The Requirement of Originality in Israeli Law

Miriam Marcowitz-Biton and Yedidya Strook

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Abstract

Under Israeli copyright law, originality has not been defined in either the earlier or the most recent Israeli legislation. Instead, it has been subject to jurisprudential development.

A few Israeli court rulings have clarified the originality requirement. In the country's early years, Israeli law seems to have been influenced by trends in English law. Accordingly, the originality requirement was interpreted as requiring that the origin of the work be in its creator. This understanding reflects a focus on the investment of some human resources, mirroring the labor theory in the Anglo-American tradition. Examples of this approach can be found in early Israeli judgments.

Later, under the influence of American law, the creative element of the work was emphasized, reflecting the incentive theory of copyright protection. This turn is reflected in the Interlego case and the Premier League case. Under these rulings, originality requires meeting three subtests—the investment test, the creativity test, and the origin test.

These three tests are problematic and not completely clear. In practice, the question of originality rarely arises, probably because the tests set a very low bar

M. Marcowitz-Biton (✉) · Y. Strook
Faculty of Law, Bar-Ilan University, Ramat Gan, Israel
e-mail: miriam.bitton@biu.ac.il

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that most works easily meet. In order to meet the investment test, a minimum investment of time, work, talent, knowledge, or other human resources is sufficient. The creativity test does not require a certain level of creativity and sometimes little or even worthless creativity is enough, and there is no need for the work to be innovative in relation to existing works in the same field. In order to meet the origin test, it is enough for the creator to show that his work is not copied from another work.

Still, a critical look at the rulings in the Israeli courts shows a certain inconsistency in the degree of rigor in meeting each of the originality tests. Sometimes it seems that the court expands or reduces the originality requirement on a case-by-case basis, according to considerations of judicial policy. In the event that the court believes that granting a copyright to a certain expression will lead to inappropriate results, taking into account the reduction of the variety of methods of expression that remain free for public use, the denial of protection will usually be through the requirement of originality.

1 Introduction

In Israeli law, a work is protected by copyright if it meets the requirements of s.4 of the Copyright Law, 2007.[1] This section requires that the work be original, fixed in a tangible medium, and one of the following four types of works: literary, artistic, dramatic, or musical. The law's main threshold requirement is the originality requirement. This requirement also existed in the previous copyright law from 1911. Nevertheless, originality has not been defined in either the earlier or the most recent Israeli legislation. Instead, it has been subject to jurisprudential development. A few Israeli court rulings have clarified the originality requirement, however.

In the country's early years, Israeli law seems to have been influenced by trends in English law. Accordingly, the originality requirement was interpreted as requiring that the origin of the work be in its creator (i.e., that it was not copied from someone else's work). This understanding reflects a focus on the investment of some human resource (time, effort, work, etc.), mirroring the labor theory in the Anglo-American tradition. Examples of this approach can be found in early Israeli judgments, such as the ***Ahiman*** case[2] and the ***Strusky*** case.[3] Later, under the influence of American law, the creative element of the work was emphasized, reflecting the incentive theory of copyright protection.[4] This turn is reflected in the ***Interlego*** case[5] and ***the Premier League*** case.[6]

[1] The Copyright Law 5768-2007, § 4(Isra.).

[2] CA 136/71 State of Israel v Ahiman, 26(2) PD 259 (1972) (Isra.).

[3] CA 360/83 Strusky v Whitman Ice Cream Ltd., 40(3) PD 340 (1985) (Isra.).

[4] Michael D. Birnhack, The Requirement Of Originality In Copyright Law And Cultural Control, 2 Aley Mishpat 347, 380 (2002).

[5] CA 513/89 Interlego A/S v Exin-Lines Bros SA, 48(4) PD 133 (1994) (Isra.).

[6] CA 8485/08 The FA Premier League v. Sports Betting Settlement Council (Nevo 18.01.2009).

Still, a critical look at the rulings in the Israeli courts shows a certain inconsistency in the degree of rigor in meeting each of the originality tests. Sometimes it seems that the court expands or reduces the originality requirement on a case-by-case basis, according to considerations of judicial policy. In the event that the court believes that granting a copyright to a certain expression will lead to inappropriate results, taking into account the reduction of the variety of methods of expression that remain free for public use, the denial of protection will usually be through a requirement of originality.

