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Speaking to the Ghost: Idea and Expression in Copyright

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"An idea, like a ghost, according to the common notion of ghosts, must be spoken to a little before it will explain itself."[1]

I. INTRODUCTION

Copyright does not protect the ideas contained in a work, but only the way in which those ideas are expressed.[2] A playwright cannot obtain exclusive rights to the idea of feuding Irish-Catholic and

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1. Robert Y. Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 737 (1967) (quoting unknown source, *reprinted in* EDWARDS, NEW DICTIONARY OF THOUGHTS 271 (1944)).

2. *See* Mazer v. Stein, 347 U.S. 201, 217 (1954); Warner Bros. v. American Broadcasting Cos., 720 F.2d 231, 239 (2d Cir. 1983); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 363 (9th Cir. 1947); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930); Dymow v. Bolton, 11 F.2d 690, 691 (2d Cir. 1926). This principle, which developed in case law, has now been codified in 17 U.S.C. § 102(b) (1990): "In no case does copyright

Jewish families whose children marry and produce grandchildren.[3] Nor will copyright give an artist the exclusive right to paint two cardinals on the branches of a blossoming apple tree.[4] As Justice Brandeis said, "the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[5]

This distinction between unprotected idea and protected expression, often called the idea/expression dichotomy, is one of the central tenets of copyright law. However, the words idea and expression remain strangely undefined, terms without content, bottles without wine.[6] One cannot coordinate all things called idea, compare them with those called expression, and draw even the fuzziest of lines between them. The terms are used impressionistically, to justify a result rather than to provide a reason for reaching it.[7] They are mantras recited to give a result the imprimatur of law. The idea/expression dichotomy does, however, serve an important purpose.[8] It leaves those things termed "ideas" unprotected, which means that they may be used, or indeed copied, by others. It mitigates the rigors of "what might otherwise be an overreaching monopolistic control by the copyright owner, thus promoting society's interest in enriching the public

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protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work."

3. *Nichols*, 45 F.2d at 119.

4. Franklin Mint Corp. v. National Wildlife Art Exch., Inc., 575 F.2d 62 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978).

5. International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* XIII THE WRITINGS OF THOMAS JEFFERSON 326, 333-34 (Andrew A. Lipscomb ed., 1903):

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

6. Professor Goldstein suggests that " 'idea' and 'expression' should not be taken literally, but rather as metaphors for a work's unprotected and protected elements." 1 PAUL GOLDSTEIN, COPYRIGHT, § 2.3.1. (1989). *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) ("[N]o principle can be stated as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*.").

7. *See* Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 324 (1989).

8. Protecting ideas under copyright might create constitutional problems, as it would undercut the First Amendment interest in the free exchange of ideas. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-60 (1985).

domain."[9]

The primary purpose of copyright is to promote creativity and disseminate creative works, so that the public may benefit from the labor of authors.[10] Copyright provides authors with an incentive to create by giving them the exclusive rights to profit from and control certain specified uses of their works.[11] However, this incentive is not without costs. An incentive for one author provides a barrier to others. The exclusive rights granted by copyright diminish the ability of new authors to make use of what has come before in creating their own works. "The more extensive copyright protection is, the more inhibited is the literary imagination."[12]

All authors build on the work of their predecessors. The process of creation necessarily reshapes what already exists in the world. Authors do not create out of some inner void, "unaided and uninstructed by the thoughts of others."[13] We live and work within our culture, and the language and symbols that inhabit it. We draw sustenance and understanding from all that surrounds us, and use what we experience, including the creative works of others. The idea/expression dichotomy helps copyright strike a productive balance between providing incentives to create and protecting the public domain from being stripped of the raw materials needed for new creations.[14]

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9. Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560, 560-61 (1982); *see* Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 992 (1990) ("Courts invoked the public domain when the breadth of plaintiffs' asserted property rights threatened, as a practical matter, to prevent many other authors from pursuing their craft.").

10. *See* ALAN LATMAN ET AL., COPYRIGHT FOR THE NINETIES 12-15 (3d ed. 1989) (quoting REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3-6) (1961)).

