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NOTES

THE KING JAMES COPYRIGHT: A LOOK AT THE ORIGINALITY OF DERIVATIVE TRANSLATIONS OF THE KING JAMES VERSION OF THE BIBLE

I. INTRODUCTION

Imagine the pastor of a church sitting at his desk trying to decide which book of the Bible to cover for one of his Sunday school classes. After hours of contemplation, he decides to teach about the Book of Acts. The pastor pulls his New King James Version (NKJV) of the Bible down from his shelf and proceeds to the photocopy machine. Upon opening the cover of the Bible he notices that his version of the Bible is copyrighted and contains the following statement:

The text of the New King James Version . . . may be quoted or reprinted without prior written permission with the following qualifications: (1) up to and including 1,000 verses may be quoted in printed form as long as the verses quoted amount to less than 50% of a complete book of the Bible and make up less than 50% of the total work in which they are quoted; (2) all NKJV quotations must conform accurately to the NKJV text.¹

After reading this statement, the pastor decides not to photocopy the Book of Acts in the NKJV for fear of copyright infringement. He returns to his office, looks at his King James Version (KJV) of the Bible, and notices a copyright on that version as well. The pastor, now confused about why the Bible is copyrighted, decides not to cover the Book of Acts in his Sunday school class, for the church cannot afford to purchase enough Bibles to avoid potential copyright infringement. The hypothetical situation involving the pastor and his two versions of the Bible raises this question: Since the KJV Bible is in the public domain, how enforceable is the copyright on the NKJV and KJV Bibles that the pastor possesses? In particular, what types of changes, and how many, are needed

¹ *Copyright Preface* (New King James) (Thomas Nelson, Inc. 1982).

in a subsequent Bible translation in order to gain sufficient originality for copyright protection? Do the NKJV and KJV Bibles satisfy this threshold?

This Note seeks to determine whether there is sufficient originality in the NKJV and KJV Bibles compared to the public domain version of the King James Bible. This Note begins by explaining the originality requirement as set out in the Copyright Act of 1976 (1976 Act).² By examining relevant case law and comparing the reasoning to the NKJV and KJV Bibles, this Note analyzes the originality of the Bibles to determine if their copyrights protect their texts. Finally, this Note concludes that the printed KJV Bible is not sufficiently original from the public domain version, but that the NKJV Bible is sufficiently original. The NKJV Bible likely has a “thin” copyright ascribed to it, however, and will only be protected against verbatim copying.

II. BACKGROUND

A. COPYRIGHT LAW

The United States Constitution allows for copyright protection in article 1, section 8, clause 8, which states, “Congress shall have the Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.”³ In 1790, soon after this constitutional provision was adopted, Congress passed our first copyright act, providing protection for maps, charts, and books.⁴ Since the introduction of the Copyright Act of 1790, Congress has revised our nation’s copyright law numerous times, most notably with the Copyright Acts of 1909⁵ and 1976.⁶ The Copyright Act of 1976 continues to provide the basis for copyright law today, although Congress is continually amending the statute to reflect the ever-evolving view of copyright law in the United States.⁷

² Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (2000)).

³ U.S. CONST. art. I, § 8, cl. 8.

⁴ Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 247 (1996) (referring to the Copyright Act of 1790, ch. 15, 1 Stat. 124-26).

⁵ Copyright Act of 1909, ch. 320, 35 Stat. 1075-88 (amended 1976).

⁶ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (2000)).

⁷ See CRAIG JOYCE ET AL., COPYRIGHT LAW 24-25 (6th ed. 2003) (listing many revisions and implementation acts in the Copyright Act of 1976).

Section 102 of the Copyright Act contains two requirements for obtaining a valid copyright: fixation and an original work of authorship.⁸ The statute further limits the protection of original works of authorship by stating “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁹

1. *Originality Requirement.* Courts have adopted two criteria for originality: “independent creation by the author and a modest quantum of creativity.”¹⁰ The independent creation prong of originality is satisfied if the work originated with the author.¹¹ To be an independent creation, the author’s work need not be novel or unique.¹² In fact, independent creation is satisfied even “if a writer who has never known a previous work somehow creates an exact duplicate of that work or a substantial portion thereof.”¹³ Significantly, in that situation “the second work is nonetheless copyrightable because, even though it is not ‘novel’ or ‘unique,’ it ‘originated’ with the second author.”¹⁴

The amount of creativity needed to satisfy the creativity prong is “extremely low; even a slight amount will suffice.”¹⁵ The Supreme Court has held that “a work may be original even though it closely resembles other works so long as the

⁸ The relevant part of the statute reads: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a) (2000).

⁹ 17 U.S.C. § 102(b).

¹⁰ JOYCE ET AL., *supra* note 7, at 85; *see also* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991). In *Feist*, Justice O’Connor stated:

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.

Id. at 346; *see also* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490, 189 U.S.P.Q. (BNA) 753, 756 (2d Cir. 1976) (defining originality as “[a] work [owing] its creation to the author and this in turn means that the work must not consist of actual copying”).

¹¹ *Id.* at 90; *see also* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102, 90 U.S.P.Q. (BNA) 153, 156 (2d Cir. 1951) (holding that the term “‘original’ in reference to a copyrighted work means that the particular work ‘owes its origin’ to the author”).

¹² JOYCE ET AL., *supra* note 7, at 89.

¹³ *Id.* at 90.

¹⁴ *Id.*; *see also* Alfred Bell, 191 F.2d at 102 (noting that “nothing in the Constitution commands that copyrighted matter be strikingly unique or novel”).

¹⁵ *Feist*, 499 U.S. at 345.

similarity is fortuitous, not the result of copying.”¹⁶ In other words, copyright law only protects direct copying, so even if two works are exactly the same, they will both be protected as long as they were independently created.¹⁷ While the legal threshold for creativity is low, some things do not satisfy the minimum requirement, including “short words and phrases, slogans, short musical phrases, slight variations of musical works, the insignia of a soccer team, and the title of a song.”¹⁸

2. *Originality of Derivative Works.* The originality standard applies not only to original works of authorship but also to derivative works.¹⁹ Section 103 of the copyright statute defines a derivative work as

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship is a “derivative work.”²⁰

The main distinction between derivative works and original works is that original works are almost entirely created from materials and ideas that originated with the author while derivative works are based primarily on materials and ideas derived from other sources.²¹ Under the current statute, the copyright in a derivative work extends only to the material contributed by the author of such work.²² Even

¹⁶ *Id.*

¹⁷ *Id.* at 346.

¹⁸ JOYCE ET AL., *supra* note 7, at 97 (citations omitted).

¹⁹ 17 U.S.C. § 103 (2000) (“The subject matter of copyright . . . includes compilations and derivative works.”).

²⁰ 17 U.S.C. § 101 (2000).

²¹ JOYCE ET AL., *supra* note 7, at 230 (noting that “the latter typically are what might be called ‘first generation’ works, composed essentially (although not, of course, exclusively) of materials created by their authors; derivative works and compilations, on the other hand, fundamentally are ‘second generation’ works based on preexisting matter”).

