

THE CHALLENGING RELATIONSHIP BETWEEN CONTEMPORARY ART AND COPYRIGHT

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This article seeks to address the current wording of the definition of ‘artistic work’ in the Copyright Act 98 of 1978. It is argued that such wording has failed to aid courts in interpreting it in a way that allows for a broadening of its scope so as to include new art forms — most importantly, for this article, multimedia installations. Analysis of the Copyright Act’s definition of ‘artistic work’ is applied to four contemporary and prominent multimedia installation artworks to determine whether such creations would fall within this definition. The outcome of this analysis shows that, although certain multimedia installation creations are provided protection under the current definition, there are artworks that do not satisfy the requirements under this definition. It is thus proposed in this article that certain amendments should be made to the Copyright Act that will afford such excluded artistic works copyright protection. Finally, this article conducts an analysis of the possible adverse effects that could arise should such amendments be effected to the wording of the Copyright Act in terms of the requirements of materiality and originality. Through the application of these two requirements to further examples of multimedia installation artworks, the conclusion is reached that these requirements would not render the proposed amendments superfluous or problematic.

I INTRODUCTION

The definition of art can take many different forms, based on a number of factors that would influence the perspective of the person who attempts to provide a broad, and yet still succinct, explanation of how they define this concept. There is, arguably, no universally accepted definition of art, although the word is used to describe something of beauty, or a skill, which produces an aesthetic result. Both of these elements are very broad and it could be argued that any creation that is made up of, but not limited to, these two elements should be accepted as an ‘artistic work’ by both society and South African copyright law. It is important to note that art reflects and belongs to the era in, and culture from, which it was produced. As a result, it would be futile to compare prehistoric murals or primitive African art with the works of Van Gogh and Michelangelo.

The concept of ‘art’ has been shaped by a number of ‘movements’ over time, and now extends further than mere single medium or mixed-media artworks to art forms that combine visual art with non-visual materials. Artists today refer to the term ‘contemporary art’ which, strictly speaking, refers to art produced after 1945, when artists began to respond to a global

environment that is culturally diverse, industrially advanced and complex. Contemporary artists working within the postmodern movement reject the concept of mainstream art and use a wide variety of materials, sources and styles to create different artworks.¹ This becomes somewhat problematic when considering the enquiry into copyright protection, as the Copyright Act 98 of 1978 (the 'Act') is both technical and restrictive in its definitions of what constitutes a work, and is inadequate in protecting all of the elements present in contemporary artworks.²

Before we are able to discuss the issue of infringement, and whether an artist would be able to seek redress for such an infringement with reference to the Act, it is important first to discuss how art is exploited. Paintings and sculptures are generally infringed by third parties through the direct production and sale of such items on the basis that the painting or sculpture is the genuine article, or an authorised reproduction thereof. Similarly, multimedia installation artworks are exploited by third parties reproducing a substantial portion thereof so as to infringe on the rights of the author of the work.

It is important to note that the term 'installation art' refers to a relatively new genre of contemporary art, which involves the configuration or 'installation' of objects in a space such as a room, art gallery or even within public spaces. Further, when we consider the term 'multimedia art', it can be distinguished from mixed-media art, which is artwork comprising multiple types of media. Multimedia art, however, involves a larger scope than mixed-media art, and is considered to be less restricted than mixed-media artworks. The term 'multimedia installation art', therefore, refers to multimedia artworks that are incorporated into a defined space in order to ascribe further meaning to that particular artwork.

If we consider the artwork of Tim Noble & Sue Webster, namely *Dirty White Trash (With Gulls)*,³ an unauthorised copy of such an artwork would be valued at a fraction of the version that has an accompanying certificate of authenticity. This article, therefore, seeks to prevent exploitation of such multimedia installation artworks by amending the definition of 'artistic work' under s 1 of the Act to recognise such artworks as a 'work' for the purposes of copyright protection.

The South African system of intellectual property, and more specifically copyright law, is arguably justified on rule-utilitarian or economic grounds in that rights are granted to the authors of intellectual property to promote

¹ See International Studies in History and Business of Art & Culture 'Contemporary art: Definition' available at <https://www.iesa.edu/paris/news-events/contemporary-art-definition>, accessed on 12 September 2019.

² O H Dean & S Karjiker *Handbook of South African Copyright Law* (2006) 1–45.

³ See the annexure at the end of the article.

further creation and to introduce such works into society.⁴ The provision of such rights to the author of a work seeks to prevent the unauthorised exploitation of that author's work before he or she has been able to recover a profit from his or her labour, judgement and skill.

Authors of multimedia installation artworks currently receive no express protection in copyright for their specific works. This is problematic because the Act, in relation to multimedia installation artworks, thus fails to achieve the very purpose for which it was created, which is to incentivise the creation of further works by providing authors with the right to reproduce and control the physical embodiments of their creative ideas.⁵ The substantial commercial value associated with multimedia installation art affirms the need for the granting of copyright protection, which has the purpose of allowing such artists to retain ownership and control over their works.⁶

The Act currently defines an 'artistic work', irrespective of the artistic quality thereof, as paintings, sculptures and works of craftsmanship not falling within the specific definitions of the Act.⁷ From this definition it is apparent that there is no express provision for installation or multimedia artworks, thus forcing artists to find ways of fitting such forms of art within the existing parameters of the Act. Since there is no express provision for 'installation artworks', the definitions of both sculptures and works of craftsmanship will be the focus of this analysis, given the limited scope of associated concepts in this context. Such an analysis will allow for a conclusion that will confirm the hypothesis that the definition of 'artistic work', as it currently stands, does not sufficiently protect installation art as either a sculpture or a work of craftsmanship.

Although a study of the issues of copyright subsistence, copyright infringement and the defence of fair dealing is necessary to ascertain the scope of protection that copyright law can provide to installation artists, this article will only address the issue of subsistence of copyright.⁸ After the analysis of such shortcomings, possible solutions will be discussed, namely the possible broadening of the scope of the Act in this regard.

Possible problems that may arise would be issues relating to the requirement of fixation, as the Act requires a work to be reduced to a physical form before it can be considered a 'work' in terms of the Act.⁹ This fixation requirement becomes problematic as installation works commonly

⁴ A D Moore 'A Lockean theory of intellectual property' (1997) 21 *Hamline LR* 1.

⁵ *Ibid* at 2.

⁶ C Y Neng & D Tan 'Copyright subsistence in contemporary times: A dead shark, an unmade bed and bright lights in an empty room' 2013 *Singapore Journal of Legal Studies* 402 at 403.

⁷ Section 1(1) s v 'artistic work'.

⁸ Neng & Tan *op cit* note 6 at 403.