2 From Ahiman to Interlego

In ***Ahiman***, the accountant Ahiman found a way to simplify the calculation of tax liability and compiled tax calculation tables.[7] Ahiman bound the tables in a booklet and sold it on the market. Not long after, the Income Tax Division also began distributing a booklet for calculating tax liability, this time for free.[8] Ahiman identified substantial similarities between his booklet and the government's and sued the State of Israel for copyright infringement.[9] The district court ruled in his favor, and the State of Israel appealed. The question on appeal was whether Ahiman's tax calculation tables were entitled to copyright protection.[10] The state argued that the tables could not be considered works of authorship, and that even if considered such works, they were not original.[11] The Supreme Court of Israel rejected the first argument outright[12] and turned to the question of originality.[13] The court held that although there is no copyright protection for mere ideas, if a review of the creator's work in its entirety establishes that the creator invested special efforts of thought, labor, or skill in the work's method of editing or special design, it may be protected.[14]

After comparing Ahiman's tax calculation tables with the government's, the court determined that Ahiman's tables displayed considerable improvements that made them original.[15] The ruling did not mention (and did not require) that the creator be the source of the work. It seems that the court viewed the originality requirement as established by the creator's investment alone.[16] Nevertheless, the court held that the state did not infringe Ahiman's copyright, reasoning that although Ahiman's tables

[7] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.).
[8] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.).
[9] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.).
[10] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.), 261.
[11] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.), 260–261.
[12] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.), 261.
[13] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.), 261.
[14] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.), 261.
[15] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.), 261.
[16] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.), 266.

were protectable original works, government employees assembled the government's tables independently and not based on Ahiman's work.[17]

In the case of ***Strusky v. Whitman***, the Whitman company, an ice cream manufacturer, ordered an advertising sign from the Strusky company, a provider of graphic services.[18] The business relationship between the two firms later ended, and Whitman ordered the same signs from another company.[19] Strusky claimed that the sign it made was a protected work of authorship and that it owned all rights to it.[20] The court explained that copyright protection is granted to the original expression of ideas; the expression need not be of an original thought or invention. All that is required is that the work not be copied from another work.[21]

The court thus held that the test for originality is the independence of the work, not its innovation, and is satisfied even where the author's degree of effort, talent, and creativity is small, provided that the work holds a character different from that of the materials from which it was created.[22] The court ruled that it was the connection and design of the elements into one sign that constituted the protected work, and that Strusky was the source of the finished sign, because its employees invested both labor and talent in designing it.[23] In conclusion, both ***Strusky*** and ***Ahiman*** reflect the Israeli Supreme Court's endorsement of the investment theory as a basis for copyright protection. This approach dominated Israeli law until the early 1990s.

The first sign of a real change in Israeli law regarding the originality requirement was the Supreme Court's ruling in the ***Interlego*** case from 1994.[24] This decision is among the most important with respect to the originality requirement in Israeli copyright law. The ruling concerned a manufacturer of Duplo cubes that sought to protect the cubes through copyright laws, even though the classification of the cubes was more suited to design law.

The court explained explicitly, for the first time, that the dominant copyright theory in Israeli law is based on the economic approach—specifically, the incentive argument (also known as the regulatory public approach)—according to which copyright protection is essential to encourage creators to create works, and that without it, "free riders" can use the work without participating in the costs of its production, which are borne by the creator alone.[25] The court explained further that copyright is intended to avoid this result by granting exclusivity to creators, allowing them to earn a return on their investment and preventing free-riders from harming the creators' incentive to create works. Against this backdrop, the court reiterated the

[17] CA 136/71 State of Israel v Ahiman, 26(2) PD 259, 260 (1972) (Isra.), 264.

[18] CA 360/83 Strusky v Whitman Ice Cream Ltd., 40(3) PD 340, 344–345 (1985) (Isra.).

[19] CA 360/83 Strusky v Whitman Ice Cream, 40(3) PD 340, 345.

[20] CA 360/83 Strusky v Whitman Ice Cream, 40(3) PD 340, 344–345.

[21] CA 360/83 Strusky v Whitman Ice Cream, 40(3) PD 340, 346.

[22] CA 360/83 Strusky v Whitman Ice Cream, 40(3) PD 340, 246.

[23] CA 360/83 Strusky v Whitman Ice Cream, 40(3) PD 340, 348.

[24] CA 513/89 Interlego A/S v Exin-Lines Bros SA, 48(4) PD 133 (1994) (Isra.).