²² 17 U.S.C. § 103(b). Section 103(b) states:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

though the copyright does not extend to the preexisting matter, the copyright protects the entire derivative work—including the preexisting matter—as a whole.²³

*Feist Publications, Inc. v. Rural Telephone Service, Co.*²⁴ is arguably the leading Supreme Court case on originality of compilations or derivative works. In *Feist*, Rural Telephone Service (Rural) brought a lawsuit for copyright infringement against Feist Publications (Feist) for copying part of its telephone directory white pages.²⁵ Feist had compiled a telephone directory based on eleven smaller directories.²⁶ Feist had gained permission to use ten of the eleven directories that it needed to cover the entire area; Rural was the only directory that did not permit Feist to use its listings.²⁷ Because Feist did not want a “gaping hole” in its directory, it proceeded to use the Rural listings anyway.²⁸ After eliminating some listings and changing others by adding street addresses, Feist ended up using 1,309 of Rural’s exact listings.²⁹

The Supreme Court held that Rural’s listings were unprotected by copyright since the telephone directory did not have the requisite amount of creativity to be sufficiently original.³⁰ In coming to this conclusion, the Court focused on the principle that “facts are not copyrightable.”³¹ Since facts do not have authors they cannot be protected.³² While fact compilations of facts are general protectable,³³ in this case there was no originality involved in selecting and compiling the phone numbers for the directory.³⁴ The Court noted that “Rural’s selection of listings

²³ JOYCE ET AL., *supra* note 7, at 230 (citing 17 U.S.C. § 103(b)).

²⁴ 499 U.S. 340.

²⁵ *Id.* at 344. The white pages in Rural’s phone directory listed “in alphabetical order the names of Rural’s subscribers, together with their towns and telephone numbers” while the yellow pages listed “Rural’s business subscribers alphabetically by category and feature[d] classified advertisements of various sizes.” *Id.* at 342.

²⁶ *Id.* at 343 (stating that the Feist directory contained 46,878 white page listings compared to Rural’s 7,700).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 343-44.

³⁰ *Id.* at 363-64.

³¹ *Id.* at 344.

³² *Id.* at 347.

³³ *Id.* at 348. The Court stated:

The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original.

³⁴ *Id.* at 362 (stating that “[t]he end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity”).

could not be more obvious: It publishes the most basic information—name, town, and telephone number.”³⁵ The Court’s holding eliminated the sweat of the brow doctrine that would have given copyright protection to facts merely because of the hard work involved in gathering the data.³⁶ It is clear from this holding that the author of a compilation or derivative work needs to include much more than trivial variations to gain a valid copyright and will not benefit from mere labor alone.³⁷

3. *The Public Domain.* The *Feist* decision has major implications for public domain works, as well as derivative works based on those public domain items, since the hard work involved in copying and collecting data is no longer sufficient to gain a valid copyright.³⁸ Items that are in the public domain are either extremely old—and thus their copyrights have expired—or are ineligible for copyright protection in the first place.³⁹ While a public domain work “that contains new matter is entitled to a derivative copyright on the new matter . . . such new matter is entitled to no copyright protection when the new matter is ‘trivial.’ ”⁴⁰ The court in *Grove Press* held that over 40,000 changes in a public domain autobiography that “consisted almost entirely of elimination and addition of punctuation, changes of spelling of certain words, elimination and addition of quotation marks, and correction of typographical errors” were trivial.⁴¹ Even though *Grove Press* occurred prior to the *Feist* decision, the holding is consistent with *Feist*’s holding that something more than sweat of the brow is necessary to establish originality.

*L. Batlin & Son, Inc. v. Snyder*⁴² is arguably the most famous case concerning public domain derivative works. The case dealt with a metal “Uncle Sam” toy bank that had entered the public domain.⁴³ The plaintiff produced a plastic version of the bank that was slightly smaller with minor changes from the

³⁵ *Id.*

³⁶ *See id.* at 364; Heald, *supra* note 4, at 250-51 (noting the significance and implications of eliminating the sweat of the brow doctrine).

³⁷ Heald, *supra* note 4, at 250-51.

³⁸ *Id.*

³⁹ JOYCE ET AL., *supra* note 7, at 239.

⁴⁰ *Grove Press, Inc. v. Collectors Pub., Inc.*, 264 F. Supp. 603, 606, 152 U.S.P.Q. (BNA) 787, 789 (C.D. Cal. 1967) (citations omitted).

⁴¹ *Id.* at 605 (“These changes required no skill beyond that of a high school English student and displayed no originality.”).

⁴² 536 F.2d 486.

⁴³ *See id.* at 488 (noting that the mechanical banks have been around since at least 1886).

original.⁴⁴ The plaintiff brought suit against another manufacturer who produced similar plastic banks.⁴⁵

The court held that the plastic bank did not differ significantly from the public domain bank; thus, there was not a valid copyright due to a lack of sufficient originality.⁴⁶ The court stated that “[w]hile a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will”⁴⁷ and noted that all of the changes here were trivial and served only a functional purpose.⁴⁸ According to the court, “[o]ne who has slavishly or mechanically copied from others may not claim to be an author”⁴⁹ as the threshold for originality is not met merely because of the tremendous amount of ability required to create the derivative work. The court established an exception for when the creator was “extremely skilled” and the new creation was a “work of art in itself.”⁵⁰ The court then concluded that the bank replica was “neither in the category of exactitude required by *Alva Studios* nor in a category of substantial originality.”⁵¹ In examining this finding, the court noted that it feared the public would suffer if it extended copyright protection to derivative works devoid of meaningful variation, which would “simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.”⁵²

The rationale behind cases such as *Batlin & Son, Grove Press*, and *Feist* falls in line with Congress’ recognition that the public possesses a monetary interest in the public domain.⁵³ That is, the public should not have to pay for a work that is substantially the same as a public domain work.⁵⁴ A threshold level of creativity

⁴⁴ Some of the changes mentioned are the shape of Uncle Sam’s face and hat, an umbrella that is fixed rather than loose, and various minor changes to the visual exterior of the bank. *Id.* Some similarities mentioned are the number of stripes on Uncle Sam’s pants, Uncle Sam’s attire and pose, the overall scheme of the bank, and the bag opening into which a coin would fall. *Id.* at 489.

⁴⁵ *Id.* at 488.

⁴⁶ *Id.* at 492.

⁴⁷ *Id.* at 490 (quoting *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927) (alteration in original)).

⁴⁸ *Id.* at 489. The plaintiff itself even admitted to some of the functional aspects of the bank. *Id.* at 488.

⁴⁹ *Id.* (quoting 1 MELLVILLE B. NIMMER, *THE LAW OF COPYRIGHT* § 6, at 10.2 (1975)).

⁵⁰ *Id.* at 491 (referring to the exact, scaled down reproduction of Rodin’s *Hand of God* in *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 123 U.S.P.Q. (BNA) 487 (S.D.N.Y. 1959)).

⁵¹ *Id.* at 492. In reaching this decision the court focused on the quality and the uniqueness of the Rodin sculpture and the amount of skill required to make an exact replica of this high quality work. Additionally, the court noted that the plastic bank was not an exact replica but merely a “knock off” of the public domain bank. *Id.*

⁵² *Id.*

⁵³ Heald, *supra* note 4, at 248.

⁵⁴ *Id.* at 249.

that distinguishes the derivative work from the public domain must exist in order to deny the creator of a derivative work the capability to significantly interfere with any other derivative work produced from the initial, underlying work.⁵⁵ The public domain is a valuable resource for inspiring new creations.⁵⁶ By granting copyright protection to derivative works based on works in the public domain, Congress may deter many prospective artists and creators from creating new works due to a fear of copyright infringement.⁵⁷ Because of this danger, the holdings of cases such as *Feist* and *Batlin & Son* are extremely important to provide assurance that minimal variations from public domain works will not be protected by copyright.⁵⁸

4. *The Merger Doctrine.* The merger doctrine maintains that there are some instances when only a few ways are available to adequately express an idea and, in these instances, none of the expressions should be copyrightable.⁵⁹ The basic rationale behind this doctrine is that the alternative “would be to allow the copyright holder a potential effective monopoly on the underlying idea, because no one else could develop an independent expression of the idea that would differ sufficiently from the copyrighted expression[s].”⁶⁰

In determining whether the merger doctrine applies, courts have focused not only on the number of options available, but also on the quality of those options.⁶¹ In *Matthew Bender & Co. v. West Publishing Co.* the plaintiff, a manufac

⁵⁵ *Woods v. Bourne Co.*, 60 F.3d 978, 990, 35 U.S.P.Q.2d (BNA) 1577, 1586 (2d Cir. 1995); *see also Feist*, 499 U.S. at 362 (noting that “[t]he standard of originality is low, but it does exist”).

