COPYRIGHT & FILM:
THE IMPACT OF STYLE

by

JOSUA JOUBERT

JBRJOS005

LLM Minor Dissertation

Supervisor: Prof. Lee Ann Tong

Word count, excluding bibliography: 23 330 words

Research dissertation/ research paper presented for the approval of Senate in fulfillment of part of the requirements for the LLM 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 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.

Signed on this the 13th day of February 2022 in Cape Town, South Africa

Signed by candidate

TABLE OF CONTENTS

1 INTRODUCTION

At any given moment in time, the law will reflect the values of the society it regulates. This is especially apparent with Intellectual Property Law – specifically copyright law – as its inner workings and structures are frequently frustrated with the advent of technological innovation. The increasing complexity and sophistication of technology invites a growing number of ways in which it can be exploited and taken advantage of, as was seen with the chaotic ramifications of the arrival of the internet, for example. The collective understanding of what ought to be protected by copyright law is thus challenged regularly; the growing intricacy of certain mediums forces lawmakers to reassess what society would deem worthy of protection, whether it be computer programs, video games, social media-related content, artificial intelligence and so forth. However, the barrage of modern-day content that preoccupies such discussions may distract from gaps in the law which have appeared and widened at a more glacial pace, through the long-term development of certain industries. One such aspect may be found in the steady evolution of film and filmmaking.

From the birth of the 'motion picture' in the late 19th century, the development of the technology that allowed people to observe stacked images together so as to create the illusion of a 'moving' picture has been fascinating. What began as simple novelty inventions, such as the Zoetrope or the Electrical Tachyscope which lightly entertained people of the 1860s by illuminating strings of images along a rotating disk, would pave the way for the billion-dollar blockbuster spectacles that capture modern audiences in astounding ways.[1] As the format was increasingly experimented with, the motion picture grew into an art form that, at its most ambitious, would go on to require thousands of collaborators – ranging from artists, writers and actors to engineers, technical experts and all sorts of professionals from various fields.

With the steady increase in films presented to audiences every year, one wonders what role originality still plays in the vast landscape of modern cinema.[2] For the sake of clarity, a distinction must be drawn between originality in its ordinary, day-

[1] Wheeler Winston Dixon & Gwendolyn Audrey Foster *A Short History of Film* (2018) Rutgers University Press.

[2] Steven Follows 'How Many Films Are Released Each Year?' available at <https://stephenfollows.com/how-many-films-are-released-each-year/> accessed 4 May 2021.

to-day understanding and that which pertains to copyright law. Currently, we are applying the former – originality as it relates to filmmaking. When the legal framework is explored, however, the discussion will refer to the concept of originality as it exists in copyright law. This distinction will be indicated explicitly whenever the word is reintroduced.

One of the themes leading this dissertation is the peculiar way that originality in film is inherently a difficult concept to grasp, considering that no film truly stands by itself in some sort of unique, cultural vacuum. As the medium grew more sophisticated, the methods by which films were kept original would develop – and this would extend to more abstract concepts like the 'style'. With some focus on the type of Hollywood films which are designed to gross excessive amounts of money, one could have anticipated how certain winning formulas have emerged for making the kind of crowd-pleasing productions that appeal to the widest range of people – and the potential erosion of originality that accompanies the release of these blockbusters. Ironically, it is often the quality of originality of a particular film which has historically been shown to garner the attention and praise of audiences, but the commodification of the art form has resulted in many examples of big studio productions simply ticking tried-and-true boxes for their respective genres rather than creating wholly original screenplays. It is the tension between the income-focused face of the film industry and the value of original storytelling that partly drives the need for the discussion at hand – the value of a director or writer's intellectual property becomes clear when large studios attempt to repurpose the labour of one director or writer, which is unique to them, for their own productions and profiting on a scale which obliterates that of the original work.

This dissertation seeks to step back and examine a bigger question – one which carries a significant consequence, potentially, to how the production of a film may be perceived by copyright law. As it stands, there is no protection in copyright law for the kind of originality resulting from the 'style' of a film – and it must be determined whether the reasons behind excluding this quality, which comprises of many components in of itself, will still hold true in the wake of the ever-developing film industry.

THESIS STATEMENT & STRUCTURE

This work will interrogate the concept of film 'style' and how it is, if at all, confronted by copyright law. Specifically, it will be determined whether the law's shortcomings in relation to protecting the more nuanced labour exerted by film directors are justified, mainly by applying the concept of film style to the operation of copyright law as it currently stands and assessing whether it could conceptually fit the mould. It is important that we emerge from the other side with some definitive descriptions surrounding film and style as well as having done a sufficient measure of investigation into the value thereof.

To accurately apply 'style' to copyright law, certain things must first be established. For example, the neglection of style in legal discourse means that there is no real, legally-minded definition thereof amongst all of its academic interpretations. With the aid of a few definitions and wisdoms offered by established film academics, a summation of all the factors which are consistently understood to make up style, beyond film and into all forms of art, will be translated and refashioned for a more demanding legal perspective. In other words, a thorough definition of film style for the purposes of copyright law as a whole must be formulated. As such, following this introduction, section 2 will provide the legal framework for the discussion, precisely indicating the gap in the law which is being addressed, and section 3 will attempt to define style thereafter.

Once style is defined, the 'wrongful' conduct of appropriation which largely inspires the need for the consideration of style must be explained. As such, section 4 will dedicate itself to describing the modern landscape of filmmaking, from the late-20th century until now. Using certain examples of films that are significant to the point being made, the cross-referential, repetitive nature of blockbuster cinema during this time will be examined with the goal of contextualising how the underlying motivations of modern filmmaking have led to an increase in appropriation, as there are more dire monetary consequences to an unsuccessful film and assured techniques become more valuable. This section will point out the resulting distortion of the concept of originality – in the ordinary sense of the word – with every highly successful film's release, which naturally will lead to the appropriation of style as the situation intensifies over time. It

may be revealed what precisely is morally reprehensible about passing off one's style as that of another by describing what such an appropriation actually entails.

The main question of whether film style can fit into the operation of copyright law will also require some unpacking of the historical relationship between copyright law and cinema; the proposed adjustments that would accommodate film style may prove profoundly inconsistent with the resolve of all copyright development prior to it, and therefore a proposal for the future ought to have first looked to the past. As such, section 5 tracks the historical relationship between copyright and film. This look into the development of copyright law will not be limited to South Africa. It will include the identification of certain points in the evolution of the motion picture at which new aspects of film were deemed copyrightable, concluding by suggesting how this signifies a comfortable inclusion of film style into the mix.

The tension between protecting the intellectual property of individuals and mitigating the undue stifling of creativity across the board for everyone will loom over most aspects of this work, and in all instances the need to balance these goals will be borne in mind. As such, the justification of intellectual property law theories will move in and out of the discussion wherever appropriate, setting the stage for the main arguments for inclusion of style into copyright law that will come later.

Ultimately, it is the aim of this dissertation to perhaps encourage a greater marriage between the more refined labour that an individual will exert over the more abstract qualities of film and the law. The discussion does not emerge from an area especially destitute of justice and in desperate, urgent need of remedy, but rather an academic curiosity as to the nature of the technical boundaries that exist between copyright protection and a specific artistic medium, combined with a passion for film and the philosophies which steer the law. By combing through this dynamic area, one may attempt to identify and plug any holes which may reveal themselves, or threaten to reveal themselves in future. For this reason, any shortcomings will be met with suggestions for amendment or remedy that may serve to guide lawmakers in the unrelenting task of keeping the law in balance with the everchanging tide surrounding it.

2 LEGAL FRAMEWORK

2.1 Introduction

As a point of departure for the rest of the dissertation, this section will identify the legal problem that is being tackled. This is how the formulation of the problem will be reached: first, a discussion of the intellectual property theories that are relevant to the matter – whenever one is contemplating potential amendments to or application of intellectual property law, it is important to be guided by the theories from which it initially was and continues to be developed. The main theories which apply to the problem at hand and will inform the discussion moving forward (namely the labour and personhood theories, and to a lesser extent the utilitarian theory) will be described, so as to provide a background for the general directions in which we aim to push and pull intellectual property law. As we embark on the issue of the impact of film style, the practical application of these theories to this particular concept will be woven into the discussion.

Second, it is important to illustrate why the copyright law route has been chosen for this discussion. In other words, the question must be answered as to why copyright law is best suited to address the currently non-existent consideration or protection of film style. To do this, the basic requirements of copyright law will be explored as well as slightly deeper analyses of the requirements of originality and the material form of the work, which will provide information and insight that has significant application to the analysis that lies ahead.

Finally, following a brief look at how legislation generally protects the cinematograph film in South Africa, what the solution to the enquiry of this dissertation means to the South African context will be explained. Whatever result is produced by the discussion following this section, its potential impact specific to South Africa will have been touched on here. This final section will end with a precise articulation of the legal questions that this dissertation aims to answer.

2.2 Theories of Intellectual Property Law

South African academics have rarely placed emphasis on the theories of intellectual property law, possibly due to the lack of attention they are given in both jurisprudence and legislation.[3] However, contemplation of these theories has shaped the common law over centuries and serves as the original catalyst for the introduction of intellectual property protection.[4] As will become clear, it is a submission of this dissertation that there is potentially a gap in copyright law regarding film style, and these theories provide lawmakers with answers in respect how to interpret or remedy grey areas, gaps or defects in the law.[5] Historically speaking, four primary types of theories have served as the basis for justification of intellectual property rights – Professor William Fisher refers to them as utilitarianism, labour theory, personality theory and social planning theory.[6] The reason that these are referred to as 'types' rather than distinct, recognisable and complete theories is that they generally contain within them varying interpretations or schools of thought; each type of theory is an umbrella term for an approach to justifying intellectual property rights.

2.2.1 Utilitarianism

The most popular theory in general Western culture is utilitarianism, or the economic theory, which demands that net social welfare ought to be increased with every change effected in property law.[7] In the context of copyright law specifically, the personal interests of authors of literary and artistic works are pulled into the equation and therefore make for a less direct application of this theory than in other forms of intellectual property rights, such as in patent law.[8] Proponents of utilitarianism would

[3] Mikhalien du Bois 'Justificatory Theories for Intellectual property Viewed through the Constitutional Prism' (2018) 21 *PER / PELJ* page 5.
[4] An example to consider, in the context of South African legal ancestry, the underlying rationale for the Roman method of acquiring ownership of property called *accessio* – a form of which, *pictora*, entails the granting of ownership of a painting to the painter rather than the owner of the canvas upon which the work is done.
[5] William Fisher 'Theories of intellectual property' (2001) *Cambridge: Cambridge* at page 8, available online at <https://cyber.harvard.edu/people/tfisher/iptheory.pdf> accessed on 4 May 2021.
[6] Ibid at 5.
[7] Giovanni Tamburrini and Sergey Butakov 'The philosophy behind fair use: another step towards utilitarianism' (2014) 9 *Journal of International Commercial Law and Technology* 190-202 at page 191.
[8] Peter S. Menell 'Intellectual Property: General Theories' (1999) 2 *Encyclopedia of law and economics* 129 – 188 page 130.

argue that a general balance must be maintained between such interests and the broader capability of the public to enjoy the works offered by such authors without being impeded by the law.

The takeaway from this theory in its application to the question of film style will revolve around the famous balance that must be struck, in copyright law, between the property interests of copyright owners and the enjoyment of their works by the public. That is the extent to which the utilitarian theory will be considered moving forward.

2.2.2 Non-utilitarian theories

The non-utilitarian theories which remain are far more compelling in their capacity to relate to the discussion of film style, and as such will be laid out to a slightly deeper extent here. Non-utilitarian theories are prevalent in European nations, which tend to favour the interests of authors more consistently than in the US.[9]

The first non-utilitarian theory to be observed is the labour theory, which consists largely of ideas emanating from the work of John Locke. Locke held that everyone has a right to the fruits of their labour, because one's labour forms part of one's person, and one has a property in their own person.[10] An individual who mixes their labour with resources that are 'held in common' is entitled to property rights if there is 'enough and as good left in common for others' after they have obtained such rights.[11] It is said that a 'natural' right to the property is earned by such an individual.[12] While some would disagree in respect of this theory's application to intellectual labours, the way it is construed for the purposes of intellectual property rights is that the resources 'held in common' refer to facts, ideas or concepts that can be taken, rearranged or added to in a way that instils greater value in those resources.[13] While it is true that intellectual resources cannot technically be exhausted exactly the same way as physical resources would be, this does not necessarily guarantee that others are left

[9] Ibid at 156.
[10] Du Bois op cit note 3 at page 8.
[11] Fisher op cit note 5 at page 3.
[12] Tony Ciro 'The scarcity of intellectual property' (2005) 1 *JILT* at page 2.
[13] Fisher op cit note 5 at page 3.

in the precise position they were before the obtaining of the common goods. This consideration must be remembered when matching the labour theory with the discussion of film style.

Based on Kant's Philosophy of Law and Hegel's Philosophy of Right, another theory which applies more closely to the forthcoming discussion is the personhood theory, which justifies intellectual property rights on the basis that such rights protect authors who have created works which are expressions of themselves, and that the ability do so is essential to human flourishing or development.[14] It is written by Justin Hughes that the public image of an individual is deserving of 'generous' legal protection, and that to support intellectual property rights for such expressions is a means by which the law can afford the individual the recognition, honour and respect they deserve.[15] It is clear that this theory is most effective in its application to more creative works; Kant, for example, held that literary works form an inalienable part of one's person.[16] Radin built upon these ideas by explaining that the more closely the interest is tied to the fulfilment of one's personhood, the greater the need for the interest to be protected.[17] The extent to which an intellectual creation may serve the fulfilment of one's personhood thus becomes an important question in determining the amount of protection it ought to be afforded, if one is guided by this theory. For this reason, the ability of film style to satisfy this type of standard may impact how readily we provide the author with rights to it.

With these main theories in mind, we can now turn to the actual operation of copyright law. While the law is being unpacked, the way in which a particular aspect of copyright reflects or fails to reflect the principles ingrained in the abovementioned theories will be assessed whenever the opportunity arises. Once the law has been set out sufficiently, how the theories intertwine with our consideration of style will be brought in where necessary as well.

[14] Ibid.
[15] Ibid at 4.
[16] Menell op cit note 8 at page 158.
[17] Du Bois op cit note 3 at page 25.

2.3 Copyright law

2.3.1 Basics of South African copyright law

Universally, copyright can be described as property rights which vest in 'works', which the Supreme Court of Appeal described as an 'incorporeal immovable'.[18] In a South African context, an appropriate place to start is normally the Constitution.[19] While not explicitly catered for by way of a dedicated provision, the protection of intellectual property rights generally can be based on section 25 of the Constitution – the property clause. Regarding copyright law specifically, courts have linked this particular limb of intellectual property rights to section 25 in cases such as *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd*[20] and *Moneyweb (Pty) Ltd v Media 24 Ltd and another*.[21] Consequently, it is considered a right subject to limitation as described in section 36, meaning that it is not absolute and will often be weighed against other constitutional rights such as the right to freedom of expression.[22]

Copyright is considered a 'bundle' of rights, protecting the economic and moral rights of the author. Regarding the former: it aims to empower the author to prevent the unsanctioned exploitation of their work by other persons, whilst affording them the right to exploit the works themselves.[23] Regarding the latter: the moral rights of the author include the right to be identified as the author as well as the right to object to any material distortion of their work.[24] It is therefore clear why the copyright route has been chosen: if one is to protect style as property, it is done to protect economic and moral rights and prevent the unjust exploitation of that property. The theories upon which this area of law is based further solidify that it is well suited for retaliating against the type of appropriation described in section 4 of this dissertation.

In South Africa, copyright law is regulated by the Copyright Act 98 of 1978 ('Copyright Act'). Broadly speaking, this Act stipulates that for copyright to subsist in

[18] Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others 2010 BIP 256 (SCA) at para 24.
[19] The Constitution of the Republic of South Africa 1996.
[20] National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd Case No 10/48519 28 February 2014 Gauteng Local Division
[21] Moneyweb (Pty) Ltd v Media 24 Ltd and another 2016 (4) SA 591 (GJ).
[22] Andries van der Merwe, Sunelle Geyer & Roshana Kelbrick *Law of Intellectual Property in South Africa* 2 ed (2016) Cape Town, LexisNexis page 28.
[23] Ibid at 180.
[24] These are known as the right to paternity and the right to integrity, respectively.

a work, it must be original, reduced to material form, and it must be authored by a qualified person.[25] The first two requirements for copyright protection will be explored individually below, as the last one mentioned is not relevant for our purposes.[26]

2.3.2 Originality

2.3.2.1 South Africa

As promised in the introduction to this dissertation, it will always be made clear what type of 'originality' is being discussed. At the moment we are considering the understanding of originality as it is applied in copyright law, rather than in ordinary conversation or film discussion. This understanding of 'original', however, is not given any conclusive definition in the Copyright Act or in any international instrument to which South Africa is a contracting party, like the Berne Convention.[27] Despite this, it is a significant requirement; it has been referenced as the *sine qua non* of copyright protection.[28] Again, it is not to be confused with the ordinary meaning of the word as it exists in everyday language, that is to say it does not necessarily refer to a novel thought nor to a creation that is wholly and purely new or inventive, but rather a work that is simply produced by an author without having been copied from somewhere else.[29] In *Kalamazoo Division (Pty) Ltd v Gay and Others*[30] the court describes originality as being in reference to 'original skill or labour in execution', and as such the relevant enquiry revolves around the extent to which an author bestows upon a work their own labour, skill or judgement – a question that must be considered on a case-by-case basis, as the different nature of works and particular surrounding circumstances will dictate the necessary amount of original skill, labour or judgment required for the work to qualify as original.[31] While South African courts have historically argued against a

[25] Section 2 and 3 of the Copyright Act.
[26] The last requirement in section 3 of the Copyright Act is that the author is a 'qualified person', specifically a South African citizen, a person domiciled or resident in South Africa or a juristic person incorporated in South Africa.
[27] Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).
[28] Northern Office Micro Computers (Pty) Ltd) and Others v Rosenstein 1981 (4) SA 123 (C) at page 129.
[29] Ibid.
[30] Kalamazoo Division (Pty) Ltd v Gay and Others 1978 (2) SA 184 (C).
[31] Ibid at 190.

subjective enquiry for the requirement of originality, this is not factually accurate because the essential considerations include the time, effort and skill exerted by the author, meaning that a subjective judgement about whether these determinants indeed point to an original intellectual creation is necessarily required.[32]

While it is accepted that the amount required will depend on the facts of each case, in all instances that amount is not usually much – as long as it is not trivial.[33] This is a characteristic of the 'sweat of the brow' test, which originates from the United Kingdom case *University of London Press Ltd v University Tutorial Press Ltd*.[34] The effectiveness of this test was scrutinised in *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* – wherein the court cautioned against a misguided application of 'sweat of the brow'.[35] If the test is to be maintained in our law, it must be added that an author must still have applied their mind to the work in order for it to pass the test.[36] If it is not a slavish copy, a work may still draw upon other work and be considered original.[37] In *Galago Publishers v Erasmus*[38] ('*Galago'*) the court further emphasises that the work must be considered as a whole, meaning that the originality and overall copyrightability of the separate pieces which make up the work must not be evaluated on their own.[39] As such, works which contain elements that are copied from elsewhere in their entirety do not necessarily fall short of the originality requirement on that basis. Those portions may still be considered as acts of infringement, but as Section 2(3) of the Copyright Act explains, a work that infringes on another does not preclude itself from copyright eligibility by virtue of that infringement alone. The originality requirement will be satisfied, regardless, when the necessary amount of effort was expended by the author.