⁹ *Galago Publishers (Pty) Ltd & another v Erasmus* 1989 (1) SA 276 (A), which held that there is no copyright in ideas, and it is the material expression of such an idea which is the subject of copyright.

have a set life span, and this article will seek to address whether an artwork must exist for a certain period of time before it will be considered as having been reduced to a material form. Further, the issue of originality must be addressed, as it may be suggested that certain installation artworks that make use of ready-made materials, and natural materials will not comply with the requirement of originality.¹⁰

II THE SUBSISTENCE OF COPYRIGHT IN MULTIMEDIA INSTALLATION ART IN SOUTH AFRICA

Under the Act, an installation artwork must satisfy four main requirements in order for copyright to subsist in such a work, thus allowing the owner of the copyright to claim protection for that work. First, s 2 of the Act provides for two initial requirements that will both be considered, namely (i) the creation in question must qualify as a work as provided for in the Act, and (ii) such a work must be original. A third requirement under s 2(2) of the Act provides that the work must 'otherwise [be] reduced to a material form'.¹¹

This part of the article will specifically focus on the first two requirements for copyright protection: is the creation a 'work' for purposes of the Act; and, if so, whether such a work is original. This will allow us to consider whether the definition of 'artistic work' allows for suitable recognition of multimedia installation artworks. The first and second requirements will be tested against examples of multimedia installation artworks, and conclusions will be drawn as to whether such internationally renowned artworks would receive protection under the Act.

(a) *The requirements of an 'artistic work'*

The Act defines the term 'artistic work' in three separate categories, with each category containing a subset of terms which are themselves the subjects of definitions within the Act.¹² It is important to note that the definition of 'artistic work' is a numerus clausus, and it therefore does not provide for an open-ended list of works that are eligible for copyright protection. An important term provided for under subsec (a) of 'artistic work' is 'sculpture'. Many multimedia installation artworks may fall within the definition of this term, and are thus protected under the Act. The second subset of terms that are important for the purposes of this article is provided

¹⁰ This article will seek to clarify the issues of materiality and originality when considering multimedia installation artworks.

¹¹ Section 3(1) of the Act then provides for the final requirement, namely copyright is conferred on any work where the author is a South African citizen or domiciled or resident within the Republic or a Berne Convention country. This will also be the case where the work in question is the first published in a convention country (s 3(1)(a)).

¹² Dean & Karjiker op cit note 2 para 2.6.

for under subsec (c) of the definition of ‘artistic work’, which provides for ‘works of craftsmanship’ not falling within the definitions contained in either subssecs (a) or (b) of the definition of ‘artistic work’.

In order to determine whether a creation warrants categorisation as a ‘work’, the court in the case of *Waylite Diaries CC v First National Bank Ltd* held that one must conduct a purely objective test.¹³ This test requires us to consider the subject matter of the creation objectively, and, as indicated in *Accesso CC v Allforms (Pty) Ltd & another*,¹⁴ such subject matter must not be so trivial so as to be ineligible to be considered a work. The court in the case of *Marick Wholesalers (Pty) Ltd v Hallmark Hendon (Pty) Ltd*¹⁵ concluded that, under the definition of ‘artistic work’ in s 1(a), any creation of greater substance than a mere straight line or circle should fall within this definition.

(i) *Multimedia installation artworks defined as an ‘artistic collage’*

When considering Marc Lee’s *10 000 Moving Cities — Same but Different*, it can be seen that the artist makes use of rudimentary shapes upon which he projects images that have been uploaded by the public relating to different cities around the world.¹⁶ When seeking protection under the Act, the artist will have to prove that his creation falls within the scope of the Act in that such a creation would satisfy the definition of an ‘artistic work’ as discussed above. It is important at this point to draw a distinction between the protection of a photograph due to its composition, and the protection of a collage of photographs.¹⁷ The particular artwork in question only exists as a collage of photographs and, although each individual photo may be a protected copyright work, that which must be considered for present purposes is the collective work comprising all the photographs and the accompanying installation. Thus, when trying to fit such a creation into the definition of artistic work, the author will clearly seek to rely on the category of ‘collage’, which is defined as a creative work that resembles such a composition in incorporating various materials or elements.¹⁸ Further, the artist would have to show that such a creation is not trivial. By applying the standard set by the court in *Marick Wholesalers*,¹⁹ a conclusion can be drawn that such a creation would not be trivial.

¹³ *Waylite Diaries CC v First National Bank Ltd* 1995 (1) SA 645 (A) at 650.

¹⁴ [1998] 4 All SA 665 (T) at 668.

¹⁵ (1999) 707 JOC (T) at 716.

¹⁶ Marc Lee ‘10.000 Moving Cities – Same but Different, VR (virtual reality)’ available at <http://marclee.io/en/10-000-moving-cities-same-but-different-vr/>, accessed on 12 September 2019.

¹⁷ For purposes of the current discussion, the issue of whether the persons, whose images are used in the artwork, are co-authors will not be considered.

¹⁸ Merriam-Webster *Collegiate Dictionary* 10 ed (1999) s v ‘collage’.

¹⁹ *Marick Wholesalers* supra note 15.

The argument could, however, be raised that the individual photographs making up the artwork do not originate from the artist himself, and that the individual photographs do not represent any substantial effort on the part of the artist in creating the work. The court in the *Marick Wholesalers* case held that when a work is made up of a compilation of common elements (and by extension elements not created by the author), the work should not be viewed as the individual elements, but rather as the ‘sum of its parts’.²⁰ Therefore, the collage as a whole will have to be considered in determining whether the author’s expended labour, judgement and skill was adequate to meet the requirement of originality. Although the work could be protected as a collage, it would fall short of a similar test in relation to its designation as a compilation. The problem is that a collection of photographs is not necessarily (and usually) itself a photograph, and the Act only recognises compilations under the definition of a ‘literary work’.²¹ Accordingly, it has been illustrated that there are examples of multimedia installation artworks that do not fall within even the least abstract kind of artistic works, namely photographs, and this specific example illustrates the need for new categories of artistic work to protect new art forms.²²

(ii) *Multimedia installation artworks defined as a ‘sculpture’*

The reference to sculptures under subsec (a) of the definition of ‘artistic work’ demonstrates that a number of three-dimensional works are also recognised as ‘artistic works’, which is important when considering that the majority of installation artworks are three-dimensional in nature.²³ The term ‘sculpture’ is further defined in the Act as including any cast or model made for the purposes of creating a sculpture, but no further mention is made as to whether a specific meaning must be attached to the term ‘sculpture’ for the purposes of the Act. There is currently no precedent in South Africa that can provide guidelines as to how a court should interpret the meaning of ‘sculpture’, and we may, therefore, look to cases in other jurisdictions for possible guidance on this issue. The provisions of the Act draw from both British law and the texts of the Berne Convention and, accordingly, the wording of the Act is similar to these above-mentioned texts. This similarity means that any precedent set under these texts would be particularly helpful when confronted with problems in South Africa concerning the particular

²⁰ Ibid at 716.

²¹ Subsection (g) of the s 1 definition for ‘literary work’.

²² This situation could be addressed fairly easily by the recognition of ‘collage’ as a kind of artistic work, as is the case in the UK’s Copyright, Designs and Patents Act, 1998 (the ‘CDPA’).