[25] CA 513/89 Interlego A/S v Exin-Lines Bros SA, 48(4) PD 133, 162–163.

standard it articulated in ***Strusky*** with respect to the components of the originality requirement: (1) the origin of the work must be in the creator; (2) the work must embody an investment of some human resource; and (3) the work must meet the standard of creativity, reflecting the spiritual labor of the creator (the creator's choices).[26] While the ***Interlego*** decision did not clarify the substance of the creativity requirement, the court did refer to decisions discussing the same requirement in American law, such as the ***Feist*** rule.[27]

3 The Qimron Appeal[28]

The ***Qimron*** appeal dealt with the fascinating question of copyright protection for the reconstitution of an ancient scroll. In 1948, a Bedouin shepherd unearthed a large number of sealed clay vessels from caves in the Judean desert near the Dead Sea. Upon examination, the vessels revealed ancient scrolls written by a Jewish sect that had escaped the city of Jerusalem in the first century BCE and lived in the Dead Sea caves awaiting the apocalypse until the first century CE. Professor Elisha Qimron of Ben Gurion University was given the task of deciphering one of the scrolls buried in the Qumran area, which he called "The Halakhic Letter" (also known as 4QMMT, or "Some Precepts of the Torah"),[29] composed of fragments written in ancient Hebrew.[30] The scroll belongs to a group of the "communal texts" and today is considered one of the most important scrolls, as it constitutes a direct testimony to the customs of the community living in the area.[31] The initial work of sorting the fragments was carried out by Professor John Strugnell, who passed on the project to his student at the time, Elisha Qimron.[32]

For approximately 11 years, Qimron worked on deciphering the scroll,[33] sorting the fragments, determining their initial physical arrangement, engaging in physical and interpretive decoding of the text in the fragments, and ultimately completing the gaps between the fragments. In the final publication, 40% of the text consists of Qimron's reconstruction based on his legal and linguistic knowledge of the scrolls.[34] This knowledge aided *Qimron* in making a series of decisions on how to arrange the text, how to complete it, and how to interpret it. In 1990, *Qimron* distributed a draft of the deciphered text among several colleagues around the world. The draft was leaked and came into the hands of a Polish researcher who published the text,

[26] CA 513/89 Interlego A/S v Exin-Lines Bros SA, 48(4) PD 133, 172–173.
[27] Feist Publications v Rural Telephone 499 U.S. 340 (1991), 342.
[28] CA 2790/93 Eisenman v Qimron 54(3) PD, 817.
[29] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 822–823.
[30] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 822.
[31] CA 2790/93 Eisenman v Qimron 54(3) PD, 817.
[32] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 822–823.
[33] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 823.
[34] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 823.

without knowing its source or reliability, in a journal he edited.[35] At a later stage, Herschel Shanks (one of the leaders of the battle against the research monopoly of the Israel Antiquities Authority) included photographs of the fragmented scrolls in a book he published, attached the deciphered draft of the scroll as an appendix, and noted that the deciphering was performed by Prof. Strugnell and his colleague.[36]

Qimron filed a lawsuit against Shanks and the two other editors of the published book. The district court, relying on ***Strusky***, focused on the originality requirement and addressed only the origin of the work, concluding that originality required only that the source of the work be with its creator.[37] The court maintained that the source element was essential to originality and could not be compromised. Investment alone, the court explained, was not sufficient for the work to be protected by copyright.

The court emphasized that in cases where the source element is not clear, the investment may serve as a proxy for source, but this should only be assumed after ruling out the possibility that the creator is not, in fact, the originator of the work.[38] In the case before it, the court added, the source of the original work is the person who composed the scroll more than 2000 years ago, and any copyright he had on the scroll has long since expired, such that the originality component needs to be clarified.[39] It bears noting that there was no dispute that no copyright laws *existed* at the time the scroll was created, so the scroll itself was always in the public domain; but the judges did not clarify this point in their opinion.

In any case, the court examined the nature of Qimron's work and characterized it as an attempt to restore the original scroll. Justice Dorner, who wrote the district court's opinion, determined that to the extent the decipherer's purpose was to restore the original scroll, the acts of sorting and physical assembly did not merit copyright protection.[40] On the other hand, she determined that Qimron was entitled to protection for editing the complex text and filling in the gaps himself.[41] The implicit assumption in this holding is that originality exists only with respect to the missing text, and because there is no way to know what the full text of the scroll was, it can be assumed that in connection with these additions, Qimron deserved copyright protection.[42]

The defendants appealed. Their main argument was that Qimron's work amounted to the completion of the scroll's text and was merely a reconstruction of the ancient text. Accordingly, the defendants reasoned, piecing together the fragments of the scroll and reconstructing the missing parts did not yield an original text

[35] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 823.

[36] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 823.

[37] CA (Jerusalem Dist) 41/92 Qimron v Shanks, 5753 (3) PM 10,23-24 (1993) (Isra.).