⁵⁶ *See Heald*, *supra* note 4, at 250.

⁵⁷ *See Woods*, 60 F.3d at 990 (noting that there is a desire to avoid “entangling subsequent artists depicting the underlying work in copyright problems” (quoting *Gracen v. Bradford Exchange*, 698 F.2d 300, 305, 217 U.S.P.Q. (BNA) 11294, 1298 (7th Cir. 1983))). *See generally Heald*, *supra* note 4, at 242-43 (presenting a choir director’s problem of trying to distinguish between a public domain version of the song “Jordan” and a copyrighted version of the same song).

⁵⁸ *See Feist*, 499 U.S. at 358 (holding that facts are never original); *Batlin & Son*, 536 F.2d at 492 (noting the public’s interest in denying a derivative work a “weapon for harassment” for “minuscule variations”).

⁵⁹ *JOYCE ET AL.*, *supra* note 7, at 124. While not expressly codified, the doctrine arises out of section 102(b) of the copyright state. *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

⁶⁰ *Id.* (alteration in original).

⁶¹ *See, e.g., Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 674, 48 U.S.P.Q.2d (BNA) 1560 (2d Cir. 1998); *CCC Info. Serv. Inc. v. Maclean Hunter Mkt. Reports Inc.*, 44 F.3d 61, 33 U.S.P.Q.2d (BNA) 1183 (2d Cir. 1994); *see also Kregos v. Associated Press*, 937 F.2d 700, 706-07, 19 U.S.P.Q.2d (BNA) 1161, 1168-69 (2d Cir. 1991) (holding that the plaintiff’s selection of various pitching statistics to assess pitching performance was copyrightable since there were many different ways to determine pitching success); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458,

turer of CD-ROM discs, created two compilations: a disc containing Supreme Court decisions from 1990 to the present and a disc containing Federal Appeals decisions from 1993 to the present.⁶² The plaintiff sought to expand its compilations to include earlier decisions, but in doing so, the plaintiff would have needed to copy many of the defendant's opinions.⁶³ As governmental works, Supreme Court and Federal Courts of Appeals decisions are not copyrightable,⁶⁴ but the defendant argued that enough alterations were made to the decisions to allow copyrightability as a derivative work or a compilation.⁶⁵ The court held that since the defendant made its selections based primarily on the "timing and nature of the court's action," very few adequate options existed as to the arrangement of the information in the decisions.⁶⁶ The expression of the court decisions merged with the idea, and the defendant's opinions were not copyrightable.⁶⁷

In reaching this holding, the court felt that the "creative spark is missing where: (i) industry conventions or other external factors so dictate selection that any person composing a compilation or the type at issue would necessarily select the same categories of information, or (ii) the author made obvious, garden-variety or routine selections."⁶⁸ The court further noted that creativity "inheres in making non-obvious choices from among more than a few options."⁶⁹ Selection from only two or three potential options is insufficient; furthermore, when numerous choices exist but have been selected a "countless number of times before and have become typical," there is still not sufficient originality for copyright protection.⁷⁰

In *CCC Information Services, Inc. v. Maclean Hunter Market Reports*, the defendant published a guide book containing used car valuations projected by its editors for

1463-64, 14 U.S.P.Q.2d (BNA) 1898, 1902 (5th Cir. 1990) (holding that the idea of a proposed pipeline on a map was not protectible since the "markings [were] certainly the only effective way to convey the idea of the proposed location of [the] pipeline").

⁶² *Matthew Bender*, 158 F.3d at 677.

⁶³ *Id.* at 678.

⁶⁴ *Id.* at 679.

⁶⁵ *See id.* at 678 (listing the defendant's changes as "(i) the arrangement of prefatory information, such as parties, court, and date of decision; (ii) the selection and arrangement of the attorney information; (iii) the arrangement of information relating to subsequent procedural developments; and (iv) the selection of parallel and alternative citations").

⁶⁶ *Id.* at 684-85 (noting that "if both the arrangements were protected, publishers of judicial opinions would effectively be prevented from providing any useful arrangement of . . . information for Supreme Court decisions").

⁶⁷ *See id.* at 689.

⁶⁸ *Id.* at 682 (citations omitted).

⁶⁹ *Id.*

⁷⁰ *Id.* at 682-83 ("[I]n sum, creativity in selection and arrangement therefore is a function of (i) the total number of options available, (ii) external factors that limit the viability of certain options and render others non-creative, and (iii) prior uses that render certain selections 'garden variety.'")

six-week periods.⁷¹ The plaintiff copied substantial portions of the defendant's guide books into its own computer database and provided that information to customers.⁷² The plaintiff argued that the defendant's guide books did not have sufficient originality for copyright protection because the valuations were facts and, if they were not facts, the merger doctrine applied because of the limited number of options available to describe the value of a used car.⁷³

In protecting the used car valuations, the court noted that the guide book figures "[were] not historical market prices, quotations, or averages; nor [were] they derived by mathematical formulas from available statistics" but were "rather, the [defendant's] editors' predictions, based on a wide variety of informational sources and their professional judgment."⁷⁴ The court noted that

the takings by [the plaintiff] from [the defendant] are of virtually the entire compendium. This is not an instance of copying of a few entries from a compilation. This copying is so extensive that [the plaintiff] effectively offers to sell its customers [the defendant's guide] through [the plaintiff's] data base. [The plaintiff's] invocation of the merger doctrine to justify its contention that it has taken no protectible matter would effectively destroy all protection for [the defendant's] compilation.⁷⁵

By focusing on the amount and type of information taken, the court rejected the plaintiff's merger doctrine argument⁷⁶ in contrast with the *Matthew Bender* court's holding that the merger doctrine applies when the copied work contains trivial variations stemming from a limited number of options.⁷⁷ Courts thus seem to apply the merger doctrine when the options are limited and the changes made are minor and "garden variety."⁷⁸

⁷¹ 44 F.3d at 63.

⁷² *Id.* at 64. In district court, the plaintiff filed for declaratory judgment of noninfringement of copyright; the defendants counterclaimed for copyright infringement. *Id.* at 61.

⁷³ *See id.* (arguing in district court that "copyright protection was nonetheless precluded by the doctrine of 'merger of idea and expression'").

⁷⁴ *Id.* at 63. For example, the court noted that car models command differing values in different locations nationally and the selection of how to divide the geographic regions produces an "approximate and original" number. *Id.* at 67.

⁷⁵ *Id.* at 72.

⁷⁶ *See id.* at 73.

⁷⁷ *See Matthew Bender*, 158 F.3d at 689.

⁷⁸ *See id.* at 689; *CCC*, 44 F.3d at 73; *Kregos*, 937 F.2d at 706-07; *Kern River*, 899 F.2d at 1463-64.