As was illustrated before, the 'sweat of the brow' standard originates from UK law. In both jurisdictions, the degree of creativity displayed by the author in a particular work is not relevant for the purposes of originality. The underlying rationale for copyright in the UK can be described as the avoidance of 'shortcuts' which allow

[32] Van der Merwe, Geyer & Kelbrick op cit note 22 at page 206.
[33] Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd 1999 BIP 394 (T) page 402.
[34] University of London Press Ltd v University Tutorial Press Ltd (1916) 2 Ch 601, 609, 611.
[35] 2016 (4) SA 591 (GJ) para 15.
[36] Van der Merwe, Geyer & Kelbrick op cit note 22 at page 205.
[37] Klep Valves (Pty) Ltd v Saunders Valves Co Ltd 1987 (2) SA 1 (A) para 28.
[38] Galago Publishers v Erasmus 1989 (1) SA 276 (A).
[39] Ibid para 25.

persons to benefit off of the time and work exerted by their competition.[40] In *Walter v. Lane*[41] it was stated that 'a man shall not avail himself of another's skill, labour and expense by copying the written product thereof'.[42] The motivation of copyright lies in the protection of the author's economic status – the possible profit to be made from their efforts and labour which others may wish to side-step – rather than the protection of an author's creativity in of itself.[43] This standard is consistent with the 'avoidance' view of labour in labour theory, which attributes the need for rewarding labour with property rights to the 'unpleasant' nature of that labour – in the context of intellectual property, the labour of creating ideas.[44]

Where works contain original material but consist of pre-existing elements as well, they can be considered partially original.[45] If a partially original work is being considered, the parts which the author can prove are the product of their own labour will enjoy copyright protection – but this does not extend to those pre-existing elements.[46] Works which are partially original in this way are known as 'derivative works', and this concept will be revisited. Where an author would be aware of pre-existing similar works, then it would not be sufficient for them to merely state that the work is original – it is required for them to actually show that they contributed the original elements independently.[47]

2.3.2.2 United Kingdom and Europe

As shown above, the UK utilises the 'sweat of the brow' test as well. Again, works are original if they are the result of an author's own skill, judgement, effort and labour – as the goal of copyright is to protect the author's various forms of investment in their work

[40] Andreas Rahmatian 'Originality in UK Copyright Law: The Old 'Skill and Labour' Doctrine Under Pressure' (2013) 44 *IIC – International Review of Intellectual Property and Competition Law* 4-34 page 12.
[41] Walter v. Lane [1900] AC 539.
[42] Ibid at 552.
[43] Rahmatian op cit note 40 at page 13.
[44] Du Bois op cit note 3 at page 13.
[45] Owen Dean & Alison Dyer *Introduction to Intellectual Property Law* (2014) Oxford University Press: Cape Town page 16.
[46] Ibid.
[47] Ibid at 17.

against the 'free riding' of others through copying without exerting the same effort.[48] According to Rahmatian, the recent decisions of the Court of Justice of the European Union ('CJEU') reinforce the understanding of UK originality as having two distinct levels; one which applies to normal types of works and the other which applies to *sui generis* type works, namely computer programs and databases.[49]

The UK stands apart from some other European jurisdictions which owe the basis of their author's rights statutes to the concept of '*droit d'auteur*', originating from French law.[50] Monta writes that this concept is the 'most personal of properties' to the French due to it being born of the mind, existing as the form of protection most favourable to authors. In such jurisdictions, these rights are comparable to human rights more so than economic rights.[51] Starting in the 1980s, the European Union ('EU') has made efforts to harmonise the copyright law of all the Member States, with great focus placed on the unifying of the economic rights but with some difficulty in doing the same for moral rights.[52] All European Union states besides UK and Ireland have structured their copyright legislation such that moral rights are paramount. Moral rights, in the European context, are far more elaborate than in South Africa, including the right of divulgation, retraction and destruction which is in addition to the rights of paternity and integrity.[53] In the UK, such rights are seen strictly as statutory right as opposed to natural law, only adopting personality rights for the first time at all in the 1988 Act. British copyright law includes only three moral rights: paternity, integrity and privacy, and unlike the French and German counterparts, these rights can be waived.[54]

So, how does this relate to UK originality standards? According to Rahmatian, arguments have been made suggesting that the CJEU decisions attempted to shift the UK's principles into a position that would resemble the originality standard of the other EU states – namely that the work must be a 'result of the author's personal intellectual

[48] Rahmatian op cit note 40 at page 5.
[49] Ibid.
[50] Rudolf Monta 'The concept of 'copyright' versus the 'droit d'auteur' (1959) 32 *Southern California Law Review* 177-186 page 177.
[51] Annabelle Littoz-Monnet 'Copyright in the EU: *droit d'auteur* or right to copy?' (2006) 13 *Journal of European Public Policy* 438-455 page 440.
[52] Irma Sirvinskaite 'Toward Copyright Europeanification: European Union Moral Rights' (2010) 3 *Journal of International Media & Entertainment Law* 263-288 page 271.
[53] Ibid.
[54] Ibid at 274.

creation', which bears the 'stamp' of the author.[55] According to the interpretation of the standard in recent CJEU case law, the originality standard can in some instances – namely when works require more creative input than those which are of practical use, generic appearance and containing minimal levels of individual expression within – require this 'stamp' to reflect the personality of the author, exhibiting a 'personal touch', such as photographs.[56] These perspectives contrast the spirit of 'sweat of the brow', which does not require even a measure of creativity for originality to be achieved.[57]

2.3.2.3 United States

In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[58] it is stated that in order for a work to qualify as copyright protection, it must be original to the author.[59] It is explained that this merely means the work is created by the author 'independently', and that it has a minimal degree of creativity applied to it.[60] This was the great setting aside of the 'sweat of the brow' test which has historical significance in the US.

Littrell holds that while US courts and academics have elaborated on the *Feist* formulation and applied them to different works, their solutions or conclusions fall short with respect to their 'conceptual clarity', opining that the standard is still effectively low as a result.[61] The US originality standard somewhat elevated over the UK standard, requiring the modicum of creativity, but not necessarily going as far as the *droit d'auteur* jurisdictions. Therefore, it still exists as a compelling middle ground in respect of emphasis placed on the creative author's interests versus that of the public.

---

[55] Rahmatian op cit note 40 at page 6.
[56] Ibid at 9.
[57] In addition to Rahmatian's arguments regarding the concern over the changing of UK copyright principles, Brexit renders much of these anxieties moot. Whichever CJEU copyright seeds have already taken in national legislation is now liable to being phased out over time.
[58] Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).
[59] Ibid para 23.
[60] Ibid.
[61] Ryan Littrell 'Toward a Stricter Originality Standard for Copyright Law' (2001) 43 *Boston College Law Review* 193-226 at page 194.

2.3.3 Material form / the idea-expression dichotomy

A concept which is central to all copyright law, regardless of jurisdiction, is that of the idea-expression dichotomy – according to which only an expressed idea can be the subject of copyright protection and not the idea by itself as it exists in the mind of the author. Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights[62] ('TRIPS') provides that protection is afforded to 'expressions and not to ideas, procedures [or] methods of operation', however there is variation in the interpretation of this doctrine across international statues and as such there is no universally accepted application thereof.[63] As it currently stands, when this dissertation offers a thorough definition of style as it aims to do momentarily, such a definition must be able to withstand the scrutiny of this doctrine if it is to be protected.

2.3.3.1 South Africa

It can be said that the true objective of copyright law is to protect the combination of an idea and the physical manifestation thereof which serves to represent it.[64] Section 2(2) of the Copyright Act states that a work shall not be eligible unless it has been 'written down, recorded, represented in digital data or signals or otherwise reduced to material form'. Regardless of the value or novelty of such ideas, they do not attract copyright protection.[65]

As Pistorius writes, the material manifestation of the work must be somewhat permanent, referring to examples of face-makeup and 'sand-drawings'.[66] That said, there is no actual reference to the quality of permanence in section 2(2) like there is in the legislation of other jurisdictions.[67] While it is clear that South Africa gives effect to this concept which is inherent to copyright law, there is little to no case law which explores the idea-expression dichotomy in depth.[68]

---

[62] Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15 1994.
[63] Sankalp Jain 'The Principle of Idea-Expression Dichotomy: A Comparative Study of US, UK & Indian Jurisdictions' (2012) Available at <https://dx.doi.org/10.2139/ssrn.2229628> at page 2.
[64] 1989 (1) SA 276 (A) at page 283-285.
[65] 1981 (4) SA 123 (C) at page 129.
[66] Van der Merwe, Geyer & Kelbrick op cit note 22 at page 217.
[67] For example, in the United States.
[68] Van der Merwe, Geyer & Kelbrick op cit note 22 at page 219.

For this reason, it is appropriate to look to English law for elaboration – courts have specified that due to the interrelated development between the two jurisdictions, English law may be referenced for guidance but no decision may be imported that is premised on legal principles that do not apply in South Africa.[69] That said, due to the significant influence that English law has exerted over South African law in the particular realm of copyright law, it has been argued that this principle should perhaps not be given too much weight when contemplating a copyright issue in need of such elaboration.[70]

2.3.3.2 United Kingdom

The exclusion of ideas alone from the protection of copyright law was already accepted in the UK before 1911.[71] Thereafter, it was confirmed by courts that it is only the reproduction of an expression of an idea which is liable for copyright infringement.[72] In the years following, discussions and debates were held regarding the underlying reason for the principle as well as what is meant by 'idea'. In *Ibcos Computers Ltd. v. Barclays Finance Ltd.*[73] the court went against the conclusions drawn from previous judgements and held that the method of expressing ideas is indeed worthy of copyright protection, as detailed literary or artistic expressions are protectable.[74] It was also explained that an idea which is general enough will not enjoy copyright protection, but one which is detailed may be.[75]

In *SAS Institute v World Programming Ltd*,[76] the point at which an idea becomes an expression was also acknowledged. Again, it was reiterated in paragraph 20 that the operation of the idea-expression dichotomy will depend on how one defines 'ideas'.[77] If an intellectual creation is reproduced, and such is detailed enough to pass the 'sweat of the brow' test, then one can consider whether copyright infringement has taken place.

[69] Van der Merwe, Geyer & Kelbrick op cit note 22 at page 182.
[70] Ibid at 184.
[71] Jain op cit note 63 at page 7.
[72] Ibid.
[73] Ibcos Computers Ltd. v. Barclays Finance Ltd. [1994] F.S.R. 275.
[74] Jain op cit note 63 at page 9.
[75] Ibid.
[76] SAS Institute v World Programming Ltd [2013] EWCA Civ 1482.
[77] Van der Merwe, Geyer & Kelbrick op cit note 22 at page 218.

The Appeals Court goes on to say in paragraph 32 that an intellectual creation consists of creative choices made by the author, and that limited choices of such nature would be less likely to yield an intellectual creation.[78] The High Court made it clear that if the expression is represented through a technical function, or even a collection thereof, then such would still be considered an idea rather than an expression in the eyes of the law.[79]

2.3.3.3 United States

In the US Copyright Act of 1976, it is required that works are 'fixed' in order to be protected. According to 17 U.S.C. § 101, works are 'fixed' when the expression thereof is 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.' The point of departure for the US in terms of the idea-expression dichotomy is *Baker v Selden*[80] wherein the original work was a book which explained a 'peculiar system of book-keeping'.[81] The court held that the book itself attracted copyright protection but not the ideas – regarding bookkeeping – that it presented.[82] In other words, the particular expression may be the subject of copyright but that does not prevent others from making expressions about the original idea. The US Copyright Act contains in section 102(b) a definition of the idea-expression dichotomy, stating that copyright protection for an original work does not include 'any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work'.

In *Apple Computer, Inc. v. Franklin Computer Corp.*[83] the operation of the abovementioned provision was explained. The court stated that copyright law aims to protect the means of expressing an idea, adding that 'if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result' and copyright infringement would not occur.[84] Courts in the US have consequently held

[78] Ibid.
[79] Ibid.
[80] Baker v Selden 101 US (11 OTTO) 99 (1878).
[81] Ibid para 1.
[82] Ibid para 12.
[83] Apple Computer, Inc. v. Franklin Computer Corp. 714 F.2d 1240 (3rd Cir 1983).
[84] Ibid para 89.

that the underlying purpose of a computer program is an idea, and the fixation or expression refers to the way that the program interacts with the computer so as to execute its functions.[85] This position has been criticised as failing to recognise that computer programs are capable of having multiple underlying purposes and that there are a great number of moving parts which work together to achieve the intended outcome.[86] As will be shown, this quality can be shared by a film whose stylistic choices serve multiple underlying purposes.

In *Nichols v. Universal Pictures Corp.*[87] the line between idea and expression was explored. A test was created in the judgement which involved a hierarchy of abstractions. This abstractions test is based on the idea that copyright should not coldly apply to the actual text contained in the work alone, because then a 'plagiarist would escape by immaterial variations'.[88] The test describes the progression from expression to idea as going from less abstract to more abstract respectively.[89] Therefore the point where idea becomes expression logically falls somewhere upon this line of abstraction.

Building upon this approach, the test formulated in *Computer Associates International, Inc. v. Altai, Inc.*[90] which is referred to as the 'abstraction, filtration and comparison' test can be examined. The test consists of three steps: first, a hierarchy of abstractions is established for the work which has been infringed. Second, the aspects which are not copyright protectable are filtered out – including that which is placed high on the abstraction hierarchy. Finally, the residual 'expressive' ingredients are compared with the work accused of infringing the original.[91] Samuelson suggests that courts too readily make the assumption that highly abstract ideas do not attract copyright protection, and that more emphasis should also be placed on the components which are protectable.[92] Courts ought to give more direction in respect of which forms of expression are original in the context of specific types of works, and Samuelson provides the example of motion pictures as likely possessing original expressions in

[85] Jain op cit note 63 at page 4.
[86] Ibid at 5.
[87] Nichols v. Universal Pictures Corp. 45 F.2d 119 (2nd Cir 1930).
[88] Ibid at 121.
[89] Van der Merwe, Geyer & Kelbrick op cit note 22 at page 216.
[90] Computer Associates International, Inc. v. Altai, Inc. 982 F.2d 693 (2nd Cir 1992).
[91] Pamela Samuelson 'A Fresh Look at Tests for Nonliteral Copyright Infringement' (2013) 107 *Northwestern University Law Review* 1821-1850 at page 1838.
[92] Ibid at 1841.

respect of 'plot elements, well-developed characters, and dialogue'.[93] As we will see, however, such expressions are vulnerable to the *scènes à faire* doctrine and are not part of the 'style' enquiry – at least not by themselves.

2.3.3.4 Conclusion

It remains to be seen how the definition of style will confront the idea-expression dichotomy. That said, what is evident from the considerations of other jurisdictions' wrestling with the concept is that there are several inherently ambiguous factors that can determine whether or not an idea has crossed the threshold into 'expression' – the main one being that 'ideas' are not necessarily defined. From the UK and US, the testing of whether the expression is 'dictated by technical function' as well as the test of abstractions can be borrowed when style is considered.[94]

2.4 South African Cinematograph Films

2.4.1 Copyright & Cinematograph Films

In South Africa, copyright need not be registered in order for it to subsist in a work. However, the Registration of Copyright in Cinematograph Films Act 62 of 1977 allows such registration specifically for cinematograph films. Taking advantage of this would mean one has proof that copyright indeed subsists in one's work and that one is indeed the owner of the copyright in the work. Once the certificate is granted and produced in court proceedings, the onus of proof is discharged – this is therefore greatly advantageous to the copyright owner.[95] Cinematograph films are defined in the Copyright Act as the following:

> '[A]ny fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a

[93] Ibid at 1842.
[94] [2013] EWCA Civ 1482 at para 33.
[95] Owen Dean 'The Registration of Copyright in Cinematograph Films Act' (1977) 119 *De Rebus* 701-703 page 701.

