyrics or the like, are of interest in infringement cases as they may aid in the establishment of causal connection.

2.5 Requirements for Copyright Protection

This section briefly outlines the requirements for copyright protection under South African law. This thesis is aimed at supplementing the general tests to offer a possible local approach to the problem of music related copyright infringement. As such, the local requirements are described. However, given that the chapter to follow delves into international approaches to infringement, the following is worth bearing in mind: the fundamental requirements do not tend to vary materially between jurisdictions but the tests which check for qualification of requirements often do.

⁵² Ibid.

⁵³ Op cit note 1 s1.

⁵⁴ Ibid.

Originality, discussed shortly, is an example of a requirement which can differ significantly in its prerequisites between jurisdictions.

Variation in requirements for subsistence in copyright between jurisdictions is not, by any means, an impassable obstruction in the effort to draw valuable knowledge from international approaches to music related copyright infringement. One reason for this, amongst others, is that infringement involves an assessment of whether some act has infringed upon a work that is subject to copyright protection. Such a work must have clearly fulfilled the requisite conditions regardless of what they may entail. Essentially, the variations in criteria predominantly inform the pool of possible works capable of being infringed rather than the infringement analysis itself.

It must be noted, however, that some indirect overlaps do exist between infringement and the nature of the requirements. One such overlap is, once again, observed in the originality requirement and the ‘substantial part’ element of the local copyright infringement test. The connection is addressed in Chapter 4.

To continue with the requirements, the following statement summarises the local position: for a work to be eligible for protection it must be a work that falls into one of the listed categories, it must be original, it must have been created by a qualified person, and it must be reduced suitably to a material form.⁵⁵

2.5.1 *Capability of Categorisation*

To be considered a work, the subject matter of the enquiry should first and foremost be able to fit into one of the categories listed in s2(1) of the Act and their respective definitions as found in s1. Those relevant to this thesis have been discussed above. In *Waylite Diaries CC v First National Bank Ltd*⁵⁶ the Oxford English Dictionary was utilised in completing the objective test to determine whether the appointment pages of a diary could be considered a literary or artistic work. Though some cases have conflated the test for originality with the test for a work, the tests should be undertaken separately.⁵⁷ A potential work must still meet the requirements of both to be eligible for copyright protection.

⁵⁵ Ibid at S2(1).

⁵⁶ 1995 (1) SA 645 (AD).

⁵⁷ For example, see *Waylite Diaries CC v First National Bank Ltd* 1993 (2) SA 128 (W).

2.5.2 Originality

The Act contains no definition of originality, but copyright cannot subsist without it. Case law, drawing initially on the British concept of originality, has shaped the standard for originality. It is important not to equate the local standard for originality, as one intuitively would, with the notion of creativity. Though the United States utilises the ‘spark of creativity’ approach in their law, South Africa, at least for the moment, does not.⁵⁸

Originality does not refer to original thought or the expression thereof, but rather to original *skill or labour* in the execution of a work.⁵⁹ Following this, a work must arise from the skill and effort of the author, enough being utilised to impart on the work a distinct quality or character.⁶⁰ The relatively low standard set by this test has led to the recognition of items such as soccer fixture lists as original works.⁶¹ A work must derive from the author and should not be the product of copying a prior work.⁶² Importantly, for the purposes of this thesis, this principle should not be interpreted to mean that works made in reference to, or that in some way derive from, prior existing works will not be able to gain copyright protection.⁶³ It would be naïve to only protect works deemed free of derivation since countless works, even perhaps the majority of those in existence, would be rendered un-copyrightable, for lack of a better term.⁶⁴ The Act reinforces this conclusion in s2(3), stating:

A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.⁶⁵

The recent case of *Moneyweb (Pty) Ltd v Media 24 Ltd and Another*⁶⁶ has upset the now well-established approach to originality. The words of Berger J have been earmarked as ones which might herald the beginning of a new or, at least, adapted test - one that takes creativity into

⁵⁸ See *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

⁵⁹ Op cit note 42 125.

⁶⁰ *Kalamazoo Division (Pty) Ltd v Gay* 1978 2 All SA 488 (C); 1978 2 SA 184 (C).

⁶¹ *National Soccer League T/A Premier Soccer League v Gidani (Pty) Ltd* 2014 2 All SA 461 (GJ).

⁶² *Haupt t/a Soficopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 4 SA 458 (SCA).

⁶³ Op cit note 42 125.

⁶⁴ Ibid.

⁶⁵ Op cit note 1 s2(3).

⁶⁶ 2016 (4) SA 591 (GJ).

account.⁶⁷ The judgment delivers the following key points: (1) originality must be determined by weighing up all of the relevant factors and making a value judgment; (2) time and effort spent by the author remains a material consideration; (3) that time and effort, though, must not amount to mere mechanical, or slavish copying of existing material; (4) there must be *sufficient application of the author's mind* to produce a work that can be judged as original; (5) where existing subject matter is embodied by the work, the court must decide if sufficient skill and labour has been expended to justify originality.⁶⁸ It remains uncertain whether this higher standard for originality will come to be the norm.

As a final point on originality, it is worth noting that it is inextricably linked to infringement assessment. Generally, for there to be infringement some part of a work must be reproduced without authorisation. In South African law, as will be seen in Chapter 4, the requirement is that 'substantial part' of the primary work is reproduced.⁶⁹ Whatever is determined to make up that substantial part must be linked to the original elements of the work as one cannot stake a claim in whatever parts are unoriginal.

2.5.3 *Reduction to Material Form*

The requirement of reduction to material form is found in s2(1) of the Act and is in line with the general rule that there is no copyright in ideas.⁷⁰ In summary, works other than broadcasts or programme-carrying signals are not eligible for copyright protection unless written down or otherwise reduced to material form.⁷¹ With respect to musical works, it has been argued that recording melody or harmony in the form of sheet music should not be a necessity and that even if a musical work exists solely in a gramophone recording, tape recording, or in any other medium, that would be sufficient to constitute material form.⁷² This argument is certainly a reasonable one given that the material form for a sound recording is acceptable to meet the requirement. Phono-recorded musical works have long since been accepted in the United States.⁷³

⁶⁷ Ibid 15.

⁶⁸ Ibid.

⁶⁹ Op cit note 42 142.

⁷⁰ Op cit note 42 127.

⁷¹ Op cit note 1 s2(1).

⁷² Op cit note 42.

⁷³ The Copyright Act of 1976 (US).

The nature of the material form requirement, however, has interesting consequences. If the requirement for musical works is satisfied by their storage in recorded mediums, then a single fixed recording can be the material form for at least two separate works – a sound recording and a musical work (even a third when literary works are considered). Additionally, performers' rights may be covered by the same expression.

2.5.4 Qualified Persons and the Territorial Nature of Copyright

This requirement is addressed briefly, as it is not critical to this thesis. In cases where infringement is alleged across territorial borders, however, these requirements, as well as the obligations of the relevant countries under international treaties and their local implementation (such as those relating to national treatment), may be of great importance to the parties. S3(1) confers copyright on an eligible work if, at the time of its making, its author (or any one of its authors in the case of joint ownership) is a qualified person.⁷⁴ For individuals, a qualified person is a South African citizen or someone domiciled in the country.⁷⁵ Juristic persons must be a body incorporated under the laws of the country.⁷⁶ S4(1)(a) confers copyright on literary works, musical works, and sound recordings first published in the country.⁷⁷ S37 allows the Minister of Trade and Industry to provide, with notice, that any provision of the Act may apply, as it does locally, to works first published in specified countries, or where authors are citizens of those countries.⁷⁸

2.6 Musical Works in the Context of the Other Copyright Works and Related Rights

The position of musical works as the primary protection for original compositions is complicated by the existence of other related rights as well as by the issue of adapting them to meet technological change.

Much of the complication stems from the fact that a plethora of rights exist to protect things that are not easily differentiated, or at least that are no longer easily differentiated. The potential for a sound recording to contain the expression of multiple works, as mentioned, is a contributing

⁷⁴ Op cit note 1 s3(1).

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid s4(1)(a).

⁷⁸ Ibid s37.

factor to the blurred line between the different rights. Technological development in recording has perhaps played the biggest part in blurring the boundaries between various works and rights.

Musical works were initially afforded copyright protection at a time when sheet music sales were dominant.⁷⁹ Sound recordings became more popular as technology developed and, in the United States at least, rampant copying of recordings occurred with authors being unable to utilise copyright to prevent this.⁸⁰ Following this, sound recordings were afforded copyright protection.⁸¹ Copyright protection of sound recordings added a new layer of complexity to the prior distinction between composition and performance. The entire dynamic, however, has become even more convoluted with the recognition of phono-recorded musical works.

If a sound recording can be an item of sufficient material expression to be afforded copyright protection then there should be no reason why the compositional protection of a musical work, recorded but not reduced to sheet notation, cannot similarly have its material form vest solely in a sound recording. The complicating concern that arises is that, essentially, one material form is considered as the basis for multiple works. From an abstract theoretical standpoint, lines can still be drawn to differentiate the various rights. For example, the compositional aspects of a phono-recorded musical work can arguably be protected as abstract items whilst the sound recording can be said to protect only the specific fixation of the relevant sound. The typical scenario to illustrate the difference is one in which someone, using their own voice and instruments, reproduces a phono-recorded musical work. The compositional elements of the musical work are potentially infringed, but the sound recording is not.

The seemingly straightforward divide is shown to be problematic in the face of tests used to determine which elements of phono-recorded musical works are of importance and where such works have been infringed. Identifying certain elements of phono-recorded musical works, which are inevitably experienced via sound recording playback, as being of importance to the musical work can potentially blur the line between musical works and other related rights such as sound recordings and performers' rights. The jeopardised balance between these rights is discussed further in Chapter 3.

⁷⁹ Jamie Lund 'Fixing Music Copyright' (2013) 79 *Brook. L. Rev.* 61 at 68.

⁸⁰ *Ibid* 69.

⁸¹ *Ibid* 69.

Concluding Remarks

This Chapter has explained musical concepts, as part of a preparatory exercise for discussion relating to infringement, in terms of their existence within the frameworks of music theory and copyright law respectively. There are a few conclusions to note in this regard. Firstly, the nature of music theory enables parallels to be drawn between different jurisdictional variations of copyright law through fundamental similarity in musical concepts and constructions, and the globalised appeal of popular music. Secondly, music is dynamic in nature and is not a concept that can easily be pinned down. Finally, in relation to the sections of this chapter which detailed the local requirements for copyright protection, copyright and related rights must be understood as the applicable legal protection for music-related works. Further, on that point, a musical composition is protected in law as a bundle of various related rights. Consequently, these must be considered separately in an infringement scenario.

Chapter 3:

The Fundamentals of International Approaches to Copyright Infringement

This chapter provides a discussion of how foreign jurisdictions have approached cases of infringement with respect to musical works. It must, of course, be emphasized that foreign approaches will always be distinct from the local approach. Some nations, such as the United States, employ tests with subjective legs which require juries to determine the outcome of infringement cases.⁸² These approaches deviate significantly from the local approach, but the objective of this chapter is not to deal with the differences in frameworks but rather to elucidate valuable fundamental information about how copyright systems have dealt with musical works.

A core reason for attempting such an undertaking is related to the fact that local case law on musical work copyright infringement is absent. That fact, in and of itself, is arguably a viable reason to look to foreign jurisdictions for help but there are yet other reasons why examining foreign jurisdictions is a useful undertaking and why differences in systems do not make for insurmountable hurdles. Firstly, although the tests may differ, most jurisdictions have similar constructions of the relevant copyright works and so parallels can easily be drawn between them with respect to the specific works. Secondly, western music theory is ubiquitous in popular music and, regardless of possible differentiations in infringement approaches, valuable information can be gained from the way in which foreign copyright systems deal with the protection of compositions as musical works. Given the prevalence of western music theory and the global appeal of popular music, normative elements of musical works must exist which, regardless of jurisdiction, are capable of identification as elements of importance in an infringement enquiry.

As a starting point, this chapter seeks to determine which elements of musical works are generally considered to be of key importance. The elements which, when reproduced without requisite authorisation, give rise to viable infringement claims. As will be seen, approaches to determining these elements can be broadly categorised as being either traditional or holistic. The traditional approach has often, at least in the past, sought to isolate what it deems to be the important elements from a given musical work, such as melody, and determine whether such

⁸² See the Second Circuit test set out in *Arnstein v Porter* 1946 154 F.2d464, 468 (2nd Circuit) and the Ninth Circuit test set out in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.* 1977 562 F.2d 1157, 1164 (9th Circuit).

elements are present in an alleged infringing work. The holistic approach stresses that musical works cannot be decontextualized. Rather than isolating certain elements, this approach suggests that the whole is more than the sum of its parts and, as such, it has a different take on the infringement scenario.