[38] CA (Jerusalem Dist) 41/92 Qimron v Shanks, 5753 (3) PM 10,23-24 (1993).

[39] CA (Jerusalem Dist) 41/92 Qimron v Shanks, 5753 (3) PM 10,23-24 (1993).

[40] CA (Jerusalem Dist) 41/92 Qimron v Shanks, 5753 (3) PM 10,23-24 (1993).

[41] CA (Jerusalem Dist) 41/92 Qimron v Shanks, 5753 (3) PM 10,23-24 (1993).

[42] CA (Jerusalem Dist) 41/92 Qimron v Shanks, 5753 (3) PM 10,23-24 (1993).

protectable by copyright.[43] The Supreme Court rejected this argument and held that Qimron held a copyright in the deciphered scroll.[44]

The Supreme Court's decision in this appeal is remarkable for its thoroughness and great caution in relation to its previous decisions concerning the requirement of originality. The court referred to its previous rulings in examining and analyzing each of Qimron's contributions. At every step, the court clarified that it would not deviate from its jurisprudence in the field of copyrights. This caution was noteworthy due to the importance of consistency with respect to such an important threshold requirement in copyright law, the nature of which remains murky.

The court addressed the source element articulated in ***Strusky*** and reaffirmed—based on a review of ***Interlego***—that a creator's investment alone is not sufficient to establish eligibility for copyright protection. The court noted that originality is a threshold condition and that the source component, the investment component, and the creativity component are all required for copyright protection.[45] In other words, the court held that originality is necessary but not sufficient for copyright protection, nor is it enough that the creator invested his human resources, as a degree of originality is required both in the creation itself and in the creative process. Nevertheless, the court acknowledged the view that the investment of time and/or talent may testify to the existence of creativity. This means that if the investment requirement (time, effort, or any human resource) is met, it is likely that the creativity requirement is also met.[46] This bold statement has withstood criticism, since the requirement of originality in copyright law is satisfied at a very low threshold, which most works exceed.[47] It is also important to note that the court took pains to clarify that its observation did not suggest a change in the law or imply that investment or talent alone would suffice for copyright protection.[48]

In the court's view, expressed by Justice Turkel, it was the investment of Qimron's efforts that entitled him to the protection of copyright.[49] In addition, the court observed that *Qimron* not only uncovered facts, which are not protected by copyright, but also performed the labor of reconstruction, which required a considerable degree of originality.[50] Therefore, all aspects of the work of deciphering should be considered part of the same work: all the tasks that Qimron performed were dependent on one another and influenced each other. That is, it was a complex process that involved more than the disclosure of facts alone.[51] The reconstruction was the fruit of a process in which Qimron used his knowledge, expertise,

[43] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 831.
[44] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 849.
[45] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 829–830.
[46] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 829–830.
[47] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 829–830.
[48] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 830–831.
[49] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 832–833.
[50] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 832–833.
[51] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 832–833.

imagination, and judgment when selecting between alternatives, all of which illustrated Qimron's originality and creativity.[52] The court emphasized that this labor was not equivalent to ministerial tasks lacking a basis for protection but was something far broader than that.[53] The court stated that the various stages of deciphering should not be examined individually but rather considered as parts of one complete work. The physical assembly of the fragments, their arrangement, the deciphering of the script, and the completion of gaps in the text are "woven and interwoven, dependent on one other and influencing each other."[54] While Justice Dorner's opinion focused on the creative process and the relationship between the creator and the text, Justice Turkel focused on the creator himself. In his ruling, Turkel used spiritual imagery to describe Qimron's work:

> Qimron's work was not a technical, "mechanical" craft, like simple manual labor whose results are known in advance. His inspiration, the "lofty soul," that he breathed into the fragments of the scroll, which turned these fragments into a living text, were not merely an investment of human resources, in terms of "sweat" in the meaning of "the sweat of man's brow." Rather, these were the fruits of a process in which Qimron used his knowledge, expertise and imagination, exercised judgment and selected between different alternatives.[55]

In conclusion, the decision was based not only on Qimron's investment but also on the knowledge, expertise, imagination, and discretion he brought to bear on his creation. These additional components were held to meet the creativity requirement of copyright law. Although it was the labor approach that led the verdict, and sweat, toil, and investment were its recurring themes, Justice Turkel made an effort to explain that this is not the sole approach, and therefore emphasized the soul and spirit as significant components of the process. Turkel emphasized that his analysis did not deviate from ***Interlego***, although in fact, the ruling underscores Qimron's great investment in deciphering the text.[56]

4 Originality in Databases: The Premier League Rule

As noted, from the 1980s onward, in a series of decisions, the Supreme Court redefined the content of the originality requirement, and in the ***Interlego*** case it held, like the US Supreme Court in the ***Feist*** case, that investment or labor alone are not enough to establish protection under copyright law, but also require a certain

[52] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 832–833.

