

## Entertainment Law Review

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### Case Comment

#### South Africa - copyright

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**Subject:** Intellectual property. **Other related subjects:** Media and entertainment

**Keywords:** Copyright; Diaries; South Africa

**Case:** Waylite Diary CC v First National Bank Ltd (Unreported - South Africa)

**\*Ent. L.R. E81 Facts:** The case was an appeal against a decision of the Witwatersrand Local Division of the Supreme Court of South Africa in which the Court had held against the applicant who had claimed that the respondent had infringed the copyright in the layout of the pages of a diary. The appellant had designed and produced a custommade diary for the respondent in 1987. The respondent's commission to the appellant was repeated in 1989, 1990 and 1991. In 1992 the respondent arranged for its diary to be produced and printed by a third party. The format of the diary produced by the third party was to all intents and purposes identical to those which had previously been produced for the respondent by the appellant.

Copyright was claimed specifically in the appointment pages of the diary. These consisted of pairs of pages facing each other, each pair covering a week **\*Ent. L.R. E82** commencing on a Monday. On the first line of the lefthand page the month appeared as well as the number of the week. The days of the week were then listed and dated on the same page, four horizontal lines of writing space being allocated for weekdays and two such lines each for Saturdays and Sundays. The righthand page contained a number of lines for making notes and at the foot was a calendar consisting of the current and the two succeeding months.

It was contended by the appellant that the original sketch of the appointment pages from which the appellant's diary was derived was an 'artistic work' being either a 'drawing' or a 'chart'. It is also contended that the appointment pages were 'literary works'.

**Held:** The Court held that the layout of the appointment pages was neither drawing nor a chart, and therefore not an artistic work, and furthermore that it was not covered by the term 'literary work'. In particular the pages were not a compilation, which is by definition a species of literary work, as contemplated in the Copyright Act. If they were held to be a compilation and bearing in mind that copying for purposes of copyright infringement can be both direct or indirect, the unacceptable result would be that anyone who wished to produce a diary having the basic layout of two facing pages for each week would infringe copyright; such a result would be so far-fetched that the legislature could not have contemplated it. The Court was of the view that for a compilation to be the subject of copyright it could not be commonplace and that the layout of the pages in question was clearly commonplace.

In coming to its conclusion the Court relied on *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd and Others*.<sup>1</sup> The Court found in essence that, as in the *Francis Day* case, the 'work' in which copyright was claimed did not have sufficient substance to warrant protection as a literary or an artistic work. Having reached a decision on this point, it was unnecessary for the Court to consider the question of the 'originality' of the work in which the copyright was claimed but it nevertheless expressed the *obiter* view that the test for originality was not solely subjective but also encompassed an element of objectivity and required the Court to exercise a value judgment as to whether the time and effort expended in producing the work eventuated in something original.

The Court dismissed the appeal and upheld the decision of the Court *a quo*.

**Comment:** There is ample authority for the proposition that something which is claimed to be a 'work' and to be appropriate subject-matter for copyright can be denied copyright on account of it having insufficient substance. A good example of this is the song title 'The Man Who Broke the Bank of Monte Carlo' which was the subject-matter of the *Francis Day* case on which the Court relied. To the

extent that the Court refused to recognise the subsistence of copyright in the diary pages on this basis there is no reason to disagree with its decision. The Court's reliance on the degree of original work put into the designing of the pages by the author thereof and the consequences which would follow from recognising the subsistence of copyright in the diary pages as factors to be taken into account when assessing the quantum of substance of the work for purposes of deciding whether it is a 'work' eligible for copyright can be supported. The effect of this approach is to take subjective considerations into account when determining whether subject-matter constitutes a 'work'. However, issue must be joined with the Court in regard to its contention that objective criteria must be taken into account when testing whether a work which has sufficient substance and is eligible in principle for copyright is 'original'. The South African courts, including the Appellate Division, in the past and even in a subsequent decision to the present one, affirmed that 'originality' for purposes of subsistence of copyright means the expenditure of individual effort and expertise as distinct from copying - in other words the 'sweat of the brow' approach. It is submitted that this is the correct approach and that if, on applying a value judgment, subject-matter is assessed to be insubstantial, trivial or commonplace, the correct approach is disentitling such subject-matter to copyright is to hold that it does not constitute a 'work' for copyright purposes and not that it is not 'original'.

Ent. L.R. 1995, 6(4), E81-82

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1. [1940] AC 112.