Beyond trying to elucidate the important elements of a given musical work and determining how they might be analysed in an infringement scenario, another fundamental aspect to understanding musical work infringement is to determine how best to assess an infringement claim. Specifically, one must ask whether works are to be examined via aural assessment or, alternatively, through notation assessment. The stance taken relating to the form of assessment is inevitably influenced by the approach taken with respect to the discernment of elements of importance and vice-versa, yet there are also other complicating factors which make any attempt at understanding the fundamentals a tricky and complex affair.

3.1 Traditional and Historic Judicial Approaches to the Evaluation of Musical Works

The traditional approach, developed at a time when musical works were associated predominantly with sheet music, has been to reduce musical works to core elements of melody, harmony, rhythm.⁸³ These elements are the ones singled out to be the raw materials of westernised music and thus they make up the building blocks of the approach.⁸⁴ Although western notation is capable of providing a rich but limited set of symbols for musical annotation, early case law in the United States sought to highlight the importance of certain elements to the hindrance of others.⁸⁵ It has been argued that this was plausibly due, at least in part, to the fact that cases often dealt with sparsely populated lead sheets for popular songs containing vocal lines and piano melody.⁸⁶ The reference by judges to a finite number of elements worthy of consideration for infringement purposes was thus, conceivably, a function of the limited expressions they were working with rather than a decisive call on which elements were always paramount to the infringement analysis.⁸⁷

⁸³ Op cit note 79 66.

⁸⁴ Emma Steel 'Original sin: reconciling originality in copyright with music as an evolutionary art form' (2015) 37(2) *European Intellectual Property Review* 66-80 at 67.

⁸⁵ Op cit note 8 15.

⁸⁶ Ibid.

⁸⁷ Ibid 16.

The traditional approach is essentially a highly theoretical one, which seeks to differentiate compositional elements from the performative elements and then, on a comparative analysis in search of reproduction of these components, determine whether infringement has occurred in a given case. This approach has, however, been criticised for decontextualizing and isolating certain elements. The case of *Northern Music Corp. v King Record Distributing Co*⁸⁸ (*Northern Music Corp*) is often singled out as an example of the unfavourable aspects of the traditional approach.⁸⁹ The changing landscape, with respect to the material form of musical works, has also been cited as a reason for divergent development of other approaches to musical works.⁹⁰ Whilst musical works previously found expression in sheet music, they are now generally expressed through phono-recordings, potentially opening up works to include further elements and blurring the lines between performance and composition.

The case of *Northern Music Corp* is worth addressing for its criticised take on the traditional approach.⁹¹ In the case it was decided, with respect to the originality of a musical work, that compositions were technically made up of rhythm, melody and harmony, as one would expect. Rhythm, however, was said to be merely tempo and thus generally devoid of originality due to exhaustion.⁹² The rules of harmony were dealt with similarly and both were said to be ineligible for copyright protection in isolation.⁹³ This left melody standing, on which the following was said:

‘It is in the melody of the composition or the arrangement of notes or tones that originality must be found. It is the arrangement or succession of musical notes, which are the finger prints of the composition, and establish its identity’⁹⁴

The elevation of melody to a status of paramount importance has attracted criticism. It has been argued, fairly, that, in elevating the status of certain elements, one neglects to consider that copyright protects musical works as a whole.⁹⁵ In a similar vein, it has been stated that while

⁸⁸*Northern Music Corp. v King Record Distributing Co.* 1952 105 F. Supp. 393, 400 (S.D.N.Y).

⁸⁹ See Brauneis (op cit note 8), Aaron Keyt (op cit note 29, and Adrian Rogowski ‘Can a song be copied with impunity? — A legal perspective on copyright infringement cases in respect of musical works’ (2017) *Stell LR* 213.

⁹⁰ *Ibid.*

⁹¹ Op cit note 29 431-435

⁹² Keyt (Op cit note 29) has pointed out that this incorrect rhythm refers to *proportional* time values eg quarter notes whereas tempo refers to *actual* time values.

⁹³ Op cit note 88.

⁹⁴ *Ibid* 400.

⁹⁵ Op cit note 8 17.

musical works can be split into multiple elements, those elements remain part of the composition itself and are not necessarily worthy of protection if singled out.⁹⁶ The criticism of the hard line taken in the *Northern Music Corp* case correctly points out that, in isolating certain elements of a musical work, one might misrepresent that work or award protection to elements which alone should not be capable of such protection. The drive to create a more holistic approach, on the back of such criticism, is discussed in the section to follow, but first it is worth defending some aspects of the traditional approach.

There is nothing inherently wrong with an approach that focuses intently on composition. Separating the compositional aspects of works from the performative aspects is a useful tool for accurate analysis. Whether differentiating between the two in the modern landscape remains viable is a separate enquiry but it may erode the usefulness of such a tool. It may also be argued that the *Northern Music Corp* case and its misguided application is unfairly used as an extreme example of the traditional approach. Using it as a skewed representation of the baseline provides one with an easily reasoned route away from the traditional approach.⁹⁷ That being said, an accurate representation of the traditional approach, which seeks to bring other elements back into the fold, makes for a picture that is not so innately different from the deviating approaches presented in the next section. Finally, it remains plausible that an isolated part (such as the melody) of a composition could, in certain circumstances, be capable of sufficient originality for a finding of infringement on its reproduction. In such a case, careful reasoning would be required to outline why that element alone is sufficiently original.

3.2 Deviating Approaches

Cases such as *Northern Music Corp* have sparked critique and discourse between academics seeking to challenge such views and develop, in greater detail, a nuanced understanding of musical works. Keyt is one academic who has challenged the prevailing construction of composition from a legal standpoint.⁹⁸ He has argued firstly, that a musical work is better seen as a function of the interaction and conjunction between all of its elements than as a sum of individual parts and,

⁹⁶ Joseph M. Santiago ‘The Blurred Lines of Copyright Law: Setting a New Standard for Copyright Infringement in Music’ (2017) 83 *Brook. L. Rev.* 289 (2017) at 309.

⁹⁷Keyt (Op cit note 29), Rogowski (Op cit note 89) and Olufunmilayo Arewa ‘From J.C. Bach to hip hop: Musical borrowing, copyright and cultural context’ (2006) 84 (2) *North Carolina Law Review* 547 at 645 are examples of academics using the melody-centric version of the traditional approach to inform holistic critique.

⁹⁸ Op cit note 29.

secondly, that music is made up of more elements than are commonly mentioned.⁹⁹ Both propositions are worth examining as both case law and academic discourse have shifted to engage with these concepts in line with the dramatic shift towards phono-recorded musical works.

3.2.1 *Musical Works as Holistic Things*

Keyt is one of several academics who have forwarded the view that a composer does more than create a string of separable acoustical events.¹⁰⁰ His view is the most developed and so is the view predominantly referred to in this section. As the theory goes, the composition that has been created is better viewed as a structure of relationships.¹⁰¹ Sounds in a composition are entirely dependent on one another and musical meaning is solely a function of context.¹⁰² Keyt's analogy is that the interplay between all of the elements is comparable to the interaction between the characters in the plot of a novel.¹⁰³

An example of the operation of this theory can be seen in his attack on the purported idolisation of melody by cases such as *Northern Music Corp*. Keyt provides notation for two phrases and states that no two listeners would find the phrases to be similar but that if rhythm and harmony were to be removed then the melodies would be virtually the same.¹⁰⁴ His point is that listeners primarily hear the structural relationships in music and so, rather than the melody featuring as the unrivalled lead, it plays its own part in combination with the other elements to create a unique whole.¹⁰⁵ Understanding the crux of this critique is extremely important and it is worth restating to ensure that it is clear. The first step of the example is to take the same melody and place it in the context of two separate musical compositions, which are otherwise entirely distinct in the sense that their rhythms, harmonies etc are different. Following this, and on playback of the compositions, the holistic experience of a person listening to both works would differ. Thus, it becomes questionable whether isolating an element and deeming it important is

⁹⁹ Ibid 431-432.

¹⁰⁰ Op cit note 97 for relevant authors, Mopas and Curran (Op cit note 4) have also written favourably on the holistic approach.

¹⁰¹ Ibid 437.

¹⁰² Ibid.

¹⁰³ Ibid 433.

¹⁰⁴ Ibid 434.

¹⁰⁵ Ibid.

the correct approach. The greater whole requires all its constituent elements to play their part for it to find its own uniquely meaningful existence.

On the holistic approach, it has been argued, unsurprisingly, that, although the ubiquitous musical building blocks should not, in general, be capable of protection on their own, their unique and combined expression through collective assembly is protectable.¹⁰⁶ The narrow version of the traditional approach would, conversely, attempt to eliminate the elements which, on their own, lack originality from the enquiry. Both are logical extensions branching out from differing theories on the fundamental notion of music. It is submitted that the past prevalence of the traditional approach is not surprising given that in many copyright infringement scenarios a key part of the analysis is to sift through the unimportant material to find the original kernel and then determine whether that is present in the alleged infringement. Being able to state outright which elements are original makes for a clean analysis which is easily understood. Holistic approaches, on the other hand, make the task of articulating where unoriginality ends and where originality begins an incredibly difficult one.

Whilst the holistic approach does not claim outright that single elements, such as melody, are incapable of protection in isolation, it is firmly based upon the notion that music is a construct informed predominantly by the interactions between its various parts. It follows then, that taking an extreme adherence to this approach would generally require an infringing act to utilise multiple elements from a protected work that act together in concert to achieve protection of unique expression.

3.2.2 The Recognition of Multiple Elements and the Overlap with Other Rights

The second proposition offered by Keyt is particularly relevant in the era of phono-recorded musical works. It is that many more elements than are usually referenced by the traditional approach can contribute to the unique nature of a musical work. For example, popular music has evolved to use rhythm, phrasing, instrumentation, bass lines, timbre, spatial organisation, dynamic elements, and technological effects to add to originality.¹⁰⁷ The argument that there are elements, beyond those usually recognised in the traditional approach, able to contribute to originality fits

¹⁰⁶ Ibid.

¹⁰⁷ See Keyt (Op cit note 11) 432 and Mopas and Curran (Op cit note 4) 40 note some of the ‘sonic qualities’ which the traditional approach ignores.

neatly within the framework of the holistic approach. Whilst these elements may not be original in isolation, they can be considered as factors which add to the collective whole of originality. The recognition of further elements, however, impacts the understanding of musical works in the context of other related rights.

A question that arises is: which elements should, in fact, be relevant to the originality enquiry? Amongst the list of elements forwarded above are elements such as timbre which are inherently aural by nature. As has been noted by many, western notation struggles to easily articulate such aural elements and so is potentially biased against their meaningful inclusion in infringement assessment.¹⁰⁸ Timbre does not have standardised nomenclature and clearly exists on an aural plane rather than a written one, though limited written attempts can be made to describe the timbre which is envisioned.¹⁰⁹ The argument for the inclusion of aural elements is often associated with phono-recorded musical works which are capable of expressing these elements upon playback. Their potential recognition, however, does much to threaten the traditional legal distinction between composition, performance, and sound recordings.

3.2.3 Phono-recorded Musical Works and Sound Recordings

If extensive aural aspects of phono-recorded musical works are to be examined in infringement cases as part and parcel of the musical work, then one must ask what gives sound recordings their independent nature. Aside from their commercial importance, would they not be superfluous?

Brauneis suggests that one possible differentiator might be found within the mode of copying. Drawing from the case of *Bridgeport Music, Inc. v. Dimension Films*¹¹⁰, the proposal is that sampling of sound recordings will always lead to infringement as substantial similarity will always be met.¹¹¹ Perhaps it is best to recognise that copyright in sound recordings is essentially a means of protecting fixations for financial reasons and that compositional elements of phono-recorded musical works are capable of expansion to include aural elements. However, if that is the case then the place of sound recordings as copyright protected works should then be questioned.

¹⁰⁸ See Michael Chanan, *Musica Practica* 5-6 (1994), Brauneis (Op cit note 8) 9, Arewa (Op cit note 97) 625.

¹⁰⁹ Op cit note 8 9.

¹¹⁰ 2005 410 F.3d 792 (6th Circuit).

¹¹¹ Op cit note 8 56.