> sound-track associated with the film, but shall not include a computer program'.[96]

The court in *Golden China TV Games Centre v Nintendo Co Ltd*[97] provided three elements to define what a cinematograph film essentially comprises of: it has a sequence of images, is fixed on material and is capable of being shown as a moving picture.[98] Importantly, a cinematograph film is considered a copyright-protected work independently from the copyrightable elements contained within one; such as the music, the script or the computer program which keeps all the sequences of images which will create the moving picture.[99]

Section 8 of the Copyright Act provides for the nature of the copyright that vests in cinematograph films. The following rights are exclusively held by the owner of the copyright: the right to reproduce the film in any manner, to make the film seen or heard in public, to broadcast the film, to transmit it through a 'diffusion service' or to create an adaptation of the film.[100] It is rare for case law concerning cinematograph films to pertain to reproductions or adaptations of the actual contents of the cinematograph film as the artistic medium it is – it is far more common for the factual scenarios to involve reproduction of actual footage or broadcasting of a cinematograph film without the necessary authorisation. However, it is in that space where this dissertation attempts to unearth a potential oversight of copyright law – routed possibly in the reality that it concerns a scenario which has not yet occurred or has not yet been brought before court.

2.4.2 Landscape of South African Filmmaking

In the 1990s, the Department of Arts, Culture, Science and Technology ('DACST') was tasked with adopting a strategic plan for 'culture industries', and part of that strategy – the Culture Industries Growth Strategy ('CIGS') included the South African Film and

[96] Section 1(1) of the Copyright Act.
[97] Golden China TV Games Centre v Nintendo Co Ltd [1996] 4 All SA 667 (SCA).
[98] Ibid para 9.
[99] Owen Dean 'Handbook of South African Copyright Law' 14 (2012) *Juta Law Online Publications at* page 15.
[100] Section 8 of the Copyright Act.

Television Industry Report, which was issued in 1998.[101] The report mentions the potentiality of South Africa's film industry to become internationally competitive and is an example of a 'knowledge intensive' as well as 'labour intensive' industry.[102] The report also recognises the capacity for the industry to facilitate the communication of 'ideas, information and ideology'.[103]

The World Intellectual Property Organisation (WIPO) commissioned a study in South Africa in order to establish the extent to which copyright industries contributed to economic growth.[104] Along with this, internal studies have been conducted to report the impact of this area – including the *National Film and Video Foundation* ("NFVF") *South African Film Industry Economic Baseline Study Report 2013* which revealed that the South African film industry contributed R3.5 billion to the country's GDP.[105] Other findings which illustrate the economic contributions of the sector have encouraged the executing of strategies dedicated to supporting it, such as the *Film Development Strategy, 1998*.[106]

Another aspect to consider is the capacity for a country to obtain a 'cinematic identity' and the advantages this offers. After 1994, the South African government realised that the content of the South African film industry was in dire need of recalibration and diversification, to broaden the target market from primarily white audiences and set aside the heavy state-censoring of such content from the apartheid era.[107] This led to the establishment of the aforementioned NFVF in 1997 for the Department of Arts Culture Science and Technology, whose main objective was to foster a successful, growing industry in film and video.[108] Up until 2017, criticisms were widely laid on the NFVF's film-funding model, mostly holding that it is over-prescriptive and consequently hampers the potential for the development of more

[101] The South African Film and Television Industry Report (published in Cultural Industries Growth Strategy (CIGS) November 1998).
[102] Ibid at 8.
[103] Ibid at 10.
[104] This was done in 2011 and limited the report between 1970 and 2009.
[105] Caroline Ncube 'The Creative Industry and South African Intellectual Property Law' (2018) 11 *Law and Development Review* 589-608 at page 603.
[106] Ibid at 604.
[107] Alan Collins, Alessio Ishizaka and Jen Snowball 'Film production incentives, employment transformation and domestic expenditure in South Africa: visualizing subsidy effectiveness' (2019) 25 *International Journal of Cultural Policy* 204-217 at page 206.
[108] Ibid.

diverse genres or styles.[109] The same has been said for the scriptwriting models – the general trend is that Hollywood-inspired models are utilised and this stands in the way of a true, original identity being formed by South African filmmakers.[110]

That said, there is an abundance of examples of modern South African films, both funded by the NFVF and otherwise, which do in fact take advantage of the medium, attempt to experiment and appeal to an intellectual audience.[111] Such films have provided marginalised communities with more powerful voices, allowing South African citizens to gain a greater understanding of the different perspectives held by people from different backgrounds.[112] Such trends are to be promoted, as various writers have passionately argued that film extends beyond the boundaries of 'economic activity' and can become an expression of culture.[113] A certain standard of quality for films can serve public welfare by 'fostering social cohesion, an appreciation of other points of view, an examination of identity and being the source of a sense of pride'.[114] As such, development in this area yields both market and 'non-market' advantages.[115]

It is a submission of this dissertation that elevating this type of filmmaking – more stimulating, creative, inventive and so forth – will have a positive effect on the promotion of creativity, the quality of works diffused into the public, the morale of South African citizens as consumers as well as on the economic interests: greater quality in filmmaking will increase the ability for South African cinema to compete internationally.[116]

---

[109] Haseenah Ebrahim 'Traversing the Cinemascape of Contemporary South Africa: A Peripatetic Journey' (2018) 9 *Black Camera* 197-215 page 200.
[110] Ibid.
[111] See Jacqueline Maingard's book, *South African national Cinema* (2007) for a comprehensive exploration of pre- and post-apartheid South African filmmaking for extensive examples of these types of films.
[112] Martin Botha *South African Cinema: 1896-2010* (2012) Bristol: Intellect page 205.
[113] Ebrahim op cit note 109 at page 201.
[114] Collins, Ishizaka and Snowball op cit note 107 at page 206.
[115] Ibid.
[116] A good example of which is *Tsotsi* (2005) by Gavin Hood, which found success in international markets and which won an Academy Award for Best Foreign Film in 2006. Another example is *Yesterday* (2004) by Darrell Roodt, which received a nomination the year before in the same category in the previous year.

2.4.3 The legal question

It can be argued that the absent experimentation or exploration of the medium's potential in a South African context can be perceived in part as a lack of stylistic innovation. There is practically no attention given to film style in copyright law, but what if this was not the case? If one subscribes to the theoretical notion of intellectual property rights that rewarding authors with copyright protection for their intellectual labour will result in a greater output of higher quality intellectual creations, then it logically follows that one might wish to contemplate whether there is a form of intellectual creation which deserves the attention of copyright law but has yet to receive it. While the argument suggesting that South Africa can acquire or develop a cinematic, cultural identity through the mechanism of heightened film style is compelling as an underlying, auxiliary motivation, it is subordinate to the main thrust of this dissertation. However, it does lead us to formulating the main legal questions at hand.

So, the questions posed by this dissertation are the following: first, how can film style be defined? Second, how can it be 'infringed'? Third, can film style be incorporated somewhere into copyright law? And finally: if so, how would it be protected?

While the South African angle has been referred to as the backdrop for this discussion, this dissertation does hope to treat the matter as one with universal reach. As such, many of the points orbiting the above legal questions will refer to cinema as a borderless artistic medium. Different jurisdictions, however, still offer varying perspectives and those will be emphasised where necessary. With the main questions of the dissertation having been articulated, the practical matter can be expanded on further.

3 DEFINING STYLE

3.1 Introduction

This section will attempt to answer the first question posed in the previous section's formulation. The definition that is eventually produced will apply throughout the dissertation and is also constructed for the purpose of having a more legally-skewed understanding of 'style' in existence generally. 'Style' is defined by the Oxford English Dictionary as a 'particular mode or form of skilled construction, execution, or production; the manner in which a work of art is executed, regarded as characteristic of the individual artist'. If we are to assemble a definition of style which can earn its stay in a conversation about copyright protection, it ought to be far more specific than what the abovementioned definition offers.

Film, like any art form, can be bifurcated into content and style. At least, that is for the purposes of analysis and discussion, as will be expanded on later. For the sake of clarity, 'content' in relation to art is understood as the actual expression of the work; as such, it encompasses the choice of subject matter being represented and the choice of motifs – the objects depicted as well as the meaning.[117] Applying this to film, content will refer to everything which is being depicted, and style will refer to *how* it is being depicted. Of course, the concept of style will be more thoroughly defined in the coming subsections.

In the world of filmmaking, a director's style is a powerful instrument for storytelling. Films are based on scripts and screenplays, and while it may seem as though a brief, passing comment on the copyrightability of a script as a literary work may sufficiently cover it, there is more to storytelling than just words on the page.[118] This is partly what makes a film unique – there are endless tricks and techniques available to the filmmaker which can serve to communicate important aspects of the narrative which simply are not available to the writer of a novel – the latter can only hope to conjure up sounds, images and performances in the minds of the reader.

[117] Dorothee Augustin, Helmut Leder, Florian Hutzler & Claus-Christian Carbon 'Style follows content: On the microgenesis of art perception' 128 *Acta Psychologica* 127 – 138 at page 128.
[118] 'Literary works' are defined in the Copyright Act as including 'cinematograph film scenarios' and 'broadcasting scripts'.

'Storytelling' is a gloriously broad idea in of itself, but it is a major part of what makes or breaks a film. It is for this reason that this work will seek to determine how certain storytelling techniques, specifically the ones that are very unique to particular directors as a manifestation of their style, can be wholly original.[119] In order to limit the scope of the discussion appropriately, the director will be considered the author of the film style – bearing in mind that in reality there are many individuals who would have played a role in bringing the director's vision to life. However, it is the execution of that vision as a final product, when reduced to material form, with which we are concerned.

3.2 Visual style

One motion picture is made up of a number of shots. An average of 1045 shots has been identified per film, although there is significant variation between films.[120] Consider high-profile releases like *Birdman* or *1917*, which are constructed as mostly one continuous shot for the entire film – achieved through clever editing that seamlessly blends one shot with another and conceals any necessary cuts. The editing of a film will determine the amount of shots as well as the average shot length, which may correlate with the style of a particular director.[121] How each shot is composed will largely determine the effectiveness of the cinematography – and by extension the style – of a film and will play an important role in making the story understandable to the observer.[122] This is not the full extent of the value of compelling style, however, and this will become apparent as the concept is unpacked. The camera angle or position, the continuity between shots, the way in which the shots are cut, and the composition of each shot will define a large part of the visual style of the film.[123] Over time, a director may learn how to use every tool available to them when constructing a shot, and this will be essential in conveying the ideas that the shots are trying to present. In learning to do so, they will naturally begin to favour certain techniques and eventually a trace of

[119] Currently, it is the understanding of 'original' as it exists in everyday language.
[120] Stephen Follows 'How many shots are in the average movie?' (2017) *Stephen Follows* available at <https://stephenfollows.com/many-shots-average-movie/>.
[121] Warren Buckland 'What Does the Statistical Style Analysis of Film Involve? A Review of *Moving into Pictures. More on Film History, Style and Analysis*' (2008) 23 *Literary & Linguistic Computing* 219-230 at page 221.
[122] Hararto Junaedi, Mochamad Hariadi and I Ketut Eddy Purnama 'Profiling Director's Style Based on Camera Positioning Using Fuzzy Logic' 7 (2018) *Computers (Basel)* at page 6.
[123] Ibid at 7.

a distinctive personality can be identified in the look and feel of their films. The stronger a director commits to certain techniques, the more visible their personality will be on the screen.

A director may even become known for a particular kind of shot alone, being informally credited therefor by audiences whenever a similar shot appears in another film by another director. An obvious example one may consider is the 'spin-around' shot which is excessively used by director Michael Bay, who is known for his loud, high-octane and bombastic action aesthetic. The 'spin-around' shot sometimes comprises of a camera travelling in a circular path around the characters which are the subject of the shot, while remaining trained on them in a medium close up or a head-and-shoulder close up, usually serving to heighten the intensity of the conversation between them.[124] This is effective in creating tension, and the impact is owed to Bay's mastery of the mechanics behind the spin-around shot, which is not as straightforward as it may initially sound – evident by some of the failed attempts to replicate the effect made by inexperienced imitators.[125] Another director which has generated many recognisable quirks is Quentin Tarantino, who is credited with the creation of famous shots such as the 'trunk and hood' POV – consisting of a camera facing up towards the characters in the frame from the perspective of the car boot – or the 'Choker Close Up' style that involves extreme close ups on the lips of a character that often signals the utterance of important dialogue or creates a sense of intimacy and sensuality.[126]

Other stylistic features that are attributed to some directors combine the technical manoeuvres made behind the camera and a particular performance that is drawn from the actor in the frame. Consider the 'Kubrick Stare' – a recurring shot across the filmography of director Stanley Kubrick, which involves a medium to close up of a character leaning their head forward and staring either at or just past the camera, often with the intention of creating a chilling effect.[127] The shot achieves its unique recognisability in part due to the thematic elements which usually accompany the

[124] Bruce Bennett 'The Cinema of Michael Bay: An Aesthetic of Excess' (2015) 75 *Senses of Cinema* page 11.
[125] Every Frame A Painting *Michael Bay – What is Bayhem?* (2014) online video essay available at <https://www.youtube.com/watch?v=2THVvshvq0Q>.
[126] Junaedi, Hariadi & Purnama op cit note 122 at page 8.
[127] Matthew Melia 'Stanley Kubrick at the Interface of film and television' 4 (2018) *Essais. Revue interdisciplinaire d'Humanités* 195-219 at page 200.

directors' films, realised through the delusion or lack of control experienced by the character being focused on. In this way, it is already somewhat apparent that style may owe part of its recognisability to an underlying idea – something which is instilled into the viewer – but this will be explored further momentarily. Directors may become so comfortable or immersed in their established style that sometimes they create works which are criticised for falling into a sort of self-parody, due to over-reliance or over-indulgence in those pre-established tricks and methods. For example, Christopher Nolan's *Tenet* certainly takes his deeply complex, time bending, plot-driven and exposition-centric style for which he has become notorious to a profound extreme. Similarly, Terrence Malick's *To the Wonder* commits fully to the structureless, dreamlike, almost entirely visual experience that has increasingly characterised his works to an unapologetic extent, including shots which gaze from the earth up at characters ambling through beautifully lit, natural scenery.

Intuition would tell us that while these shots are staples in the works of Michael Bay, Quentin Tarantino, Stanley Kubrick, and Terrence Malick, the idea of directors 'owning' one type of shot beyond the context of film analysis or conversation and into the realm of legal discourse would probably be absurd. All the ingredients present in any famous or generic type of shot, paired with the editing of the film, will merely represent some components of a director's visual style – which, in turn, will merely represent an aspect of a style in the broader sense.

3.3 Where would 'style' be located?

In the South African Copyright Act 78 of 1978, copyright protection is only provided for eligible 'works' which are listed in section 2(1). It must thus be determined through which exact, practical avenues 'style' is communicated and whether this manifestation of style can be described comfortably as any of the listed works outside of cinematograph films, which does not provide any insight into style as a protectable component. If style cannot stand as a work category of its own, then it must be a consideration found within the margins of another.

Ultimately, one may instinctively resist the notion of creating a 'work' category solely for style, as it is already a difficult concept to easily identify or recognise – additionally, the inclusion of such a category may create overbroad protection for style

which will inevitably stifle creativity in many forms of art and entertainment that extend beyond the realm of filmmaking. Unless the final product is congruent or extremely faithful to the screenplay, at least from a stylistic perspective, the category of 'literary works' might not provide thorough protection either. Rather, for the purposes of protecting film style, perhaps it is the aforementioned section 8 of the Copyright Act – setting out the nature of copyright in cinematograph films – that is most suitable as a home for a claim pertaining to the protection of film style.

Here it becomes necessary to explain how a director will map out their stylistic ambitions for a film. It is important to bear in mind that this is being done in pursuit of a suitable definition for style – at the moment, we are attempting to pinpoint where exactly style can be found in the clusters of elements which make up a motion picture. As previously indicated, style is determined by a great number of moving parts in the overall production. It is the product of all the technical cogs functioning together to convey an idea – and as such, the document which will most accurately or holistically represent the style of a film may potentially be the screenplay, described often as a written 'plan' for a motion picture which contains a story communicated through images, dialogue and extensive description.[128] This is an advanced, direct and detailed evolution of a script. The question of whether the screenplay is authored by the screenwriter alone will naturally depend on the particular production being considered, and thus the extent to which it is an instance of joint authorship between the writer and the director must be judged on a case-by-case basis.[129] Emphasis has been placed by some on the flexible and temporary nature of a screenplay, however, bearing in mind its function as a guide or plan and how the actual final product may deviate from it due to improvisation by any of the key players, such as the director, the director of photography or the actors.[130]

The style of the film can then probably most accurately be traced to the discussions between the director and the various significant collaborators on the film, often occurring on the days of actual filming. So, if we have begun establishing the practical, physical origin of style of a film, where should it be placed in the eyes of the

[128] Ted Nannicelli 'What is a Screenplay?' in Carroll N, Di Summa L, Loht S (eds) *The Palgrave Handbook of the Philosophy of Film and Motion Pictures* (2019) 215-234 at page 215.
[129] Ibid at 220.
[130] Ibid at 215.

law? It may be the safest option to consider the category of 'cinematograph film' as an all-encompassing, packaged end product which comprises of all the stylistic choices made at every level of production; costumes, sets, cinematography, performances, soundtrack and editing to name a few of the aspects which potentially contribute to the overall style of a film. Cinematograph films may contain other separate works within them which are also copyright protectable, like the script or the soundtrack.[131]

Mise-en-scène, which translates to 'placing on stage' from French, refers to the placement of everything that will appear on the screen in a film, as decided by the director.[132] This will be used as a shorthand for the collection of the following components, as provided by StudioBinder: Props, set design, costumes, makeup, colour, lighting, blocking, framing, lenses, sound, frame rate, music. While each component can probably be further broken down, and others added, these will suffice for the enquiry at hand. Using mise-en-scène and everything we have discussed so far it is possible to display graphically where style belongs in a consideration of a cinematograph film. Consider Figure 1 below.