11. These exclusive rights are, with limitations, reproduction, distribution, performance, display, and the preparation of derivative works. 17 U.S.C. § 106 (1988).

12. RICHARD A. POSNER, LAW AND LITERATURE 348 (1988). *See* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing en banc) ("Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.").

13. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C. D. Mass. 1845) (No. 4,436); *see* POSNER, *supra* note 12, at 348 ("The literary imagination is not a volcano of pure inspiration but a weaving of the author's experience of life into an existing literary tradition."); Litman, *supra* note 9, at 966-67 (Authorship is "more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea . . . . [Authors] all engage in the process of adapting, transforming, and recombining what is already 'out there' in some other form. This is not parasitism: it is the essence of authorship.").

14. *See* Sayre v. Moore, 102 Eng. Rep. 138, 140 n.6 (1785) (Lord Mansfield), *quoted in* Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1235 n.27 (3d Cir. 1986) ("[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived

> If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative, and dramatic action and other branches of literature would be hindered by copyright, instead of being promoted.[15]

Thus, elements called ideas should be left unprotected in order to avoid unduly inhibiting the independent creations of others.

The distinction helps draw an economic balance as well. Copyright protection may provide incentives for creation and investment in creation.[16] However, it undermines competition, which ordinarily makes markets efficient,[17] and renders the creation of new works more costly. Protecting ideas, in particular, might increase the cost of creating works and reduce the number of works created. An author would be required either to design around the ideas already expressed by earlier authors or incur increased licensing costs in order to obtain the right to use them.[18] Authors use "scraps of thought from thousands of predecessors, far too many to compensate even if the legal system were frictionless, which it isn't."[19] They should be free to use the basic building blocks of creation without having to locate and bargain with earlier authors. Furthermore, all authors are borrowers as well as lenders of ideas. Because creating an idea that is embedded in a copyrighted work ordinarily costs less than creating the work itself, authors, hiding "behind a veil of ignorance," might

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of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.").

15. Eichel v. Marcin, 241 F. 404, 408 (S.D.N.Y. 1913).

16. It is difficult to determine how much protection is needed to induce the optimal flow of creative works. *See* Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 596 (1985). There are other incentives to creation, such as prestige, prizes and patronage, and publishers continue to make money publishing HAMLET. *Id.* Other motives include fame or recognition among their peers, the desire to promulgate their views, or a need to create that is an integral part of their personalities. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1574.

17. Brown, *supra* note 16, at 604.

18. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 348 (1989). Landes and Posner hypothesize that each of N works express the same idea differently. Each might be a romance between those of different social classes or religious faiths whose parents are feuding. "If copyright protected the first author's idea, the cost of expression to each of the remaining N-1 authors would increase, because each would have to invest time and effort in coming up with an original idea for his work, or to substitute additional expression for the part of his idea that overlapped the first author's, or to incur licensing and other transaction costs to obtain the right to use the first author's idea." *Id.*

19. Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990).

well agree to a rule that protects expression but not ideas.[20]

Thus, the distinction between idea and expression serves an important purpose, but the meanings of protected expression and unprotected idea are unclear.[21] Copyright is not limited to prohibiting literal copying—taking the words, sounds, colors, lines used by an author.[22] Therefore, protectible expression must comprehend more than those literal elements. But if the distinction between idea and expression does not lie between the form of a work and its content, where does it lie? Ideas are difficult to explain and define. Like Hamlet, they will not have the heart plucked out of their mystery.[23] We may not be able to grasp them firmly in our hands. But perhaps, if we speak with them a little, they will explain themselves. This article

> does not run a straight course from beginning to end. It hunts; and in the hunting, it sometimes worries the same raccoon in different trees, or different raccoons in the same tree, or even what turns out to be no raccoon in any tree. It finds itself balking more than once at the same barrier and taking off on other trails. It drinks often from the same streams, and stumbles over some cruel country. And it counts not the kill but what is learned of the territory explored.[24]

Sections II and III consider the scope of copyright, the proper context for discussing the idea/expression dichotomy. Section II deals with the consequences of extending copyright protection beyond verbatim copying and the relationship between form and meaning. Section III analyzes the way in which the scope of copyright protection and infringement interact, and the effect this has on the idea/expression distinction. Section IV circles around the notion of an idea, and its distinction from expression, seeking for context and meaning. Finally, section V considers some symptoms of unprotected ideas—symptoms that are neither necessary nor sufficient conditions for the existence of an unprotectible idea, but tend, in conjunction with other such symptoms, to be present.[25]

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20. Landes & Posner, *supra* note 18, at 348-49.