As has been explained, sound recordings are not universally accepted as works capable of copyright protection but they were a common addition to the protected categories when recordings became popular as a response to rampant copying.¹¹² If the content they contain is covered largely by other works or rights, such as musical works or performers' rights, then perhaps an argument can be made that they are analogous to databases whose capability for originality has been proved to be a contentious point internationally.¹¹³ This thesis does not purport to speak in-depth on the status of sound recordings but it is worth noting that the recognition of elements that are exclusive to recording as part of musical works unsettles their place as a separate category of work.

3.2.4 Phono-recorded Musical Works and Performers' Rights

The interplay between phono-recorded musical works and performers' rights is fascinating. It is, once again, beyond the scope of this thesis to speak in depth on performers' rights, but they are worth mentioning given that a holistic approach to phono-recorded musical works might encroach upon them. As outlined in Chapter 2, performers' rights are limited to the protection of fixations of performance.¹¹⁴ Phono-recorded musical works and the possible recognition of aural elements blurs the distinction between musical works and performance. In general, when a composition is recorded for commercial purposes the performers on the recording will receive performance royalties for their efforts.¹¹⁵ If the dynamic work of a performer is considered in an infringement enquiry involving a phono-recorded musical work, the distinction between musical works and performers' rights is lost. Performers' rights are separated from copyright works on the basis that their secondary nature means it is difficult to attach determinable originality to them.¹¹⁶ If the dynamic aural quality of a performance is effectively used in the infringement equation, then it would suggest that those elements are capable of the copyright protection they have been deprived of. Endorsement of the importance of these elements with respect to musical works, whether correct or not, suggests that a re-evaluation of performers' rights would be necessary.

¹¹² Op cit note 79 69.

¹¹³ See Tana Pistorius 'The IP Protection of Electronic Databases: Copyright or Copywrong?' available at <http://icsa.cs.up.ac.za/issa/2008/Proceedings/Full/66.pdf> or Grosheide, F.W. 'Database Protection – The European Way' (2002) Volume 8 *Washington University Journal of Law & Policy* 39-77 for information on the database situation.

¹¹⁴ See Chapter 2, section 2.3 above.

¹¹⁵ Nick Matzukis 'The Great South African Needletime Debacle' Nov 21, 2014 available at <http://www.musicinafrica.net/great-south-african-needletime-debacle> accessed 7 August 2018.

¹¹⁶ Op cit note 39.

3.3 Means of Assessing Musical Works

When comparing works in a case of potential infringement, there are, broadly speaking, two ways in which this can be achieved. Either the works can be compared aurally, or they can be compared via analysis of their representation in sheet music notation. The two are not mutually exclusive. Aural assessment, for the purposes of this section, means infringement analysis through comparison by ear, of two musical works. Notation assessment, on the other hand, means infringement analysis based on comparison of the relevant sheet music.

3.3.1 Aural Assessment

The exercise of listening to musical works to determine infringement predates the abundance of phono-recorded musical works. In the 1850 case of *Jollie v Jacques*¹¹⁷ it was noted that the question was whether the ear could detect the ‘same air’ in a new arrangement.¹¹⁸ Similarly, *Hein v Harris*¹¹⁹ used the ear of the average listener as a determinative factor, finding that, despite the fact that there was differentiation in notation, only a skilled listener would be able to tell the difference aurally (thus infringement occurred using the metric of an average listener).¹²⁰ In 1946, the United States Second Circuit courts developed a two pronged test in *Arnstein v Porter*¹²¹, the second prong of which required jurors to determine whether the defendant took what is pleasing to the ear of lay listeners from the plaintiff’s work.¹²² In the UK it was suggested in the case of *Francis Day and Hunter Ltd v Bron*¹²³, by Upjohn J, that the question depends mostly on the aural perception of the judge and the expert evidence, though other important factors were listed, including: the essential parts of a work that give it character and memorability, the length of the phrase that has been allegedly copied, and compositional tricks or commonplace elements.¹²⁴

Aural assessment has thus been a longstanding norm in infringement cases and has followed into the era of phono-recorded musical works. Whether using it alone, however, is the most effective way to evaluate infringement remains questionable. Though capable of use in both

¹¹⁷ 1850 13 ECas. 910 (C.C.S.D.N.Y) (No. 7437), Mopas and Curran (Op cit note 4) 31.

¹¹⁸ Ibid.

¹¹⁹ 1923 183 Fed. 107 (2d. Circuit).

¹²⁰ Op cit note 4 at 31.

¹²¹ *Arnstein v Porter* 1946 154 F.2nd 464 (2d. Circuit).

¹²² Jason Palmer ‘Blurred Lines Means Changing Focus: Juries Composed of Musical Artists Should Decide Music Copyright Infringement Cases, Not Lay Juries’ (2016) 18 *Vand. J. Ent. & Tech. L.* 907 at 919.

¹²³ 1963 Ch. 587 (Eng.)

¹²⁴ Ibid.

traditional and holistic approaches, aural assessment certainly allows for one to consume the entirety of a musical work as intended, as a combination of all its parts - original or otherwise. As such, the holistic approach aligns itself more comfortably with aural analysis than the traditional approach does. Under the traditional approach, an aural examination of a phono-recorded musical work is invariably clouded by elements deemed to be irrelevant. Nevertheless, aural assessment has always been the primary mode of assessment and that is unlikely to change.

The potential conflict with other rights represents the biggest problem with aural assessment. Lund, in conducting aural experiments targeted at average listeners to analyse the jury-based legs of US tests, has demonstrated that listeners are often influenced by performative elements in their perception of aural similarity between sound recordings.¹²⁵ In testing lay listeners, certain elements were classified to be of a compositional nature ('melody', 'beat', 'rhythm', 'harmony', 'song structure', 'miscellaneous composition') and others of a performative nature ('tempo', 'instruments', 'feel', 'key', 'style', 'miscellaneous performance', 'miscellaneous indeterminate').¹²⁶ The focus of the lay participants was skewed towards elements placed in the performative category, with answers mentioning performative elements being twice as prevalent as those referring to the compositional elements.¹²⁷ Lund's conclusion was that judges should be wary of playing recordings to jury members given that these elements fall outside of the dominant musical work definition.¹²⁸

It should be noted that the groupings of elements deemed compositional versus performative in the study was largely in keeping with the traditional distinction between the two. The holistic approach might class some of those elements as part and parcel of a phono-recorded musical work. Where that is the case, and the holistic approach is interpreted widely to account for entirely aural aspects, the results are rendered less persuasive but the issue of establishing congruent co-existence with performers' rights remains.

The final concern that plagues aural assessment relates to the notion that music of certain genres will have commonalities in aural expression, which may be capable of being misconstrued as being relevant to infringement. Musicians have always been influenced by those that have come

¹²⁵Op cit note 79.

¹²⁶ Ibid at 82.

¹²⁷ Ibid.

¹²⁸ Ibid.

before them and often attempt to create their own versions or expressions of a type of music.¹²⁹ Entire genres of music are built upon similar sounds, feelings, and types of music.¹³⁰ To someone unfamiliar with a particular genre the musical works of that style will often seem indistinguishable.¹³¹ For example, to an unfamiliar lay listener presented with two different punk rock songs the aural similarities that exist within the genre (such as: fast-paced tempo, shouted lyrics, stripped down instrumentation, DIY-style production) may be misconstrued as elements which have been copied from one to the other.¹³² This is clearly a concern in cases where traditional compositional comparisons are ignored. These concerns can be allayed by utilizing experts who are capable of discerning similarities or differences beyond the genre staples to objectify an aural assessment. As Lund has found, musicians perform better than average listeners at comparing similarities in compositionally relevant aspects of aural playbacks.¹³³ On that finding, expert testimony is plausibly a useful tool in a system which seeks to more accurately differentiate between composition and performance.

3.3.2 Notation Assessment

The other approach to assessment that can be utilised for analysis in infringement cases is notation assessment. Boretz has argued that music has nothing to do with sound despite its importance to transmission. Scores specify information about structural musical components such as pitches, relative attack times and durations etc.¹³⁴ Notation assessment shares a strong bond with the traditional approach but, despite the bond, aural assessment has always been the norm.¹³⁵ The notation approach has predominantly been utilised as a secondary tool to aural assessment. Even so, it has certainly influenced many decisions.

In the case of *Allen v Walt Disney*¹³⁶, lawyers for the plaintiff were able to successfully convince the judge of infringement with the help of charts demonstrating conformation.¹³⁷

¹²⁹ Op cit note 96 301.

¹³⁰ Ibid 302.

¹³¹ Op cit note 29 428.

¹³² Wikipedia contributors 'Punk rock' *Wikipedia, The Free Encyclopedia*, available at https://en.wikipedia.org/w/index.php?title=Punk_rock&oldid=875867077 (accessed 8 December 2018).

¹³³ Op cit note 79 88.

¹³⁴ B. Boretz, 'Nelson Goodman's Languages of Art from a Musical Point of View' in *Perspectives on Contemporary Music Theory* 31(1972) as mentioned by Keyt (op cit note 29) 436.

¹³⁵ Op cit note 8 35.

¹³⁶ 1941 41 E Supp. 134 (S.D.N.Y).

¹³⁷ Op cit note 4 35.

Following that case, however, the lawyers in *Jones v Supreme Music*¹³⁸ were unsuccessful in their attempts to follow a similar line. The judge, in finding that similarity needed to be determined by an untutored ear, largely ignored the expert evidence outlining the notation in bar by bar analysis.¹³⁹ Despite being shrugged off in favour of aural assessment, notation assessment has crept into the infringement enquiry through expert testimony.¹⁴⁰ In *Bright Tunes Music v Harrison's Music*¹⁴¹, George Harrison's hit song 'My Sweet Lord' was found to have infringed The Chiffon's 'He's so Fine'. Visual presentation was used to show melodic similarity and the use of distinctive grace notes in similar positions was found to be more than simple coincidence.¹⁴² Harrison regarded his song as one which was experienced in the moment of singing and not something reduced to paper notation but this was largely ignored.¹⁴³ One's stance with respect to notation assessment depends, to a large extent, on their adherence to either the traditional or the holistic approach. Depending on one's alignment, the use of notation might be considered as a means of objectively observing crucial elements whilst excluding unimportant ones or, conversely, as an assessment which excludes important role-playing elements in a collective whole.

A benefit of notation assessment is that it can be utilised to demonstrate tangible, visible similarities between works where infringement is alleged. This argument is clearly related to the traditional approach. Visual information can be compared successfully without the performative elements clouding the assessment. Notation assessment is theoretically able to deal with the aural overlap between performance and musical work with ease by removing the performed work from the enquiry. The perceived practicality of this benefit is, however, dampened somewhat by the prevalence of phono-recorded musical works and the question of whether it is suitable to reduce them to sheet music notation.¹⁴⁴ Proponents of an extreme version of the traditional approach might argue that after-the-fact transcription remains useful as a means of separating the work from the performative elements. It would certainly be anomalous in copyright law, however, to compare works outside of the frame of expression in which they are fixed.

¹³⁸ 1951 101 E Supp. 989 (S.D.N.Y)

¹³⁹ Op cit note 4 36.

¹⁴⁰ Ibid.

¹⁴¹ 1976 420 E Supp. 177 (S.D.N.Y).

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Op cit note 8 38.

The prevalence of phono-recorded musical works has another odd effect on the potential use of the notation approach. It is that, in transcribing phono-recorded works after-the-fact, the resulting notation makes for a ‘thicker’ musical work than would be the case with sheet music written pre-emptively.¹⁴⁵ Such a transcription would contain all of the ‘arrangement’ elements, including all parts background and foreground, the descriptive products of technological effects and attempts to further annotate the sheet music to mirror the performed recording by highlighting accents, vocal melismas, fills and more.¹⁴⁶ After-the-fact notation, full to the brim with various parts, makes for an interesting discursive point when considered through different lenses.

From a traditional perspective, it might be viewed as evidence of phono-recorded musical works muddying the boundary between performance and composition. In other words, it creates a visual depiction of the unwanted elements which are naturally incidental to aural assessment. Though that point may be reasonable, it leaves one who prefers traditional compositional approaches with few other means with which to evaluate infringement given that phono-recorded musical works are now the norm. Perhaps objectification through use of an expert, either for honed aural analysis or for discerning the key components in after-the-fact transcription, would be viable for proponents of a traditional system. As will be seen, however, expert objectification of musical works is not always as reliable or accurate as one might expect.

Proponents of the holistic approach might view ‘thick’ after-the-fact transcription as evidence of the ability of phono-recorded works to capture far more of original copyright worthy compositions. This argument presents sound recordings as a better means of accurately capturing musical works than sheet music. Unsurprisingly, it leaves the clashes between musical works and performance rights and any attempt to clarify their overlap off to the side.