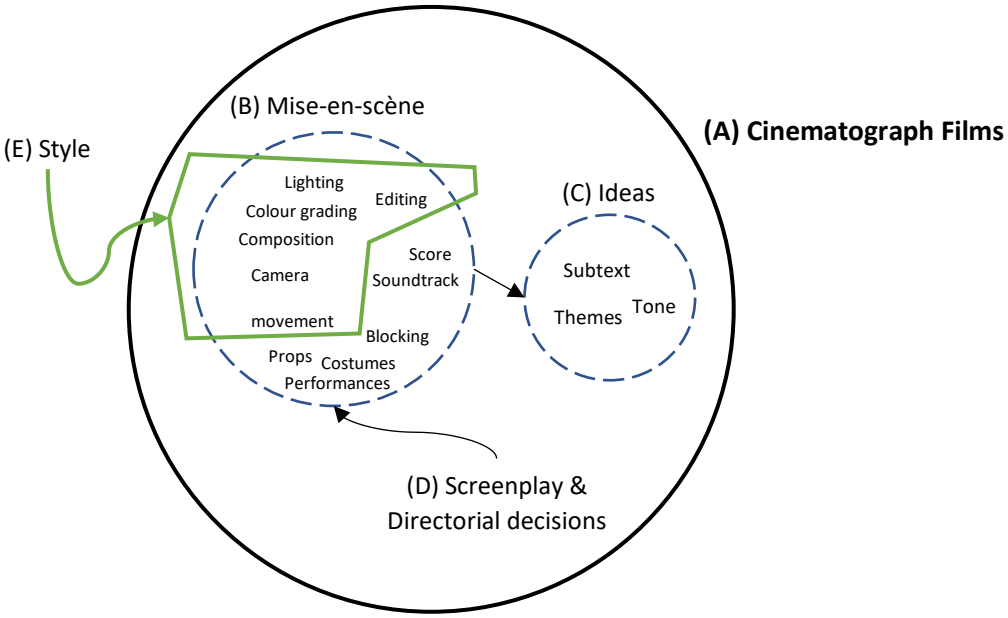

Figure 1. Visual representation of what style may entail within a cinematograph film

[131] Dean & Dyer op cit note 45 at page 11.
[132] StudioBinder 'What is Mise en Scene — How Directors Like Kubrick Master the Elements of Visual Storytelling' (2020) online video essay available at <https://www.youtube.com/watch?v=3euNFd7-TCg&t=320s>.

With the aid of the diagram in Figure 1, one can visualise a cinematograph film as a circle with all the different types of works – or ideas – which come together to form the final product within its borders. Style can thus be seen as being any combination or collection of those specific components which make up the mise-en-scène, signified by the green box, encircling those components which factually determine a particular film's style. Each film will, intentionally or otherwise, make use of a number of these components for the purpose of forging a style.

A useful guideline, therefore, in order to determine whether substantial copying has taken place in respect of film style, would be to decide on a number of components of mise-en-scene that cannot be the same, or considered the same by a reasonable person. Hypothetically, one could declare that if six of the components are reproduced similarly enough, then there is a rebuttable presumption of style-copying. This could be subject to different weightings for different components, depending on which are used and to what effect.

The reason why the subtextual elements of the film are separated and labelled as 'ideas' will be elaborated on in the next subsection.

3.4 Style reduced to material form?

As anticipated in the legal framework, the manner in which style comes into conflict with this requirement will be expanded upon here. The question is therefore whether style can be understood to be 'fixed' or 'reduced to material form' so as to satisfy the demands of the idea-expression dichotomy. Ideally, the relationship between the idea-expression and film style would be left for the section which applies style to the established legal framework, but it has been brought forward out of necessity; there are elements of film style which will inevitably 'poke the bear' in respect of this copyright rule and as such it is prudent to address it here, in our formulation of a definition for style.[133]

The most notable issue which arises in respect of style's relationship with this doctrine is that it *prima facie* excludes the abstract, underlying meanings or subtext which we hope to acknowledge in our definition of style. According to American legal

[133] See Section 6 below.

academics Melville and David Nimmer, works qualify as fixed so long as they are made in mediums 'capable of identification and having a more or less permanent endurance'.[134] Is an underlying artistic idea fixed in a tangible medium?

Let us refer back to the UK 'generic-to-detailed' concept and US 'hierarchy of abstractions' to analyse this – including the point made in *SAS Institute v World Programming Ltd* regarding an expression represented by functions.[135] How detailed, essentially, would the underlying meaning, theme or subtext have to be to move from idea to protectable expression? Additionally, what is the difference between an abstract underlying film idea and one which is 'actual'? These are difficult to answer.

On the question of functionality, it is clear that style is represented by some instruments of function – editing, camera movement, choice of camera lens and so forth. In respect of films, however, these functions arguably 'become' the art when presented in the mise-en-scène. As expressed in *SAS Institute v World Programming Ltd*, the number of choices made, as well as the extent to which the expression hinges on function rather than creative choices as mentioned before, will be telling of whether the ideas invoked by the functions employed amount to an expression.

One can also look to the example of contemporary art, which is normally considered to derive its value from the idea or meaning behind the actual presentation of the content. Some claim that fixation requirements ought not to be the tool by which contemporary art is denied copyright protection.[136] However, those types of works are not excluded for exactly the same reason as the subtext of a film would be; rather it is their impermanence or existence as derivative works which invites challenge. The underlying idea of the work is simply used as an explanation and possibly a means of evading the fixation requirement. Perhaps the subtext-component of a film's style can be wielded the same way – rather than being a necessary element in the definition of style, it can be a mitigating factor which is indicative of originality or difference between two styles. This way, that which is presented by the style of a film and amounts to ideas and meanings do not need to confront the material form requirement at all. As such, for the purposes of defining style, the underlying themes, feelings evoked and

[134] Zahr K. Said 'Copyright's Illogical Exclusion of Conceptual Art' (2016 39 *Columbia Journal of Law & the Arts* 335-354 at page 338.
[135] See Section 2.3.3.2.
[136] Said op cit note 134 at page 337.

abstract subtexts, which may sometimes be the entire point of the style being implemented in the film, can be severed from the heart of the definition we construct and relegated to a supporting consideration.

The rest of the ingredients which essentially constitute film style, on the other hand, are all cast onto the final product of the film anyway, manifesting in whichever way they do on the screen – as such, anything which forms part of the mise-en-scène is necessarily reduced to material form.

3.5 Defining style

Here we approach the actual pinning down of a definition of style that can lend itself to legal conversation, using what we have gathered so far. It has been held that the content of any piece of art and the style thereof are intrinsically linked, although they are often divorced from one another in film analysis or casual conversation.[137] David Bordwell points to the industrial motivations that underlie filmmaking as the reason why it stands apart from other forms of art, and his definition of film style is informed by this.[138] Bordwell describes style as 'a film's systematic and significant use of techniques of the medium'.[139] This definition is rather broad but makes for an appropriate point of departure.

One could argue that Bordwell's approach on the matter allows room for an interpretation of style being perceived as a unique type of process; a method by which screenplays are brought to life and conveyed through the end product, in the form of a motion picture, using every tool available to the director. As shown previously, however, processes are explicitly excluded from the protection of copyright in Section 102 of the US Copyright Act and also do not attract protection from any South African copyright law, as mentioned in the relevant international instrument before – but upon meeting certain criteria, they can be protected through patent law.[140] Bearing in mind the gradual mutation of large studios into highly profit-focused, blockbuster-producing machines guided by mildly avaricious intentions, as will be explored in section 4, one

[137] James Morrison & Thomas Schur *The Films of Terrence Malick* (2003) Praeger Publishers, London (Westport) page 115.
[138] Ibid at 116.
[139] David Bordwell *On the History of Film Style* (1997) Cambridge: Harvard University Press page 4.
[140] See section 2.3.3.3 for US Copyright Act exclusions from copyright.

might be tempted to theoretically compare the future of those massive studios to any company whose business involves the manufacturing of goods, also technically executing internally known processes and generating products to be consumed by the public. The problem with this train of thought – where one can imagine an assembly line of unoriginal films being produced according to a checklist of common-denominator, audience-pleasing factors ranging from the script to the stylistic character thereof – is that works of an aesthetic nature are expressly excluded in most Patent statutes.[141] As such, establishing a definition which leans towards the 'process' concept will not serve to advance the pursuit of protection for a filmmaker's style beyond providing a descriptive metaphor.

At this stage, one can formulate a definition which narrows the concept of style down from its uninhibited, extra-legal understanding to one which facilitates the application of copyright language and may someday lead the concept of style to some measure of copyright protection.

As such, let us define style as 'the identifiable cinematic character of a cinematograph film that is brought about through filmmaking techniques, at every level of production, that visually and auditorily elevates the content of the film'. 'Every level of production' includes the script, screenplay, set design, costume design, performances, cinematography, editing, soundtrack, special effects and virtually any creative decision made along the way, whether it is during the phases of pre-production, production or post-production. This definition abandons the subtextual elements but leaves room for aspects such as the tone and genre to be participants in the discussion of style.

Additionally, the degree to which it elevates the content is unimportant. This is also the case for the degree of sophistication, complexity or artistic quality – as is the case with most artistic works – however these may be indicative of the level of originality whenever that aspect must be considered. Should this definition be rejected as an effective representation of film style based on its exclusion of the underlying ideas which will inevitably fail to clear the hurdle of the idea-expression dichotomy, then the

[141] Section 25 of the South African Patents Act 57 of 1978.

only route for protection in the realm of copyright would be the lobbying for some form of exception to the dichotomy's application.

And so, armed with a suitable definition for film style that may be carried through the rest of the discussion, the potential, practical shortcoming of the law in respect of film style can be explained.

4 THE CURRENT LANDSCAPE OF FILMMAKING

4.1 Introduction

In order to appreciate the practical ramifications of the aforementioned legal oversight, one can discuss the current state of cinema. This section will illustrate the reality in which 'style' can be vulnerable to being appropriated – as well as explain why it is now in the best interest of big film studios to do so.

The types of films which have come to dominate theatres in the 21st century have allowed the discussion around originality in film to slowly approach a kind of zenith, as many persons express disappointment and disapproval in respect of the waning quality of originality in film. This section seeks to explain what the lack of originality in film looks like in the context of contemporary filmmaking, how this came to be, and finally how these trends have facilitated copying between directors, which will lead to the further discussion of style and how it may or may not relate to the realm of copyright law in South Africa.[142] For this section, Western cinema is primarily focused on as the United States has by far the largest filmed-entertainment market, boasting an over 25.9 billion US dollar revenue in 2020, with China coming in second at 12.7 billion.[143] One can assume with the growth of the industry worldwide, the creative fallout of this growth in the United States will theoretically apply to a country like South Africa whose film industry is expanding, even if its revenue pales in comparison.

Any regular admirer of film will note the way the industry itself has mutated in the past few decades. In 1996, Susan Sontag wrote an article for *The New York Times* titled 'The Decay of Cinema', in which the rise of production costs for film as well as the globalisation of the industry during the 1980s are identified as the bigger contributions to the shift in ambitions of the industry, which crept away from purer displays of artistic integrity and moved towards straight profitability.[144] Money needed

[142] As will be made clear in a moment, this is not in reference to 'originality' as a copyright requirement anymore.
[143] José Gabriel Navarro 'Filmed entertainment revenue worldwide 2019, by country' (2021) *Statista* available at <https://www.statista.com/statistics/296431/filmed-entertainment-revenue-worldwide-by-country/>.
[144] Susan Sontag 'The Decay of Cinema' *The New York Times* 25 February 1996 at 60.

to be made immediately upon release in order to balance out these rising costs, and as such the production of potentially high-earning, franchise-starting blockbuster spectacles became more attractive than smaller, less extravagant projects.

To once again be clear, this particular section will refer to originality in the more conventional sense, free from legal connotations and the context of copyright. 'Unoriginal' films can be understood as referring to films which belong to an existing franchise, either as a sequel or prequel, a remake, a reboot or any type of spin-off title that may be associated with that franchise. Consider the numerous titles that fall under the Marvel superhero continuity, currently owned by Disney – one may consider them to be separate franchises but the entire draw of that series is its interconnectivity and its grand, multi-film, cross-over narratives. As an indication of the current trend in popular cinema, one can consider the increase in frequency of unoriginal film titles appearing in the top 25 highest-grossing films of the year from 2000 to 2019. In 2000, the number of unoriginal films came to 10, and in 2019 it came up to 24.[145] It is important to bear in mind, however, that this understanding of 'unoriginality' is only being mentioned for its existence as a possible underlying basis for the ever-increasing frequency of stylistic copying in blockbuster filmmaking.

4.2 The financial risks of films

There are a couple of reasons why unoriginal films have come to dominate the industry, but the main one concerns the potential risks and profits they have come to represent. A film can be financed in many ways, but usually a major studio will fund the production in its entirety.[146] As mentioned before, production costs have become remarkably expensive, with the average cost of a major studio-released film being between 70 to 100 million US dollars, and that is without factoring in marketing costs which have grown from $36 million (according to a report in 2007) to global expenses as high as $200 million.[147] The most expensive film ever made to date is *Pirates of the Caribbean: On Stranger Tides* according to the estimates provided by Insider, coming

[145] Jacob Graber-Lipperman *The Impact of Originality in a Transitioning Movie Industry* (Thesis, Duke University, 2019) at page 4.
[146] Jeffrey C. Ulin *The Business of Media Distribution: Monetizing Film, TV and Video Content in an Online World* 3 ed (2019) New York: Routledge at page 95.
[147] Ibid.

to a total of roughly $376,5 million.[148] In 1977, the original *Star Wars* was released and grossed $775 million worldwide – this was considered a massive success at the time. In 2015, the seventh instalment in the series – *Star Wars: Episode VII -The Force Awakens* grossed over $2 billion worldwide and $936,7 million domestically.[149] Clearly, the stakes have changed dramatically over time.

Studios now aim to make billions at the box office, because it has shown to be possible with major 'tent-pole' films such as *The Force Awakens* or *Avengers: Endgame*. The business has therefore grown immensely and the vast profits that are attainable have justified these incredible budgets for modern day films. It therefore tracks that the decision-making process driving the production of a film would err on the side of providence; the amount of money a studio consequently loses when a film flops at the box office can be devastating. Take, for example, Disney's *John Carter*: the film cost $306,6 million to make and ended up grossing only $284 million, bearing in mind that theatres are entitled to about half of that gross. The overall loss was estimated at around $200 million. The potentially catastrophic risk that studios face when embarking on projects of this scale would naturally lead to the search for methods of mitigating such risk. From the abovementioned patterns, it can be gleaned that audiences are far more likely to spend their money on tickets for film titles or franchises in which they already have some investment, regardless of the quality. When it comes to blockbuster filmmaking, these methods are baked in to every stage of production.

4.3 Recipe for a blockbuster

So, the question is how does exactly does the resulting aversion to risk-taking lead to copying, generally?

When large film projects are given the green light and are put into production, the filmmakers and producers ensure that whatever part they are working on is tested and scrutinised whenever and wherever possible – whether it be footage that was completed on a particular day or an early cut of the film in its entirety.[150] Test screenings

[148] Kirsten Acuna 'The 30 most expensive movies ever made' (2020) *Insider* available at <https://www.insider.com/most-expensive-movies-ever-made>.
[149] The Numbers 'Box Office History of Star Wars Movies' available at <https://www.the-numbers.com/movies/franchise/Star-Wars#tab=summary>.
[150] Ulin op cit note 146 at page 60.

are held where footage is shown to small, select audiences and evaluated based on their emotional responses – this information is subsequently used to guide marketing campaigns or creative adjustments to the film during the final stages of its production.[151]

Screenwriters and filmmakers generally understand that the key to the success of the film is the emotional impact it makes on an audience – the particular emotion they aim to achieve will depend on the genre of the film – who will talk to other potential moviegoers about their experience.[152] After all, positive word-of-mouth communication has proven to play a significant role in box office success.[153] So, if a strong emotional response from an audience is consistently elicited from a particular type of scene, moment, image or any aspect of an observed film, it is logical that filmmakers will want to work these tested trends into their own film to ensure an emotional reaction, ergo a greater chance at profit. Remember, the types of films being considered now do not include smaller projects which may still be guided more holistically by the creativity and vision of the filmmakers, but rather those steered by the fiscal ambitions of big studios.

Consider the types of cinematic moments audiences have come to expect from their favourite genres – the scenes or shots that are inherent to a film that may even be classified as clichés of that genre. Some examples may include a medium shot of two characters embracing in the rain at the climactic moment of a romantic film, or a rugged action-film protagonist turning their back on an explosion and walking in slow-motion towards the audience with a stoic expression on their face. Certain genres will consist of multiple clichés in any film belonging to it. This is especially true in the wake of a very successful film which subsequently leads to the sudden appearance of multiple copycat-films that try to replicate its success by loosely offering audiences the same experience. For example, in 1978 and 1979, the years following the release of *Star Wars*, the world was treated to an influx of cheaply made, shameless rip-offs such as *Starcrash*, *Message from Space* and *Star Odyssey*. These films all involved a team of

[151] Sandra Pelzer, Marc T.P. Adam and Simon Weaving 'NeuroIS for Decision Support: The Case of Filmmakers and Audience Test Screenings' (2018) 29 *Information Systems and Neuroscience* 29 – 35 at page 30.
[152] Ibid.
[153] Yong Liu 'Word of Mouth for Movies: Its Dynamics and Impact on Box Office Revenue' (2006) 70 *Journal of Marketing* 74-89 at page 86.

underdog protagonists adventuring through space – one of whom is royalty that must sometimes first be rescued – to fight an evil galaxy-ruling empire. There are more specific similarities found in *Starcrash* that include entire plot points which are directly lifted from *Star Wars*.[154] So, the question is: how is the incessant re-emergence of these predictable cinematic moments viewed by copyright law?