5. *Copyrightability of Religious Texts.* As is the case with public domain music,⁷⁹ case law directly concerning the originality of religious texts is sparse. Two relevant cases, however, are *Merkos L'inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*⁸⁰ and *Torah Soft Ltd. v. Drosnin.*⁸¹ In *Merkos*, the defendant disseminated a version of a prayerbook, the Siddur Tehillat Hashem (STH), used by the Lubavitch movement of Hasidic Judaism.⁸² The plaintiff argued that the new prayerbook infringed its copyright on the original STH because it copied verbatim various Hebrew prayers.⁸³ The court looked at the originality of the plaintiff's prayerbook⁸⁴ and held that the plaintiff had a "sufficient probability of success" as to his claim of copyright infringement.⁸⁵ Specifically, the court stated that "[t]he translation process requires exercise of careful literary and scholarly judgment"⁸⁶ and "the fact that the [plaintiff's] translation is designed to serve a practical aim does not render it ineligible for copyright protection."⁸⁷ Accordingly, the court upheld the trial court's ruling that there was sufficient originality in the plaintiff's work.⁸⁸

The court then held that the defendant's work did not vary substantially from the plaintiff's work.⁸⁹ In reaching this conclusion, the court noted that, even though the defendant added "user-friendly instructions to the translation and utilize[d] a different layout,"⁹⁰ there was not a substantial difference between the two translations because the defendant copied the plaintiff's prayers verbatim.⁹¹ Furthermore, reasoning that "the art of translation involves choices among many possible means of expressing ideas, and in that sense the merger argument is inapposite to the context presented here," the court rejected the defendant's argument that the merger doctrine applies to the translation.⁹²

⁷⁹ Heald, *supra* note 4, at 252 (noting that "only one federal appellate decision in the last 40 years discusses the standard of originality necessary for a new musical composition to constitute a copyrightable derivative work").

⁸⁰ 312 F.3d 94, 65 U.S.P.Q.2d (BNA) 1043 (2d Cir. 2002).

⁸¹ 136 F. Supp. 2d 276, 58 U.S.P.Q.2d (BNA) 1583 (S.D.N.Y. 2001).

⁸² 312 F.3d at 96.

⁸³ *Id.*

⁸⁴ *Id.* at 97.

⁸⁵ *Id.* at 100 (affirming the district court's injunction against the defendant's prayerbook).

⁸⁶ *Id.* at 98 ("The translation of prayers . . . involves partly the precision of science but partly the sensitivity and spirit of art. Behind the words that are found in the Hebrew and the words that are used in the English are shades of meaning and subtlety that cannot be labeled functional." (quoting the district court below)).

⁸⁷ *Id.* at 97.

⁸⁸ *Id.*

⁸⁹ *Id.* at 98-99.

⁹⁰ *Id.* at 98.

⁹¹ *Id.* at 99.

⁹² *Id.* at 99.

In *Torah Soft*, the defendant wrote a book entitled *The Bible Code* containing printouts that the plaintiff claimed infringed its copyright.⁹³ While the case does not deal directly with the copyrightability of a religious text, the case does contain valuable guidance on the standard of originality for religious texts.⁹⁴ The Hebrew Bible is the backbone of the plaintiff's software, which produces a computerized, matrix form of the Hebrew Bible.⁹⁵ Though the plaintiff admitted that the Hebrew Bible was in the public domain and not copyrightable, he claimed that his changes to the Bible were sufficient enough to merit copyright protection.⁹⁶ Specifically, the plaintiff argued that "replacing final consonants of Hebrew letters by non-final consonants demonstrate[d] the requisite degree of originality."⁹⁷

In holding that the program lacked sufficient originality, the court noted that the changes were functional in nature and thus not protectable.⁹⁸ The use of asterisks and pound symbols were not original, for they were merely "obvious, garden-variety, or routine selections."⁹⁹ Finally, the court found that the plaintiff's selection of which version of the Prophets and the Writings to include in the software did not establish sufficient originality.¹⁰⁰ In coming to this conclusion, the court noted that "[t]he Hebrew Bible necessarily consists of a compilation of the Torah, the Prophets, and the Writings arranged in precisely the same order as arranged in the Database."¹⁰¹ The court did not want to reward the plaintiff for making a selection that was necessitated by the inherent form of the Hebrew Bible.¹⁰² The court expressly rejected the plaintiff's argument that its work should receive protection because of the amount of time and effort involved in creating the software.¹⁰³ The plaintiff's changing of final consonants of Hebrew letters to non-final consonants was merely a "mechanical substitution of two forms of the

⁹³ 136 F. Supp. 2d at 282.

⁹⁴ *See id.* at 286-89.

⁹⁵ *Id.* at 286.

⁹⁶ *Id.* The Hebrew Bible had not been compiled on an electronic database prior to the plaintiff's program because of the "Jewish doctrine of *sheimot*, which prohibits forming the letters that constitute certain of the several Hebrew names of God in a medium that is expected to be deleted." *Id.* at 280. The plaintiff argued that the software represented an independently copyrightable expression of the application of the *sheimot* rules. *Id.* at 286.

⁹⁷ *Id.*

⁹⁸ *Id.* at 287 (noting that "as a functional, as opposed to a creative, alteration, the *sheimot* changes are not protectable").

⁹⁹ *Id.* (quoting *Matthew Bender*, 158 F.3d at 681). The court further stated that "the decision to use these particular symbols in the Database is nothing more than a *de minimis* quantum of creativity." *Id.*

¹⁰⁰ *Id.* at 288.

¹⁰¹ *Id.*

¹⁰² *See id.* (noting that the "selection and arrangement of the Hebrew Bible is nothing more than a trivial distinguishable variation").

¹⁰³ *Id.* (noting that the Supreme Court in *Feist* expressly denied the sweat of the brow argument).

same Hebrew letter which ‘required no skill beyond that of a high school . . . student and displayed no originality.’¹⁰⁴ In sum, the court held that the changes the plaintiff made to adapt the Hebrew Bible to the software did not provide enough originality to distinguish it from the public domain version.¹⁰⁵

Taken together, *Merkos* and *Torah Soft* provide a spectrum for courts to determine the amount of originality needed to make a derivative religious text copyrightable. At one end of the spectrum, *Merkos* held that the translation process is a form of art that easily satisfies the creativity requirement of originality due to all the potential choices at a translator’s disposal to express the idea.¹⁰⁶ At the other end of the spectrum, *Torah Soft* held, at least with regard to the Hebrew Bible, that minimal, high-school level, garden-variety changes will not suffice; the format of the Hebrew Bible cannot lead to copyrightability because there is only one way to present it.¹⁰⁷ In order to establish exactly where on the spectrum a derivative religious work will fall, the derivative text must be analyzed to determine whether changes are merely functional or are truly a work of art.

B. THE HISTORY OF THE KING JAMES BIBLE

Beginning in England in 1529, Henry VIII limited the printing of the Bible by royal patents.¹⁰⁸ Thus, the KJV Bible, which was first published in England in 1611 and also known as “the Authorised Version,”¹⁰⁹ was subject to these royal patents.¹¹⁰ The copyrightability of the Bible became a major issue in England in 1709 upon the establishment of the Statute of Anne, which was the first copyright legislation.¹¹¹ The Statute of Anne provided authors “the sole liberty of printing and reprinting [their] books for the term of fourteen years.”¹¹² The English courts recognized Statute of Anne protection along with the common law’s perpetual copyright in books.¹¹³ In 1611, the King of England purchased the KJV Bible translation, so when England adopted the Statute of Anne, the King assumed that he owned the copyright as well.¹¹⁴ The House of Lords held,

¹⁰⁴ *Id.* at 289 (quoting *Grove Press*, 264 F. Supp. at 605).

¹⁰⁵ *Id.*

¹⁰⁶ 312 F.3d at 99.

¹⁰⁷ 136 F. Supp. 2d at 287-89.

¹⁰⁸ Roger Syn, (*c*) *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 4 (2001).