The use of notation as a means of objectifying musical works has come under criticism for skewing the analysis in a different way. Mopas and Curran have argued that notation assessment can be used to misleadingly decontextualize melody from other harmonic elements and stress its importance, thereby overextending protection to those elements, which are ultimately highly context dependent.¹⁴⁷ They contend that while the rationale of utilizing experts to ‘objectify’ the

¹⁴⁵ Ibid 37.

¹⁴⁶ Ibid.

¹⁴⁷ Op cit note 4 36.

assessment of musical works is understandable given the subjectivity issues with the ear of the average or reasonable listener, it can do much to essentially change the core character of the work.¹⁴⁸ Some elements of their argument against notation assessment are in line with the standard holistic critique of traditional approaches. For example, they state that focus on melody and visual analysis means that other components, including various ‘sonic qualities’, are left out of consideration (style, timbre, instrumentation etc).¹⁴⁹ Though these elements of their critique are not new to the discussion and fall in line with the holistic critique of the traditional approach, their argument is informed by another, interesting concept – Ocular-centrism.

Ocular-centrism relates to a common circumstance in the law of evidence whereby evidence that is capable of being assessed visually is given more weight than evidence not capable of such assessment.¹⁵⁰ This occurrence has been prevalent within other areas of the law. In negligence cases visible injuries have been more compensable than unseen ones (emotional distress, for example) and in civil rights law visible minorities have received more attention and protection than others (such as the deaf).¹⁵¹ The emphasis on ocular-centrism is an effective alternative angle of attack on the use of notation because it hints at a more widespread problem in the law of evidence: reliance on visual cues as a form of objectifying the assessment.

Their argument goes further, stating that former means of ensuring copyright in musical works, reliant on formal notation, were ill-fitting for certain genres of music. Jazz, folk music and indigenous music are offered as examples of this. Where a genre did not inherently rely on western musical theory and notation as a means of expression, it was poorly protected by copyright.¹⁵² Where transcription was possible, the person who transcribed and published the composition, rather than the rightful composer, was awarded copyright protection.¹⁵³ These issues concerning emphasis on notated works show a side of musical copyright law that is often forgotten because works find themselves marginalized outside of the bounds of a system.

Concluding Remarks

¹⁴⁸ Ibid 38.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Hibbitts, B. ‘Making sense of metaphors: Visuality, aurality, and the reconfiguration of American legal discourse’ (1994) *Cardozo Law Review* 16 (2): 229-356.

¹⁵² Op cit note 4 39.

¹⁵³ Ibid.

This chapter sought to explain the complex interaction between approaches to infringement and the relevant modes of assessment. First and foremost, the distinction between the traditional approach to infringement and the holistic approach was set out. The traditional approach, as it is generally presented, valiantly attempts to differentiate musical works from other works and rights but it is capable of being narrowly construed, leading to cherry-picking of important elements. The traditional approach is arguably out of touch with the new norm of phono-recorded musical works but is effective in its distinction between the various works and rights. The holistic approach embraces music as it is expressed and experienced and aligns itself more easily with phono-recorded musical works and the primary mode of infringement assessment than the traditional approach does. It does, however, struggle to clarify the overlap between musical works, performers' rights and sound recordings and therefore presents multiple theoretical difficulties.

As far as modes of assessment go, aural assessment aligns itself comfortably with the holistic approach whilst notation assessment is suited to the traditional approach. It appears that aural assessment will, nonetheless, remain the norm and that is a factor worth taking into consideration when deciding on an approach.

Chapter 4:

Finding Middle Ground Between the Extremes and Application to the Local Framework

This chapter sets out to determine whether there is a way of maximizing the values that are attached to both approaches by formulating a robust middle ground approach. Following that, the local framework and its capacity to adopt such an approach is examined.

4.1 A Balance Between the Approaches

The holistic and traditional approaches are often construed as being incredibly distinct from one another. Arguments forwarded in favour of either are generally bolstered by presenting the alternative in its most extreme or narrow form. It is submitted, in fairness, that neither should be adopted in a narrow form. When the extremes are mitigated there is far more overlap between the approaches than is commonly expressed and their respective weaknesses are complimented by the strengths of the other. The consequences of the avoidable extremes are, however, worth understanding as they provide guard rails between which a middle ground approach can be formed.

The troubles that mar a narrow view of the traditional approach have already been discussed as they formed the basis of the critique that ultimately informed the holistic approach. These include the stance taken in cases such as *Norther Music Corp* and the concern that the traditional approach can take a view that is too granular, cherry-picking certain elements and elevating their importance when the context of the entire composition is relevant. Though the holistic approach is less capable of being warped so narrowly, recent case law has presented a concerning vision of the approach when applied too broadly. The case of *Williams v Bridgeport Music, Inc*¹⁵⁴, is worth considering in this regard.

4.1.1 The Blurred Lines case

Williams v Bridgeport Music, Inc, commonly referred to as ‘the Blurred Lines case’ in reference to the popular song which was accused of infringing the work of Marvin Gaye on ‘Got to Give it Up’, has been the cause of much controversy. The case was recently upheld, and the initial verdict

¹⁵⁴ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240.

has received a fair share of criticism for jettisoning so strongly away from the traditional approach.¹⁵⁵ It arguably exemplifies an extreme version of the holistic approach in its utilisation of aural assessment and departure from expectations regarding composition and infringement. The fact that a jury was utilised is a relevant qualifier to note when contrasting with systems that award primary power to judges, but it is submitted, nonetheless, that this case is evidence of an instance where normative values and expectations regarding protection of musical works were violated. The test used by the court in this case is one commonly applied by the Ninth Circuit Courts and family - the extrinsic/intrinsic analysis test.¹⁵⁶ The prongs of the test attempt to deal specifically with the problems of the idea/expression dichotomy. Under the extrinsic leg, the judge analyses whether there is similarity between the ideas in an infringement case and seeks to separate the protectable from the unprotectable.¹⁵⁷ Expert testimony may also be used in this leg.¹⁵⁸ Should there exist substantial similarity in the ideas, the intrinsic leg asks ‘whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar’.¹⁵⁹ This leg seeks to determine whether there is similarity in the actual expression.¹⁶⁰ It is considered to be subjective, however it is clearly objectively qualified to some extent by requirement that the listener to be a reasonable, average one.

The team representing Gaye’s estate utilised forensic musicologists to demonstrate that several substantially similar elements were present in the infringing work (including: main vocal melodies, backup vocals, hooks, core theme, base and keyboard melodies etc.) which went beyond the realm of generic coincidence.¹⁶¹ The defendants, conversely, took a fairly traditional line by arguing that copyright manifested in composition and that other elements such as ‘groove’ or ‘feel’ should not be protected by copyright.¹⁶² The court rejected any arguments by Gaye’s team that elements beyond those in the sheet music were protected (Gaye’s song was, in fact, protected via the old system under the 1909 Copyright Act whereby sheet music was deposited at the copyright office) but, nevertheless, there was sufficient disagreement for the court to proceed to the ‘intrinsic’

¹⁵⁵ No. 15-56880 (9th Cir. 2018).

¹⁵⁶ Op cit note 122, 907.

¹⁵⁷ Ibid 921.

¹⁵⁸ Ibid.

¹⁵⁹ *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991).

¹⁶⁰ Op cit note 122 921.

¹⁶¹ Op cit note 154 as summarized by Santiago (op cit note 96) 312.

¹⁶² Ibid.

stage of the relevant test: the jury stage.¹⁶³ Though the defendants had argued that a number of the elements emphasized by Gaye's team were not themselves protectable, the court mentioned, relying on *Swirsky v Carey*¹⁶⁴, that extrinsic similarity may include what can be described as the holistic contribution of individually unprotected elements.¹⁶⁵ The quote utilised from *Swirsky* went as follows:

'[o]bjective analysis of music under the extrinsic test cannot mean that a court may simply compare the numerical representations of pitch sequences and the visual representations of notes to determine that two choruses are not substantially similar, without regard to other elements of the compositions.'¹⁶⁶

The elements in dispute under the extrinsic test were: signature phrases, hooks, bass lines, keyboard chords, harmonic structures and vocal melodies.¹⁶⁷

The jury ultimately found that Williams and Thicke had infringed upon Gaye's work. Essentially finding infringement in a case where objective similarity in traditionally important elements was lacking. As Judge Nguyen opines in her dissenting judgment for the subsequent Circuit Court, 'Blurred Lines' and 'Got to Give it Up' are not objectively similar. They differ in melody, harmony and rhythm'.¹⁶⁸ An independent musicologist, Joe Bennett, in his pre-trial dissection of the compositions which was positively referred to in a WIPO article on the matter, struggled to comprehend some of the claims of similarity alleged by Gaye's party.¹⁶⁹ Referring to the allegedly copied bass line, Bennett notes the following:

'If this is true, and Thicke's team actually 'copied the bassline,' then they changed most of the pitches, moved lots of notes around, and deleted some notes. Or put another way, they wrote an original bassline.'¹⁷⁰

¹⁶³ Ibid.

¹⁶⁴ *Swirsky v. Carey* 2004 376 F.3d 841 (9th Circuit).

¹⁶⁵ Op cit note 96 312-314.

¹⁶⁶ Ibid at 849.

¹⁶⁷ Op cit note 96 312.

¹⁶⁸ Op cit note 155 57.

¹⁶⁹ Joe Bennett 'Did Robin Thicke steal a song from Marvin Gaye?' available at <https://joebennett.net/2014/02/01/did-robin-thicke-steal-a-song-from-marvin-gaye/> and Ben Challis 'Blurred Lines: The difference between inspiration and appropriation' available at https://www.wipo.int/wipo_magazine/en/2015/05/article_0008.html.

¹⁷⁰ Ibid.

The resulting finding by the jury was likely based on perceived aural similarity of a collection of elements whose right to copyright protection remains unclear, or as some may put it: the ‘feel’ of the songs.

4.1.2 The Blurred Lines Case as an Over-Extension of the Holistic Approach

Though no doubt qualified and contextualized by the relevant system and specific test, it is submitted that the Blurred Lines case is an example of the problems that can manifest when there is over-zealous application of the holistic approach.

The nature of the Blurred Lines case presents a view of the chilling effect that the holistic approach can have. An example of this can be seen through the actions of artist Jidenna, who preemptively awarded writing credits for his song ‘Classic Man’ to fellow artist Iggy Azalea, believing that in lieu of the Blurred Lines decision it was better to be safe than risk an infringement claim.¹⁷¹ The decision and its potential ramifications clearly remain fresh in the minds of those in the industry, but a pertinent question that must be asked is what problems does it present to future infringement enquiries. A key point of concern harks back to the research of Jamie Lund. The average listeners in those experiments focused on traditionally irrelevant elements when looking for similarity between songs.¹⁷² Where much of the decision is left down to the lay listener, without any enquiry into objective similarity between compositional elements, the accuracy of the outcome becomes highly suspect. This is because it is entirely unclear whether the decision is based upon the comparison of elements protected by copyright or of those which are merely stylistic or performative choices.

Staunch supporters of purely aural and holistic assessment might, in response, argue that aural similarity is more crucial than visually demonstrable objective similarity of the compositional elements. It is submitted, however, that even for one who counts themselves as a member of this group, the outcome remains problematic. In attempting to establish this, the first point to be submitted is that, even in a system that emphasizes the importance of aural similarity, it is unworkable that a situation could exist where creators live in fear of infringing past works in instances where their own compositions are entirely dissimilar from another work on an element-by-element dissection. Essentially, the notion that ‘feel’ alone could be enough to constitute

¹⁷¹ Op cit note 122 297.

¹⁷² Op cit note 79.

infringement is enough to cause serious concern for any potential creator. The logical retort to that might be that this would only occur where similarity is beyond coincidence in any case. The fault with this argument is that genre or stylistic similarities which, by all accounts, should not be considered, could still sway judgement in favour of an infringement finding. One is simply trading traditional over-zealous comparison of isolated components for an approach that struggles to consistently determine whether similarity is down to a reproduction of expression or to common performative or genre-based traits.

The final argument against the use of the extreme holistic approach comes in the form of an absurd example. If one were to take an original composition and perform it with entirely new instruments, in a different style, and with a new vocalist, it would be possible for the extreme version of the holistic approach to fail to find infringement despite the two versions being like for like compositionally. Such a result should be difficult for even the staunchest supporters of holistic comparison to back.