21. *See* Libott, *supra* note 1, at 738. Libott notes that words such as "theme" or "plot" are appended to idea to show what sort of writings are beyond the pale of copyright protection, but this says nothing about the nature of an idea. *Id.* at 739. Furthermore, other cases, in other contexts, have protected themes and plots. *Id.*

22. *See infra* notes 34-38 and accompanying text.

23. "You would play upon me, you would seem to know my stops, you would pluck out the heart of my mystery, you would sound me from my lowest note to the top of my compass—and there is much music, excellent voice, in this little organ—yet cannot you make it speak . . . Call me what instrument you will, though you can fret me, you cannot play upon me." WILLIAM SHAKESPEARE, HAMLET, act III, sc. 2, 367-75 (G.B. Harrison ed., 1962).

24. NELSON GOODMAN, WAYS OF WORLDMAKING ix (1978).

25. *See* NELSON GOODMAN, LANGUAGES OF ART 252 (1968) (symptoms of the aesthetic).

II. SCOPE OF PROTECTION—FORM AND CONTENT

If copyright protected only against literal copying, the distinction between protected expression and unprotected ideas would present few problems. The line could be drawn between the form in which the author expressed her ideas and the content of those ideas. Indeed, copyright initially protected a work against literal copying only; abridgements, translations and dramatizations did not infringe an author's copyright.[26] Works adopted from "page to stage" infringed only if the dramatist made abundant use of the exact language from the original book.[27]

Stowe v. Thomas[28] provides an example of the way in which courts approached these cases. The plaintiff, Harriet Beecher Stowe, was the author of the very successful[29] and influential[30] novel, *Uncle Tom's Cabin*. The court held that an unauthorized German translation of the complete text of the novel did not infringe Stowe's copyright.[31] The court concluded:

> By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. . . . All her conceptions and inventions may be used and abused by imitators, play-rights, and poetasters. . . . All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it . . . . A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.[32]

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26. Charles B. Collins, *Some Obsolescent Doctrines of the Law of Copyright*, 1 S.C. L. REV. 127, 127 (1928); *see* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1-32 (1967); Libott, *supra* note 1, at 743-44.

27. Libott, *supra* note 1, at 744.

28. 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).

29. The book, published in 1852, sold 300,000 copies in the United States within the first year, and over one million copies in its London publication. George L. Aiken, *Uncle Tom's Cabin: Introduction*, *in* DRAMAS FROM THE AMERICAN THEATRE 1762-1909 350 (Richard Moody ed., 1966).

30. Lincoln reportedly said to Stowe, "So you're the little woman who wrote the book that made this great war!" *Id.* at 351.

31. *Stowe*, 23 F. Cas. at 208.

32. *Id.* Numerous dramatizations of the novel were also created and performed, without authorization, and Ms. Stowe never received a penny in royalties. Aiken, *supra* note 29, at 349-50. Shortly after publication of the novel, Asa Hutchinson, a popular temperance singer, asked permission to dramatize the play. Ms. Stowe replied:

> It is thought, with the present state of theatrical performances in this country, that any attempt on the part of Christians to identify themselves with them will be productive of danger to the individual character, and to the general cause. If the barrier which now keeps young people of Christian families from theatrical entertainments is once broken down by the introduction of respectable and moral plays, they will then be open to all the temptations of those who are not such, as

A copyright gave an author the right "to that arrangement of words which the author has selected to express his ideas."[33] The court in *Stowe* focused on the question of whether an allegedly infringing work had been literally copied or independently created, and whether any copying had been substantial enough to be considered infringing. An author of a literary work was only protected against the taking of her language. Everything else could be termed ideas, sentiments, conceptions, or thoughts and left undefined and unprotected.