¹⁰⁹ *Preface* at v (King James) (Zondervan 2002); *see id.* at 1.

¹¹⁰ *Id.* at 4.

¹¹¹ *Id.*

¹¹² *Id.* at 4-5 (quoting the Statute of Anne of 1709, 8 Ann., c.19 § 1 (1710) (Eng.)).

¹¹³ *Id.* at 5.

¹¹⁴ *Id.* at 6-7.

however, that since the Bible was not an ordinary book, the copyright was inapplicable even though the King owned the translation.¹¹⁵

Since the Bible was not protected by copyrights, only the royal patents remained; upon winning the Revolutionary War in 1776, however, the United States disregarded all English patents, and everything under these patents, including the KJV Bible, fell into the public domain.¹¹⁶ When the Constitution was ratified, all the works in the public domain remained in the public domain.¹¹⁷ Even though the public domain contained the KJV Bible, as early as 1859 courts recognized that biblical translations could be copyrightable.¹¹⁸ Today, all of the major translations of the Bible, including the NKJV Bible, are registered with U.S. copyright office.¹¹⁹

1. *The Printed King James Version.* The editors of the *Holy Bible: King James Version* state that the printed edition is a reissue of the 1873 edition of the 1611 Bible.¹²⁰ The significant changes from the 1611 edition include adding italic type “to indicate words in the English translation that have no exact representative in the original language”;¹²¹ changing punctuation by adding periods, colons, and other punctuation marks;¹²² correcting spelling and capitalization errors or discrepancies;¹²³ and changing paragraph marks that were inconsistent in the 1611 KJV Bible.¹²⁴

2. *The New King James Version.* The NKJV Bible was originally published in 1979 with the goal of creating a Bible “[i]n harmony with the purpose of” previous King James versions of the Bible.¹²⁵ The translators desired to “preserve all of the information in the text, while presenting it in good literary form.”¹²⁶ Thus, they chose when to change outdated terminology and when to leave the

¹¹⁵ *Id.* at 7.

¹¹⁶ *Id.* at 12.

¹¹⁷ Heald, *supra* note 4, at 247.

¹¹⁸ See *Flint v. Jones*, 9 F. Cas. 276 (C.C.E.D. Pa. 1875) (No. 4872) (holding that the notice of copyright was not sufficient to grant an injunction); *Lesser v. Sklarz*, 15 F. Cas. 396 (C.C.S.D.N.Y. 1859) (No. 8276A) (rejecting the defendant’s argument that “[h]e could not be made amenable for selling or printing or publishing a book which had existed beyond the memory of man” and granting the plaintiff’s injunction for copyright infringement).

¹¹⁹ Syn, *supra* note 108, at 13.

¹²⁰ *Preface* at vii (King James) (Zondervan 2002).

¹²¹ *Id.* at vi.

¹²² *Id.*

¹²³ *Id.* at vii (noting that generally “whenever a word was spelled more than one way, [the editor] conformed all occurrences to the standard spelling of the late nineteenth century”). For example, four occurrences of “unpossible” were changed to “impossible.” *Id.*

¹²⁴ *Id.*

¹²⁵ *Preface* at v (New King James) (Thomas Nelson, Inc. 1982).

¹²⁶ *Id.*

original words intact.¹²⁷ They “sought to maintain those lyrical and devotional qualities that are so highly regarded in the Authorized Version”¹²⁸ but noted that “[w]here obsolescence and other reading difficulties exist, present-day vocabulary, punctuation, and grammar have been carefully integrated.”¹²⁹ The translators changed pronouns such as “thee” and “thou” to “you” and “your”¹³⁰ and eliminated the “-est” and “-eth” suffixes in words such as “lovest” or “doeth.”¹³¹ Also, the NKJV Bible translation contains many format changes, including the addition of page headings to identify topics, italicized words to show original expressions maintained from the original King James Version, bold verse numbers to indicate the beginning of a paragraph, oblique type in New Testament corresponding to quotations from the Old Testament, and “[s]ignificant explanatory notes, alternate translations, and cross-references.”¹³²

III. DISCUSSION

A. AUTHORSHIP REQUIREMENT

The first step in determining the copyrightability of the KJV and NKJV Bibles is to determine whether original authorship exists.¹³³ Some have suggested that since the Bible is the inspired Word of God, God owns the copyright.¹³⁴ While this suggestion raises interesting philosophical and theological questions, it is

¹²⁷ *Id.* at vi-vii.

¹²⁸ *Id.* at vi.

¹²⁹ *Id.* at vi.

¹³⁰ *Id.*

¹³¹ *Id.* at vii.

¹³² *Id.* at vii.

¹³³ See 17 U.S.C. § 102(a) (2000); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 18 U.S.P.Q.2d (BNA) 1275, 1278 (1991) (holding that the “work must be original to the author”).

¹³⁴ See Syn, *supra* note 108, at 23. Syn remarks: “We conceive the Bible to be in actuality the very Word of God. The divine Author prompted the original thought in the mind of the writers; He then guided their choice of words to express such thoughts. . . . Thus, both thought and language are revelatory and inspired.” Syn goes on to state that this implies that God is the owner of the Bible’s copyright. *Id.* See also Thomas F. Cotter, *Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CAL. L. REV. 323, 353 (2003). Cotter states:

In sum, only two logical outcomes emerge when an individual claims to be an instrument through which another being dictated a work. Either the claim of supernatural authorship is true, or at least sincere, in which case a supernatural being authored the work, and the work is not subject to copyright protection; or the claim is false, and the human author should be estopped from later asserting her own authorship of the work. In either case, the work is not copyrightable, and courts should be spared the difficult—and probably unconstitutional—task of deciding the validity of the human author’s revelation.

highly unlikely that a court would find that God owns the copyright to either the KJV or NKJV Bible. The copyright statute provides copyright protection to derivative works and compilations.¹³⁵ Furthermore, the statute's definition of derivative works expressly contains translations.¹³⁶ The KJV and NKJV Bibles are both translated in English. Thus, even if the Bible is the inspired word of God, the words inspired were in Greek or Aramaic, and the subsequent English, Hebrew, translations would not be inspired themselves and would qualify as derivative works.¹³⁷

B. CREATIVITY REQUIREMENT

The next step in ascertaining the validity of the copyright of the KJV and NKJV Bibles is to establish whether or not there is sufficient creativity to distinguish the KJV and NKJV Bibles from the public domain version of the 1611 King James Version (1611 KJV).¹³⁸ Even though the creativity threshold is low, it does exist.¹³⁹ The derivative work must include changes from the public domain work that are more than merely trivial variations requiring little or no skill.¹⁴⁰ In order to determine whether the changes made by the KJV and NKJV Bibles satisfy the creativity prong, a comparison between the actual texts of the Bibles is necessary.

1. *The Printed King James Version.* Both the KJV and the NKJV Bibles claim to make changes from the original 1611 KJV.¹⁴¹ The KJV Bible italicized some words for emphasis, changed punctuation of verses, changed spelling and capital letters, and added paragraph symbols.¹⁴² For example, Psalm 1 of the 1611 KJV reads as follows:

¹³⁵ 17 U.S.C. § 103 (2000).

¹³⁶ 17 U.S.C. § 101 (2000) (defining a derivative work as “a work based upon one or more preexisting works, such as a translation”).

¹³⁷ See Syn, *supra* note 108, at 24.

¹³⁸ See JOYCE ET AL., *supra* note 7, at 85 (stating that “a modest quantum of creativity” is the second prong of the originality test); *Feist*, 499 U.S. at 345 (stating that a work needs to possess at least some “minimal degree of creativity”).