²³ O Dean & A Dyer *Dean & Dyer: Introduction to Intellectual Property Law* (2014) 11.

interpretation and application of the Act. The first important case in Britain concerning the interpretation of ‘sculpture’ is the case of *Metix (UK) Ltd v G H Maughan*.²⁴ First, the court in the *Metix* case held that the term ‘sculpture’ should be defined as a three-dimensional work made by an artist’s hand.²⁵ Although this interpretation is somewhat broad, Laddie J in this case held that there was no reason why the meaning of the word should be extended further than the ordinary meaning given to it by members of the public.²⁶

The Supreme Court of the United Kingdom in the case of *Lucasfilm Ltd & others v Ainsworth & another*²⁷ specifically addressed the definition of the term ‘sculpture’ in order to determine whether the work in question would be protected as such. The court in this case was tasked with determining whether a prop used in the making of the *Star Wars* films fell within the definition of a sculpture and, in order to make its determination, the court first had to confirm the interpretation that should be given to the term ‘sculpture’ in terms of English copyright law.²⁸

The court in the *Lucasfilm* case looked to previous decisions and agreed that when determining the meaning of certain terms — such as ‘sculpture’ — within the Act, it must start with the ordinary meaning of the words of the statute.²⁹ Lord Walker and Lord Collins first considered the decision of the Court of Appeal of New Zealand in the case of *Wham-O Manufacturing Co v Lincoln Industries Ltd*.³⁰ It was held by the court in that case that the definition of ‘sculpture’ could not be extended to include all works created by hand, but only to those works that express the idea of the sculptor in three-dimensional form.³¹ The Supreme Court in the *Lucasfilm* case concluded by stating that the guidelines (discussed below) set out in the *Wham-O Manufacturing* case, and which were accepted by Mann J in the trial court³² as well as the Court of Appeal in the *Lucasfilm* case,³³ were correct, and should be followed when determining whether a work qualified as a sculpture.³⁴

²⁴ [1997] FSR 718. The Court of Appeal of New Zealand in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1995] RPC 127 did not agree with the approach taken in *Metix*, arguing that the scope given to the definition of ‘sculpture’ cannot be so broad as to include all works created by an artist’s hand. See the discussion below for clarification on the matter.

²⁵ *Metix* *ibid* at 718.

²⁶ *Ibid* at 720–2.

²⁷ [2011] UKSC 39.

²⁸ *Ibid* para 7.

²⁹ *Ibid* para 29.

³⁰ *Supra* note 24. The New Zealand Court of Appeal held that a wooden model for making a mould for the production of frisbee was a ‘sculpture’, but many consider this to be incorrect.

³¹ *Wham-O Manufacturing* *ibid* paras 30–5.

³² *Lucasfilm Ltd & others v Ainsworth & another* [2008] EWHC 1878 (Ch).

³³ *Lucasfilm Ltd & others v Ainsworth & another* [2010] Ch 503 (CA) para 54.

³⁴ *Lucasfilm* (UKSC) *supra* note 27 para 46.

The guiding principles that the court suggested should be followed when determining whether the work in question falls within the interpretation of ‘sculpture’ are summarised succinctly by Stokes³⁵ as follows:

1. Some regard has to be had to the normal use of the word “sculpture”.
2. Nevertheless, the concept can be applicable to things going beyond what one would normally expect to be art in the sense of the sort of things that one would expect to find in art galleries.
3. It is inappropriate to stray too far from what would normally be regarded as a sculpture.
4. No judgement is to be made about artistic worth.
5. Not every three-dimensional representation of a concept can be regarded as a sculpture. Otherwise every three-dimensional construction or fabrication would be a sculpture, and that cannot be right.
6. It is the essence of a sculpture that it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well. This “purpose” is determined by looking at what the creator of the work intended it to be.³⁶
7. The fact that the object has some other use does not necessarily disqualify it from being a sculpture, but it still has to have the intrinsic quality of “being intended to be enjoyed” as a visual thing.
8. The process of fabrication is relevant but not determinative.’

For the purposes of this article, guidelines two, three and six will specifically be considered and applied to a particular multimedia installation artwork to determine whether such a creation would fall within the scope of ‘sculpture’ within the Act.

When considering William Kentridge’s *Double Half Horse*,³⁷ the artist will have to try to fit his creation within the definition of ‘artistic work’ as a sculpture for the purposes of copyright protection as there is not, as yet, a defined category for multimedia installation artworks. However, as previously indicated, the term ‘sculpture’ is not defined in the Act, and the meaning of the term is only expressly extended to include a cast or model used in the creation of a sculpture.³⁸

The next relevant guideline is that the concept of sculpture could be applicable to things that go beyond what one would normally expect to be art.³⁹ A substantial part of the Kentridge work is made up of a shadow

³⁵ Simon Stokes *Art and Copyright* (2012) 43.

³⁶ This requirement is in contradiction to the ruling of the court in the case of *Bress Designs (Pty) Ltd & another v GY Lounge Suite Manufacturers (Pty) Ltd & another* 1991 (2) SA 455 (W), where subjective considerations were ruled out and it was held that the purpose of the work should be judged objectively.

³⁷ Goodman Gallery ‘Sculpture for return (*Double Half Horse*), 2008, Bronze, Edition of 12’, available at <http://www.goodman-gallery.com/exhibitions/439>, accessed on 12 September 2019.

³⁸ Section 1 of the Act s v ‘sculpture’.

³⁹ Stokes op cit note 35 at 43.

projected onto the wall, an element that could be argued to extend beyond what is conventionally considered to be art. It is important to consider the point made in the *Marick Wholesalers* case, namely that one must consider a work as the ‘sum of its parts’, and not consider the individual components thereof separately. Therefore, if one were to consider the Kentridge creation in its entirety, it could be argued that the physical bronze portion that casts a shadow would constitute a substantial part of the work, and would satisfy the definition of ‘sculpture’.

The last of the guidelines to be taken into consideration is that it would be inappropriate, in the course of its interpretation, for a court to stray too far from what would normally be regarded as a sculpture. This guideline harks back to the words of Laddie J in the *Metix* case, namely that a sculpture is a three-dimensional work made by an artist’s hand.⁴⁰

Considering that such a shadow could be reproduced without reproducing a substantial part of the bronze sculpture is somewhat problematic in light of the scope of protection afforded by the Act. This example shows that although a multimedia installation artwork may be protected under the Act, there are, arguably, substantial parts thereof that still remain unprotected.

When considering the artwork in the illustrative example, the conclusion can be drawn that, even if the said creation was not illuminated, it still served an artistic purpose, being aesthetically pleasing. Although only half of the intended shadow was, prima facie, physically represented, the front half of the horse could not be said to serve a purely functional purpose. Rather, the front half of the horse serves a dual function; it is both aesthetically pleasing and allows for a shadow to be cast representing the back half of the horse, once illuminated. It is for this reason that such a creation would fall within the sixth guideline in that it can be enjoyed for that aesthetic purpose alone, without materially changing the nature of the artwork.

(iii) *Multimedia installation artworks defined as a ‘work of craftsmanship’*

The phrase ‘work of craftsmanship’ is similar to that of ‘sculpture’ in that there is no further definition, or description, of the expression in the Act. Hence, as above, we have to determine how the courts would interpret and apply this phrase in practice.⁴¹ Prior to 1992, subsec (c) of the definition of ‘artistic work’ referred to ‘works of artistic craftsmanship’ and ‘works of craftsmanship of a technical nature’, thus providing for a narrower definition within the Act.⁴² The amendment made in 1992 had the effect that such

⁴⁰ *Metix* supra note 24 para 34.

⁴¹ Cf Stokes op cit note 35 at 44.