[53] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 832–833.

[54] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 832–833.

[55] CA 2790/93 Eisenman v Qimron 54(3) PD, 817, 832–833.

[56] To expand the criticism of the inconsistency reflected in the Kimron case, see Michael D. Birnhack, The Requirement Of Originality In Copyright Law And Cultural Control, 2 Aley Mishpat 347, 404-08 (2002).

element of creativity.[57] The Supreme Court did not expand the discussion of the issue of the creativity requirement in the ***Interlego*** case, for the facts of the case did not require such elaboration, but the court cited the ***Feist*** decision.[58]

What is the creativity requirement? A clear answer to this question was not given in Israeli case law. The ruling contains differing statements regarding the nature of the requirement and does not provide clear instructions on how to implement it.

Regarding compilations, Israeli law explicitly states that a literary work includes, among other things, a table and a compilation. A compilation is defined by law as "a compilation of works including an encyclopedia or anthology, as well as a compilation of data, including a database."[59] The law further states that "originality of a compilation is the originality in the selection and arrangement of the works or data therein."[60]

In the matter of *the* ***Premier League***, the Court finally clarified the requirement of originality in general, and the protection of databases in particular, in Israeli law. In this regard, the question arose as to whether fixture schedules prepared by English football leagues for the purpose of displaying UK league matches are protected under copyright law. The court ruled that these schedules are not protected under copyright law because they do not meet the originality requirement. There is no dispute that the schedules were the product of investment, but this is not sufficient for the purpose of obtaining protection. It was determined that the schedule boards did not satisfy the requirement of creativity, since these boards presented trivial information and lacked creativity. The manner in which the information was presented in the tables was not particularly creative or original, in the opinion of the court. In any event, it was held that the Sports Betting Settlement Council presented the information and data in its own unique and original manner, and therefore did not violate the rights of the appellants in the boards. Moreover, the Court emphasized that the mere selection of data to appear in the tables was not creative enough, since it did not require any expertise or imagination. Interestingly, the Court did not contribute to clarifying the requirement of creativity, but merely repeated the Supreme Court's statements in the ***Interlego*** case, emphasizing that "the work must bear some imprint—even if sometimes minimal—of the author or collector. It must be 'the fruit of the creator's spiritual labor'. . . and reflect, at the very least, 'an extremely low level of personal expression'."[61] The determination that the appellants' panels are trivial and devoid of creativity, and that they are not the result of a selection process reflecting expertise or imagination, was not explained in a way that allows distinguishing between protected and unprotected compilation works.

[57] CA 513/89 Interlego A/S v Exin-Lines Bros SA, 48(4) PD 133 (1994) (Isra.).

[58] CA 513/89 Interlego A/S v Exin-Lines Bros SA, 48(4) PD 133, 169.

[59] The Copyright Law 5768-2007, § 1(Isra.)

[60] The Copyright Law 5768-2007, § 4(Isra.)

[61] CA 8485/08 The FA Premier League v. Sports Betting Settlement Council, 14 March 2010, para. 31 of Justice Gibran's judgment.

It can be seen that copyright in databases has shrunk,[62] so copyright protection is granted only to a database that has creative components—for example, in the way the items to be included in the database are selected or arranged.[63] Copyright protection does not apply to the factual information in the database.[64] It is also important to emphasize that a database will not receive protection at all–both with regard to the selection and arrangement of the database and with regard to the factual information contained in it—if it does not have a subjective choice of the data. Rather, collection according to general criteria, such as all telephone numbers of residents of Tel Aviv-Jaffa, are not eligible for copyright protection.

Considering the shrinkage of copyright in databases in the United States and Israel, it is important to examine the approaches in case law in both countries in recent years, especially after the ***Feist*** ruling. The ***Feist*** ruling also undermined the scope of protection afforded to databases. Therefore, even when the courts determine that the database is protected under copyright law, they tend to determine that there was no infringement of copyright in the database, due to lack of substantial similarity between the new data and the copied data. Examples of this trend are the rulings in the ***Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.***[65] case and the ***Warren Publishing, Inc. v. Microdos Data Corp.***[66] case. These and other rulings allowed competitors to harvest a substantial amount of raw data from databases without infringing copyright in the original database.