¹³⁹ See JOYCE ET AL., *supra* note 7, at 346; *Feist*, 499 U.S. at 362 (noting that the white pages directory was “garden variety” and “devoid of even the slightest trace of creativity”).

¹⁴⁰ See *Grove Press, Inc. v. Collectors Pub., Inc.*, 264 F. Supp. 603, 605, 152 U.S.P.Q. (BNA) 787, 788 (C.D. Cal. 1967).

¹⁴¹ See *Preface* at vi-vii (King James) (Zondervan 2002); *Preface* at vi-vii (New King James) (Thomas Nelson, Inc. 1982).

¹⁴² *Id.*

1 Blessed is the man that walketh not in the counsel of the ungodly, nor standeth in the way of sinners, nor sitteth in the seat of the scornful.

2 But his delight is in the law of the LORD; and in his law doth he meditate day and night.

3 And he shall be like a tree planted by the rivers of water, that bringeth forth his fruit in his season; his leaf also shall not wither; and whatsoever he doeth shall prosper.

4 The ungodly are not so: but are like the chaff which the wind driveth away.

5 Therefore the ungodly shall not stand in the judgment, nor sinners in the congregation of the righteous.

6 For the LORD knoweth the way of the righteous: but the way of the ungodly shall perish.¹⁴³

Compare to Psalm 1 of the printed edition of the KJV Bible which reads as follows:

1 Blessed *is* the man that walketh not in the counsel of the ungodly, nor standeth in the way of sinners, nor sitteth in the seat of the scornful.

2 But his delight *is* in the law of the LORD; and in his law doth he meditate day and night.

3 And he shall be like a tree planted by the rivers of water, that bringeth forth his fruit in his season; his leaf also shall not wither; and whatsoever he doeth shall prosper.

4 The ungodly *are* not so: but *are* like the chaff which the wind driveth away.

5 Therefore the ungodly shall not stand in the judgment, nor sinners in the congregation of the righteous.

6 For the LORD knoweth the way of the righteous: but the way of the ungodly shall perish.¹⁴⁴

Notice that the only changes in the verse are the italicized words “is” in verses one and two, the italicized words “are” in verse four, the different font for the words “Lord” in verses two and six, and the indented first line of each verse. Other than these changes, the passages are word-for-word identical.

¹⁴³ *Psalm 1:1-6* (1611 King James), available at <http://bibledatabase.net/html/kjv/index.html>.

¹⁴⁴ *Psalm 1:1-6* (King James).

Courts have held that minimal or trivial variations lack the requisite amount of creativity to gain a valid and enforceable copyright.¹⁴⁵ The court in *Batlin & Son* held that the plaintiff's changes to a public domain bank were trivial and refused to grant a copyright to a work that was "slavishly or mechanically copied from others."¹⁴⁶ Some of the minor changes included changing the shape of Uncle Sam's face and hat, the number of stripes on his pants, and the bag opening into which a coin would fall.¹⁴⁷ In contrast, the court in *Merkos* held that "the translation process requires exercise of careful literary and scholarly judgment."¹⁴⁸ In that case, however, the defendant's work did not meet the minimal standard since the defendant copied the plaintiff's work verbatim and used it for an identical purpose.¹⁴⁹ The court also held that the "user-friendly instructions" added to the text were not enough to displace the verbatim copying of the plaintiff's text.¹⁵⁰ Similarly, the court in *Torah Soft* denied copyrightability to a work in which the only changes from the public domain version of the Hebrew Bible were functional¹⁵¹ and required "no skill beyond that of a high school . . . student and displayed no originality."¹⁵²

Like the defendant's work which was copied verbatim from the plaintiff's work verbatim in *Merkos*,¹⁵³ the printed KJV Bible is word for word the same translation as the 1611 KJV Bible. The italicization of words such as "is" and "are" resembles merely the uncopyrightable, garden variety selections of asterisks and pound symbols used by the plaintiff in *Torah Soft*¹⁵⁴ and the trivial changes to the exterior of the Uncle Sam bank in *Batlin & Son*.¹⁵⁵ While the editors of the printed KJV Bible did not slavishly copy the public domain material, they did mechanically copy the public domain version, making only slight changes. Since the court in *Feist* expressly rejected the sweat of the brow doctrine,¹⁵⁶ the

¹⁴⁵ See *Feist*, 499 U.S. at 363-64 (holding that a white pages directory was unprotected by copyright); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492, 189 U.S.P.Q. (BNA) 753, 759 (2d Cir. 1976) (holding that a plastic Uncle Sam bank that only functionally differed from a public domain Uncle Sam metal bank was not sufficiently creative).

¹⁴⁶ *Id.* at 489-90 (quoting *NIMMER*, *supra* note 49, § 6, at 10.2).

¹⁴⁷ *Id.* at 489.

¹⁴⁸ *Merkos L'inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 97, 65 U.S.P.Q.2d (BNA) 1043, 1045 (2d Cir. 2002).

¹⁴⁹ *Id.* at 99.

¹⁵⁰ See *id.* at 98.

¹⁵¹ *Torah Soft Ltd. v. Drosnin*, 136 F. Supp. 2d 276, 287, 58 U.S.P.Q.2d (BNA) 1583, 1591 (S.D.N.Y. 2001).

¹⁵² *Id.* at 289 (quoting *Grove Press*, 264 F. Supp. at 605).

¹⁵³ 312 F.3d at 99.

¹⁵⁴ 136 F. Supp. 2d at 287.

¹⁵⁵ 536 F.2d at 489.

¹⁵⁶ *Feist*, 499 U.S. at 364.

originality requirement cannot be satisfied merely because of the hard work and effort involved in copying the public domain 1611 KJV Bible.

The printed KJV Bible does not contain sufficient changes to establish originality and thus does not have a valid copyright on its biblical text. Upholding a copyright for such minor changes to the biblical text would “put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work[s].”¹⁵⁷ The public needs access to items that are in the public domain, and upholding a copyright for minor changes such as italicizing words periodically throughout a copied text would seriously thwart the public’s access. The printed KJV Bible states that it is copyrighted in 2002.¹⁵⁸ The editors do not purport that the copyright extends to the text of the Bible itself, however, for they leave out a copyright infringement statement such as the one that appears at the beginning of the NKJV Bible.¹⁵⁹ The copyright likely extends only to the beginning notes and the index at the end of the Bible but not to the text. If the public was well educated in copyright law, it would understand that the text of the KJV Bible could be copied freely without fear of infringement. Unfortunately, the public is not adept at deciphering the intricacies of copyright law and would likely be deterred from copying the text. As Professor Heald stated in his article on public domain sheet music:

[M]usic publishers’ persistent claims to public domain works have created a climate where most consumers instinctively pay for new sheet music rather than copy it. High search costs and a dearth of appellate precedent make it difficult even for sophisticated consumers to investigate and challenge music publishers’ spurious and very profitable claims to copyright.¹⁶⁰

Similarly, preachers and pastors desiring to teach a book of the Bible to their Sunday school classes may be intimidated into purchasing a Bible that is free for them to copy from the public domain.

¹⁵⁷ *Batlin & Son*, 536 F.2d at 492.

¹⁵⁸ See *Preface* (King James) (Zondervan 2002).

¹⁵⁹ The NKJV copyright statement reads:

The text of the New King James Version (NKJV) may be quoted or reprinted without prior written permission with the following qualifications: (1) up to and including 1,000 verses may be quoted in printed form as long as the verses quoted amount to less than 50% of a complete book of the Bible and make up less than 50% of the total work in which they are quoted; (2) all NKJV quotations must conform accurately to the NKJV text.