4.4 The *scènes à faire* doctrine

Since the typical Hollywood production largely makes up the subject matter of this particular discussion, one can consider the *scènes à faire* doctrine as found in US law. The reason why this US doctrine can be pulled into this discussion is that there is no counterpart in South African copyright law. It is a submission of this dissertation that there are elements of *scènes à faire* which can be translated into our law, with the purpose of balancing out the suggested expansion of copyright protection so as to prevent creativity from generally being stifled. This will be explained later once the discussion arrives at those suggestions: for now, one can analyse how the doctrine relates to the problem of 'unoriginal' films.

The phrase roughly translates from French to mean 'scenes to do', and states essentially that stock or standard elements existing in expressive work cannot form the basis of a copyright infringement claim unaccompanied.[155] In other words, certain details which are common to works which qualify for a particular genre.[156] More often than not, the doctrine is mentioned in relation to the use of certain plot points which are inseparable from the formula of the genre. However, it can be understood in a narrower sense as well, like when the doctrine was first brought into US case law in *Cain v. Universal Pictures Co.* ('*Cain*').[157] The scene in question involved the two leads of the film taking shelter from the rain in a church, which the plaintiff accused Universal Pictures of copying from a novel he had written prior to the film.[158] While the doctrine

[154] Matthew Byrd '15 Most Shameless Star Wars Rip-Offs Of All Time' (2017) *Screen Rant* available at <https://screenrant.com/obvious-most-shameless-star-wars-rip-offs-copies-movies-tv-shows-ever-all-time/>.
[155] Robert Kirk Walker 'Breaking with Convention: The Conceptual Failings of Scenes a Faire' (2020) 38 *Cardozo Arts & Entertainment Law Journal* 435-472 at page 436.
[156] Ibid at 438.
[157] Cain v. Universal Pictures Co., Inc., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942).
[158] Ibid at 1015.

normally considers broad scenes which are common to a genre that cannot be omitted, the judge in *Cain* considered details which are not necessary to the genre but which arise naturally from the setting of the scene itself.[159] There are thus two meanings that can be attributed to *scènes à faire* – first, that some scenes cannot be protected because identical circumstances will produce identical scenes, and second, some elements are not protected because they are standard to that genre.[160] This is copyright protection in terms of literary works – the screenplays that contain descriptions of the scenes are being compared.

So, a filmmaker ensuring that the tried-and-true beats of the genre at hand are maintained in the work, making all the necessary emotional connections with the audience, will not immediately be policed by copyright law. However, the application of this doctrine will likely be relegated to the blunter examples of parallel ideas in filmmaking, or at least to the more generic scenes or moments. Contemporary blockbuster filmmakers have an infinitely large historical pool of reference to draw from; the features that work for audiences are weaved into every script and put to film so as to guarantee emotional resonance as has been achieved by their predecessors. The potential dilemma will lie where a scene or moment crosses the threshold from generic to unique – think back also to the 'abstraction hierarchy' – and the question is therefore how this line would be identified.

The question posed by this dissertation, however, concerns more than just the protection of a scene as a literary work in the form of a script. The quality of originality in a film may emerge from ideas which are found beyond the direct practical execution of the words from a page, and so the concept of *scènes à faire* may not extend to the stylistic attributes of a particular film or director. Consider instances where genres are blended by certain directors – like Jordan Peele's mixture of comedy and horror with *Get Out* and *Us*, both of which carry underlying political commentary about modern manifestations of racism in the United States and obtained their identity due to the stylistic choices made by their director.[161] Naturally, some of the scenes or moments contained in those films cannot be easily compared to pre-existing expectations from a

[159] Walker op cit note 155 at page 446.
[160] Ibid.
[161] Jared Sexton *Black Men, Black Feminism Lucifer's Nocturne* 1 ed (2018) Cham: Springer International Publishing at page 21.

genre or set of circumstances, because the genre itself is relatively original and the circumstances in question are unique to that particular hybrid of genres. The operation of *scènes à faire* will be considered again when style has been applied to the operation of copyright law.

Theoretically, the most flagrant scenario possible for the form of appropriation in question will concern films produced by large studios, committee-driven rather than artist-driven, and which owe their excessive commercial success in part due to their style – which has been sufficiently copied from smaller films, the directors of which are not credited for it in any way. Consider the following hypothetical set of facts: An up-and-coming director that has not had a big commercial hit yet makes an indie science fiction thriller and is praised by viewers and critics for having crafted a unique voice for his work. His film contains clever and original action scenes which make elaborate use of specific martial arts but with a camera shot that continuously and seamlessly moves in and out of the protagonists' point of view, sitting behind their eyes one moment and moving – with the aid of visual effects – out and around the action in one unbroken motion, signifying that the character periodically loses control of their own body when engaged in hand-to-hand combat. The fight scenes are accompanied with eccentric trance music to elevate the action and emphasise the science fiction motif behind this protagonist's condition – sprinkled with voiceover narration from the protagonist which indicates they are aware and are struggling to regain control. Thematically speaking, the scenes serve an allegory for the effect of performance enhancing drugs, or any substance, and the emotional and physical toll it takes on the user and their loved ones.

The film flies relatively under the radar despite good reviews. Meanwhile, a big-studio production is greenlit by Sony Pictures. It is the sequel to a successful adaptation of a fantasy novel, which was released in cinemas two years prior. The producers at Sony watch the up-and-coming director's film and realise they have an opportunity to use this style of action throughout their planned fantasy sequel, and will simply concoct a storyline which accommodates the loss-of-control plot-point by attributing it to magic rather than science. The screenplay is finished and a director is hired, but their agreement stipulates an overwhelming amount of creative control be maintained by the studio. The resulting film uses the same type of camera shots, extremely similar music and voiceover, all conveying the same subtextual ideas and

achieving the same message. The film triples its $200 million budget in earnings, and is praised for its revolutionary camerawork. Due to the film's popularity, the camera movement and action choreography – and overall frantic style – are referenced by every major action film that releases in the following years, much like what occurred with bullet-time action effects following *The Matrix* in 1999.[162] No caution has been taken that would contextualise the copying as some kind of homage; [163] no credit has been given whatsoever.

The original, up-and-coming director makes another film using similar tropes but it is met with lukewarm reviews, audiences cite their exhaustion for the style as the main gripe and the film consequently fails at the box office. As it currently stands, the concept of film style has not been made concrete and as such there is no hopeful legal avenue for such a director to pursue in the given circumstances.

In the modern landscape of filmmaking, as alluded to above, it is not only plot points and particular moments or clichés that are reproduced. The art form has always had the capacity for subtler techniques and devices to be put on display, and the ever-expanding range of filmmaking and storytelling tools that are available to the directors has led to unique voices and visions which can bring their screenplays to life in an exceptional way. The direction of the actors' performances, combined with the camera movement, lighting, colour grading, visual effects and editing can make up very particular tones and styles which are completely unique to one visionary director as well as a cinematographer. It is the recreation of all these elements by another that intentionally brings a completely different screenplay to life using another established director's style that constitutes wrongful action and is the focus of this dissertation.

[162] Phil Villarreal 'Underwhelming ripoff of 'Matrix' movies' (2006) *Tucson.com* available at <https://tucson.com/entertainment/movies/underwhelming-ripoff-of-matrix-movies/article_13c595c3-0861-5c41-9273-e982d536bb55.html>.

[163] 'Homage' as well as 'tribute' are mentioned as proposed general exceptions from copyright protection by the Copyright Amendment Bill [B13-2017]. It is therefore clear that the appropriation in question does not qualify as such.

5 HISTORY OF COPYRIGHT IN FILM

5.1 Introduction

Here we begin to interrogate whether style can be comfortably introduced into copyright law. To trace the development of the relationship between copyright law and film, one can start by determining the origin of the motion picture as we understand it today. The purpose of doing so is to gain a deep understanding of exactly how the law perceives the medium, which would have gradually developed over time and which will offer an insight into the trajectory of that relationship. The necessary extension of this research beyond the borders of South Africa will also reveal how other jurisdictions with richer histories in filmmaking have carried themselves in respect of addressing film, hopefully providing compelling insight into whether the incorporation of style is on the table at all.

This section will first indicate the origin of the type of motion picture which forms the subject of this work, followed by an examination of how copyright law incrementally took hold of the medium throughout its early development – specifically tracking the history of mostly UK and some US law. The reason for discussing the UK's history is the influence that its legislation exerted on other European countries in this area as well as South Africa itself. The British Copyright Act of 1911 was adopted by South Africa in 1916 and the 1956 British Copyright Act was similarly integrated to a significant extent into the 1965 South African Copyright Act.[164] The United States will be examined, albeit to a less thorough extent, because the majority of the largest, most impactful and profitable films in the 20th and 21st century all are native to it, and perhaps its natural exposure to intellectual property disputes in respect of filmmaking has shaped it in ways that might one day be true of other jurisdictions like South Africa. The purpose of this section as a whole is to establish the gradual increase in layers of protection added to the medium of film over the decades, so that once the discussion turns to the hypothetical inclusion of 'style' amongst that which is protected, it can be determined whether this potential inclusion – around which this dissertation mostly

[164] Van der Merwe, Geyer & Kelbrick op cit note 22 at page 183.

revolves – would be consistent with the spirit of film and copyright's historical relationship.

5.2 Origins of the motion picture

An appropriate point of origin from which the evolution of the medium commenced must be determined – in the interest of conducting a focused investigation, we will move forward past the age of the aforementioned Zoetrope or Phenakistoscope type inventions, or any digression into the more technical landscape of the creation of film and photography that would concern the likes of William Friese-Greene or William Kennedy-Laurie Dickson.[165] Rather, we will identify a moment in the development of the science of filmmaking which actually attracted the attention of the law in a significant way – as such, it would be apt to springboard off from the work of Louis and Auguste Lumière.

The Lumière Brothers were responsible for the invention of the *Cinèmatographe* – or Cinematograph system – for projecting motion pictures.[166] An improvement on the basic and unrefined devices which preceded it, the invention proved commercially valuable and led to the first public screening of a series of short films at the Grand Café in Paris; this public performance of projected moving pictures astonished audiences for the first time on December 28, 1895, marking the genesis of the modern film-going experience. This would be the catalyst for a rapid expansion, as theatres experienced greater business and attention when longer-form works were presented through this brand-new medium. This first generation of films, consisting of a greater sense of narrative and creativity than the experimental works that came before, includes the 1902 science fiction film *A Trip to the Moon* by Georges Méliès.

The success of that first screening in Paris led to another in London, at the Marlborough Hall of the Royal Polytechnic Institute on 20 February 1896.[167] The growing popularity of these shows, which came to be known as 'photo-plays' or 'cinematograph films', would soon necessitate an establishment of their

[165] John Hannavy *Encyclopedia of Nineteenth-Century Photography* 1 ed (2008) *Routledge* at page 943.
[166] Pascal Kamina *Film Copyright in the European Union* 2 ed (2016) Cambridge: Cambridge University Press at page 7.
[167] Kamina op cit note 166 at page 8.

copyrightability.[168] This came about very shortly following a trend in copyright law development in Europe which saw authors being granted a greater amount of international protection and becoming the focal point of copyright law-making.[169]

5.3 A new challenge for copyright

About ten years before the Grand Café screening, ten countries signed the Berne Convention. Contracting states agreed to a minimum standard of copyright protection afforded to a non-exhaustive list. So, with the emergence of this new medium so shortly after the signing of the Berne Convention, one can imagine a measure of confusion naturally frustrated the process of deciding on a suitable application of copyright law to cinematograph films.[170]

The initial lack of thorough definition for films kept their true nature a mystery. At the time, an important question posed by lawmakers was whether the law should perceive a film as a combined series of photographs or rather as a dramatic work.[171] Initially, photography was not included in the list of protected works contained in article 4 – so whether states offered such protection for photography was, for a while, a decision left up to them.[172] Early film copyright-related history can be described as an ambivalent back-and-forth between understanding the production of film as a technical or artistic process, between various European countries attempting to define cinematograph films for the purposes of copyright protection.

5.3.1 *United Kingdom*

If one were to consider a film as a series of photographs, one could examine the protection afforded to photographs leading up to the invention of the film. When the UK included photographs in their 1862 Fine Art Copyright Act, the relatively new

[168] Ibid.
[169] Peter Burger 'The Berne Convention: Its History and Its Key Role in the Future' 3 (1988) *J.L. & TECH* at Page 10.
[170] Kamina op cit note 166 at page 8.
[171] Ibid.
[172] Burger op cit note 169 at page 18.

nature of the medium caused concern about its inclusion.[173] Before the 1861 Bill was passed, parliamentary deliberation on the question of whether or not to include photography involved an interrogation of photography as intellectual property. Specifically, it was concluded by some that photography was not to be considered a 'fine art' but rather a mechanical process.[174] However, the argument was also made that the pursuit of obtaining compelling photographs could cost a photographer a great deal of time, labour and monetary expenses – stirring doubt as to whether persons should be able to profit freely off of their work without the protection of copyright law.[175]

Another argument made in favour of excluding photography from the Bill was that the number of disputes and consequential litigation potentially arising as a result of photographers theoretically being able to capture the exact same phenomenon renders the whole idea of allowing for copyright protection impractical, in this instance.[176] To a certain extent, this observation called into question the presence of originality in the medium, and one can view this argument as an early demonstration of the impact filmmaking has made on the arts – at least in the eyes of intellectual property law – regarding how we are to potentially evolve our understanding of originality moving forward.

At the time of its emergence, the act of merely capturing existing imagery may have been considered a sort of step down from literary or artistic work that preceded it, as a measure of originality is ostensibly lost along the way. However, this train of thought was somewhat derailed when Sir Richard Bethell – the man responsible for presenting the 1861 Bill – drew attention to the fact that it is highly improbable for two individuals to produce photographs of the same subject under congruent conditions, including but not limited to its positioning and lighting.[177] The last part of this affirmation can be seen as a harbinger for the distinction between content and style, which is considered inherent in all art today and which will largely inform the impending discussion of film style. The arguments in favour of its inclusion were

[173] Ronan Deazley et al *Privilege and Property: Essays on the History of Copyright Law* (2010) Cambridge: Open Book Publishers page 291.
[174] Ibid at 305.
[175] Ibid.
[176] Ibid at 306.
[177] Ibid.

convincing, and so it became accepted that photography was capable of being considered 'fine art'.[178]

Continuing on in the timeline of the UK, it would follow that, were one to view cinematograph films as a series of photographs, such protection would naturally fall upon films as well. However, the operation of 1862 Act required registration of each photograph taken from a different negative in order for any legal protection to granted – but for cinematograph films, only reels could be registered, prompting certain legal scholars to challenge the kinship of the two mediums in the application of copyright law.[179]

The other option was to perceive films as dramatic works, which also enjoyed protection under the Dramatic Copyright Act of 1833. Following the decision of *Tate v. Fullbrook*,[180] it was held that for a work to qualify for this protection, it must have been 'capable of being printed and published'.[181] As such, the physical form of film would have been beyond the reach of the relevant provisions; the script thereof would have been the closest component which was deemed worthy of protection. Entertaining the thought of cinematograph films as dramatic works, at that stage, indicates a deeper level of appreciation – and consequently, value – for film; this, too, foreshadows the closer observation of film as an art form, recognising potential beyond pure 'content'.

A great advancement in the perception of cinematograph films in terms of their legitimacy within the world of art – as well as their protection – was made as a result of the Berlin Revision Conference for the Berne Convention in 1908. This revision had the overall ambition of bringing greater protection to authors of all kinds, and of the two new exclusive rights introduced by the Berlin conferees, one was the Cinematographic Right. This allowed authors to permit cinematographers to reproduce their works as films.[182] However, the most notable change brought by the revision conference in this regard was the extension of the list of protected works so as to include 'photographic works' and 'works produced by process analogous to photography', in article 3.[183] The latter implies cinematographic films, marking the moment that

[178] Ibid.
[179] Kamina op cit note 166 at page 9.
[180] Tate v. Fullbrook [1908] 1 KB 821; 98 LT 706; 77 LJKB 577; 24 TLR 347; 52 SJ 276.
[181] Kamina op cit note 166 at page 9.
[182] Burger op cit note 169 at page 25.
[183] Kamina op cit note 166 at page 16.

international law acknowledged the medium as worthy of being afforded copyright protection in of itself.

For the United Kingdom, the Copyright Act 1911 was brought about in order to extinguish the outdated operation of the older copyright systems in place, including all the complex registration requirements that made copyright protection entirely reliant on formalities and procedure. The 1911 Act allowed for the law to be brought up to standard so as to reflect the principles of Berlin Revision Conference.[184] In addition to the possibility of protecting them as a series of photographs, films could now also be perceived as dramatic works as provided for in section 35(1), and as long as a cinematograph film possessed the prerequisite originality it would be granted copyright protection.[185]

This is also significant for the purposes of this dissertation, because it was not the physical recording of the film onto a strip which was being protected, but rather the dramatic work which was being conveyed by means of the art of cinematography.[186] The film, in its complete form, is perceived as having dramatic quality, not just the script upon which it is based. The aforementioned recognition of potential beyond the basic function of a film recording was now confirmed, inching the public closer to an understanding of what cinematograph films could represent artistically: no longer just reproductions of dramatic works, but dramatic works themselves. These gradual statutory adjustments are significant, as the evolution of the public's opinion in respect of the medium's value is directly linked to the lengths to which it will be granted protection.