4.2 A Middle Ground Approach

Having established the flaws that both approaches exhibit in their most extreme forms, it is necessary to set out a baseline for the sort of approach that could highlight the values of each. The advocated middle ground approach is, perhaps unsurprisingly, a moderate one. As has been noted, the distinctions between the two core approaches are often spoken of more than the similarities. This phenomenon likely occurs because distinction is more easily presented through a lens of strong contrast than through the highlighting of similarity. Additionally, reciprocal critique between systems can become an echo-chamber where the most extremes of both are mentioned more than the common ground.

The traditional approach need not be construed as one which entirely ignores context just as the holistic approach need not be construed as necessarily excluding compositional elements. The traditional approach inherently emphasizes certain elements associated with composition - melody, rhythm, and harmony. They remain some of the most vital elements in distinguishing musical works from their performance and, as such, deserve a place in the middle ground approach. There is no reason why more elements, as are mentioned by later approaches, cannot be added to the list when relevant, particularly in a time when phono-recorded musical works are prevalent.

The key elements of the traditional approach are an appropriate base from which other things can be added or subtracted if necessary. In an infringement scenario these elements should be interrogated both holistically and on an individual level to determine whether they have inherently original characteristics worthy of protection. It is submitted that in most scenarios it will be the relationship between all elements together which contributes to the originality of a musical work. It may also be possible though that a single element could be so unique that it would warrant protection if it alone were to be used. There is nothing to say that a melody cannot be so distinct that it warrants protection even if decontextualized. One must simply be wary that all the parts of a composition inform one another, and, in many cases, a singular element will not be worthy of protection.

The proposed outlook is essentially that traditional compositional elements (melody, rhythm, harmony etc) make up the fundamentals of assessment but, for the most part, it is their interaction together that imparts original expression. If one element is particularly unique then there is no reason why it alone cannot be protected but, where that may be the case, great care should be taken to determine if the expression of that one element is, in fact, original. Where a country's bar for originality is low, the test should require that a larger portion of the prior work be utilised in an infringing work.

Santiago has developed a test called the 'Unique Quality Test' and though it draws parallels with the above approach much of it is tailored to the two-pronged American tests and the idea/expression dichotomy.¹⁷³ Nevertheless, he describes a useful example case that the basic approach described above can also be applied to. The case was one that ultimately did not make its way to the court room, but it involved guitarist Joe Satriani, the band Coldplay, and the question of whether they had infringed on Satriani's musical work. Satriani had claimed that Coldplay's 'Viva la Vida' contained substantial portions of his own song 'If I Could Fly'.¹⁷⁴ The similarities between the two can be seen in more than melody alone. The melodies are played over similar chord progressions, at similar tempos, and with similar rhythm.¹⁷⁵ These elements, which

¹⁷³ Op cit note 96 316

¹⁷⁴ Ibid 318.

themselves may not be capable of protection, are capable of being considered together as a blend of original and unoriginal elements to make up original expression.

A question that is difficult to deal with on more than a case by case basis is which other elements beyond those commonly mentioned and associated with traditional composition should be considered? The fact that phono-recorded musical works are, at present, the most common form of expression must be considered in any approach. The difficulty with proposing that the aural elements, specific to the recordings, should be taken into the bargain, however, is, of course, the overlap with other rights such as performance rights. The difficulty in separating these is well established. It is submitted that elements predominantly associated with the aural experience rather than traditional composition, such as timbre or spatial organization, may be considered to the extent that they are tied to traditional compositional elements. In this way, although the overlap with other works or rights remains inevitably blurred, the relevance of these elements is grounded by objectively determinable composition. This avoids a situation where vague considerations such as 'feel' are included the enquiry, unless they are pinned to a compositional element.

It must be acknowledged that it is impossible to clarify, beyond a measure of a doubt, the scope of what should be considered. Aural elements inevitably form part of the material expression but, given that they are experienced subjectively and invisibly, this presents an issue for objectified case law. On the other hand, aural assessment is clearly the primary mode of assessment and so some of the issues are oddly swept under the rug by the fact that it remains the norm in any case. It is submitted that the best that can be done to minimize subjectivity is to compliment the above middle ground approach by utilising both aural and notation assessment. Aural assessment remains the primary mode of assessment but where exclusively aural elements are considered there should always be a clear link between aural similarity and compositional similarity to avoid protection of elements that are merely stylistic or genre specific. Notation assessment can be used where that is the case to establish the link and ultimately add to the robust nature of the middle ground approach.

The undertaking of this entire approach is to ensure that the final determination is based on a rigorous assessment of all the relevant elements in order to determine their substantiality and subsequently to make a finding as to whether a sufficient part of their expression has been reproduced in an alleged infringing work.

Taking this approach ensures several things. Firstly, it ensures that the actual expression is what is being evaluated. Following the classic abstractions test from Judge Learned Hand, as layers are stripped away from expression the work at hand gets closer and closer to an abstract idea that does not warrant protection.¹⁷⁶ Keeping all the moving parts in the foreground and paying attention to their connection and reproduction avoids overextending protection to ideas. Secondly, a multifaceted approach that operates on multiple indicators avoids overemphasis on elements that may not be worthy of such attention. This might occur, for example, in situations where a melody making up only a few single notes is taken out of context and assumed to be of key importance. Finally, and in a similar vein, great care should be taken, in line with a multi-faceted middle ground approach, to ensure that elements which appear to be clear signs of derivation are not immediately assumed to constitute infringement. The use of relatively unique grace notes in similar points in time between works may give away the ghost of derivation so to speak, but mere causal connection should not be determining factor in the final infringement finding. The reproduction of a sufficient part of the primary work's expression in the infringing work is what must be evaluated. Causal connection does not make for infringement alone.

What is left now is to determine whether the values of a robust middle ground approach can be effectively adapted and applied within the general local framework for infringement. The following section details the local framework in terms of its tests and how they are to be applied generally to all infringement cases. Thereafter the tenets of a middle ground approach are applied to the framework to test for potential congruity or difference.

4.3 The South African Infringement Framework

The key provision in the Act relating to direct infringement is 23(1). It states,

‘Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorize’.¹⁷⁷

23(1) is qualified by s1(2A) which states that the doing of any acts in relation to any work shall be construed as doing any such act in relation to a *substantial part* of such work (emphasis

¹⁷⁶ Op cit note 122 919.

¹⁷⁷ Op cit note 1 s23.

added).¹⁷⁸ The exclusive rights afforded to each category of work are found in s6-11B of the Act.¹⁷⁹ The right of reproduction is generally the right that is implicated in infringement cases involving musical works.¹⁸⁰

Section 23(1) has been developed by case law to flesh out the circumstances in which infringement occurs. This development of the law has resulted in the establishment of broad tests to be applied to all potential instances of direct copyright infringement. This setup is the inherent framework under which infringement cases are to be dissected. Musical works, like all others, must conform to this. The starting point of the enquiry and, to an extent, its boundaries are easily established. The concern, however, is that the broad tests, while being flexible, do little to consider the minutia of certain types of work.

Regarding reproduction, the infringement test can be broadly construed as a two-legged one requiring: 1) a sufficient degree of objective similarity between the original work or a substantial part thereof and the infringing work and 2) a causal connection between the original work and the infringement.¹⁸¹ The test is a factual inquiry.¹⁸²

The law informing the requirement under the objective similarity leg holds that the similarity must be between at least a substantial part of the original work and the infringing work. This is critical as it regulates the boundaries for any potential application of the international approaches. The discussion to follow involves analysis of the substantial part requirement, objective similarity and causal connection as they are applicable to musical works in the context of reproduction infringement.

4.4 The Requirements

4.4.1. Causal Connection

This element is addressed first and in brief because, although important, it is uncontroversial and operates adjacent to much of the discussion in this thesis. The requirement is essentially that the original work must have been the source from which the alleged infringing work was derived.¹⁸³

¹⁷⁸ Ibid s1(2A).

¹⁷⁹ Ibid s6-11B.

¹⁸⁰ Ibid s6 and s9.

¹⁸¹ *Laubscher v Vos* 3 JOC (W) [case no 278/74] at 6 A-D.

¹⁸² Ibid.

¹⁸³ *Galago Publishers (Pty) Ltd. and Another v Erasmus* (130/88) [1988] ZASCA 131; [1989] 1 All SA 431 (A).

Copying, for the purposes of direct infringement, can be conscious or subconscious.¹⁸⁴ Causal connection is determined on a balance of probabilities and the onus is on the party alleging infringement to prove access to the other work.¹⁸⁵ It is generally established through evidence or it may also be evident from the works themselves, that the latter option alleviates some of the difficulty in proving access.¹⁸⁶ Despite being a separate work, it is logical that literary works embodying the lyrics of a song could be suitable evidence of access or connection if the lyrics related to the infringing work bear a resemblance that goes beyond mere coincidence. This is because of the way these works are created, distributed and experienced as singular entities despite their separation at copyright level.

4.4.2 Objective Similarity and Substantial Part

4.4.2.1 Substantial Part

The requirement that a substantial part of an original work be used in an act of infringement is entirely logical. It ensures that protection is not doled out to elements unworthy thereof and that the original elements of the infringed work remain of importance. Thus, mere copying of a protected work will not be infringement unless a significant part is used.¹⁸⁷ Substantiality is often associated with two key factors, those being quality and quantity. The phrase which is echoed often in precedent is that the quality is of greater importance than quantity though both elements form part of the consideration.¹⁸⁸ The case of *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd. and Others*¹⁸⁹ is commonly used as an example to demonstrate the principle. In that case 63 lines of code were found to be substantial amongst thousands of others due to their being essential to the operation of the program and difficult to implement.¹⁹⁰ It is submitted that the greater emphasis on qualitative assessment is appropriate for musical works as important sections

¹⁸⁴ Op cit note 42 142.

¹⁸⁵ *Fax Directories. (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D).

¹⁸⁶ *Ibid.*

¹⁸⁷ Op cit note 42 142.

¹⁸⁸ See for example *Sweeny v MacMillan Publishers Ltd* (2002) ROC 35; *Moneyweb (Pty) Ltd v Media 24 Ltd* 2016 (4) SA 591 (GJ), and OH Dean *Handbook of South African Copyright Law* 14 ed (RS 2012) at 65 - Dean's interpretation of s1(2A) suggests that the use of the word 'any' favours a quality driven approach.

¹⁸⁹ 2006 (4) SA 458 (SCA).

¹⁹⁰ *Ibid* 45.

may seem insignificant if viewed only in terms of their proportional duration within the composition.¹⁹¹

It is worth noting that a substantial part of the primary work must be utilised in the infringing work but the part that is utilised need not make up a substantial part of the infringing work.¹⁹² Though this is a common thread in all of copyright infringement it has, interestingly, been targeted as a potential point of departure for musical works. This is evident in Steel's take on the Australian case of *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited*¹⁹³ (*Larrikin Music*). Following the public disapproval of the finding in *Larrikin Music*, Steel has proposed an approach which abandons the rule that the part used need not make up a substantial part of the infringing work. Under this approach the focus would be to look at both works and determine whether they are distinctive and original in their own rights rather than to focus on whether one part of a work has been imported into another.¹⁹⁴

Larrikin Music involved use of the melody from the classic Australian folk song 'Kookaburra' in a flute part for Men at Work's hit song 'Down Under'. Following Steel's suggested approach, if the focus was on the distinctive nature of 'Down Under' as well as its ability to stand alone and be protectable without use of the reproduced flute part then infringement would not be found. It is submitted that, although that outcome would have likely been a fair one in the eyes of the public, musical works are not so different from other copyright works that use of substantial part of a primary work by an infringing work should negate infringement.

4.4.2.2. *Objective Similarity and Substantial Part*

The requirement of objective similarity, as described in local law, is always spoken of in conjunction with the notion of substantial part. The first leg of the test for reproduction set out in *Galago*¹⁹⁵ is an example of this. As it goes, there must be sufficient objective similarity between the alleged infringing work and the original work or a substantial part thereof to be properly described as a reproduction of the latter.¹⁹⁶

¹⁹¹ Op cit note 89, Rogowski 214.

¹⁹² Op cit note 42 142.

¹⁹³ 2010 FCA 29.

¹⁹⁴ Op cit note 84 14.

¹⁹⁵ Op cit note 183.

¹⁹⁶ Ibid.