⁴² This definition is narrower than the current definition on the basis that it required the work to have some degree of artistic merit before it could receive protection under either category.

works of craftsmanship no longer require any form of artistic merit before they will receive protection under the Act.⁴³

Although the *Bress Designs* case was decided prior to the 1992 amendment, Van Dijkhorst J held that the term ‘artistic craftsmanship’ was in any event obsolete, and so we can accept that he did not require any artistic merit in its interpretation.⁴⁴ Van Dijkhorst J preferred the view of Pape J in the Australian case of *Cuisenaire v Reed*,⁴⁵ who held that in order for an article to be a work of artistic craftsmanship, its main purpose should be artistic and not utilitarian in nature.⁴⁶ One must not, as a consequence, consider the artistic quality of the work, but rather the object of the article in its creation. The test put forward by the court is purely objective in that it must be asked whether the work is generally made by craftsmen with an aesthetic, rather than a utilitarian, end in mind.⁴⁷ By applying this test to the facts at hand, the court was able to conclude that although the couch design was aesthetically pleasing, it remained an article to be sat on, and would be sold as such.⁴⁸ This particular view has been shared in UK case law, with Lord Morris concluding that the work should be assessed in an objective way to determine whether it has the character of being functional.⁴⁹ This does not mean that all articles that serve a utilitarian function will be denied protection under the definition of a work of craftsmanship. The following example substantiates this.

When considering Damien Hirst’s *The Physical Impossibility of Death in the Mind of Someone Living*, it can be seen that the artist makes use of a steel framework to create a ‘coffin’ in which he has placed the corpse of a shark preserved in embalming fluid. This particular artwork raises a number of issues when considering whether such a work is protected under the Act and, if so, under which category of ‘artistic work’ such a creation would fall. The first issue to consider is whether such a creation would fall within the scope of the definition of an ‘artistic work’ under the Act, and the second issue is whether such a creation, once defined as a work, would meet all other requirements for copyright protection.

When considering whether the creation in question would fall within the scope of a sculpture, it can be seen that Hirst’s creation falls foul of

⁴³ Dean & Karjiker op cit note 2 para 2.6.5, as was the situation in the *Bress Designs* case supra note 36.

⁴⁴ *Bress Designs* supra note 36 at 459.

⁴⁵ [1963] VR 719 at 730.

⁴⁶ *Bress Designs* supra note 36 at 465.

⁴⁷ The argument could be made that the new meaning given to the definition of an artistic work would increase the chances of this having a wider application when testing whether a work would fall within the scope of the definition.

⁴⁸ *Bress Designs* supra note 36 at 466.

⁴⁹ *George Hensher Ltd v Restawhile Upholstery (Lancs)* [1975] RPC 31 at 54.

the sixth guideline. This guideline provides that a part of a sculpture's purpose is to have some sense of visual appeal, so that it can be enjoyed for that purpose alone.⁵⁰ Therefore, the conclusion can be drawn that such a creation would not comply with this guideline, as a substantial portion of the components in the creation, arguably, do not serve any aesthetic purpose. If one were to remove the shark from the artwork one would be left with a steel frame holding glass panels in place so that the fluid used for preserving the shark does not run out. These elements make up a substantial part of the installation and serve only a functional purpose, which would put the artwork outside of the definition of a sculpture, if we were to consider the sixth guiding principle. The argument could be raised that this would amount to a fragmentary approach to copyright protection, on the basis that the work in question has been broken down to its individual components and not considered as the sum of its parts. It is an accepted principle that, when assessing the originality of a copyright work, a fragmentary approach must be avoided.⁵¹

It is important, then, to remember the seventh guiding principle, which provides that although the work may serve some other purpose, it must still have the intrinsic quality of being intended to be enjoyed as a visual thing. The above discussion shows that every aspect of the work, excluding the actual shark, is intended merely to display the shark and does not itself serve as a visual component of the work. Furthermore, a dead shark, arguably, does not per se serve any aesthetic purpose. The components of the creation that serve no aesthetic purpose perform a function that allows for the sum of the components to comply with the overall aesthetic objective. This reasoning finds support in the third and fifth guiding principles, which require that one must not stray too far from what would normally be regarded as a sculpture and, further, that not every three-dimensional representation of a concept can be regarded as a sculpture. On this basis, it is difficult to fit such a creation within the scope of s 1(a), as a sculpture, and the artist would have to look to s 1(c) for the necessary protection.

As mentioned previously, s 1(c) under the definition of an 'artistic work' provides that a creation may be protected as a work of craftsmanship where that creation (irrespective of its artistic merit) serves an aesthetic purpose. Therefore, the artist will merely have to show that the main object of the

⁵⁰ Stokes op cit note 35 at 44.

⁵¹ *Marick Wholesalers* supra note 15, where the respondent disputed that there was anything original in the designs of the applicant's watches on the basis that all of the various features that make up the Michel Herbelin watches could be found in other makes of watches which were on the market prior to the creation of the works in question. The court, however, held that a fragmentary approach to the enquiry of originality must be avoided and we are to consider the independent labour, skill and creativity applied to the entire work.

creation in question is artistic in nature and not utilitarian, thus allowing us to disregard the purpose of each individual component of the work. The test put forward by Van Dijkhorst J above necessitates that two enquiries be undertaken and, if both enquiries are satisfied, such a creation can be accepted as a work of craftsmanship under s 1(c).

The first enquiry requires that the artist show that the creation in question would be considered to be a work of craftsmanship, and must involve some degree of production by hand, which requires either skill or special training.⁵² The second enquiry, however, shifts the focus from the artist himself to the actual creation and considers the purpose of such a creation to determine whether the material expression thereof achieves that purpose. The court in *Bress Designs* came to the correct conclusion that although the couch satisfies the first enquiry, its main purpose was to be bought and sold as a utilitarian object to be sat on. Therefore, the conclusion can be drawn that the purpose of Hirst's creation is aesthetic rather than functional, contrary to the purpose determined by the court in the *Bress Designs* case. There may, however, be some debate whether its execution involved skill (craftsmanship) or special training, and relevant judgement.

(iv) *Multimedia installation artworks falling outside the scope of a 'work' in terms of the Act*

All of the examples discussed above identify a pattern in the Act, which indicates that the further we stray from what would be traditionally accepted as art, which the Act uses as the basis for its categorisation, the more difficult it becomes to fit such a creation within the scope of a 'work' for the purposes of copyright protection.

Tim Noble & Sue Webster's *Dirty White Trash (With Gulls)* makes use of a number of existing elements to create a unique type of multimedia installation artwork.⁵³ The artists in this example make use of discarded items formed into a 'trash heap', and once illuminated a shadow is cast onto a blank surface depicting the silhouettes of two people sitting back-to-back. First, we must consider whether such a creation would fall into the scope of subsec (a) of 'artistic work' and, for the purposes of this enquiry, we will attempt to fit such a creation within the definition of a sculpture, as discussed above. In order to fit such a creation within the scope of the term 'sculpture', consideration must be given to the guiding principles which were endorsed and accepted in the *Lucasfilm* case.⁵⁴ Taking into consideration all the guiding principles, it can be seen that the creation in this example will fail to comply with a large number of them. For the

⁵² Neng & Tan op cit note 6 at 419.

⁵³ See the annexure at the end of the article.

⁵⁴ *Lucasfilm* (UKSC) supra note 27 para 46; Stokes op cit note 35 at 43.

purposes of this article, however, we shall only consider the most problematic of the guiding principles, namely the seventh and eighth principles.