Naturally, the next matter to clarify would be that of who qualifies as author. At this stage, it would depend on whether the work was being protected as a series of photographs or dramatic work, as both were available options in the 1911 Act – the former would have the 'producer' of the photographs as the author and the latter would have whomever qualified as the author of the work, in the absence of an employment contract and so forth.[187] It was generally accepted that the director of a film would be

[184] Ivor Davis 'A Century of Copyright: The United Kingdom and the Berne Convention' (1986) 11 *Columbia-VLA Journal of Law & Arts* (1986) 33 at page 39.
[185] Ibid at 40.
[186] Kamina op cit note 166 at page 20.
[187] Ibid at 24.

an author of a cinematograph film, and this sentiment has echoed on all the way through to the present day.[188]

When it came to infringement under the 1911 Act, authors enjoyed thorough protection against copying and theatrical performance of their films.[189] If an adaptation of their work was made, the reproduction of plot points and incidents would amount to an infringement due to the capacity of a film to be a dramatic work. Additionally, the repurposing of actual imagery of the film – which would be an infringement of the work in its capacity to be considered a series of photographs – was not the only way to be liable for infringement; the filming of scenes that merely resembled each other enough, in certain instances, could amount to infringement too.[190] This differentiation between perfect reproduction and sufficient resemblance is one which also alludes to the protection of films involving a more subjective, qualitative enquiry in the future, as the art form becomes more nuanced.

The next significant development for protection of film in the UK was induced by the Copyright Act of 1956. In the interim, the general public started taking the medium more seriously as the industry maintained its steady expansion throughout the 1920s. Well-educated individuals were starting to commit themselves to the art form either as filmmakers or as critics, and as the quality of filmmaking elevated, so too did the status of the cinematograph film.[191] The decade notably saw the introduction of sound into film, which was initially not met with much enthusiasm – but undoubtably, this would further expand the opportunities for exploitation and reproduction of film-related works as a significant dimension now accompanied the visuals.[192] Fortunately, the arrival of sound did not thwart the operation of the 1911 Act, as the film's soundtrack would fall comfortably within the 'contrivance by means of which sounds may be mechanically reproduced' description as provided for in section 19(1), which dealt with sound recordings.[193]

The 1956 Act introduced a fifty-year copyright period for cinematograph films that was separate from the classification of artistic and dramatic works, defining the

[188] Ibid at 25.
[189] Kamina op cit note 166 at page 28.
[190] Ibid.
[191] Rachael Low (ed) *History of British Film (Volume 4)* 1 ed (2005) London: Routledge at page 16.
[192] Ibid at 206.
[193] Kamina op cit note 166 at page 27.

work as 'any sequence of visual images recorded on material of any description… so as to be capable, by the use of that material, (a) of being shown as a moving picture, or (b) of being recorded on other material (whether translucent or not), by the use of which it can be so shown'.[194] With a cinematograph film category independent from dramatic or artistic works, it could be more specific about what is protected. This is important because it allows room for aspects unique to the medium of film to be acknowledged, an example of which being the proposed consideration of style that will form the subject of the discussion later on. The 1956 Act also clarified that soundtracks of films were to be protected as part of such films rather than separate sound recordings.[195]

The Copyright, Designs and Patents Act of 1988 diverged somewhat from this position, however, by defining 'film' in section 5 as the 'recording', rather than the aforementioned sequence of visual images. More importantly, in respect of this work, it maintained what was also present in the previous Act – the attributing of authorship to the individual 'by whom the arrangements necessary for the making of the film are undertaken'.[196] This, of course, points to a producer rather than a director, or any person who is responsible for the myriad of creative pieces that come together in the filmmaking process, such as the script. However, moral rights in the work would belong to the director – moral rights are attributed to the author of the work, which also may not be the owner due to the operation of copyright ownership.[197] This includes the right to have been identified as the director of the film, and in modern South African copyright law it includes the right to object to any material distortions that undermines the author's reputation or honour.[198] Importantly, the Copyright and Related Rights Regulations of 1996 made the additional recognition of a 'principal director' which was inserted alongside the producer as a co-author of the work, rendering the work as one of joint authorship.[199]

One manner of interpreting the historical development of copyright law and film as it unfolded in the UK is that the recognition of the true nature of the medium was a remarkably gradual process – copyright law employed practically an entire century to

[194] Section 13(10) of the UK Copyright Act of 1956.
[195] Section 12(9) and 13(9) of the UK Copyright Act of 1956.
[196] Section 9(2) of the Copyright, Designs and Patents Act of 1988.
[197] Kamina op cit note 166 at page 32.
[198] Section 20 of the Copyright Act.
[199] Ibid at 33.

identify the director, the creative mind that drives the whole project, as an author thereof. This interpretation supports the general suggestion put forward by this work that copyright law has not quite yet anticipated or addressed the nuances of the industry produced by modern circumstances. While the specifics will be laid out in the coming sections, it can be seen in the actions of large film studios regarding the appropriation of the styles of lesser known, more indie-orientated directors whose productions generate significantly lower amounts at the box office. It can be assessed, now, whether the development in the US – a state that was not a contracting party to the Berne Convention until 1988 – during the 20th century fared any better in this regard.

5.3.2 United States

As mentioned before, the US is home to Hollywood and therefore exists as the site at which most of the cases where the style appropriation in question occurs. As such, copyright law as it pertains to film in the United States specifically will occasionally be referenced throughout this dissertation, wherever it can serve as an example for the South African counterpart to potentially follow.

The US copyright development can be characterised as always trailing closely behind the UK.[200] As such, an equally in-depth study is not required for the purposes of determining the spirit of the development. Article 1, section 8 of the US Constitution states that Congress has the power to promote the progress of useful arts. Photographs were included in the copyright statue as far back as 1865, three years after the UK, as it was an expanding art form deemed worthy of the law's acknowledgement.[201] Early American motion picture companies tried to rely on these photograph-aimed provisions to protect earlier films, as motion pictures would not receive copyright protection until the 1912 Townsend Amendment.[202] This was the moment that films were given their own form of copyright protection, and following this, the Copyright Office was

[200] Peter Decherney 'Copyright dupes: piracy and new media in Edison v. Lubin (1903)' (2007) 19 *Film History* 109-124 at page 111.
[201] Ibid.
[202] John Belton 'Introduction: Film and Copyright' (2007) 19 *Film History* 107-108 page 107.

inevitably swarmed with motion picture applications, registering 892 films in that first year where the amendment took effect.[203]

However, before this occurred, there was an abundance of piracy and confusion in the realm of motion picture distribution and in the way copyright law treated the medium. While trying to determine whether films ought to be perceived as an evolved form of photography or a different medium entirely, courts initially decided in favour of this route in an attempt to counter the overt piracy that was occurring between film companies – such as the Edison Company, the owner of which, inventor Thomas Edison, was intimately involved in the development of the medium through the invention of the Kinetoscope, considered to be the precursor to the motion picture film projector – referred to as film 'duping'.[204] At one point, rather than making the argument that all duping ought to be declared illegal, Edison argued that there was a difference between legal and illegal duping, and this precedent ultimately led to even greater disarray as to the operation of copyright and film.[205] The messy progression of copyright in film prior to the 1912 Townsend Amendment places the medium in an unflattering light; as long as a 'legal' form of duping was available, copyright law would be far from recognising and protecting films as valuable artistic expressions and even further from something less obvious such as film style.

The temporarily 'lawless' period that separates the invention of a new medium and the promulgation of the appropriate copyright protection is historically vulnerable to extensive piracy.[206] With film, it took decades to recognise every element necessary to be considered for protection against copyright infringement, which supports the idea that there will perpetually be incentive for hypothetical enquiries into the unrecognised aspects of creativity or innovation in filmmaking, which is one of the motivations behind this discussion about style.[207]

[203] Wendi A. Maloney '1912 Amendment Adds Movies to Copyright Law' (2012) *Copyright Lore* 16.
[204] Decherney op cit note 200 at page 120.
[205] Ibid.
[206] Ibid at 109.
[207] Ibid.

5.3.3 Application of theories

What is also worth noting, in respect of the historical development of copyright law as it may relate to the future consideration of style, is how the theories of intellectual property rights are potentially being served through this development. To phrase it broadly: the hypothetical protection of film style can be linked to the primary theories that were set up before. This, in tandem with the timeline we have just covered, will assure that the inclusion of a style consideration does not disturb the historical trajectory of film and copyright which is clearly characterised by the peeling back of layers to reveal the potential complexity and nuance that consumers can extract from the medium.

First, the granting of protection for style benefits not only the individual who originally came up with it, but also the consumers of the market, which is consistent with the utilitarian theory.[208] While it can be argued that limiting the output of films which mimic the exact style of a successful original film amounts to denying society more of which they evidently enjoy, it has also been shown that style is abstract enough, broad enough and flexible enough to consistently be re-imagined and made unique. Overlap in some techniques are inevitable but to copy every essential aspect of another's style is certainly avoidable, and to allow protection from such comprehensive appropriation will theoretically lead to more innovation in creative filmmaking; creators will be somewhat forced to avoid relying entirely on the mental labour of another for style. This would have a positive impact on society as well, as audiences would consequently be treated to more sophisticated levels of stimulation from the average film they consume. Thomas Edison once held that the medium of film will eternally exist as a compelling tool that educates the masses, in a manner that is affordable, 'inciting their imagination' by bringing the rest of the world right before them.[209] This, in addition to developing the cinematic identity and culture of a particular country, weighs in favour of the implementation of style protection in copyright as the net impact will arguably skew positively.[210]

---

[208] As has been alluded to, to promote greater protection in style will result in greater sophistication of style, increasing the quality of output as well as the interests of artists. See section 2.4.2 for the explanation of the socio-economic benefits thereof.

[209] Frederick James Smith 'The Evolution of the Motion Picture' The New York Dramatic Mirror July 1913 at 9.

[210] See Section 2.4.2.

Also, the hopes of the labour theory are satisfied too as individuals who exercise their mental labour to assemble a unique style are using tools and methods which are 'held in common' but have the potential to conceive a style unique enough that they are not practically hoarding such concepts from other creators in the medium.[211] As predicted, however, the other artists are not left entirely in the same position as before – but this does not necessarily indicate an unfair monopoly; considering the perpetual innovation that exists in the medium paired with the advent of more sophisticated filmmaking technology.

The 'personhood' theory is possibly the most appropriate when discussing copyright in an artistic medium, as the works in question are direct expressions of the artist's will. Directors who have developed a unique, recognisable and compelling style have been referred to as 'self-promotional machines', essentially becoming a brand by themselves that generates a particular kind of film and from which audiences will expect a certain level of quality.[212] Given the nature of art and style, this form of expression is one with the potential to be intrinsically tied to reputation and identity, the latter of which has received increasing attention from the law over the last few decades. For this reason, the personhood theory matches comfortably with the notion of allowing film style to exist as an essential, protected feature of a motion picture.

5.3.4 Conclusion

In conclusion, the 'spirit' of the historical relationship between copyright and film can certainly be categorised as a slow process; the medium immediately grew popular and was subjected to a rapid evolution as a result. Its capacity to present complex and dramatic expressions was only realised at least a decade after the world was introduced to it and is still flowering in unexpected and dynamic ways today. With the arrival of the internet, so too came the media content explosion by way of websites such as YouTube or apps such as Vine and TikTok. Due to the ease with which content can be produced as a result of the exponential advancements in technology made since the dawn of the 20th century, there is greater opportunity for appropriation and an inevitable

[211] Fisher op cit note 5 at page 2.
[212] Michael Rennet 'Quentin Tarantino and the Director as DJ' (2012) 45 *The Journal of Popular Culture* 391 – 409 at page 391.

frequency of overlap. It is therefore a medium which actively invites new perspectives and investigations, and so it can be argued that the spirit of the historical development of film copyright is one which increasingly recognises the boundless potential as well as the technical, artistic sophistication that the medium inherently possesses. As such, the possible recognition of style as a component of a cinematograph film capable of being infringed and worthy of protection is theoretically consistent with the spirit of film copyright history.

6 APPLYING STYLE TO COPYRIGHT LAW

6.1 Originality and style

6.1.1 *South Africa*

As established before, one of the major requirements for copyright protection is that the work in question must be 'original'. How this requirement will relate to our definition of style must be determined, and once it is, the ability or inability of film style as previously defined to additionally qualify for protection will be clear.

When demonstrating the originality of a particular cinematograph film, one can refer back to our separation of content and style and might be tempted to consider style as one separate piece of that bifurcation, with content as the other.[213] It is rare that content will be copied exactly beyond instances of parody or satire, so the issue with South Africa's low standard for originality is that the content of a film can very easily allow for the cinematograph film as a whole to be rendered original, belying the true implications of appropriating a style in its entirety. Opining on whether or not this should be the law in respect of originality does not fall within the scope of this dissertation. However, it is important to map out the application of the originality requirement to the discussion for the purpose of illuminating where 'style' could fit into the mix.

As has been alluded to, a work can contain elements which copy pre-existing material and still be considered partly original. Such works are called derivative works, where an existing expression, for example, can be taken from the original work and added to or expanded upon to create a new work. Works are not ineligible for copyright by virtue of its capacity to infringe on another work alone.[214] The potential infringement through the copying of style will therefore necessarily concern derivative works, as the content will very easily qualify as original.[215]

---

[213] See under Section 3.1.

[214] Section 2(3) of the Copyright Act.

[215] It is also technically possible to make an adaptation of a cinematograph film – for example, into a literary work such as a novel or graphic novel. Making adaptations are also an exclusive right afforded to the copyright owner in terms of section 8 of the Copyright Act, but it is not relevant to the discussion of style due to its inherent connection to the medium; the way in which style has been

6.1.2 United Kingdom and Europe

At this point, it has been established that South African and UK originality standards are the same, but spring boarding off the comparison between UK and *droit d'auteur* countries one can consider how the principles behind such jurisdictions' originality standard may embrace the concept of style.

As alluded to before, the general European originality requirement is higher than the 'sweat of the brow' test. Germany, for example, refers to it as a requirement of a 'personal intellectual creation'.[216] The French define it as demanding the 'imprint of the author's personality'.[217] The former jurisdiction even allocates a less stringent definition of originality for certain types of works, such as computer programs, to maintain the high standard it bestows upon more creatively-driven works.[218] Style would probably be given a warmer welcome as a consideration of originality in these jurisdictions than in the UK or South Africa. Looking to the German system specifically, the delineation between works which owe their value to creative input and works which merely possess a creative aspect – and derive their value more from their function – is one which could inform the incorporation of a style consideration into a jurisdiction with a lower overall standard.

The operation of UK copyright law will be examined once more when exploring the hypothetical infringement of style.

6.1.3 United States

As one may recall, the US originality standard essentially requires just a small measure of creativity to be exerted.[219] As such, the form of appropriation in question will still easily clear this hurdle. For this reason, the ability for content to uplift an otherwise unoriginal film to the safety of 'original' status is a missed opportunity that is shared

defined emphasizes that it is routed largely in the filmmaking techniques available to a director and unique to the art of film.

[216] A phrase echoed by the CJEU in *Infopaq International A/S v. Dankse Dagblades Forening* [2009] ECR I-6569; [2010 FSR 20; [2009] ECDR 16.

[217] Pascal Karima page 86.

[218] Ibid.

[219] See under section 2.3.2.3.

by US copyright law as well, and it will also potentially benefit from understanding the ability of style to be central to the originality of a particular film.

6.1.4 Conclusion

If one were to sever style from content as has been suggested, the standard will apply differently. In keeping with our formulation of the definition for style, and the guideline provided by Figure 1, let us apply that understanding to the originality requirement.

From a US perspective specifically, one can see how separating style from content will favour authors of a particular style. One could invoke the use of techniques to determine originality because the decision-making behind those techniques necessarily involve a degree of creativity. For example, one could again stipulate that if six particular mise-en-scène components are individually set up in particular way and also have a unique interaction or relationship with one another, then the work is *prima facie* original, barring any recontextualization resulting from the considerations of subtext or underlying ideas. If a derivative work sets up and combines three elements the exact same way, it will be a partially original style – with copyright only being able to vest in respect of those parts of the style that are original.

For the 'sweat of the brow' jurisdictions, the originality requirement will effectively steamroll the nuance of this approach. Applying the style of another film to the content of one's own still requires labour, and that labour will reflect in the DNA of the style even after it has been detached from the content. As such, a solution to this would be for a court to objectively 'set off' the adjustments that have only been made so as to accommodate divergence in content. This is a calculation which should not be carried out by judges without the aid of experts in film analysis – a point which will be returned to momentarily.

6.2 Infringement of style

Another avenue by which one can highlight the assessment of style appropriation is by running a factual scenario through the test for infringement, demonstrating the compatibility of the style concept with an ordinary infringement claim and assessing

the results. Such an undertaking requires the selecting of an appropriate factual scenario, and due to the focus required by such a test, only the operation of copyright infringement as it exists in the South African jurisdiction will be considered, with a brief reference to UK case law.

In order to determine whether direct infringement has occurred as described in section 23(1) of the Copyright Act, it would have to be shown that a substantial amount of the work has been reproduced or adapted. Such an enquiry would involve testing for sufficient objective similarity between the two films as well as the causal connection between them, as explained in *Galago*.