Despite being a seemingly simple concept, objective similarity's role is somewhat perplexing when its relationship with substantial part is taken into consideration. This is because, although objective similarity is required, it is not entirely clear from case law to what extent it must interact with substantial part. The question is whether it is possible for one to conclude that although a substantial part was reproduced, an evident lack of objective similarity means that reproduction has not occurred. Alternatively, it can be framed to ask whether reproduction of a substantial part implies objective similarity. Determining the distinction between substantial part and objective similarity is important in this context because its application to music could aid in clarifying the infringement analysis. For example, if they are distinct, one could recognise a certain melody as being a substantial part of a work and simultaneously understand that its use in an entirely different musical context could fall outside the realm of infringement due to lack of objective similarity. Under that construction the system allows for derivative influence to occur so long as objective similarity, considered separately, is lacking. It arguably allows for a system that takes actual expression into account more effectively because it acknowledges use of some aspect of the prior work but can conclude a lack of objective similarity in the ultimate expressions.

Separating objective similarity and substantial part in this manner has its own concerns though. Firstly, being able to conclude that some part of the prior work has been used but that objective similarity is lacking erodes the usefulness of the causality leg. A preliminary determination that substantial part has been used, before examining objective similarity, is essentially an admission that the infringing act is causally connected to the prior work. Secondly, it may still indirectly undermine the rule that the part used need not be a substantial part of the infringing work as it allows objective similarity, as a distinct test, to override it and take the context of the part, as it is used in the infringing work, into account in this leg.

It must be determined, to the extent possible, what the reality is. Dean and Dyer state that if there has been copying but it does not result in the two works being sufficiently objectively similar to one another there is no infringement of copyright.¹⁹⁷ From this it seems plausible that the two can be considered distinctly from one another. LAWSA, however, states that whilst unauthorised copying does not necessarily imply infringement, it does in circumstances where a

¹⁹⁷ Dean and Dyer *Introduction to Intellectual Property Law* (2014) 35-36.

substantial portion has been copied.¹⁹⁸ *Laubscher v Vos*¹⁹⁹ is a case that is often referred to as an authority for objective similarity. The judgment contains a phrase similar to that in *Galago* and deriving from *Francis Day & Hunter Limited v Bron*²⁰⁰ - ‘in order to constitute reproduction within the meaning of the Act, there must be (a) a sufficient degree of objective similarity between the original work and the alleged infringement...’. The judgement also quotes another phrase: ‘It has to be determined whether the defendant has used a substantial part of those features of the plaintiff’s work, upon the preparation of which skill and labour has been employed. Once it is established that there has been such a use of the plaintiff’s work, there will be an infringement’.²⁰¹ The latter seems to suggest objective similarity is implied by use of substantial part. A third phrase, once again from *Francis Day*, seems to call back to a distinction: ‘a defendant might in theory go into the witness box and say that he deliberately made use of the plaintiff’s work, but that it is not an infringement, either because he did not make use of a substantial part of the plaintiff’s work, or that, though the plaintiff’s work has been utilised, he has been able to so alter it that it cannot properly be described as a reproduction.’²⁰² In his comparison of two of the works in *Laubscher v Vos*, Nicholas J stated that although he was of the opinion that the plaintiff’s photograph was the source of the defendant’s picture, it was not objectively similar enough to be considered a reproduction.²⁰³ Viewed as a whole, the judgment does not declare outright that there is no infringement if substantial part is used without objective similarity being present but on a balance it appears to lean toward allowing for the distinction.

Australian law utilises a similarly constructed objective similarity test and so is worth examining for further insight. The case of *Larrikin Music* is useful once again as an example of the objective similarity leg’s application. In that case it was found that a substantial part of Kookaburra had been reproduced despite the fact that the phrase, as it was used in Down Under, was contextually distinct, underpinned by different chords in a minor key, and implemented between a new original melody. The finding in this case suggests that where a substantial part is used and is identifiable in the allegedly infringing act, provided it is substantial in the prior work,

¹⁹⁸ Op cit note 42 142

¹⁹⁹ 3 JOC (W).

²⁰⁰ 1963 ChD 587 618.

²⁰¹ Copinger and Skone James on *Copyright*.

²⁰² Op cit note 123.

²⁰³ Op cit note 199.

there will be infringement and objective similarity is present. Objective similarity, in that approach, is met where the parts can be matched to one another within the work, regardless of the whether the works are objectively distinct as wholes.

It is submitted that it is not entirely clear whether the local approach to objective similarity allows those who use a substantial part in a way that ultimately results in something holistically distinct from the prior work to avoid infringement. It is submitted further that a conclusion, one way or another, on this point would determine the way in which a middle ground approach could be adapted into local copyright law.

4.5 Adapting the Middle Ground Approach into South African Law

The fundamentals of the robust middle ground approach described earlier in this chapter are generally applicable to the local infringement enquiry but there are a few issues which must be dealt with.

The first relates to the low bar for originality in South African copyright law. It should be noted that following the *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* decision it is possible that the originality bar will be lifted but, as it stands, the skill, labour, and judgment standard remains. If the originality standard remains a low one, more onus is placed on the infringement test to ensure that copyright is not protected to the extent that it undermines future creation. This is either done through separating substantial part from originality and holding it to a different standard or by requiring that more expression of a work that is creatively lacking be present in an infringing act.

The second point of order is to reaffirm that the best approach to take is a multi-faceted middle-ground approach which both considers the compositional elements emphasized in the traditional approach and accepts, in general, that all the moving parts of a work create a context that is highly relevant to a work's originality. Rogowski, writing locally on the subject of music copyright infringement, has proposed a view that differs slightly in that he advocates more visibly for a focus on an approach which fits the holistic model. With respect to substantial part, he has embraced Keyt's ideas.²⁰⁴ He submits, in line with the critique of a melody-driven concept of musical works, that in determining infringement one must 'at least consider if enough of those

²⁰⁴ Op cit note 89, Rogowski.

elements which attribute meaning to the melody are taken before a finding of infringement can take place'.²⁰⁵ This is in support of the offering that a melody extracted and placed in a new context may effectively be granted a new meaning.²⁰⁶ He relies on *Laubscher v Vos* to adapt this to South African law. To revisit that case, it dealt with the similarity between artistic works and photographs and expressed the importance of considering the works as wholes when determining infringement.²⁰⁷ Rogowski contends that the court's analysis of the overall composition endorses the importance of the elements that surround the central theme when determining originality and substantial part.²⁰⁸ It is submitted that this argument is a fair one and the key deviation forwarded by this thesis would be to qualify any overly-holistic approach by ensuring it is connected to composition as discussed earlier to avoid, as best possible, any overlap with other rights and a total abandonment of compositional elements.

The third and final hurdle for adaptation relates to the nature of the objective similarity leg as it has been discussed above. With respect to either construction of the leg, the middle ground approach can be imported but the operation of the test will differ based on which is used. If it is possible to conclude that substantial part has been utilised but that, on a holistic examination, objective similarity is lacking then the objective similarity leg essentially becomes, by far, the most important part of the test. It would result in that leg taking on almost all of the necessary application. This would plausibly solve some issues. For example, it would call for the context of use in an infringing work to be considered in the infringement enquiry. But, such an approach risks conflation with causality and contravention of the rule that the part used need not make up a substantial part of the infringing work for there to be a finding of infringement.

If, on the other hand, confirmation of use of substantial part is sufficient for a finding of objective similarity then the concerns that have been raised regarding the relevance of the use in the context of the allegedly infringing work must be dealt with in another manner. There are a couple of ways of doing so. One is to take the route that Steel proposed in the wake of the *Larrikin Music* case and suggest that the context of the allegedly infringing work is relevant to the infringement enquiry even if substantial part has been used. It is submitted that this approach

²⁰⁵ Ibid 222.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

requires one to accept that musical works are unique in that even if substantial part is used it is possible to avoid infringement under the general infringement enquiry. The two-part objective similarity test effectively operates in the same way, but, because the objective similarity test is ubiquitous in the infringement enquiry, it does not require musical works to be considered as inherently unique. A second way that the context of the allegedly infringing work can be considered is by focusing on the substantial part and the expression of the prior work and requiring, in general, that it be imported holistically into the infringing work for there to be infringement. This view takes the context of the infringing work into account in a backwards fashion by emphasising the holistic assessment of the originality of the prior work and requiring that the entire contexts of both works align for there to be infringement. The flaw in this view is that it ignores the possibility that originality and substantial part can be found, in certain instances, in the expression of one element of a work, such as the melody. The final and most reasonable way of taking the context of use in an alleged infringing work into account (where the objective similarity test is not fragmented) is to do so outside of the infringement enquiry, in the realm of exceptions and limitations. This allows for implementation of an infringement enquiry which is not excessively distorted whilst simultaneously allowing for outcomes which take the context of the use in the allegedly infringing work into account. The necessary adaptations of the exceptions and limitations for this to be possible are discussed in the following chapter.

Concluding Remarks

The purpose of this chapter has been to set out a robust middle-ground approach which utilises aspects of both the traditional and the holistic approach. The useful aspects of both approaches are maximised within the middle-ground approach whilst the flaws of each nullified by a multi-faceted enquiry. Aural assessment, qualified by notation assessment where necessary, should be utilised.

Following the establishment of the middle-ground approach, the local framework for infringement was set out. It is submitted that the middle-ground approach is capable of being imported into the local framework. There are no conflicts between the local framework and the middle-ground approach but operation of the broad legs of the local test, especially those relating to objective similarity, must be clarified in order to determine exactly how the middle-ground approach would operate within the local system.

Chapter 5:

Other Considerations

It is important, at this point, to understand that considerations outside of the infringement enquiry can still be relevant to its effective operation. This chapter seeks to contextualise the infringement enquiry in two ways. The first is by understanding how the copyright system, as it relates to music, impacts those it intends to protect and determining whether it is out of touch with creators on the African continent. This contextualisation is depicted through the lens of research completed in Egypt which sought to determine how the framework could be nurtured and sustained given the nature of music consumption and production practices.²⁰⁹

The second form of contextualise infringement is far more direct and is established through the understanding of exceptions and limitations. Exceptions and limitations serve an important function as they limit the scope of the author's rights and allow acts which would otherwise constitute infringement to be undertaken lawfully. Their setup, if correctly constructed, allows use of copyrighted work to avoid infringement where such use is deemed to be fair, either through a system of fair dealing or fair use. The local approach to exceptions and limitations and the potential imminent changes to its construction are analysed with respect to their impact on outcomes relating to musical work copyright infringement.

5.1 Music Copyright Protection in the African Context

When discussing musical work copyright infringement as a function of the infringement test in the Act, it is easy to forget to question the efficacy of the legislation itself, its imperatives, and whether it has been suitably adapted for application within the relevant context. The lack of local case law is a contributing factor to the undertaking of this research and, though many factors may play a role in that, it is worth considering whether the system is underutilised or whether it does not provide rights and remedies tailored for the local context.

There are two angles on which the copyright system, as it relates to musical works, can be questioned to determine whether its adherence to context is effective. First, and fundamentally, the very nature of copyright can be questioned – whether its underlying philosophy is contextually applicable and effective. Secondly, taking the fundamental copyright system as a given, the

²⁰⁹Op cit note 5.

tailoring of exclusive rights, the infringement tests, and exceptions and limitations, amongst other things, can be questioned for their efficacy within the local context.

It has been generally expressed that intellectual property rights should be effective in protecting the creator and ensuring they enjoy commercial and other advantages arising from such rights.²¹⁰ Copyright in particular, operates on a *quid pro quo* principle. The state offers an exclusive right to the creator, granting them the ability to exclude others from unauthorised use of the work and thereby reap the advantages of exclusivity. In return for the advantage, the state ensures that some benefit accrues to the public.²¹¹

Unlike the Copyright Act of 1965, the current Act is not a replica of British legislation.²¹² It has been updated to meet the developing demands of the commercial and digital world as well as various international obligations.²¹³ The question remains, despite development, whether the system suitably protects and accounts for the actions and operations of creators, as they operate on the ground locally. The research discussed in this section offers insight on how creators operate in the African context. This research paints a visceral image of independent music creators and how they interact with copyright in the Egypt and though the research is not directly focused on infringement, it can be utilised in a couple of ways. Firstly, even if the correlation to the South African context is not direct, the research offers, at the very least, relevant findings on the interaction between African creators and consumers on the one hand and copyright law on the other. Legislation should be tailored to interact effectively with these parties and so the contextual nexus between these parties and prospective legislation or amendments should be accounted for when legislators apply their minds to future alterations.

Secondly, it may offer insight as to why case law is absent locally. The results, of course, cannot be assumed to apply directly to South Africa but they provide for pause to consider whether similar systems are at play locally and are perhaps worth investigating.

5.1.1 The Research

²¹⁰ Op cit note 42 98.

²¹¹ Ibid.

²¹² Ibid 97.

²¹³ Ibid.