An argument could be made that the creation in question fails to comply with the sixth guiding principle in that the three-dimensional representation fails to convey the concept of the author without illumination. The failure of the creation to satisfy the sixth guiding principle is amplified once we turn to the seventh guiding principle, which provides that, '[although] the object has some other use ... it still has to have the intrinsic quality of being ... enjoyed as a visual thing'.⁵⁵ This seventh guiding principle, therefore, requires the object to have some form of aesthetic appeal over and above any other functional use it may serve the creation. When applying this guiding principle to the example at hand, one can conclude that a pile of 'trash' on the floor lacks any aesthetic appeal; it is, arguably, the silhouettes represented on the wall that it creates that transforms the work into something with an aesthetic appeal. In other words, the pile of trash has no aesthetic appeal in and of itself: it is largely functional, namely used to create the shadow, which then gives the artwork aesthetic appeal.

The eighth guiding principle endorsed by Mann J refers to the process of fabrication and, although this principle is not determinative, it is still relevant, and thus we are required to consider it. The term 'fabrication' refers to an industrial process whereby prepared components are put through a process of manufacture to create a finished product. The procedure followed by the artists in this example cannot be likened to a process of fabrication, as their process was more random and ad hoc in nature, following a method of trial and error with individual waste items to achieve the final artwork. Although the action of construction could be said to have taken place, this act of construction entailed balancing individual components on one another with no semblance of permanence or fabrication of any kind.

Therefore, the creation in the example, arguably, fails to satisfy any of the abovementioned guiding principles, allowing for the conclusion that such a multimedia installation would fail to qualify as a sculpture for the purposes of the Act. We will, therefore, have to consider whether it is possible to fit the illustrative example within the scope of a work of craftsmanship in order for the work to receive protection under the Act. The test that will have to be applied to the creation in question was put forward by Van Dijkhorst J in *Bress Designs*, and such a test requires the creation to comply with two separate enquiries.

The more problematic requirements with regard to this example are that it must be shown that the artists' hands produced the creation in question and that such production required either advanced skill or special training

⁵⁵ Ibid at 44.

for its execution.⁵⁶ By applying the requirements to the given example, it is clear that it was created by the artists' hands; however, there is a question concerning the skill or special training required to produce such an artwork. Although the individual trash components were placed by hand, the entire procedure was an exercise in trial and error and, arguably, other than time, required little to no special skill in its execution. The technique adopted by Noble & Webster is somewhat rudimentary in comparison to that of Hirst. It is, according to current case law, this lack of special skill and technical precision in the creation process that leads this particular creation to fall short of the first requirement for a work of craftsmanship.

The second, and less problematic, enquiry to be satisfied is whether the material expression of the creation in question achieves the aesthetic purpose for which it has been created. It is important to note here that there is no requirement of artistic merit, and as long as the creation is not utilitarian in nature, the conclusion can be drawn that it serves an aesthetic purpose.⁵⁷ Therefore, the conclusion can be drawn that the creation of Noble & Webster serves an artistic purpose, and thus easily satisfies the second requirement of Van Dijkhorst J's test.

Although Noble & Webster's creation is easily able to satisfy the requirement of artistic purpose, it falls short when considering the requirement of skill and precision in executing such an artistic creation. It is for this reason that, in light of current copyright law, there would be a high probability that Noble & Webster would fail to categorise their creation as a work of craftsmanship for the purposes of copyright protection. There is also a concern of having an open-ended definition of 'artistic work', which will be addressed below.

(b) A proposed amendment of the Act to recognise new art forms

It should be clear at this point that, from what has already been discussed, there is a need for some form of amendment of what is considered an 'artistic work' for the purposes of the Act, in order for there to be effective protection of modern art forms. The question to be answered, therefore, is what form of amendment is required in order for there to be sufficient inclusion of these types of art forms within the definition of 'artistic work'.

The first proposed approach would involve a change in the manner of interpretation of the already existing definitions within s 1 of the Act under 'artistic work', with specific regard to the definitions of 'sculptures' and 'works of craftsmanship'. This article will, therefore, outline the current interpretations of such terms, as discussed above, and then suggest possible changes that could be made to allow for a broadening of the scope of the said terms. These suggested changes will then be tested against Noble &

⁵⁶ Neng & Tan op cit note 6 at 419.

⁵⁷ *Bress Designs* supra note 36 at 466.

Webster's creation, in order to show that such a change may successfully include artworks similar to that by Noble & Webster, within the definition of an 'artistic work'.

An alternative is an amendment which is more explicit than the proposed re-interpretation, and which would add a further category within subsec (a) of 'artistic work', and would broaden the scope of subsec (a) of the Act. By explicitly broadening the scope of the Act, we seek to include creations such as that of Noble & Webster, thus providing such artists with the possibility of copyright protection. This proposed amendment, although effective in broadening the scope of protection, may raise a number of issues in determining the extent to which the scope of 'artistic work' should be broadened.

(i) *A new interpretation given to the existing categories of what constitutes an 'artistic work'*

The proposed revised interpretation requires us to look at the existing interpretations that are given to the word 'sculpture' and the phrase 'work of craftsmanship' in order to determine whether new interpretations could be given to either category of artistic work, so as to broaden the scope thereof. This part of the article will, therefore, first consider the term 'sculpture', followed by the phrase 'work of craftsmanship', allowing for a conclusion to be drawn as to whether such new interpretations would solve the issue in question.

(1) *A new interpretation of the term 'sculpture'*

It has been shown above that a number of the principal guidelines accepted and endorsed in the *Lucasfilm* case do not sufficiently provide for multimedia installation artworks that are more abstract in nature than a sculpture. It must therefore be asked whether there is a sensible manner of amending the guiding principles and thus broadening their scope, allowing for creations such as Noble & Webster's to be accepted as a sculpture for the purposes of the Act. The guidelines that pose the greatest limitation on the interpretation of 'sculpture' in this context are the fifth and first, alongside the third, and the following discussion will outline why an amendment thereto would be inappropriate.

The fifth guiding principle is, for the purposes of this article, the most contentious when considering whether an amendment to this specific interpretation of the term 'sculpture' is possible. The fifth principle provides that 'not every three-dimensional representation of a concept can be regarded as a sculpture'.⁵⁸ From this it can be seen that the artistic work to which this specific guiding principle applies is required to be three-dimensional in

⁵⁸ Stokes op cit note 35 at 43.

nature, and thus any creation lacking a third dimension will fail to comply with this principle. When considering the creations of Kentridge and Noble & Webster, they both include two-dimensional components, namely a shadow cast onto the wall. As the court confirmed in the *Marick Wholesalers* case, we must not consider a work in terms of its individual components, but rather as a sum of its parts.⁵⁹ Therefore, although ‘half’ of Kentridge’s creation will comply with this fifth principle, ‘half’ of it (as would be the case with a substantial part of Noble & Webster’s creation), will fail to satisfy the fifth principle due to the substantial two-dimensional aspects of the creations. It would be artificial to alter the three-dimensional requirement put forward in the fifth principle, without contradicting both the first and third principles, based on the common meaning given to the term ‘sculpture’.

The first and third principles can be read together, as they both require that some regard has to be given to the word ‘sculpture’, and that it would be inappropriate to stray too far from what would normally be regarded as such.⁶⁰ From the dictionary definition of ‘sculpture’, the inference can be made that the term describes a creation that necessarily has a three-dimensional quality.⁶¹ This further supports the argument that a substantial part of both the Kentridge and Noble & Webster creations consisting of two-dimensional elements would fail to satisfy both the first and third principles, alongside the fifth.