Copyright Preface (New King James) (Thomas Nelson, Inc. 1982).

¹⁶⁰ Heald, *supra* note 4, at 274.

2. *The New King James Version*. In 1979, the translators of the NKJV Bible sought to provide an updated version of the King James Bible without losing the literary form and message of the original.¹⁶¹ The translators changed pronouns such as “thee” and “thou” to “you” and “your” while modernizing words such as “doeth” by removing the suffix “-eth.”¹⁶² Aside from these changes, the translators also reworded much of the text of the Bible to have a more modern tone. For example, the first chapter of Acts in the 1611 KJV Bible reads as follows:

1 The former treatise have I made, O Theophilus, of all that Jesus began both to do and teach,
 2 Until the day in which he was taken up, after that he through the Holy Ghost had given commandments unto the apostles whom he had chosen:
 3 To whom also he shewed himself alive after his passion by many infallible proofs, being seen of them forty days, and speaking of the things pertaining to the kingdom of God:
 4 And, being assembled together with them, commended them that they should not depart from Jerusalem, but wait for the promise of the Father, which, saith he, ye have heard of me.
 5 For John truly baptized with water; but ye shall be baptized with the Holy Ghost not many days hence.¹⁶³

Compare that to the first chapter of Acts in the NKJV Bible, which reads:

1 The former account I made, O Theophilus, of all that Jesus began both to do and teach,
 2 until the day in which He was taken up, after He through the Holy Spirit had given commandments to the apostles whom He had chosen,
 3 to whom He also presented Himself alive after His suffering by many infallible proofs, being seen by them during forty days and speaking of the things pertaining to the kingdom of God.

¹⁶¹ See *Preface* at v-vi (New King James) (Thomas Nelson, Inc. 1982) (noting the translators’ desire to provide a Bible in “present-day vocabulary, punctuation, and grammar”).

¹⁶² *Id.* at vi-vii.

¹⁶³ *Acts* 1:1-5 (1611 King James), available at http://bibledatabase.net/html/kjv/acts_1.html (last visited Jan. 14, 2005).

4 And being assembled together with *them*, He commanded them not to depart from Jerusalem, but to wait for the Promise of the Father, “which,” *He said*, “you have heard from Me;
5 “for John truly baptized with water, but you shall be baptized with the Holy Spirit not many days from now.”¹⁶⁴

Many of the trivial changes discussed in the section on the printed KJV Bible are present, such as italicizing the words “He said” and “them” in verse four.¹⁶⁵ But the majority of the NKJV Bible, at least in this passage, is not copied verbatim from the KJV Bible. Many of the words are changed. The word “treatise” becomes “account” in verse one, “Holy Ghost” becomes “Holy Spirit” in verse two, “shewed himself alive after his passion” becomes “presented Himself alive after His suffering” in verse three, and “but ye shall be baptized with the Holy Ghost not many days hence” becomes “but you shall be baptized with the Holy Spirit not many days from now.”¹⁶⁶ The word order and the flow of the verses remain the same. The only difference between the two passages are the actual words chosen, although the majority of the passages are similar.¹⁶⁷ In the entire NKJV passage cited above, there are 125 words but only nineteen of those words differ from the KJV passage.¹⁶⁸ If this percentage of change is applied over the entire Bible, *arguendo*, then fifteen percent of the KJV Bible is altered in the NKJV.

In order to determine if the NKJV Bible contains sufficient originality, a comparison to relevant case law is necessary. In *Merkos*, the court suggested that translations are works of art which satisfy the creativity requirement due to all the potential choices available to express an idea.¹⁶⁹ The court held that the plaintiff’s translation was sufficiently original, stating: “Behind the words that are found in the Hebrew and the words that are used in the English are shades of meaning and subtlety that cannot be labeled functional.”¹⁷⁰ The court did not uphold the copyright on the defendant’s work, however, as this work was copied verbatim from the plaintiff’s work.¹⁷¹ Conversely, the court in *Torah Soft* held that there is only one way to present the Bible and that minimal, high school level changes will not be enough to gain copyrightability.¹⁷² The court denied copyrightability to the

¹⁶⁴ *Acts* 1:1-5 (New King James).

¹⁶⁵ *Acts* 1:4 (New King James).

¹⁶⁶ *Cf. Acts* 1:1-5 (1611 King James); *Acts* 1:1-5 (New King James).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See Merkos*, 312 F.3d at 99.

¹⁷⁰ *Id.* at 97 (citations omitted).

¹⁷¹ *Id.* at 98-99.

¹⁷² *See Torah Soft*, 136 F. Supp. 2d at 287-89.

plaintiff's work because the only changes made to the Hebrew Bible in the plaintiff's computer program were functional in nature.¹⁷³ Similar to the holding in *Torah Soft*, the court in *Batlin & Son* denied copyrightability to a defendant's plastic replica of a public domain bank because the replica incorporated only minor, functional changes to the exterior of the bank.¹⁷⁴ The previously stated case law illustrates how courts generally have held that functional or garden variety changes in a derivative work are not enough to establish copyrightability,¹⁷⁵ and when there are many options available for changes, the chosen alternative must not be obvious.¹⁷⁶ For example, in *Feist* the Court stated that a white pages listing "could not be more obvious: It publishes the most basic information—name, town, and telephone number."¹⁷⁷

Using the reasoning established in the relevant case law, the changes made in the NKJV Bible appear to satisfy the creativity prong. Unlike the KJV Bible, the NKJV Bible does not copy the public domain text verbatim. Thus, it is not similar to the verbatim copying situation in *Merkos*. While much of the text is the same as the public domain version, the changes are more than merely functional in nature and surpass the obvious and garden variety changes found in *Torah Soft*, *Batlin & Son*, and *Feist*. The translators' goal was to retain the feel of the KJV Bible while modernizing the biblical language.¹⁷⁸ For example, in Acts 1:3 the NKJV Bible reads: "[T]o whom He also presented Himself alive after His suffering . . ."¹⁷⁹ This is changed from the original verse which reads: "To whom also he shewed himself alive after his passion . . ."¹⁸⁰ The word "shewed" becomes "presented" and the word "passion" becomes "suffering." The meaning has not changed, yet the verse has been modernized through what the translators describe as "complete equivalence."¹⁸¹ Via this method, the translator seeks to "preserve *all* of the information in the text, while presenting it in good literary form."¹⁸² The translators of the NKJV desired to present an updated version of the King James Bible without paraphrasing the text.¹⁸³ Because of the self-imposed constraint through their adherence to complete equivalence, the NKJV

¹⁷³ *Id.* at 287.

¹⁷⁴ 536 F.2d at 489.

¹⁷⁵ See *Feist*, 499 U.S. at 362 (holding that a white pages phone directory was "garden variety" without the "slightest trace of creativity").

¹⁷⁶ See *id.*; *Matthew Bender*, 158 F.3d at 682 (holding that there is not creativity in selecting from choices that have been made numerous times previously).

¹⁷⁷ 499 U.S. at 362.

¹⁷⁸ *Preface* at v (New King James) (Thomas Nelson, Inc. 1982).

¹⁷⁹ *Acts* 1:3 (New King James).

¹⁸⁰ *Acts* 1:3 (1611 King James).

¹⁸¹ *Preface* at v (New King James) (Thomas Nelson, Inc. 1982).

¹⁸² *Id.*

¹⁸³ *Id.* (noting that a "more literal rendering is needed to reflect a specific and vital sense").

translators needed to achieve a high level of skill that required to modernize a passage without losing its meaning and structure.