Israeli courts have also discussed, on several occasions, the scope of database protection under copyright law. In a series of decisions handed down in magistrates' and district courts, and more recently in the Supreme Court regarding *the* ***Premier League***, Israeli courts have insisted on the "lean" protection afforded to databases. Courts have ruled in several rulings that factual databases are not protected by copyright law. The raw database itself is not protected, nor is the organization and arrangement of the database protected if they are generic or descriptive classification names. Thus, for example, in the case of ***Chaim Acherim Communications and Marketing Ltd. v. Krivoshai***,[67] the District Court ruled that there is no copyright

[62] Feist Publications v Rural Telephone 499 U.S. 340 (1991), 359.

[63] Feist Publications v Rural Telephone 499 U.S. 340 (1991), 342.

[64] The Copyright Law 5768-2007, § 5(Isra.)

[65] Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc., 999 F.2d 1436, 1446 (11th Cir. 1993) (en banc), cert. denied, 510 U.S. 1101 (1994).

[66] Warren Publishing, Inc. v. Microdos Data Corp., 115 F.3d 1509 (11th Cir. 1997) (en banc), cert. denied, 522 U.S.963 .(1997)

[67] CC (TA) 13191/03 Other Life Communications and Marketing Ltd. v. Krivoshay (Nevo 25.9.2003). See also CC (TA) 2018/05 Maariv Modiin Publishing Ltd. v. All You Need Ltd. (published in Nevo, 3.3.2005) (hereinafter: Maariv case in the supreme court—temporary injunction); CA 2516/05 Maariv–Modiin Publishing Ltd. v. All You Need Ltd. (Nevo 7.5.2006) (hereinafter: Maariv matter in the Supreme Court—temporary injunction) (the court ruled that databases containing data and facts that appeared on the newspaper's bulletin boards are not protected under copyright law, and therefore rejected the request for a temporary injunction and the request for leave to appeal the decision).

protection for factual data in databases, but only for the manner in which they are expressed. In the same case, the respondent copied data from a classified guide to natural medicine, proper nutrition and body-mind-spirit awareness. The court ruled that such factual information does not satisfy the requirement of originality, and that even if the applicant succeeds in showing that she invested effort and time in collecting the data contained in the manual, this will not grant her copyright protection for such data.[68] The court also examined whether the database was original due to the way it was arranged and organized, and ruled that the classification names included in the manual are not original—since most of them are generic names or names that describe a profession or occupation and are used by the general public and as such they do not qualify for copyright protection.

Similarly, in ***Bezeq v. Yellow Pages***, the District Court and the Supreme Court discussed Bezeq's request to prevent Yellow Pages from using its database, which included details about private subscribers, such as last name, first name, address, telephone numbers, and sometimes occupation.[69] In all instances, the court refused to grant the requested injunction, ruling that copyright does not apply to facts and data, therefore, the use of these by Yellow Pages does not constitute infringement. Moreover, the court rejected the argument that the database was original, on the grounds that no creativity was invested in its preparation. Moreover, the court emphasized that the effort was not sufficient to justify copyright protection, and even questioned whether those single questions addressed to a Bezeq customer who contacts the service randomly, and the receipt of its updated details, can be considered any "effort" whatsoever. The court also rejected additional legal arguments raised by Bezeq regarding the harvesting of data from its database. The Court ruled that the information was not the property of Bezeq, but rather information accessible to the general public, and even rejected claims of breach of contractual obligation, since the information was harvested from Bezeq's website, which is open to all.

In the decisions of the District Court and the Supreme Court in the case of ***Maariv–Modiin Publishing Ltd. v. All You Need Ltd.***,[70] the courts ruled, both in the proceedings for a temporary injunction and in the final ruling in the case, that

[68] See also CC (BS) 7287/06 Jannik v. Farnes Israel 100% Eilat (Nevo 28.2.2009) (the court examined whether the compilation that is the subject of the lawsuit is original in terms of the selection of data and the manner in which they are arranged, and concluded that it is a non-original compilation, since the classification and editing of the material are ordinary and simple). It is important to note that defining a "fact" or "given" is not an easy task at all. In American case law, this question has been addressed in several judgments, and sometimes there is a debate as to whether the characterization of items as "given" or "fact" is correct. See Miriam Bitton, Protection for Informational Works After Feist Publications Inc. v. Rural Telephone Service, 21 Fordham Intell. Prop. Media & Ent. L.J. 611 (2011).

[69] CC (TA) 11667/09 "Bezeq" Israel Communications Company Ltd. v. Yellow Pages Ltd. (Nevo 13.9.2009); CA 8304/09 "Bezeq" Israel Communications Company Ltd. v. Yellow Pages Ltd. (Nevo 1.12.2009).