The discussion above illustrates that the interpretation accepted by the UK Supreme Court contains a number of limitations, with the biggest limitation being that the creation in question must inherently be three-dimensional in nature. Multimedia installations, however, consist of a number of elements that are not three-dimensional in nature and, given the fact that they have to be considered as the sum of their parts, they would fall foul of this central requirement. In conclusion, it would not be appropriate to amend the current interpretation given to the guidelines that have to be followed when determining whether an artistic work falls within the scope of a ‘sculpture’ for the purposes of copyright protection.

(2) *A new interpretation of the phrase ‘work of craftsmanship’*

In the discussion concerning the interpretation of the phrase ‘work of craftsmanship’, the two-stage enquiry put forward by Van Dijkhorst J was the yardstick against which such creations should be measured.⁶² For the purposes of a new interpretation, the first part of the prescribed enquiry poses problems in that it requires a certain level of precision and skill being

⁵⁹ *Marick Wholesalers* supra note 15 at 717.

⁶⁰ Stokes op cit note 35 at 43.

⁶¹ Merriam-Webster *Collegiate Dictionary* 10 ed (1999) s v ‘sculpture’.

⁶² *Bress Designs* supra note 36 at 466.

involved in the creation of the work.⁶³ The second part of the enquiry merely requires that the creation in question serve an artistic purpose in that it has a principally aesthetic function. When applied to the works of both Kentridge and Noble & Webster, it can be seen that the bronze statue and the pile of discarded waste do in fact serve principally artistic purposes. Therefore, there is no need to amend the scope of the second part of the enquiry because it is broad enough to include such multimedia installation creations, as they serve an artistic purpose.

The first part of the enquiry is problematic in that it requires some form of skillful technique or special training in its production, as we discussed above with regard to Hirst's work.⁶⁴ The works of Kentridge and Noble & Webster consist of a trial-and-error process of creation, with both artworks comprising, in substantial part, projections cast from their illumination; the process of creation of such projections, arguably, lacks the precision or skilled technique required by the first part of Van Dijkhorst's requirements. This would definitely be more so in the case of the work of Noble & Webster. To overcome this obstacle, a possible reinterpretation could involve the removal of the requirement of precision and skilful technique from the enquiry, thus broadening the scope of what may be considered to be a work of craftsmanship. By removing the requirement of precision or skilful technique in the interpretation of a work of craftsmanship, the only requirement to be satisfied would be that the work be produced by the artist's hand. By applying this new interpretation to the work of Noble & Webster, the conclusion can be drawn that it is an artistic work because it is produced by hand and serves an artistic purpose.

However, such a possible reinterpretation would remove the requirements that are unique to the category of a 'work of craftsmanship', consequently rendering the category redundant as there would no longer be any specific characteristic to distinguish it from the other possible categories of 'artistic work'. Therefore, if this reinterpretation were to be accepted, it would be more logical simply to remove subsecs (a) and (b) from the definition of 'artistic work' and just provide for a broad definition, which would essentially correspond with that of the reinterpreted subsec (c), with no requirement of skill or precision.

(ii) *An explicit amendment to the definition of 'artistic work'*

Rather than trying to fit new forms of artistic works into existing terminology in the Act, an alternative approach would involve amending subsec (a) of the definition of 'artistic work'. Such an amendment will provide specifically for

⁶³ This precision and skill is technical in nature in that it relates to the use of precise measurement or calculation in the execution of the work in question.

⁶⁴ Neng & Tan op cit note 6 at 419.

the protection of multimedia installation artworks. Along with the proposed amendment of subsec (a) of ‘artistic work’, an additional definition could be provided for in the Act to assist a court in its interpretation and application.

This article, therefore, proposes that the term ‘multimedia installation art’ be added to the list of kinds of work currently provided for under subsec (a) of the definition of ‘artistic work’, so as to provide for the protection of the artworks discussed above. However, adding the term ‘multimedia installation art’ alone would pose broad interpretative problems of its own, so it is necessary to limit the scope of its interpretation by providing a definition of the term, similar to that of ‘sculpture’.⁶⁵ The proposed definition will limit the term ‘multimedia art’ to include only a combination of those works already defined under the Act. ‘Multimedia installation art’ should, therefore, for the purposes of the Act, be defined along the following lines:

‘A work comprising of any combination of those works defined under subsection (a) of “artistic work”, as well as, combinations with any other any other copyright works or any associated aspect of the work.’⁶⁶

This definition does not limit the combination of components that are necessary in order for a multimedia creation to be considered a work for the purposes of the Act. Therefore, an artist may employ any number of combinations of different media in the creation, and will still have the creation protected within the scope of the Act.

(c) *Concluding remarks*

An explicit amendment to the Act is preferred, as it will pose fewer problems in its application by allowing for a clear definition that provides for the abovementioned artworks. However, certain issues regarding the other requirements provided for by the Act concerning the requirements for copyright subsistence may be raised. This is considered next.

III PROBLEMS THAT MAY ARISE SHOULD THE DEFINITION OF ‘ARTISTIC WORK’ BE AMENDED

Having dealt with the main issue — whether a multimedia installation artwork can be considered to be a ‘work’ — consideration must be given to further issues that may arise if the Act were to recognise such creations as a ‘work’ for the purposes of copyright protection. The first issue relates to

⁶⁵ The addition of the term ‘multimedia installation art’ to the definition of an artistic work in s 1 of the Act without limitation would render those definitions currently provided by s 1 for ‘artistic work’ redundant, as it is possible to fit all art forms within the scope of ‘multimedia installation art’ without limitation.

⁶⁶ The inclusion of any ‘by-product’ of a copyright work would allow scope for shadows or any other projection emanating from the copyright work in question to be included within the new definition, as in the case of Kentridge’s *Double Half Horse*.

the originality of the work in question, on the basis that most multimedia installations are created from already existing materials and, accordingly, questions may arise as to the level of judgement, skill and effort expended in creating the work. The second issue that may arise, should such creations be accepted as a 'work', relates to the requirement under s 2(2) of the Act. Most multimedia installations appear in public spaces or art galleries and do not exist in perpetuity, but rather for a finite period of time. Therefore, this article will seek to address what the materiality requirement entails.

(a) *The issue of originality*

There are two main issues that need to be addressed when considering whether multimedia installation artworks will satisfy the requirement of originality, if they are to be considered a 'work' in the Act. The first issue is whether the visual elements of an installation artwork involve enough judgement, skill and effort in their creation to be considered as original in terms of the Act. In order to address this issue, we will consider the work of Noble & Webster, and apply the assessment of originality thereto, in order to determine whether it complies with the requirement under s 2(2).

The second issue pertains to the use of natural and ready-made objects in the creation of multimedia installation artworks, and whether such use would contradict the notion of originality. For this enquiry, we will consider the work of Hirst to determine whether it satisfies the requirement of originality.⁶⁷ This issue is predicated on the concern that by granting an artist copyright over an artistic work containing natural objects, one would grant the artist a monopoly over a particular form of natural expression.⁶⁸

(i) *Applying the test for originality to a multimedia installation artwork*

The court in the case of *Haupt v Brewers Marketing*⁶⁹ held that the term 'original' means that the work in question should originate from the author and not be slavishly copied.⁷⁰ It is important to note at this point that, although creative works will be original by definition, creativity is not a requirement for a work to be original. This interpretation reflects the previous UK standard of the 'sweat of the brow' for determining originality, where focus is placed on the judgement, effort and skill expended in creating the work, and not on how creative the work actually is.⁷¹ The court in the *Acceso* case confirmed this position by stating that the degree of judgement,

⁶⁷ Damien Hurst 'The Physical Impossibility of Death in the Mind of Someone Living, 1991', available at <http://www.damienhurst.com/the-physical-impossibility-of>, accessed on 12 September 2019.