In determining originality, courts strongly consider the amount of skill involved in creating the derivative work.¹⁸⁴ The court in *Grove Press* held that changing the spelling of words, changing punctuation, and other trivial changes required only the skill of a “high school English student.”¹⁸⁵ The court in *Batlin & Son* did not want to recognize a derivative work that was slavishly copied¹⁸⁶ but did concede that there would be much more consideration to copying if the copying required extreme skill.¹⁸⁷ The NKJV translators’ changes were more than simple spelling corrections or omissions of words. While some changes seem trivial, such as changing the word “saith” to “said” in verse four, the translators had to find words such as “suffering” and “presented” to take the place of outdated words such as “passion” and “shewed” without losing the meaning and flow of the text.¹⁸⁸ To translate the entire Bible in this manner should satisfy the low creativity threshold established in cases like *Grove Press* and *Batlin & Son*. Although the modernization of the KJV Bible necessitated some copying, the selection process of what was copied and updated was not done slavishly. In fact, as the court in *Merkos* suggested, translations are akin to works of art¹⁸⁹ and works of art should be considered creative.

C. APPLICATION OF THE MERGER DOCTRINE

The merger doctrine applies when copyright is denied because there are only a few options available to adequately express an idea and granting a copyright to one of these limited options would give an “effective monopoly on the underlying idea.”¹⁹⁰ In holding that the merger doctrine does not apply to a religious prayerbook, the court in *Merkos* stated that “the art of translation involves choices among many possible means of expressing ideas.”¹⁹¹ In holding that the format of the Hebrew Bible could not be copyrighted, the court in *Torah Soft* stated that “[t]he Hebrew Bible necessarily consists of a compilation of the Torah, the Prophets, and the Writings arranged in precisely the same order as arranged in the

¹⁸⁴ See *Grove Press*, 264 F. Supp. at 605; *Batlin & Son*, 158 F.3d at 490.

¹⁸⁵ 264 F. Supp. at 605.

¹⁸⁶ 536 F.2d at 490.

¹⁸⁷ *Id.* at 491 (referring to the skill involved in creating an exact replica of Rodin’s *Hand of God* in *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 123 U.S.P.Q. (BNA) 487 (S.D.N.Y. 1959)).

¹⁸⁸ *Cf. Acts* 1:3-4 (1611 King James); *Acts* 1:3-4 (New King James).

¹⁸⁹ See 312 F.3d at 97.

¹⁹⁰ JOYCE ET AL., *supra* note 7, at 124.

¹⁹¹ 312 F.3d at 99.

[plaintiff's] Database."¹⁹² Aside from trivial, functional changes, however, the Hebrew Bible was copied verbatim.¹⁹³

Unlike the situation in *Torah Soft*, the NKJV Bible is not a verbatim copy of the KJV Bible with only trivial, minor changes though the format of the Bible necessarily begins with Genesis and ends with Revelations and the number of verses and the message of each verse remains the same in every single translation. As stated in *Merkos*, there are many available word choices, especially if the only important point is the message and not the word order.¹⁹⁴ The translators of the NKJV Bible, however, translated the KJV Bible through complete equivalence,¹⁹⁵ even the word order was not original to the translators.

In *Matthew Bender*, the court held that the merger doctrine applied to court opinions.¹⁹⁶ The court noted that there were few choices available to adequately display the necessary information and that most of the choices were driven by function and not pure creative choice.¹⁹⁷ Conversely, the court in *CCC* held that the merger doctrine did not apply to used car valuations since the valuations depended on the professional judgment of the editors and there were many options available to devise price estimations.¹⁹⁸ As was the case in *CCC* where the used car valuations were projected using a number of factors chosen from many options,¹⁹⁹ the NKJV translators chose from a wide array of possible words in order to maintain the feel of the newer, modern translation. They had to chose which words to leave and which ones to change. Unlike the court opinions in *Matthew Bender* which were primarily functional and predicated on what occurred at trial,²⁰⁰ the words they chose were not necessarily limited to function and were chosen to maintain the original feel of the KJV Bible.

Even though the merger doctrine would not apply, there still are only a few ways to adequately translate a Bible since the message must necessarily be the same. While some Bible translations may allow for paraphrasing, the NKJV Bible was translated using the method of complete equivalence which necessarily limits the number of available options for alterations from the original. Thus, the NKJV Bible likely holds only a "thin" copyright. A thin copyright exists when the merger doctrine does not necessarily apply but options are limited; in this

¹⁹² 136 F. Supp. 2d at 288.

¹⁹³ *See id.* at 288-89.

¹⁹⁴ *See Merkos*, 312 F.3d at 99.

¹⁹⁵ *Preface* at v (New King James) (Thomas Nelson, Inc. 1982).

¹⁹⁶ 158 F.3d at 684-85.

¹⁹⁷ *See id.* at 683.

¹⁹⁸ *See CCC Info. Serv. Inc. v. Maclean Hunter Mkt. Reports Inc.*, 44 F.3d 61, 72-73 (2d Cir. 1994).

¹⁹⁹ *Id.*

²⁰⁰ *See Matthew Bender*, 158 F.3d at 684.

situation, copyright protection extends only to verbatim copying.²⁰¹ Some instances of paraphrasing that would normally be considered infringement would be permitted because of the thin protection.²⁰²

IV. CONCLUSION

It is highly likely that the majority of people who desire to copy sections from the Bible are not well versed in intellectual property law. They are likely to take for granted that the copyright symbol at the front of the Bible applies to the entire Bible, including the full text. Even if they were to conduct legal research, the amount of case law on Bible translation originality is severely lacking, and because of this dearth in litigation, many preachers and others desiring to use the Bible do not have an adequate basis for determining whether their photocopied section of the Bible infringes the Bible's supposed copyright. This Note analyzed two common translations of the Bible, the KJV Bible and the NKJV Bible, and compared the texts with the public domain version of the 1611 KJV Bible. This Note then sought to determine whether the KJV Bible and the NKJV Bible met the requisite amount of originality to gain a valid and enforceable copyright.

The KJV Bible was originally published in 1611 and has been in the public domain for quite some time. Because the KJV Bible is in the public domain, copyright protection cannot extend to a subsequent translation of the Bible unless sufficient originality is established. In the case of the KJV Bible, the text of the 1611 KJV Bible was copied verbatim with only trivial changes such as various words being italicized. Thus, the text of the KJV Bible should not be protected by the copyright notice that appears on the inside cover. While the KJV Bible's copyright will likely protect against added notes and introductory materials, the general public, including the pastor who desires to make photocopies, will probably be unaware of this distinction. To alleviate the public's confusion, the copyright statement should be accompanied by an acknowledgment that the copyright extends only to independently created materials. While this may not eliminate the problem entirely, the clarification would at least provide notice as to what was actually covered by the Bible's copyright.

The NKJV Bible contains the same message as the public domain KJV Bible and follows the same format, including the word order. Many of the words, however, were changed to aid in reading and account for modern language. Because of the skill involved in the selection process and the number of options available to the translators, the creativity prong of the originality requirement appears to be satisfied. Due to the many options available to the translators, the

²⁰¹ MARGRETH BARRETT, *INTELLECTUAL PROPERTY* 92 (Aspen Publishers 2004).

²⁰² *Id.*; see also *Feist*, 499 U.S. at 349 (noting that copyrights in factual compilations are thin).

merger doctrine should not apply. Because of the necessary format and flow of the Bible and the desire of the translators to adhere to the doctrine of complete equivalence, however, the copyright protection on the NKJV Bible is thin and will likely protect only against verbatim copying. Nonetheless, this copyright appears to be valid. Thus, unlike the KJV Bible, the entire NKJV Bible should be protected and an explanatory statement of the limits of copyright protection is not needed.

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