Over the years, however, the scope of copyright protection greatly expanded, progressively providing more extensive rights. Copyright is no longer restricted to protecting against verbatim or near verbatim copying.[34] Appropriating the action of a play or novel, for example, may be infringing, even if none of the words are taken.[35] Although one who copies the basic plot or theme of a work will be taking only an unprotected idea, copying the patterning and arrangement of events and the interplay of characters is an actionable taking of expression.[36] In what has become known as the "abstractions" test, Judge Learned Hand said:

> Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where

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> there will be, as the world now is, five bad plays to one good. . . . The world is not good enough yet for it to succeed.

Id. at 350.

33. Holmes v. Hurst, 174 U.S. 82, 86 (1899).

34. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (protection "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations").

35. Frankel v. Irwin, 34 F.2d 142, 143 (S.D.N.Y. 1918). One author suggests that the change in conception among authors as to what constitutes literary property, which made its way into the law, was the result of

> the substitution of the canons of romantacism for those of classicism as the criteria of literature. Classicism assumed that literary excellence had some relation to scholarship—that inborn genius could not result in literature except in conjunction with learning and culture . . . . Romantacism went to the opposite extreme. Scholarship, it maintained, could never result in the production of great literature. The test of genius was originality and only the complete ignoramus could be completely original.

Kenneth B. Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932, 947-48. *But see* Libott, *supra* note 1, at 744-45 (suggesting that the expansion of literary property was due to the market for secondary and derivative uses of literary works, which expanded along with the Industrial Revolution).

36. *See* Zechariah Chafee, *Reflections on Copyright Law: I*, 45 COLUM. L. REV. 503, 513-14 (1945).

> they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.[37]

Once copyright began protecting against non-literal copying, the idea/expression dichotomy became more important. Because any taking or use of elements from a copyrighted work might be considered an infringement, a device was needed to limit potential liability. Copyright's refusal to protect what is termed "idea" limits the uses of elements from a copyrighted work that will be considered infringing. Otherwise, later creators would be unduly restricted as they sought to build on the work of others, to make use of what already exists in the culture. Too strict a limitation on the borrowing of non-literal elements could stifle independent creation.[38]

The extension of copyright protection beyond verbatim copying, however, not only made the distinction between ideas and expression more important, it also made it more difficult to characterize. Because copyright protection is not limited to the literal aspects of a work, liability may exist for taking content without form. But the form of a work cannot be cleanly separated from its content; the way something is said cannot be neatly detached from what is said. Changing the words used in a literary work may change the significance or feeling of what is said. Similarly, a slight alteration in color or shape may affect a painting's aesthetic qualities. Nelson Goodman has noted that when something is said, some aspects of the way it is said may be considered issues of style; content remains constant although the form has changed.[39] But each different way of saying something may amount to the saying of a different thing.[40] Synon-

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37. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). In what has been called the "patterns" test, Professor Chafee also sought to distinguish protectible expression from unprotectible ideas:

> [I]f we protect more than precise words, where shall we stop? The line is sometimes drawn between an idea and its expression. This does not solve the problem, because "expression" has too wide a range. To some extent, the expression of an abstract idea should be free for use by others. No doubt, the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the protection covers the "pattern" of the work. . . . the sequence of events and the development of the interplay of characters.

Chafee, *supra* note 36, at 513-14.

38. *Id.* at 513.

39. GOODMAN, *supra* note 24, at 24.

40. *Id.*

ymy[41] is suspect, and no two terms are likely to have exactly the same meaning.[42]

Keats wrote

> O, for a draught of vintage! that hath been
> Cool'd a long age in the deep-delved earth[43]

William Alston offers a paraphrase of those lines:

> Oh, for a drink of wine that has been reduced in temperature over a long period in ground with deep furrows in it.[44]

The words are very different. At first glance, the meaning seems very similar.[45] However, there are major differences. The words in Keats' lines are evocative. "Draught," "vintage," "cooled", and "earth" have connotations that go beyond the explicit meanings of the words. Keats conveys the excellence of the wine, the care and time that went into its production, and the delight that drinking it is expected to give.[46] The two pieces of writing do not say the same thing.