⁶⁸ Neng & Tan op cit note 6 at 425.

⁶⁹ 2006 (4) SA 458 (SCA).

⁷⁰ Ibid para 24.

⁷¹ Stokes op cit note 35 at 50.

labour and skill required is a question of fact in each case, and the greater the amount of judgement, labour and skill, the more likely the work will be deemed to be original.⁷²

On the basis that the author of a work needs to contribute effort in the creation of an original work, the next question that must be asked is how much of a contribution must be made before the originality requirement is satisfied. The court in the *Marick Wholesalers* case provided that the effort of the author must be non-mechanical and non-trivial in nature so as to satisfy the originality requirement.⁷³ Therefore, the judgement, effort and skill put into creating the work must be of such a nature that it must not be characterised as a purely mechanical exercise.

In order to satisfy such a test, the author will have to show that, although being aware of pre-existing works, the author is able to distinguish his or her own work from the pre-existing works and demonstrate his or her own contribution.⁷⁴ Therefore, the correct test to be applied when determining whether a work is original requires a purely subjective enquiry to be made into the individual efforts of the author in the creation of the work. When applying this test to an artistic work, the enquiry must address whether that judgement, skill and labour applied to the work pertains to the visually significant aspects of the work. This is particularly important when looking at a work that is derived from pre-existing works, where slavish copying may still occur even though a significant amount of judgement, skill and effort was put into the creation thereof.⁷⁵

The standard set by the test for originality is a low one, and it is not hard for an author of a work to satisfy the requirement of expended judgement, labour and skill in order to show that the work in question is in fact original.⁷⁶ Therefore, when applying the test of originality to the work of Noble & Webster, a number of considerations have to be taken into account concerning pre-existing works and the amount of judgement and effort it took to create the work. When considering the work of Diet Wiegman, it can be seen that the work of Noble & Webster is not unique, or the first of its kind.⁷⁷ Therefore, it must be asked whether Noble & Webster copied existing works in their creation to such a degree that their work was not original. Even though the concept may be the same, the process of rendering the material expression thereof is a process of trial and

⁷² *Accesso* supra note 14 at 667–9.

⁷³ *Marick Wholesalers* supra note 15 at 715–16.

⁷⁴ *Dean & Dyer* op cit note 23 at 17.

⁷⁵ *Stokes* op cit note 35 at 51.

⁷⁶ *Ibid* at 50.

⁷⁷ Diet Wiegman ‘*Shadow Dancing*, 2008’, available at <https://shadowsculptures.wordpress.com/2015/04/29/diet-wiegman/#jp-carousel-389>, accessed on 12 September 2019. The work is not ‘the first of its kind’ in that it is not the first artistic work to make use of a shadow cast on a wall in the execution of the work.

error, as we have discussed above. Therefore, Noble & Webster would have to show that there is a significant difference in the visual aspects of the work in order to prove that the creation is not a slavish copy of works that already exist, such as that of Wiegman.

The very nature of multimedia installation artwork is that the artist physically installs it in a space, and the standard of originality merely requires that effort and skill be expended in the creation of the work. This effort and skill must be directed at the visual aspects of the work when dealing with artistic works, and a comparison between the works of Noble & Webster on the one hand, and Wiegman on the other hand, evidences such effort. The visual aspects of both works are not so similar as to amount to a reproduction; even though they both portray the silhouettes of people, a large amount of effort and skill has gone into making the silhouettes differentiable. In conclusion, a strong argument could be made that multimedia installation artworks would easily comply with the requirement of originality, on the basis that the visual aspects of each work require a considerable amount of effort and skill in their execution.

(ii) *Does the use of natural and ready-made objects in multimedia installation artworks conflict with the requirement of originality?*

A number of multimedia installation artworks make use of ready-made, or natural, materials in their creation to convey a certain belief or idea to the observer that invites a certain emotional response to the work. It has been argued in US courts that artworks depicting natural objects in their expression would fail to satisfy the originality requirement, on the basis that no artist may monopolise an object 'first expressed by nature', as the court said in *Satava v Lowry*.⁷⁸

The argument is that the use of natural materials in the creation of an artistic work would be to copy from another work, namely the 'first expression by nature'.⁷⁹ Therefore, in order for an artist to meet the requirement of originality when copying from another work, he or she must be able to show that there is an element of material alteration or embellishment to make his or her own work original. The court in the case of *Satava v Lowry* held that an artist may alter 'the pose, attitude, gesture, muscle structure [or] facial expression' of the animal, and such variations, if original, may warrant copyright protection.⁸⁰

⁷⁸ 323 F 3d 805 at 813. See Neng & Tan op cit note 6 at 425. This requirement of originality will, therefore, fail if the artist does not apply some form of 'unnatural' expression to the natural elements of the artistic work. An example of such an unnatural expression would be to portray a dead bird in mid-flight.

⁷⁹ Neng & Tan ibid at 425.

⁸⁰ *Satava v Lowry* supra note 78 at 813; Neng & Tan ibid at 425.

Therefore, when considering the shark used in Hirst's creation, the conclusion can be drawn that, by preserving the shark in formaldehyde and removing it from its natural habitat, he has materially altered the 'first expression by nature' of that animal. By adding embellishments to the natural object, the artist has contributed a sufficient amount of effort and skill towards the visual aspects of the work in order for the work to comply with the requirement of originality. Noble & Webster could raise the same argument with regard to the use of stuffed seagulls and pre-existing waste materials, and the alteration thereof, in their artwork, thus rendering such a work original for the purposes of copyright protection.

(b) *The issue of materiality*

The second requirement that must be met in order for copyright to subsist in a work originates from art 2(2) of the Berne Convention for the Protection of Literary and Artistic Works. The Act adopted the wording of art 2(2) of the Convention into s 2(2), which states that a work must be reduced to a material form, and the wording of s 2(2) of the Act does not explicitly exclude artistic works from that requirement.⁸¹ Copyright does not subsist in thoughts or ideas, but rather the material expression thereof; ideas must exist in a specific physical embodiment before they can be protected under the Act.⁸² Therefore, even though there is no express provision in the Act that artistic works must permanently be reduced to a material form, it has been widely accepted that this requirement is also satisfied where the work does not exist in perpetuity.⁸³ Laddie J said in the *Metix* case that merely because an artwork has an inherently transient existence does not mean that it would not be able to satisfy the requirement of being reduced to a material form.⁸⁴

There has been no definite period of time provided in legislation or by the courts that must pass before a work could be said to have complied with the fixation requirement. However, there is an interpretation given to the term 'permanence'.⁸⁵ Therefore, an artistic work will be accepted as having the requisite degree of permanence if it can be 'perceived, reproduced, or otherwise communicated for a period of more than transitory duration'.⁸⁶ The court in the case of *Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd* held that even though the material form of the work was no longer perceivable,

⁸¹ Dean & Dyer op cit note 23 at 18.