[70] Maariv District Court Judgement—Temporary Injunction; Maariv Matter in the Supreme Court—Temporary Injunction; CC (TA) 1074/05 Maariv–Modiin Publishing Ltd. v. All You Need Ltd. (Nevo 11.7.2010) (hereinafter: Maariv District Matter—Final Judgment).

facts embodied in "wanted" ads published in the Maariv newspaper are not protected by copyright, and therefore their copying by the website AllJobs did not constitute copyright infringement. Judge Dr. Michal Agmon-Gonen insisted that the raw data contained in the advertisements is not protected, since "the job ads include technical details, without any degree of creativity. These details are not at all under the protection of copyright law."[71]

With regard to the case of ***Lines of Information and Advertising***,[72] the Beersheba District Court explicitly adopted the ***Feist*** ruling. In that matter, the defendant included on its website a link to the plaintiff's telephone directory for the communities of Omer, Meitar, and Lehavim. The Court emphasized that the originality requirement in copyright law requires meeting the investment test and the creativity test, and that the investment of effort is not sufficient to obtain copyright protection. The Court held, like Justice O'Connor in the ***Feist*** case, that a telephone directory is not protected under copyright law, since it contains no independent and special creative expression. Moreover, it seems that Justice Netzer's decision was based on the merger doctrine, according to which when there is a limited number of ways of expression for a particular idea, the ways of expression and the idea merge and are not entitled to copyright protection. The judge explained that a telephone directory has very limited forms of expression, and therefore cannot be given protection against copying.

In other cases, the courts have granted protection for the arrangement and organization of the database. For example, in the case of ***The Haredi Guide Ltd. v. Haredi Phone Ltd.***,[73] the publisher of "The Haredi Guide Ltd." sought a temporary injunction prohibiting the respondents from distributing and selling the guide "Kosher Phone," which it claims infringes its copyright in the Haredi guide. The applicant has been printing a guide for many years, which includes "religious, community and public services information." According to the applicant, the respondents copied from her guide the chapter on the charitable society, which includes a unique classification that she created with 164 classifications. She argued that these classifications are original and therefore protected under copyright law. The court ruled that the applicant's manual was indeed original and therefore entitled to the protection of copyright law. The court concluded the originality of the manual from the fact that it was not presented with any other manual that included the same or even similar classification to that of the applicant. With all due respect, it seems that this reasoning in itself is not a sufficient reason for determining that a work is

[71] Maariv District Court Matter – Final Judgment, ibid., at p. 17. See also (District Court) 11359-03-09 Job Master Ltd. v. All You Need Ltd. (published in Nevo, 28.12.2010), in which it was held that job offers published on the applicant's website include data and facts provided to her by employers for the purpose of advertising for which she receives payment. There is no degree of creativity in these ads, and therefore the information contained in them is not protected by copyright law, and is even explicitly excluded from them.

[72] CC (BS) 5310-08 Information and Publications Lines Ltd. v. Bell Communications Advertising and Public Relations (Nevo 5.1.2012).

[73] CC (Jer) 3711/08 Haredi Guide Ltd. v. Haredi Phone Ltd. (Nevo 18.8.2008).

original. The novelty of a work is not a guarantee of its originality. It is possible that the Haredi manual was the first of its kind and in this sense an innovative work, but it is possible that the arrangement and classification in themselves were not original because the classification was technically necessary, such as the classification in the ***Feist*** case, or because the classifications were generic. In any event, the court ruled that this was an original guide, and that the copying of the classification of the charitable society chapter constituted copyright infringement on the part of the applicant.

5 The Safecom Matter: The Test of Origin and Functional Creation

In the ***Safecom*** case,[74] the question of copyright protection in functional work was discussed. Safecom, which develops and markets electrical backup systems for cable television broadcasting systems, entered into an exclusive agreement with a marketing company in the USA. A few years later, Ofer Raviv—who was involved in the actual marketing of the product—filed a patent application in the USA regarding an electrical voltage backup system for cable systems. Safecom sued Raviv for copyright infringement, alleging that he copied 14 original company drawings. The Haifa District Court agreed with Safecom's argument that these drawings were a protected work, but at the same time, it was ruled that Safecom had failed to prove that Raviv had copied Safecom's drawings. Safecom appealed to the Supreme Court.[75]

The court insisted that the originality requirement is examined according to two main tests—**the investment test** and **the creativity test**. These two tests were supplemented by a third test—**the origin test**, meaning that the work originates from its creator and is not copied.[76]

Functional works, such as the drawings by Safecom, raise certain difficulties in examining the originality of the work. The distinction between an idea and an expression is a basic concept in copyright law. The expression is entitled to protection, while the idea is not. Under the doctrine of merger, when there is only one way to express an idea—for example, in the case of functional work—there will be no copyright protection for the work. Moreover, when there are a limited number of ways to express an idea, Justice Danziger opined in the ***Safecom*** case that establishing copyright infringement in such instances requires almost identical copying of the work, raising the bar for copyright infringement.[77]

[74] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013).