A similar problem in sorting meaning from form can be found in

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41. "Perfectly synonymous words would be . . . intersubstitutable in every sentence." WILLIAM P. ALSTON, PHILOSOPHY OF LANGUAGE 44 (1964).

42. *Id.* at 45.

43. John Keats, *Ode to a Nightingale*, *in* JOHN KEATS COMPLETE POEMS AND SELECTED LETTERS 349, 349 (Clarence D. Thorpe ed., 1935).

44. ALSTON, *supra* note 41, at 45.

45. Indeed, while conceding that the word "earth" has special associations lacking in the word "ground," such as earth mother, fertility, earthy qualities in people, Alston states: "I cannot see that in saying 'It came from the earth' I am taking responsibility for any condition over and above those for which I am taking responsibility in saying 'It came out of the ground.'" He thus concludes that ground and earth have the same meanings. *Id.* at 46. Monroe Beardsley disagrees, saying first that if the meaning of each word is its total illocutionary-act potential, earth and ground do differ in meaning; there are many illocutionary acts that can be performed with the help of one that will fail if the other is substituted. For example, ground mother cannot be substituted for earth mother. Monroe C. Beardsley, *The Testability of an Interpretation*, *in* PHILOSOPHY LOOKS AT THE ARTS 477 (Joseph Z. Margolis ed., 3d ed. 1978). He also concludes that the two words have different meanings in context. *See infra* note 46 and accompanying text.

An illocutionary act is what is accomplished in or by uttering a sentence. "The minimal units of human communication are speech acts of a type called illocutionary acts. Some examples of these are statements, questions, commands, promises, and apologies. Whenever a speaker utters a sentence in an appropriate context with certain intentions, he performs one or more illocutionary acts." JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC 1 (1985). The effect, the illocutionary act performed, in uttering a sentence, should not be confused with the effect on the hearer or reader. By asking the question, "Have you seen John?" I might cause you a crisis of conscience (you just saw your friend John photocopying secret documents). Nevertheless, the illocutionary act carried out by uttering those words is just that of asking a question. The term originated in J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 99-131 (1962); *see also* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 24-25 (1969).

46. Beardsley, *supra* note 45, at 478. "In short, the wine is praised in Keats's lines, but not in Alston's: a secondary illocutionary act is performed, as well as the primary one." *Id.* The quoted lines from Keats are followed by "Tasting of Flora and the country green, Dance, and

the distinction made in linguistics between syntax and semantics. Syntax deals with the grammar of a language;[47] semantics deals with its interpretation and meaning.[48] Semantics, however, is connected to syntax. We learn to use and understand language in terms of stimulus and response.[49] We learn to say "red" when exposed to certain sensations; and when exposed to the word "red" (its sound or, as seen here, its appearance), we call up certain sensations. Learning to understand and use a sentence, however, is more complicated than merely forming a habitual association of that sentence with a certain stimulus.[50]

Competent speakers of a natural language,[51] who possess a finite vocabulary and grammatical base, can produce and comprehend an indefinite number of new sentences in that language. They can create new sentences never before spoken or written by anyone, and other competent speakers of that language will understand these sentences. For example, it is unlikely that anyone has previously written the sentence: "Skinny lawyers with bald, sunburned heads who wear green and blue polka dot bowties are particularly good at mowing lawns." Nevertheless, the sentence is understood by any person who speaks English.

This is explained by supposing that the meanings of complex expressions are developed out of the meanings of their parts by using

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Provencal song, and sunburnt mirth!" Keats, *supra* note 43, at 349. It is unlikely that anyone could successfully paraphrase these lines.

47. "Syntax is a study which classifies expressions into various categories (such as nouns, verbs, etc.), and states principles according to which expressions of various categories can be combined. (For example, an adjective can modify a noun, so adjectives and nouns have a certain syntactic relation. Adjectives are not related to prepositions in the same way, for an adjective doesn't modify a preposition.)" JOHN T. KEARNS, THE PRINCIPLES OF DEDUCTIVE LOGIC, 4-5 (1988) (emphasis omitted).