When applying the test for sufficient objective similarity, it is a qualitative assessment rather than a quantitative one.[220] For the purposes of recognising the similarity of two films as a result of style alone, this naturally helps for the infringement test to expand beyond mere use of actual footage or content from one film directly in another – like if a film were to include 20 minutes of *Raiders of the Lost Ark* on a television screen in the background. As written in *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd*[221] (‘*Jacana’)*, a person is allowed to use the work of another as inspiration but cannot ‘steal its essential features and substance’ and circumvent copyright by making negligible adjustments and variations to that work.[222] Whether or not the parts of the original work that have been copied are substantial enough will be a value judgement, which potentially aids in allowing for something as abstract as our understanding of style to be considered. It must therefore be determined whether the style of a particular film could ever qualify as being so essential that it may satisfy this enquiry, in the eyes of a court.

6.2.1 Style as an ‘essential’ feature

Wendy Gordon expands on Locke’s natural rights theories, explaining that there is a duty of ‘charity’ which accompanies one’s ownership over resources – namely that a person must allow others to share in their resources when in a time of need, as long as

[220] Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd 1998 (2) SA 965 (SCA) at para 24.
[221] 1998 (2) SA 965 (SCA).
[222] Ibid para 24.

this does not undermine the survival of the property owner.[223] To extract the meaning of this duty in the context of 'ownership' of style, the argument can be made that where the style of a particular film is unequivocally linked to the film's success – or at least its capacity to sell tickets – then it can be symbolically tethered to the director's 'survival' as a filmmaker. The more modest the career of the director and the more essential the style to success of the film, the more intensely this philosophy finds application.

Sontag, when dissecting and exploring style, writes the following: 'Style is the principle of decision in a work of art, the signature of the artist's will. And as the human will is capable of an indefinite number of stances, there are an indefinite number of possible styles for works of art'.[224] Aside from reinforcing the notion that style can be linked to the personhood theory of intellectual property rights, it is worth noting that this statement supports the idea that protecting style independently as intellectual property, hypothetically, could contribute to the promotion rather than the stifling of creativity, as it is suggested that the creative potential of style is tethered to the boundless resource of the human mind. This is compelling but not as relevant to this subsection as her comments regarding the nature of style in its relationship to film. Sontag asserts that content and style are inseparable and describes an encounter with art as an experience rather than a statement – art does not only refer to 'something', it also is 'something' on its own, and the fact that it has 'content' at all is already an indication of a stylistic decision.[225] Without descending into too deep a meditation on how human beings interact with art, the takeaway from Sontag's perspective is that her definition emphasises the significance, importance and inevitability of style in the consumption or observing of a particular work – inherent to and indivisible from whatever content is being presented. She states that '[t]here are no style-less works of art, only works of art belonging to different, more or less complex stylistic traditions and conventions'.[226] She goes on to condemn most historically offered metaphors on style which deem it decorative or external, like a curtain.[227] This interpretation could

[223] Wendy J Gordon 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 1553-1609 at page 1453.
[224] Susan Sontag 'On Style' (1966) *Coldbacon* available online at <http://www.coldbacon.com/writing/sontag-onstyle.html>.
[225] Ibid.
[226] Ibid.
[227] Ibid.

undoubtably persuade in favour of viewing style as an 'essential feature' or as 'substance'. Of course, this understanding might be contested if the film in question can be convincingly disqualified as 'art' to begin with – but this is another philosophical rabbit hole in which this dissertation will not dwell.

6.2.2 Style as a 'substantial part' taken

In *Payen Components South Africa Ltd v Bovic Gaskets CC and Others*[228] ('*Payen Components*') it was stated that where enough was taken so that the value of the original work is 'sensibly diminished' and where the original author's work is appropriated by another to an 'injurious extent', then a substantial part has been taken.[229] Importantly, the factors to be considered when answering these questions include the nature of the work in question, the quantity and value of what is used, and the extent to which the use directly or indirectly impacts the profits of the original work or 'supersedes the objects' thereof. Further, it must be determined whether the intention behind the copying amounts to the defendant attempting to benefit from a work while saving themselves from certain labour.[230] Here is where one may find it useful to once again refer back to the guideline provided with the diagram in Figure 1.

6.2.2.1 Factual scenario

Let us examine an existing instance of film-style copying in order to test whether such use will qualify as taking a substantial part of the original, applying the above factors. One of the most recognisable visual styles is that of the aforementioned auteur filmmaker Terrence Malick. As previously alluded to, the inception for much of what practically determines the style of a film can be traced to improvisation on the actual set whilst filming. This is particularly the case with Malick's work, according to John Toll, the cinematographer for Malick's *The Thin Red Line*[231]. There are countless nods to Malick's style across live-action mediums, but some of the more intense or direct instances of appropriation are laid out in Nick Schager's article, 'Hands Brushing

[228] Payen Components South Africa Ltd v Bovic Gaskets CC and Others 1995 (4) SA 441 (AD).
[229] Ibid para 24.
[230] Ibid.
[231] Morrison & Schur op cit note 137 at page 131.

Against Wheat, or the Many Mimics of Terrence Malick'. Reference is made to some of the types of shots which are remarkably common and consistent in Malick's films, such as the 'trademark' imagery of man and nature captured in free-flowing, wandering camera moves, a more specific example of which includes a close-up of a character's hands brushing through tall blades of grass or wheat – a shot replicated and made somewhat famous in Ridley Scott's *Gladiator*.[232] Other classic, more nuanced Malick tropes include contemplative voice-overs on top of serene visuals of landscapes accompanied by orchestral music – thematically channelling the director's fascination with mankind's relationship with spirituality and their environment.

Malick's aesthetic has been copied all over visual media – even peppered into films like Zack Snyder's *Man of Steel* where it is spared for scenes attempting to conjure up the same emotional and spiritual contemplation built into the filmography of Malick; handheld shots of swaying wheatfields in the early evening sun, or small waves of water slipping over rocks, sometimes combined with pensive voice-overs from the film's characters.[233] One can assume the reason for working these independent film-like shots into a blockbuster science-fiction superhero film is that the filmmaker hopes the audience will receive the visuals and identify the correct underlying themes through association, probably on a subconscious level, with the pre-existing films from which they originate. However, the application of the Malick style to a movie which ends with a city-wide fistfight between Superman and General Zod will not necessarily be a major draw for audiences of this particular genre, so a better example for the purposes of our discussion is to compare a film which not only uses the Malick style but does so to enhance a story or setting that is more akin to the plotless, poetically vague dramas for which he is known.

Consider the early work of David Gordon Green, whose films have historically been compared to that of Malick's and who has openly admitted to watching Malick's films in preparation for the constructing of his own.[234] Film critic Roger Ebert praised the style of Green's film, *George Washington*, while defending the obvious Malick-

[232] Nick Schager 'Hands Brushing Against Wheat, or the Many Mimics of Terrence Malick' (2013) *Vulture* available at <https://www.vulture.com/2013/04/imitation-of-style-the-terrence-malick-effect-to-the-wonder.html>.
[233] Ibid.
[234] Roger Ebert '*George Washington*' (2001) *Roger Ebert* available at <https://www.rogerebert.com/reviews/george-washington-2001>.

tropes by assuring that no real copying has occurred – rather, the two films are simply 'in the same key'.[235] In other words, the ideas of the film are communicated through the same language, transcends plot and lives largely in the feelings evoked by the imagery. Peter Bradshaw, when reviewing the film, refers to Green as being 'set to become a Terrence Malick for the 21st century'.[236] Another critic insists that it is not the film's use of Malick's visual style which makes it memorable, but instead it achieves the same overall effect and leaves the audience with a similar kind of message: 'a singular, golden-hued vision that makes every aspect of life beautiful and fleeting'.[237] The same critic also mentions that it differs from Malick's filmography because it places more emphasis on plot and story, while others – like Ebert – claim that it attempts the opposite: to transcend plot as Malick does.[238]

One thing that is evident from these reviews, as a preface to this particular analysis, is that the interpretation and reception of a film is largely and frustratingly subjective. However, it can also be gleaned that, while some say *George Washington* only borrows from Malick's visual style and others hold that the similarity lies more in its subtext or content, the film would not be praised for either had it not copied elements of the more seasoned and acclaimed author's work. That said, the impact that the copied component makes to the entirety of the infringing material is beside the point – what matters is whether the part that was taken is substantial to the original work, and the corresponding part in the infringing work must be compared independently from the works overall.[239]

6.2.2.2 'Sensibly diminished'

Again, the first question from *Payen Components* is whether the original author's work is consequently 'sensibly diminished'.[240] What is the effect of a film like *George Washington* on Malick's works? The director's 2013 release, *To the Wonder*, has been

[235] Ibid.
[236] Peter Bradshaw 'George Washington' (2001) *The Guardian* Available at <https://www.theguardian.com/film/2001/sep/28/culture.peterbradshaw3>.
[237] Aren Bergstrom 'Review: George Washington (2000)' (2020) *3 Brothers Film* available at <https://3brothersfilm.com/blog/2020/7/7/review-george-washington-2000>.
[238] Ibid.
[239] Dean & Dyer op cit note 45 at page 34.
[240] 1995 (4) SA 441 (AD) para 24

criticised for leaning too heavily onto his own established aesthetics and visual techniques at the cost of emotional satisfaction, to the extent where the film begins to venture into self-parody.[241] How much of this complaint being specifically rooted in emerging audience fatigue for the style in question is a matter of speculation. Simply put, would audiences be as tired or disillusioned with Malick's bag of tricks had other films not so frequently employed them?

This is possibly the most difficult aspect to prove – that the value of the original work is sensibly diminished, in fact, and as a direct result of the reproduction and eventual cheapening of the style by another director. However, it is not impossible; negative reviews have been proven to impact the box office earnings of motion pictures more than positive reviews, especially in the opening weeks of a film.[242] To make the argument effectively, one may have to highlight every noteworthy instance of credible film journalism or criticism specifically mentioning the oversaturation of the market with the style in question, or explicitly describing the director's original style as being overused. However, this may be a tenuous hill to die on, and beside the true point of allowing protection for film style to begin with.

6.2.2.3 Novel / striking

On the point mentioned in *Galago* regarding whether the copied part is novel or striking, or whether it is commonplace as a result of the nature of the work: one could possibly point to all the aforementioned tropes which appear in other works and conclude that they are common.[243] However, in the examples mentioned, the number of analogous ideas and details which are weaved together to create the derivative style are too many for Malick's work to not form a large part of the film's ancestry, if not being the direct source of copying. It is a matter of fact that the primary reason for re-emergence of these tropes in other films is due to the critical and commercial success

[241] Michael O'Sullivan ''To the Wonder' movie review' (2013) *The Washington Post* <https://www.washingtonpost.com/goingoutguide/to-the-wonder-movie-review/2013/04/11/1531fa5c-a060-11e2-be47-b44febada3a8_story.html>.
[242] Suman Basuroy, Subimal Chatterjee & S. Abraham Ravid 'How Critical Are Critical Reviews? The Box Office Effects of Film Critics, Star Power, and Budgets' (2003) 67 *Journal of Marketing* 103 -117 page 116.
[243] 1989 (1) SA 276 (A) page 285.

of Terrence Malick – especially when aiming to evoke the same themes – and especially his early, highly influential work.

6.2.2.4 Quantity & value of materials taken

Continuing with the guidance of the *Payen Components* judgement, we have already considered the nature of the object that has been taken from the original work: the indispensability of style. Similarly, we can consider the 'quantity and value' of the materials used. In *Haupt v Brewers Marketing*,[244] there were only 63 lines of code copied from thousands of lines of code behind the original program, but those particular lines were significant because they were the lines that the respondents were unable to come up with themselves.[245] The question is thus whether a director like Green using Malick's known techniques can be perceived the same way. One must bear in mind what is actually being compared here – in order to isolate what is being taken, we are not strictly placing a single scene from both films beside each other and identifying the similarities. It would be impossible to convince anyone that the film is a direct reproduction of the other. In the scenario where style is recognised as being an element worthy of copyright protection, the 'material' in question is the style itself – so we are examining the overall style of both films. This will allow us to forage through the entirety of both films for scenes, moments or techniques which a court may deem substantially similar. That said, the necessary copied fragments have been sufficiently referred to here; what is important to reiterate is Green studying Malick's films prior to making his early work.[246]While not availing himself of the tremendous amount of labour and skill inherently required in helming a motion picture of any scale, as it is worded in *Galago*, Green arguably availed himself of the labour it would have taken to conceive of the style essential to Malick's work.[247]

Here is another opportunity to demonstrate the utility of Figure 1, as we can now attach a quantum to the enquiry. With the comparison of the films at hand, one can begin counting: the subtle golden tint in many of the scenes, the use of natural outside

[244] Haupt v Brewers Marketing 2006 (4) SA 458 (SCA).
[245] Ibid para 45.
[246] Ebert op cit note 234.
[247] 1989 (1) SA 276 (A) page 294.

lighting, the lingering, handheld shots without dialogue that do not depict any plot-driving moments, string-centric notes overlayed by narration and placed on top of montages, the similarity in underlying themes as indicated before – five examples of mise-en-scène components which are perhaps more subtle and abstract. Like it was suggested before, different weights may be assigned accordingly, which makes this method most comparable to the enquiry of the quantity and value of parts taken.

6.2.2.5 United Kingdom

As previously established, South Africa owes its copyright law development in large part to the UK history – so it is apt to investigate how the question of style might be part of an infringement consideration there. The particular example of *Norowzian v. Arks*[248] (‘*Norowzian*’) will be explored – but first, some background is necessary. The 1988 Copyright, Designs and Patents Act allowed for films, or audiovisual works, to be considered dramatic works again – setting aside the change brought about by the 1956 Act as mentioned before. Such works could also only enjoy protection once fixated in film.[249]

In *Norowzian*, the claimant had authored a short film called ‘Joy’ which involved a man dancing eccentrically to music but depicted through a particular style that was achieved through jump-cut editing that sought to invoke a ‘surreal effect’.[250] The same camera and editing tricks were employed by Arks Ltd. in an advertisement they shot for Guinness, which also depicted a man dancing in a similar way and creating a similar effect through the style.[251] In determining whether a substantial part of Joy had been taken, the court identified the greatest similarity between the two works as being the style, but confirmed that ‘mere style’ does not enjoy copyright protection, nor do techniques.[252] Lord Justice Nourse points to other examples that can be framed as

[248] Norowzian v. Arks Ltd & Anor (No.2) [1999] EWCA Civ 3014.
[249] Pascal Karima page 72.
[250] [1999] EWCA Civ 3014 at page 3.
[251] The two films are brief and can be viewed on YouTube through these links: ‘Joy’ by Mehdi Norowzian https://www.youtube.com/watch?v=jRH93S00HLs; ‘Anticipation’ by Arks Ltd. https://www.youtube.com/watch?v=3MuEtGPXLPI.
[252] [1999] EWCA Civ 3014 at page 8.

artists copying the style of another when depicting entirely different subject matter – the latter part of that being a crucial difference.[253]

From the outset, the discrepancy between this particular decision regarding style and the definition of style as is being put forward by this dissertation is that the court in *Norowzian* places 'style' and 'technique' on similar footing. As explained in section 3, style is the product of a great number of techniques, ranging from editing and camerawork to colour grading, music choice, tone and endless other elements which swirl together to create a unique cluster. Tested against Figure 1, the films in question share only in the editing, framing and, to an extent, the actor's performance.[254] This is only three of the mise-en-scène components – as such, guided by the logic provided in this dissertation, it would not qualify as sufficiently original in any case. From this perspective, the reason for dismissing the appeal in *Norowzian* can be attributed either to a failure to appreciate the true nature of what 'style' encompasses, or to the style of 'Joy' not being original enough in of itself. Either way, the court shrugging off style for not being copyright protectable on its own does not sway the contention of this dissertation, and has in fact already been addressed in a previous section.[255] Additionally, one of the concurring judgements further explained that the subject matter – which we can understand to be part of the 'content' – paired with the admittedly identical stylistic choices produced an entirely different *meaning*.[256] One may recall that in our definition of style, this was left as a consideration that may not necessarily eclipse the comparison of the actual visual and audio similarities – one of the reasons for its relegation as a consideration is to prevent courts from relying on their own artistic interpretations to decide cases like the one in question, as will be contemplated in the next paragraph.

6.2.2.6 Conclusion

One might wonder how nuanced or thorough a court would have to be to determine the similarity in these instances. As previously shown, the subtext of a film may form part

[253] Ibid at 9.
[254] Although it was concluded by an expert that the choreography could not be considered similar enough – see page 13 of the judgement.
[255] See section 3.3.
[256] Ibid at 13-14.

of a director's particular style, so the considerable subjectivity inherent in film analysis may profoundly complicate any enquiry that seeks to expose such subtexts; the underlying ideas, themes or message of a film may be subject to vastly differing interpretations, depending on the nature of the film. In fact, great ambiguity may be a stylistic choice in of itself. As such, it may not be appropriate to expect courts to delve into the artistic merits or intentions of high-brow, abstract works – this extends to a court's historically inconsistent understanding of what style is, hence the necessity for an established definition.[257] That being said, and in accordance with the definition of style that has been constructed for the purposes of this discussion, it may be necessary to open up that conceptual Pandora's box when determining the similarity between the two works. The level to which such an analysis will be taken will depend on the complexity of the style, and perhaps expert testimony may be called upon to aid in what will still amount to a value judgement.