[75] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), paras. 1–5 of Justice Danziger's judgment.

[76] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), para. 12 of Justice Danziger's judgment.

[77] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), para. 28 of Justice Danziger's judgment.

One of Raviv's arguments was that substantial parts of the copied drawings are not Safecom's original works and that the company's original parts of the drawings do not amount to an essential substantial part of the work. Raviv argued that in functional works, only identically copying original parts of the work will be considered copyright infringement. This claim was rejected. Justice Danziger ruled that when substantial elements of the work are in the public domain and not protectable, the copying of protected elements of the work will be considered copying of a substantial part of the work.[78]

In this case, the court Safecom's drawings met all three tests of originality. In addition, a comparison between the drawings revealed that four of Raviv's drawings were copied identically, or almost identically, from Safecom's drawings,[79] therefore infringing infringes Safecom's copyright in the drawings.[80] Justice Rubinstein opined that two other tests should be recognized regarding originality: "common sense" and "appearance." The common sense originality test means that the court should consider all the relevant factors of the case. The appearance test means that the court should also consider the overall appearance of the work. The result, in this regard, was requested by him and the rest of his colleagues after they saw with their own eyes the great similarity between the drawings.[81]

In conclusion, following the ruling in the ***Safecom*** case, the originality requirement in Israeli law has three cumulative subtests—the investment test, the creativity test, and the origin test.[82] These tests are also applicable for functional works, but when there are a limited number of ways to express a particular idea of functional works—the bar required for establishing copyright infringement is higher, requiring near identical copying of the work.[83]

Professor Michael Birnhack argued that the tests cannot be cumulative because at times requiring that an author meets more than one test can lead to nonsensical results. For example, Birnhack worried that a masterpiece, which did not require a significant investment of labor would not meet the investment test, concluding it should be enough to meet the test of origin in such a case.[84] However, the prevailing

[78] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), para. 34 of Justice Danziger's judgment.

[79] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), para. 33 of Justice Danziger's judgment.

[80] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), paras. 29–34 of Justice Danziger's judgment.

[81] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), paras. 3–4 of Justice Rubenstein's judgment.

[82] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), para. 15 of Justice Danziger's judgment.

[83] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), para. 28 of Justice Danziger's judgment.

[84] Michael D. Birnhack, The Requirement Of Originality In Copyright Law And Cultural Control, 2 Aley Mishpat 347, 382–86 (2002).

approach is that all three subtests of originality must be met. Indeed, recently in the **Astrolog** case, the court stated explicitly that the three subtests are cumulative.[85]

6 Conclusion

Meeting the originality requirement under Israeli law generally requires meeting three subtests—the investment test, the creativity test, and the origin test .Similarities can be found between these tests and the originality standard in US law. However, as can be learned from the rulings discussed above, these three tests are problematic and not completely clear. In practice, the question of originality rarely arises, probably because the tests set a very low bar that most works easily meet. In order to meet the investment test, a minimum investment of time, work, talent, knowledge, or other human resources is sufficient.[86] The creativity test does not require a certain level of creativity and sometimes little or even worthless creativity is enough, and there is no need for the work to be innovative in relation to existing works in the same field.[87] In order to meet the origin test, it is enough for the creator to show that his work is not copied from another work.[88]

It is worth considering whether it is time to reexamine the originality requirement, especially in the age of artificial intelligence, where many innovative and creative projects are based on large databases.

[85] Tamir Afori, Copyright Law 95 (2012); CA 8742/15 Astrolog Publishing Ltd. v. Sharon Ron (Stivalman) (Nevo 03.12.2017), para 33.

[86] CA 513/89 Interlego A/S v Exin-Lines Bros SA, 48(4) PD 133, 170; CA 8485/08 The FA Premier League v. Sports Betting Settlement Council (Nevo 18.01.2009), para. 34.

[87] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), para. 13 of Justice Danziger's judgment.

[88] CA 7996/11 Safecom Ltd. v. Ofer Raviv (Nevo 18.11.2013), para. 12 of Justice Danziger's judgment.