The research was undertaken by Nagla Rizk and studied the dynamics of Egypt's vibrant independent music industry.²¹⁴ That section of the industry was of particular interest because it had been identified as potentially having 'commons' dynamics.²¹⁵ Musicians and consumers were surveyed, whilst stakeholders were interviewed in the course of the research.²¹⁶ The research ultimately found a complex set of dynamics and attitudes influencing the distribution and consumption of a musician's output.²¹⁷ Given the findings, Rizk proposed the concept of a Creative Commons style model for payment as one that was worth entertaining as a possible means of complying with existing copyright law and aligning the realities of musicians and consumers with such law.

The sections to follow outline a few of the observations set out by Rizk, which are particularly noteworthy with respect to the content of this thesis.

5.1.2 Knowledge of the Law

Relating to the alternative music scene it was found that musicians, consumers, and other stakeholders held little knowledge regarding Egyptian copyright law.²¹⁸ Only 26% of the total sample of participants was familiar with the substance of copyright law.²¹⁹ This finding revealed the lack of relevance of copyright law to members of society who take part in or interact with an industry that utilises works covered by copyright. A member of the Law Committee in the Supreme Council of Culture, Hosam Loutfi, observed that independent musicians do not seek out options available to them and are thus not aware of the law.²²⁰

A couple of other factors also displayed copyright's lack of relevance. The first was the fact that rather than citing the copyright regime as a hindrance to musical creativity, the roles of production companies, media, and government bureaucracy were listed.²²¹ The second was the apparent failure by the copyright system to incentivize creation. Two views were cited as to why this may be the case. One was that music copyright protection creates a system of violent coercion via enforceable privatized rights which disturbs the relationship that musicians seek to foster with

²¹⁴ Op cit note 209 171.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid 179.

²¹⁹ Ibid.

²²⁰ Ibid 180.

²²¹ Ibid.

consumers.²²² The other differing view was that enforceability through Egyptian courts was not perceived as being viable and that the use of the law was a luxury.²²³

5.1.3 Consumption, Means of Income and Attitudes

Much of the consumption of music was demonstrated to occur via acts of piracy. Purchase of illegally copied street CDs and digital downloads from free music sites were some of the ways through which consumers obtained music.²²⁴ An interesting observation was that the perception of digital music available online differed from analog modes of consumption. The view among most consumers was that music available online was free and legally available to all.²²⁵ This trend seemed to exist within the community of musicians as well, with streaming, in particular, being viewed as a form of music that was free of charge.²²⁶ However, the difficulties of tracking downloads and administering online payments were cited as being obstacles in attempts to charge for digital downloads.

Given the above, the findings relating to means of income are perhaps not surprising. The income received by musicians for live music concerts made up a disproportionately large portion of total income and were the best medium of reward for the musicians' work.²²⁷ Half of the interviewed musicians stated that live music or concerts made up 50% or more of their revenue.²²⁸

Interestingly, the interviewed alternative musicians displayed views which distanced them from a highly commercialised notion of the music industry. The portion of the musicians who would even entertain the idea of signing with a label remained concerned about 'selling their souls' to production companies.²²⁹ None of the musicians stated that they created music in order to make money and almost half of them stated that they'd prefer to make music as a form of self-expression rather than as a response to market demands.²³⁰

5.1.4 Alternative Means of Maximising Utility for Creators

²²² Ibid.

²²³ Ibid 181.

²²⁴ Ibid 182-184

²²⁵ Ibid 184.

²²⁶ Ibid.

²²⁷ Ibid 186.

²²⁸ Ibid 187.

²²⁹ Ibid 187.

²³⁰ Ibid 188.

The findings appear to depict a parallel and non-intersecting music scene alongside the mainstream commercial scene.²³¹ Rizk has promoted the idea of utilising digital commons to accommodate these musicians into the copyright regime. The digital commons are made up of informational resources created and shared within a voluntary community. The resources are generally held as *de facto* communal and are used within a community rather than exchanged in a market.²³² Sustainability depends on revenue, which is usually generated through sponsorships, subscription fees and advertisements.²³³

The notion of using digital commons was rebuffed by most musicians, who offered a number of reasons for not investing in the development of such a platform. One view was that people do not purchase music online and so digital commons would not be sustainable.²³⁴ The lack of internet access, limited security for online payment, and irrelevance of copyright were also cited as reasons.²³⁵

Nonetheless, Rizk believes the concept is still worth promoting as it can protect the moral elements of copyright and is a means of implementing a ‘freemium’ model which could allow for the bundling of online music with accepted forms of remuneration such as concert tickets. Certain musicians raised the importance of financial reward, even if not as a primary motivation for creation.²³⁶ A collaborative online platform could yet improve monetary reward as well as disseminate expression and promote music and so is not worth dismissing entirely.²³⁷

5.1.5 Discussion and Local Relevance

The finding that knowledge of the law is lacking or is perceived to be irrelevant is of concern. Though the lack of case law locally could be the result of a various factors, the lack of awareness demonstrated in the Rizk’s findings may be cause for concern that people simply aren’t aware of the law that seeks to protect them or that they have forsaken hope of utilising it to prevent infringement. If the former is the case, then that can be cured by publicising information regarding copyright. It may also help vulnerable musicians who might enter into publishing contracts

²³¹ Ibid 189.

²³² Ibid 181.

²³³ Ibid.

²³⁴ Ibid 182.

²³⁵ Ibid.

²³⁶ Ibid 190.

²³⁷ Ibid.

without awareness of the rights they hold. The second possibility is more troublesome. It could be the result of multiple causes ranging from exorbitant legal fees rendering rights a luxury to attitudes misaligned with the copyright framework. It is submitted that similarly oriented research targeted at various segments of the South African music industry would be worthwhile to further understanding whether the lack of case is related to a disconnect between the legislation and the relevant creators.

It is not implausible too, that parallels exist with regard to mode of music consumption. The internet is a global source of ‘free’ downloadable music and connectivity is ever increasing. If digitally available music is not profitable then a bias towards live music as a pillar of remuneration is logical. Reliance on live music may be another reason for the lack of case law relating to musical work infringement. This is because the form of infringement discussed in this thesis is unlikely to directly affect income through live performance and so is less likely to be acted upon by the owner.

Possibly the most concerning finding is the fact that a large segment of the industry may not find the fundamental *quid pro quo* nature of copyright to be an adequate incentive. If that is indeed the case the legislation is perhaps in need of extensive re-evaluation. If its fundamentals still operate effectively with respect to the mainstream music industry then it is submitted that alternative and innovative measures, such as those suggested by Rizk, be investigated as a means of aligning copyright with the expectations of those who operate in other segments of the industry. If the incentives do not match with the expectation of those in the industry the issue is more difficult to tackle. The entire underpinning of the system as it relates to musical works would theoretically need to be re-evaluated. To understand whether the incentives and fundamental theory are effective, it is submitted that further investigation is required.

Finally, it is submitted that the research undertaken by Rizk supports the notion, mentioned in past chapters, that litigation and case law regarding musical work copyright infringement would generally involve mainstream or popular music. That segment of the industry is the most lucrative and so logically the most stands to be gained or lost financially through acts of infringement. Additionally, the legal costs are more likely to be affordable by those in the commercialised segments of the music industry or worth pursuing if the infringing work has been successful.

5.1.6 Conclusion

Though the insight provided by Rizk's work is not fundamentally aimed at infringement of musical works, it provides essential context which prompts one to question whether the setup, as it stands, is suitable for African jurisdictions. The distinct lack of case law, though plausibly the result of diverse causes, should be enough to ignite some concern as to whether the system is operating as intended. Further research is required to determine whether the setup is effective.

If there is a disconnect between the legislation and creators in the industry then perhaps alternative means of bringing them into the fold, such as the establishment of digital commons, can be utilised in the interim while legislation is re-evaluated.

5.2 Exceptions and Limitations

Exceptions and limitations affect the scope of an author's copyright and play a crucial role in copyright law. They form part of the benefit that accrues to the state in return for the granting of exclusive rights to the author. Exceptions relate to each category of work and provide that certain acts, which would usually constitute infringement, are exempt.²³⁸ Limitations provide that certain acts are exempt entirely from constituting copyright infringement and as such limit the rights of the author.²³⁹

The setup of exceptions and limitations differs between countries. The local approach as well as the possible changes it could undergo in an upcoming amendment are discussed below. Exceptions and limitations are relevant to musical copyright infringement because they provide a means of avoiding infringement liability and, as such, are indirectly relevant to the infringement test.

As will be seen, it is particularly important that, when discussing infringement, one considers the relevant exceptions and limitations. If one does not, it is possible that unqualified consequences of the infringement enquiry might influence any discussion on that point.

The sections to follow describe the current setup of the Act with respect to musical works, the potential incoming changes, as well as the key differences between 'fair use' and 'fair dealing' doctrines. Following that, the importance of understanding the effect of exceptions and limitations is discussed in conjunction with recommendations for their setup with respect to musical works.

²³⁸ Op cit note 42 154.

²³⁹ Ibid.

5.2.1 *The Current Setup*

S12 of the Act states the following:

- ‘(1) Copyright shall not be infringed by any fair dealing with a literary or musical work—
- (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
 - (b) for the purposes of criticism or review of that work or of another work; or
 - (c) for the purpose of reporting current events...’²⁴⁰

The formulation above provides limited purposes for which unauthorised use of copyright will not be infringed. The exceptions which follow in s12 relate to specific acts, are rigid, and do not offer a means of escaping infringement purely based on using the work ‘fairly’. S12(1) is a form of catch-all exception, focusing on purpose rather than the type of act as the remainder of s12 does, but the nature of fair dealing exceptions is incredibly restrictive. The narrow list of available purposes places a strait jacket on the general notion of fair dealing. None of them, as they are set out, offer a means of avoiding infringement in the way that jurisdictions which offer a fair use exception do. This represents the key difference between so-called fair dealing and fair use exceptions. The latter is discussed in the following section but what must be noted is that fair dealing, as it is currently constructed, does not offer much hope to musicians who would hope that, in using elements of a prior work, infringement can be avoided by creating something transformative or by using a proportionally small amount of the work.

5.2.2 *Fair Use*

The fair use doctrine, as opposed to fair dealing, is not constrained by having to conform to certain specific purposes. Its construction under United States law is set out as follows:

- ‘...the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

²⁴⁰ Op cit note 1 s12.

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.’²⁴¹

Importantly, the section does not limit the fair use of a work to the purposes it suggests, rather opting to use four broad factors to determine whether use was fair. Mopas and Curran have noted that fair use has the potential to be utilised as a means of avoiding liability in musical work infringement cases.²⁴² If the use of the work is ‘transformative’ and does not harm the market of the original work then it possible that fair use may be established.²⁴³ With respect to transformation, the following quote from *Campbell v. Acuff-Rose Music, Inc.*²⁴⁴ is relevant:

‘whether the new work merely supersede[s] the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message’.²⁴⁵

That case related to parody and it was determined that the more transformative the new work, the less weight need be given to the other remaining factors.²⁴⁶ Taking a broad view of this approach to fair use, it is possible to envisage a scenario where the use of part of a musical work in the creation of another wholly different work could constitute fair use. Under such a construction, the context of the use as it appears in the infringing work is an acceptable consideration. This is important as academics have struggled with addressing situations where parts of a composition have been used in another work that is otherwise contextually distinct. In such situations, where the public dissatisfaction with a finding of infringement is palpable, academics have offered numerous complex solutions. For example, as was discussed in the previous chapter, the rule that the part used in the infringing work need not make up a substantial part thereof has been targeted

²⁴¹ the Copyright Act of 1976 (US) s107.

²⁴²Op cit note 4 41.

²⁴³ Ibid.

²⁴⁴ *Campbell v. Acuff-Rose Music* 510 U.S. 569 (1994).

²⁴⁵ Ibid.

²⁴⁶ Op cit note 4 41.

as a departing point for musical works from the norm.²⁴⁷ A well-constructed fair use test is submitted as an elegant way of dealing with the context issue without overly burdening the objective similarity leg of the infringement test. In other words, it may be better to accept that where substantial part is used in a holistically different work, the *prima facie* bar for infringement is still met because objective similarity is implied but the context and nature of the infringing work may yet save that work under the banner of fair use. Through this approach the infringement enquiry is not warped too far under presumptions that musical works are somehow unique in how they interact with fundamental copyright rules.