The difficulty in deciding whether two styles are similar enough, outside of the subtext or meaning, will depend on the films in question. As has been indicated with the given example of Malick and Green, it is clear that most critics that are knowledgeable enough about the film make the connection and regard *George Washington* – and some of Green's other works – as stylistic echoes of Malick's work. Assuming that the similarity is recognised, the next question to explore is how essential this style is to Malick's work. Even in 1978, critics were pointing out Malick's lack of plot or 'dramatic interest', and his filmography since *Days of Heaven* have shown a deeper commitment to that trend rather than any attempts to surrender to any such criticism.[258] As Sontag suggested, some works of art will dedicate themselves to greater, more sophisticated levels of stylistic tradition – and Malick's work would be an example of this. When the narrative itself is as minimalistic as can be sustained, and the dialogue is particularly sparse, there is extensive space left for the visual style to breathe and practically drive the film. As such, it is clearly arguable that Malick's style is essential to his work, and to refer back to *Jacana*: taking that style may amount to taking an 'essential feature' if the court makes a value judgement to that effect.[259]

[257] Arjun Gupta 'I'll Be Your Mirror – Contemporary Art and the Role of Style in Copyright Infringement Analysis' (2005) 31 *University of Dayton Law Review* 45 – 82 page 56.
[258] Morrison & Schur op cit note 137 at page xiv.
[259] 1998 (2) SA 965 (SCA) para 24.

What can be extrapolated from this thought experiment is that, although the Malick example leaves room for much debate regarding the proof of injury and generally being cautious not to stifle the creativity of filmmakers, it is possible to populate the requirements for a copyrightability infringement claim with factors relating to film style, diminishing the abstract, subjective and artistic considerations through the use of the mise-en-scène method and definition supplied. Through these tools, the ability of style to be substantial enough is proven; there are plenty of high-profile directors whose stylistic choices are a large selling point for their productions, solidifying the ability for such choices to be considered essential features or substantial parts of those works.

6.3 *Scènes à faire* and style

It has been explained why the *scènes à faire* doctrine may not comfortably apply to the notion of style. The underlying rationale behind the doctrine, however, is that it serves to ensure a measure of freedom for creatives to generate works that are inspired or borrow modestly from other works. One may concede that the implementation of protection for style might lead to an influx of studios and directors alike scrambling to register copyright for their cinematograph films just to lay claim to their directing styles.[260] It is therefore in the interest of maintaining a sufficient measure of freedom in filmmaking to conceive of a limit to the new, indirect measure of protection for style that is proposed.

To introduce a doctrine which is a close relative of *scènes à faire* may succeed in being the necessary counterbalance to this protection. Instead of being directed at preventing protection for scenes emerging from 'common sources', it will prevent the protection of stylistic *techniques* which are obvious and universal enough to a particular theme or story, or it will allow the use of stylistic decisions which are naturally called upon by a scene. What is being suggested is not truly a divergence from the *scènes à faire* as much as it is an extension of its parameters beyond mere scenes alone, so as to include the now defined concept of style. These 'generic' components may either be

[260] Remember, in South Africa the Registration of Copyright in Cinematograph Films Act 62 of 1977 allows for registration of copyright in cinematograph films, even though registration is not required for copyright subsistence.

completely omitted from the application of Figure 1 depending on the genre of the films in question, or they may be assigned lower status as would be done in the determination of quantity and value of the parts that have been taken.

7 CONCLUSION

It is evident that there is something to gain from copying film style, and for this action to transcend the limits of mere inspiration. This is achieved when the style of a particular original film, or particular director, forms an essential portion of that original film's appeal and thus a significant part of its profitability. That being said, the focus of this dissertation was never overly concerned with the obligatory monetary implications so much as the admittedly less important reputational impact, the kind that underlies the motivation for providing authors with moral rights in copyright legislation. It is in the interest of supporting the art of filmmaking to grant some kind of protection for style, even if it is limited to scenarios transparently devoid of genuine inspiration or admiration for its source, with consideration given to the extent and tone of the appropriation in question. While it is arguable that this is a step towards stifling creativity, it is equally arguable that it is a means by which to reintroduce creativity in blockbuster filmmaking, while allowing smaller creators to benefit from their original mental and physical labour.

To summarise the suggestions put forward by this dissertation in respect of what could potentially be altered in pursuit of the aforementioned aims: what is advocated for mostly is an inclusion of the concept of style, to any extent, in the sections of the Copyright Act which pertain to cinematograph films, such as section 8, in the form of motion pictures – it has already been acknowledged that to create a category on its own is not tenable. Alternatively, this dissertation offers a methodology by which style can be considered for its originality as well as compared with another for similarity. It is however also a submission of this dissertation that the style of a film is often capable of being so essential to a film's value, as well as to the livelihood, reputation and identity of a particular director, that to copy it is to take an essential part of that individual's original work. There are other ideas which are certainly more extreme and also peripheral to the main issue, such as a modification to one of the most fundamental requirements of copyright law: an exception to the idea-expression dichotomy for underlying themes that may be intrinsic to a director's style. These, however, are probably ideas best left for the next significant leap in film technology.

The concept of style is wide enough for a more careful appropriation to circumvent the proposed adjustments, thereby lessening the impact of this interpretation on the stifling of creativity as well as raising the creative standard of the medium and resulting in a greater output of higher quality films. Not only does this suggestion serve the utilitarian theory of intellectual property rights but also the theories of natural rights and personhood. For this reason, the discussion around these more nuanced cinematic concepts must never be allowed to die, and while there are factors which pull the debate in either direction, it is submitted that there is certainly room for film style to enjoy the protection, or at least act as an important vehicle for cinematograph film protection, in the eyes of copyright law – whether that be in a South African context or any country which purports to value the art of cinema.

BIBLIOGRAPHY

Primary Sources

Cases

South Africa

Galago Publishers v Erasmus 1989 (1) SA 276 (A).

Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others 2010 BIP 256 (SCA)

Kalamazoo Division (Pty) Ltd v Gay and Others 1978 (2) SA 184 (C).

Klep Valves (Pty) Ltd v Saunders Valves Co Ltd 1987 (2) SA 1 (A).

Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd 1999 BIP 394 (T).

Moneyweb (Pty) Ltd v Media 24 Ltd and another 2016 (4) SA 591 (GJ).

National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd Case No 10/48519 28 February 2014 Gauteng Local Division.

Northern Office Micro Computers (Pty) Ltd) and Others v Rosenstein 1981 (4) SA 123 (C)

Golden China TV Games Centre v Nintendo Co Ltd [1996] 4 All SA 667 (SCA).

Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd 1998 (2) SA 965 (SCA).

Payen Components South Africa Ltd v Bovic Gaskets CC and Others 1995 (4) SA 441 (AD).

Haupt v Brewers Marketing 2006 (4) SA 458 (SCA).

United Kingdom

Ibcos Computers Ltd. v. Barclays Finance Ltd. [1994] F.S.R. 275.

Norowzian v. Arks Ltd & Anor (No.2) [1999] EWCA Civ 3014.

SAS Institute v World Programming Ltd [2013] EWCA Civ 1482.

Tate v. Fullbrook [1908] 1 KB 821; 98 LT 706; 77 LJKB 577; 24 TLR 347; 52 SJ 276.

University of London Press Ltd v University Tutorial Press Ltd (1916) 2 Ch 601, 609, 611.

Walter v. Lane [1900] AC 539.

United States

Apple Computer, Inc. v. Franklin Computer Corp. 714 F.2d 1240 (3rd Cir 1983).

Baker v Selden 101 US (11 OTTO) 99 (1878).

Computer Associates International, Inc. v. Altai, Inc. 982 F.2d 693 (2nd Cir 1992).

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

Nichols v. Universal Pictures Corp. 45 F.2d 119 (2nd Cir 1930).

Statutes

Copyright Act 98 of 1978.

Patents Act 57 of 1978.

The Constitution of the Republic of South Africa 1996.

Reports

The South African Film and Television Industry Report (published in Cultural Industries Growth Strategy (CIGS) November 1998).

International Instruments

Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15 1994.

Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

Secondary Sources

Books

Bordwell, David *On the History of Film Style* (1997) Cambridge: Harvard University Press.

Botha, Martin *South African Cinema: 1896-2010* (2012) Bristol: Intellect.

Dean, Owen & Alison Dyer *Introduction to Intellectual Property Law* (2014) Oxford University Press: Cape Town.

Deazley, Ronan et al *Privilege and Property: Essays on the History of Copyright Law* (2010) Cambridge: Open Book Publishers.

Dixon, Wheeler Winston & Gwendolyn Audrey Foster *A Short History of Film* (2018) Rutgers University Press.

Hannavy, John *Encyclopedia of Nineteenth-Century Photography* 1 ed (2008) *Routledge*.

Kamina, Pascal *Film Copyright in the European Union* 2 ed (2016) Cambridge: Cambridge University Press.

Low, Rachel (ed) *History of British Film (Volume 4)* 1 ed (2005) London: Routledge.

Morrison, James & Thomas Schur *The Films of Terrence Malick* (2003) Praeger Publishers, London (Westport).

Sexton, Jared *Black Men, Black Feminism Lucifer's Nocturne* 1st ed (2018) Cham: Springer International Publishing.

Ulin, Jeffrey C. *The Business of Media Distribution: Monetizing Film, TV and Video Content in an Online World* (2019) 3 New York 95. Routledge.

Van der Merwe, Andries; Sunelle Geyer & Roshana Kelbrick 'Law of Intellectual Property in South Africa' 2 ed (2016) Cape Town, LexisNexis.

Journals

Augustin, Dorothee; Helmut Leder; Florian Hutzler & Claus-Christian Carbon 'Style follows content: On the microgenesis of art perception' 128 *Acta Psychologica* 127 – 138.

Basuroy, Suman; Subimal Chatterjee & S. Abraham Ravid 'How Critical Are Critical Reviews? The Box Office Effects of Film Critics, Star Power, and Budgets' (2003) 67 *Journal of Marketing* 103 -117.

Belton, John 'Introduction: Film and Copyright' (2007) 19 *Film History* 107-108.

Bennett, Bruce 'The Cinema of Michael Bay: An Aesthetic of Excess' (2015) 75 *Senses of Cinema*.

Buckland, Warren 'What Does the Statistical Style Analysis of Film Involve? A Review of *Moving into Pictures. More on Film History, Style and Analysis*' (2008) 23 *Literary & Linguistic Computing* 219-230.

Burger, Peter 'The Berne Convention: Its History and Its Key Role in the Future' 3 (1988) *J.L. & TECH*.

Ciro, Tony 'The scarcity of intellectual property' (2005) 1 *Journal of Information, Law & Technology (JILT)*.

Collins, Alan; Alessio Ishizaka & Jen Snowball 'Film production incentives, employment transformation and domestic expenditure in South Africa: visualizing subsidy effectiveness' (2019) 25 *International Journal of Cultural Policy* 204-217.

Davis, Ivor 'A Century of Copyright: The United Kingdom and the Berne Convention' (1986) 11 *Columbia-VLA Journal of Law & Arts* (1986) 33.

Dean, Owen 'The Registration of Copyright in Cinematograph Films Act' (1977) 119 *De Rebus* 701-703.

Decherney, Peter 'Copyright dupes: piracy and new media in Edison v. Lubin (1903)' (2007) 19 *Film History* 109-124.

Du Bois, Mikhalien 'Justificatory Theories for Intellectual property Viewed through the Constitutional Prism' (2018) 21 *PER / PELJ.*

Fisher, William 'Theories of intellectual property' (2001) *Cambridge: Cambridge* at 8, available online at <https://cyber.harvard.edu/people/tfisher/iptheory.pdf> accessed on 4 May 2021. Tamburrini, Giovanni & Sergey Butakov 'The philosophy behind fair use: another step towards utilitarianism' (2014) 9 *Journal of International Commercial Law and Technology* 190-202.

Ebrahim, Haseenah 'Traversing the Cinemascape of Contemporary South Africa: A Peripatetic Journey' (2018) 9 *Black Camera* 197-215.

Gordon, Wendy J 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 1553-1609.

Gupta, Arjun 'I'll Be Your Mirror – Contemporary Art and the Role of Style in Copyright Infringement Analysis' (2005) 31 *University of Dayton Law Review* 45 – 82.

Jain, Sankalp 'The Principle of Idea-Expression Dichotomy: A Comparative Study of US, UK & Indian Jurisdictions' (2012) Available at <https://dx.doi.org/10.2139/ssrn.2229628>.

Junaedi, Hararto; Mochamad Hariadi & I Ketut Eddy Purnama 'Profiling Director's Style Based on Camera Positioning Using Fuzzy Logic' 7 (2018) *Computers (Basel)*.

Littoz-Monnet, Annabelle 'Copyright in the EU: *droit d'auteur* or right to copy?' (2006) 13 *Journal of European Public Policy* 438-455.

Littrell, Ryan 'Toward a Stricter Originality Standard for Copyright Law' (2001) 43 *Boston College Law Review* 193-226.

Liu, Yong 'Word of Mouth for Movies: Its Dynamics and Impact on Box Office Revenue' (2006) 70 *Journal of Marketing* 74-89.

Maloney, Wendi A. '1912 Amendment Adds Movies to Copyright Law' (2012) *Copyright Lore*.

Melia, Matthew 'Stanley Kubrick at the Interface of film and television' 4 (2018) *Essais. Revue interdisciplinaire d'Humanités* 195-219.

Menell, Peter S. 'Intellectual Property: General Theories' (1999) 2 *Encyclopedia of law and economics* 129 – 188.

Monta, Rudolf 'The concept of 'copyright' versus the 'droit d'auteur' (1959) 32 *Southern California Law Review* 177-186.

Nannicelli, Ted 'What is a Screenplay?' in Carroll N, Di Summa L, Loht S (eds) *The Palgrave Handbook of the Philosophy of Film and Motion Pictures* (2019) 215-234.

Ncube, Caroline 'The Creative Industry and South African Intellectual Property Law' (2018) 11 *Law and Development Review* 589-608.

Pelzer, Sandra; Marc T.P. Adam & Simon Weaving 'NeuroIS for Decision Support: The Case of Filmmakers and Audience Test Screenings' (2018) 29 *Information Systems and Neuroscience* 29 – 35.

Rahmatian, Andreas 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 *IIC – International Review of Intellectual Property and Competition Law* 4-34.

Rennet, Michael 'Quentin Tarantino and the Director as DJ' (2012) 45 *The Journal of Popular Culture* 391 – 409.

Said, Zahr K. 'Copyright's Illogical Exclusion of Conceptual Art' (2016 39 *Columbia Journal of Law & the Arts* 335-354.

Samuelson, Pamela 'A Fresh Look at Tests for Nonliteral Copyright Infringement' (2013) 107 *Northwestern University Law Review* 1821-1850.

Sirvinskaite, Irma 'Toward Copyright Europeanification: European Union Moral Rights' (2010) 3 *Journal of International Media & Entertainment Law* 263-288.

Walker, Robert Kirk 'Breaking with Convention: The Conceptual Failings of Scenes a Faire' (2020) 38 *Cardozo Arts & Entertainment Law Journal* 435-472.

Thesis

Jacob Graber-Lipperman *The Impact of Originality in a Transitioning Movie Industry* (Thesis, Duke University, 2019) 4.

Online references

Acuna, Kirsten 'The 30 most expensive movies ever made' (2020) *Insider* available at <https://www.insider.com/most-expensive-movies-ever-made>.

Bergstrom, Aren 'Review: George Washington (2000)' (2020) *3 Brothers Film* available at <https://3brothersfilm.com/blog/2020/7/7/review-george-washington-2000>.

Bradshaw, Peter 'George Washington' (2001) *The Guardian* available at <https://www.theguardian.com/film/2001/sep/28/culture.peterbradshaw3>.

Byrd, Matthew '15 Most Shameless Star Wars Rip-Offs Of All Time' (2017) *Screen Rant* available at <https://screenrant.com/obvious-most-shameless-star-wars-rip-offs-copies-movies-tv-shows-ever-all-time/>.

Dean, Owen 'Handbook of South African Copyright Law' 14 (2012) *Juta Law Online Publications*.

Ebert, Roger '*George Washington*' (2001) *Roger Ebert* available at <https://www.rogerebert.com/reviews/george-washington-2001>.

Every Frame A Painting *Michael Bay – What is Bayhem?* (2014) [online video] available at <https://www.youtube.com/watch?v=2THVvshvq0Q>.

Navarro, José Gabriel 'Filmed entertainment revenue worldwide 2019, by country' (2021) *Statista* available at <https://www.statista.com/statistics/296431/filmed-entertainment-revenue-worldwide-by-country/>.

O'Sullivan, Michael '"To the Wonder" movie review' (2013) *The Washington Post* available at <https://www.washingtonpost.com/goingoutguide/to-the-wonder-movie-review/2013/04/11/1531fa5c-a060-11e2-be47-b44febada3a8_story.html>.

Schager, Nick ‘Hands Brushing Against Wheat, or the Many Mimics of Terrence Malick’ (2013) *Vulture* available at <https://www.vulture.com/2013/04/imitation-of-style-the-terrence-malick-effect-to-the-wonder.html>.

Sontag, Susan ‘On Style’ (1966) *Coldbacon* available at <http://www.coldbacon.com/writing/sontag-onstyle.html>.

Steven Follows ‘How Many Films Are Released Each Year?’ available at <https://stephenfollows.com/how-many-films-are-released-each-year/> accessed 4 May 2021.

StudioBinder ‘What is Mise en Scene — How Directors Like Kubrick Master the Elements of Visual Storytelling’ (2020) online video essay available at <https://www.youtube.com/watch?v=3euNFd7-TCg&t=320s>.

The Numbers ‘Box Office History of Star Wars Movies’ available at <https://www.the-numbers.com/movies/franchise/Star-Wars#tab=summary>.

Villarreal, Phil ‘Underwhelming ripoff of ‘Matrix’ movies’ (2006) *Tucson.com* available at <https://tucson.com/entertainment/movies/underwhelming-ripoff-of-matrix-movies/article_13c595c3-0861-5c41-9273-e982d536bb55.html>.

Newspaper

Smith, Frederick James ‘The Evolution of the Motion Picture’ *The New York Dramatic Mirror* July 1913 at page 9.

Sontag, Susan ‘The Decay of Cinema’ *The New York Times* 25 February 1996 at page 60.