⁸² *Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd* (1991) 399 JOC (T) at 409.

⁸³ Stokes op cit note 35 at 53.

⁸⁴ *Metix* supra note 24 at 721.

⁸⁵ The term 'permanence' is used in this context to relate to any work that has been reduced to a material form, and which would then exist for a period of more than transitory duration.

⁸⁶ Joan Infarinato 'Copyright protection for short-lived works of art' (1982) 51 *Fordham LR* 90 at 94.

this did not mean that the copyright no longer existed (or never existed).⁸⁷ Artworks that consist of no static elements would find it difficult to satisfy the fixation requirement where the scope and subject matter of the work is not clearly ascertainable. In the Australian case of *Komesaroff v Mickle & others*,⁸⁸ the court held that works of ‘kinetic art’ lack sufficient permanence to be classified as ‘works’ for the purposes of copyright.⁸⁹

The artwork of Noble & Webster is static enough whilst the trash element of the piece is illuminated, even if someone or something were to obstruct, or alter, the light causing the shadow to be cast. However, the argument could be made that without any external intervention, the artwork itself exists in a form of stasis, and such stasis is not influenced by the inherent nature of the artwork. On this basis it can be seen that the creation of Noble & Webster would also satisfy the materiality requirement on the basis that it too is perceivable for longer than a mere transitory duration.

It is important to note that not all multimedia installations would satisfy the requirement of fixation, and a good example of such an artwork would be Damien Hirst’s *A Thousand Years*.⁹⁰ Because the artwork is constantly changing with the addition of dead flies and the dissipation of organic materials, it is hard to identify a single static element in the artwork. There is no preservation of the elements in *A Thousand Years*, and, therefore, it cannot be said to comply with the requirement of materiality in s 2(2). Although the initial form of the work exists for a fleeting moment, an argument could be made that the requirement of ‘materiality’ must be changed to incorporate artworks that exist for fleeting moments before such change occurs.

The conclusion can be drawn from the preceding discussion that, although there is no direct provision in the Act that artworks must be reduced to a material form for a definite period of time, academic writers are of the opinion that it is a necessary requirement based on evidentiary considerations.⁹¹ Therefore, although multimedia installation artworks do not exist in the same location, but are moved from gallery to gallery (as is the case with traditional artworks), the elements that make up the artwork itself are static in nature, and are, therefore, fixed in space.⁹²

⁸⁷ *Pastel Software* supra note 82 at 409–10.

⁸⁸ [1988] RPC 204.

⁸⁹ Stokes op cit note 35 at 52. See for an example of kinetic art Ilana Yahav *Sand Art* available at https://www.youtube.com/watch?v=_jfS2rybDOg&t=17s, accessed on 12 September 2019.

⁹⁰ Damien Hurst *A Thousand Years* available at <http://www.damienhurst.com/a-thousand-years>, accessed on 12 September 2019.

⁹¹ Zahr K Said ‘Copyright’s illogical exclusion of conceptual art’ (2016) 39 *Columbia J of Law & the Arts* 335 at 339–400.

⁹² This is not peculiar to multimedia installation artworks, as a number of sculptures and works of craftsmanship are so big that they too require disassembly

(c) *Concluding remarks*

From the above discussion, the conclusion can be drawn that, if we were to implement the proposed amendments to the Act, the further requirements of originality and materiality would not be so contentious as to render such amendments redundant. It can be seen that, even though multimedia installation artworks consist of ready-made or natural materials, they are still able to comply with the requirement of originality on the basis that they satisfy the required level of effort and skill. Further, when we consider the fixation requirement under s 2(2) of the Act, we must not look at the fixation of the artwork in its surroundings but rather the fixation of the elements that make up the artwork itself. Although not all multimedia installation artworks will comply with the fixation requirement, as indicated above, if the Act is amended, as proposed, the issue of materiality will not be so contentious so as to render such an amendment redundant in relation to a vast spectrum of multimedia artworks.

IV CONCLUSION

The introductory part of this article noted that before an enquiry can be made into copyright infringement and the possible defences thereto, one must first address the issue of copyright subsistence. This article, therefore, set as its objective to determine whether the inherent nature of multimedia installation art prevents it from adequate recognition under copyright law in South Africa. In order complete this objective, the test for possible copyright subsistence was applied to four prominent multimedia installation artworks, and the outcome of this analysis shows that the wording of the Act is, arguably, somewhat restrictive in its interpretation and application.

The second part of this article sought to determine whether the current wording of the Act limited the scope of its application and failed to include multimedia installation artworks within the definition of 'artistic work' in s 1(1). From the discussion above, it can be seen that, when considering multimedia installation artworks, the further we stray from what has conventionally been recognised as an 'artistic work', the harder it becomes to interpret the Act in order to provide such creations copyright protection. This analysis, therefore, provided an answer to the question posed in the introductory part of this article, namely whether the inherent nature of a multimedia installation artwork prevents it from being recognised as such by the Act. In conclusion, it is clear that it is not the inherent nature of multimedia installation art, but rather a limitation imposed by the wording of the Act, and the judicial interpretation thereof, that renders such creations

in order to be relocated. However, the inherent nature of multimedia installations requires their disassembly in order to be relocated, and such disassembly cannot be said to negate reduction to a material form.

potentially ineligible for copyright protection. Seeing that the issue lies with the wording of the Act, the second objective of part II was to determine whether a revised interpretation given to the current wording of the Act, or adding new terminology thereto, would provide the necessary solution. From the above discussion, it can be seen that the more preferable approach is that a new term be added to the definition of 'artistic work' that provides for multimedia installation artworks in a general sense. The addition of this term will be accompanied with the addition of a definition of 'multimedia art' to the definitions section of the Act, which will limit the scope of the term. This definition does not, however, limit the combination of components that are necessary in order for a multimedia creation to be considered a work for the purposes of the Act.

Part III of this article sought to build on the conclusions drawn in part II and address any possible issues that could arise if the proposed amendment were to be incorporated into the Act. From that analysis, it can be seen that multimedia installation artworks would still meet the standard of originality, on the basis that South African law measures the amount of effort and skill put into the creation of the work, rather than the artistic quality thereof. By placing an emphasis on the skill, labour and judgement of the author, rather than the make-up of the work itself, the test for originality should be satisfied if the proposed amendments were to be incorporated into the Act. Further, although the Act requires that a work be reduced to a material form before it can be considered a work eligible for copyright protection, the analysis in part III of this article shows that this requirement sets a low standard that must be met. Although there are examples of multimedia installation artworks that may not comply with this requirement, as identified above, it is not so contentious as to affect the general efficacy of the proposed amendments.

Thus, in the final analysis, it is submitted that a case has been made out for an amendment to the definition of 'artistic work' in the Act so as to make provision for multimedia installation artworks, and that such an amendment is a viable solution to the identified shortcomings of the Act. Although a revised interpretation of what is currently defined as an 'artistic work' could be somewhat problematic, the inclusion of multimedia installation art within this definition would seem to have the most effective outcome. However, this article also submits that there should be a limitation on the scope of what will be considered to be multimedia installation art for the purposes of the Act.

ANNEXURE:

Tim Noble & Sue Webster's *'Dirty White Trash (With Gulls)'*