Whether the favoured approach to fair use can create such a solution, in reality, remains unclear at both a national and an international level. To address the latter first, Mopas and Curran have noted that although courts have not struggled to determine that there has been fair use in parody cases, they have been seemingly unable or unwilling to acknowledge that aural variations can have the same effect in cases where the contextual difference has simply resulted in wildly different musical works.²⁴⁸ Perhaps the comedic nature of parody is sufficient to nudge it into a place where it no longer competes with the market of the original work. It is submitted, however, that contextually different musical works should be capable of the same treatment. Even if an operatic composition shared many similarities with a popular hip-hop song, it would be unlikely that one would impact the market of the other in a negative way and, in fact, there would likely be little to no overlap. Returning to the situation as it remains locally, if fair dealing remains in place in its current form, such an approach is not viable. This saddening fact, however, may be open to short term change with a possible amendment to the Act.

5.2.3 *The Draft Amendment Bill*

It appears that the current iteration of the Copyright Amendment Draft Bill, currently under consideration at the National Council of Provinces, contains a reworking of the exceptions and limitations sections which purports to shift the system to one of fair use.²⁴⁹ The section reads states:

²⁴⁷ Op cit note 84.

²⁴⁸ Op cit note 4 42.

²⁴⁹ The Copyright Amendment Bill B13B-2017 available at <https://pmg.org.za/bill/705/>.

‘fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:...’²⁵⁰

It goes on to list a number of purposes before stating the following:

‘(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—

- (i) the nature of the work in question;
- (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
- (iii) the purpose and character of the use, including whether—
 - (aa) such use serves a purpose different from that of the work affected; and
 - (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
- (iv) the substitution effect of the act upon the potential market for the work in question. (c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.’²⁵¹

Crucially, and unlike its predecessor, s12A(a) uses the words ‘such as’ when referring to the purposes for which fair use applies. This opens up the list and allows for purposes other than those listed to be capable of protection through fair use. The iteration prior did not use the words ‘such as’ and so, although it referred to fair use, it appeared to be a change in name rather than a change in substance from fair dealing.²⁵²

The factors to consider differ slightly from the approach in the United States but it is submitted that they are broad enough to allow for a musical work that utilises some part of another work but in such a way that the result is unique and does not act upon the potential market for the work in question to escape liability. Whether such an interpretation is likely to be forthcoming is an entirely separate question. Though fair use remains a theoretically elegant way of taking the context of the infringing work into account without risking the destabilisation of the infringement analysis, it may be a step too far to assume that it will perform this role if it is ever introduced into the local setup.

²⁵⁰ Ibid s12A.

²⁵¹ Ibid s12A.

²⁵² Op cit note 249.

To bring to light further concerns regarding fair use, it must be noted that the broad factors of fair use inherently require case law to be fully fleshed out. South Africa, as has already been noted, does not rank highly as a litigious state in this area. Therefore, although fair use theoretically allows for greater flexibility it forgoes some amount of certainty in the process and where certainty is lacking people may be hesitant to test the system. Any hope that music-related case law can quickly flesh out the fair use factors would be particularly speculative, a somewhat disheartening conclusion. It must still be stressed, however, that flexibility is inherently better than a highly limited fair dealing system but that, in a system where litigation is lacking, the best approach would be to enumerate as many clearly legislated exceptions as possible and to use fair use as a catch-all.

5.2.4 Conclusion

It is submitted that a flexible fair use system is better suited to the operation of musical work copyright infringement because it removes some amount of strain from the infringement analysis process. Instead of warping the test to a state where it becomes needlessly complex or divergent from that which is applied to other copyright works, fair use creates the potential for those who use parts of a prior work in way that is ultimately transformative to escape liability in any case. The concern with a fair use system, however, is that case law is required to shape it. Given that precedent is already scarce, it is submitted that an enumerated exception with respect to musical works, if possible, would provide further certainty which may not otherwise appear soon.

Chapter 6:

Conclusions

This final chapter seeks to reiterate the important findings from the previous chapters and connect the notes in such a way that a reasonable and robust approach to musical work copyright infringement in South Africa can be outlined before hopefully being developed and applied to case law as it arises.

The first point to grasp goes beyond the law to normative questions regarding the nature of music and composition. Essentially, the important parts of a musical composition must be understood or at least grappled with first, as findings thereon inform their legal existence as copyrightable works. Music is an inherently dynamic medium and is difficult to pin down, even within the expansive framework of western music theory it must be acknowledged that rules do not always fit or work in a mathematical manner as the theory intends they do. Though a seemingly difficult conclusion to move forward from, it is more useful than it seems. Musical works will always be evaluated in infringement cases and, as such, any evaluation method that is utilised should not assume that what may be important to one composition is inherently important to another. Any test should act on multiple adaptable prongs to determine which parts are substantial in a given composition.

Moving beyond the fundamental nature of music, the setup of the copyright system informs the legal concept. The copyright system does not consider compositions or songs in the same way that a lay person might. Whilst a given song might be considered a single entity by a lay person, the copyright system undertakes to split it into a number of discrete works. Beyond that, related rights such as performers' rights are introduced to the mix as well. The boundaries between these various works and related rights may or may not be easily defined. The lyrics, as potential literary works, are relatively simple to separate from the remaining elements from a conceptual point of view. The boundaries between sound recordings, performers' rights and musical works are less easily defined and have become murkier since the introduction of phono-recorded musical works. The status that varying infringement approaches award to certain elements of phono-recorded musical works influences the clarity of the boundaries between these works and rights. As such, when any approach is settled on, the implications that it may have on these other works and rights, and their reciprocal effect, should be considered and appropriate alterations should be implemented.

Infringement enquiries which seek to identify the important elements of musical works in infringement cases can generally be categorised as being adherent to either the traditional approach or the holistic approach. The two approaches are often described in their narrowest forms, either as a means of starkly differentiating their respective outlooks or in an effort to bolster the argument for the other. The traditional approach harks back to a time when musical works were protected based on their sheet music notation, that being the relevant material form. As such, the focus is on compositional aspects of musical works that exist within the framework of western music theory. Melody, rhythm and harmony are often singled out to be of importance. Melody, in particular, has been elevated to a higher status in certain cases. A narrow application of the traditional approach can be faulty for undertaking an assessment that is too granular in its focus, losing sight of the broader context of the work. Nevertheless, the traditional approach is useful as it defines the boundaries between various works and rights effectively. It is submitted further that a focus on compositional elements, even sometimes in isolation, is not necessarily incorrect. Rather, it is an approach that is sound in its efforts to separate musical works from other rights but is arguably guilty of not keeping the pace with the reality of phono-recorded works. It must be noted further that the traditional approach does not necessarily preclude the consideration of multiple elements together. The greatest difficulty in applying it to phono-recorded musical works, however, is found in the fact that the distinctive compositional portion no longer exists separately in the traditional sense.

The holistic approach is built on the premise that a musical work's unique nature is found in the combined product of multiple elements and that, following this interpretation, they should be considered as wholes. This approach advocates that elements which are not necessarily protectable on an individual basis, are protectable when considered as part of a greater whole. Conversely, and in response to narrow constructions of the traditional approach, the holistic approach suggests that individual elements alone are generally not protectable as the contextual whole is of utmost importance to original expression. The holistic approach is useful because it is easily adapted to phono-recorded musical works which are inherently experienced as complete interactive wholes. Some proponents of this approach have also emphasized that other elements, beyond those generally mentioned in the traditional approach are relevant to the enquiry. This is either because they have been deemed irrelevant for lack of individual originality by the traditional approach or because their dynamic qualities, present only in sound recordings, are not generally reducible to

sheet music notation (such as timbre, special organisation or technological effects). A concern that arises with the consideration of these elements, especially those that are dynamic or aural in nature, is that they blur the boundaries between musical works, performers' rights and sound recordings. Though an approach which takes these elements into account is arguably more in touch with the reality of phono-recorded musical works, the position of sound recordings and performers' rights would need to be addressed. Finally, the holistic approach is more robust than the traditional approach in the sense that it is less likely to overemphasise any one element. It can, however, prove to be problematic if separated entirely from compositional norms because a finding of infringement is consequently possible in a situation where similarity in any single element is lacking. Essentially, a finding of infringement is possible based on similarity between elements whose relevance remains questionable.

A further factor to take into consideration when evaluating the approaches is the mode of assessment. Aural assessment has been the norm and likely will remain so. Where such assessment is of phono-recorded musical works, however, the boundaries between the performative elements and the compositional elements once again become unclear. Notation assessment is the alternative, which looks to compare the sheet music notation of the prior work against the allegedly infringing work. This approach fits comfortably with the traditional approach to infringement and, unsurprisingly, comes with many of the same benefits and concerns. A key concern with such an approach is that it relies on ocular-centrism and observes music in an abstract, detached fashion.

It is submitted, considering the findings above, that a middle ground approach should be adopted and applied locally, to the extent that it is congruent with the South African framework, to maintain the benefits of both approaches whilst minimising their individual flaws. Such an approach would avoid potential conflict by ensuring that neither of the existing formulations is taken to the extreme and by recognising that, because music is dynamic, one approach may be more or less applicable depending on the circumstances. The proposed middle-ground approach utilises the traditional compositional elements as a base-line as they mark distinction between musical works and other works or related rights. It is the combination between these elements which will generally give rise to original expression. This includes elements which may not themselves be individually protectable. It submitted further, under this approach, that whilst it is unusual that any one element

would be protectable on its own, there may be instances where an individual part is protectable. Where that is the case, substantial groundwork should be done to show why protection should be awarded to the relevant element. Assumptions that elements such as melody are important should not be forthcoming.

When it comes to the consideration of elements which fall outside of the traditional compositional framework, such as dynamic ones which are prevalent only upon aural playback, it must be recognised that phono-recorded musical works are the norm and that these elements need to be accounted for. It is submitted that they may be considered to the extent that they are tied to a compositional element of the work. This avoids a situation where stylistic or performative elements, which have no discernible connection to composition, are considered. It is submitted further that where entirely aural elements are considered, care should be taken either to distinguish them from works or rights protected under a different moniker, such as performance rights. If the election is not to distinguish then the nature and position of these other works or rights should be addressed to the extent that the overlap or divide is clarified.

The primary mode of assessment for a middle ground approach would be aural assessment, in keeping with the universal norm. The use of notation should be implemented as a secondary system to ensure that aural elements are connected to compositional foundations.

It is submitted that the above middle ground approach is capable of importation into the South African copyright infringement framework. The local framework requires that there be a causal connection between the work and the alleged infringing work, and that there be sufficient objective similarity between the alleged infringing work and the original work or a substantial part thereof to be properly described as a reproduction of the latter.²⁵³ There is no part of the local test that prohibits the use of the middle ground approach but some adaptation issues must be addressed.

The first is the standard of originality and the contrasting requirement of substantial part. In order to ensure that low-quality copyright works do not undermine future creation either the substantial part must be separated, or it must require that more expression of a low-quality work be present in an alleged infringing work.

²⁵³ Op cit note 183.

The second relates to whether the local approach has historically viewed copyrighted works as holistic things or whether a traditional approach has been taken. Following *Laubscher v Vos* it appears that holistic consideration is possible and so the suggested middle ground approach is likely viable.

The final adaptation hurdle relates to the nature of the objective similarity leg and whether it can be divided in such a way that the context in which the alleged infringing work utilises part of the prior work can be considered. If it is possible to split the enquiry, then the context of use in the alleged infringing work can be considered as part of the infringement enquiry at the risk of undermining the rule that the part of the prior work used does not need to make up a substantial part of the infringing work. If the objective similarity and substantial part make up a single leg, then potential infringers must rely on exceptions and limitations to have the context of their use examined.

Exceptions and limitations, as they exist in the local framework, are extremely narrow. It is submitted that a fair use provision, as is contemplated in the amendment bill, be implemented to remove the potentially problematic burden of assessing the context of the alleged infringing work from the infringement enquiry. It is noted that a fair use exception requires case law to inform its broad principles. Given that case law on musical work infringement is not forthcoming, it is submitted that an enumerated exception allowing for fair use where such use is highly transformative or one that is specific to musical works should be considered.

Finally, but crucially, the African context and the interaction between interested parties and the copyright system is incredibly important to take into account going forward. The distinct lack of case law, though plausibly the result of diverse causes, should be a flag for concern. It is possible that the copyright system as it relates to musical works is not providing creators with the protection they require. Alternatively, it may be that their expectations are not aligned with the system. If that is the case, then a serious undertaking may be required to ensure that the legislation is relevant to the applicable parties. It is submitted that local research is required to determine whether similar issues to those observed in Egypt are prevalent locally and, if they are, whether other mechanisms such as digital commons could be utilised to legally bring creators into the fold.

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