48. "Semantics is a study of the meanings of expressions and the truth conditions of their sentences. Semantic relations between expressions are based on their meanings." *Id.* at 5. "Semantics, which is the study of meaning, is also concerned with the way in which the meanings of complex expressions in the language are determined by the structure of the expressions together with the meanings of the simple components occurring in the expressions." DONALD NUTE, ESSENTIAL FORMAL SEMANTICS 4 (1981) (emphasis omitted). "The study of the interpretation of the language as an interpretation is called semantics." 1 ALONZO CHURCH, INTRODUCTION TO MATHEMATICAL LOGIC 64 (1956) (emphasis omitted).

49. WILLARD VAN ORMAN QUINE, WORD AND OBJECT 81-85 (1960). On the dispute concerning the role of behavioral conditioning in language acquisition, see Danny D. Steinberg, *Overview*, *in* SEMANTICS 485 (Danny D. Steinberg & Leon A. Jakobovits eds., 1971).

50. An example is forming a habitual association of the sentence "I am thirsty" with certain somatic sensations.

51. A natural language, such as English, Japanese or Russian, is an historically conditioned language that developed and evolved naturally, through its use over the course of many years. An artificial language is a made-up language. Artificial languages may be intended as vehicles for human communication, as in Esperanto, or as logical or scientific instruments, as in Fortran and other computer languages.

rules that parallel the rules of syntax.[52] A person who internalizes the syntax of a language and knows the meaning of simple expressions is able to do two things; first, to combine simpler expressions in order to produce more complex ones; and second, to combine the meanings of the simpler expressions to produce a more complex meaning. The semantical rules for a language are dependent on its syntax. The rules used to work out the meaning of complex expressions closely parallel the rules used to construct them.[53]

Thus, form and meaning, syntax and semantics, are interdependent. However, this does not mean that different forms, which will inevitably have meanings that differ, cannot have very similar content.

> [D]istinctness of style from content requires not that exactly the same thing may be said in different ways but only that what is said may vary nonconcomitantly with ways of saying. Pretty clearly there are often very different ways of saying things that are very nearly the same. Conversely, and often more significantly, very different things may be said in much the same way—not, of course by the same text but by texts that have in common certain characteristics that constitute a style. . . . Even without synonymy, style and subject do not become one.[54]

Although a nonliteral copyist can never fully duplicate the meaning found in the original author's work, the duplication may justify a finding of infringement.[55] But caution is needed before accepting the notion that meaning/content/semantics has been taken when form/syntax is radically different. The most individualized contributions of

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52. This is known as the "Principle of Compositionality" or "Frege's Principle." *See* DAVID R. DOWTY ET AL., INTRODUCTION TO MONTAGUE SEMANTICS 7-10 (1981). *See also* MARK DE BRETTON PLATTS, WAYS OF MEANING 43-49 (1979). This principle has been attacked by a number of prominent philosophers and linguists, including Benson Mates and Noam Chomsky. For a review of their criticisms and a response, see JERROLD J. KATZ, LANGUAGE AND OTHER ABSTRACT OBJECTS 138-42 (1981).

53. The theory is that in a "logically perfect" language, there would be a perfect parallel between syntax and semantics. "[T]he desired result [is] that the semantical evaluation of an expression exactly recapitulates its grammatical construction." David Kaplan, *What is Russell's Theory of Descriptions*, *in* THE LOGIC OF GRAMMAR 214 (Donald Davidson & Gilbert Harman eds., 1975). For an explanation of the concept of a logically perfect language, see *id.* at 210-17.

54. GOODMAN, *supra* note 24, at 24-25.

55. To prove infringement, a plaintiff must show ownership of the copyright by the plaintiff and copying by the defendant. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.01 (1993). Without direct proof, plaintiff can establish copying by showing that the defendant had access to her work and that there is "substantial" or "probative" similarity between the two works. *Id.* Substantial similarity may also be used in determining whether the "copying went so far as to constitute improper appropriation." Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975); *see* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *see generally infra* notes 83-95 and accompanying text.

an author are ordinarily found in what is literal. Indeed, the greater a work of art, the more stubbornly it resists simple explanation and the more difficult it is to abstract from it that which makes it unique.

> A line may be stolen; but the pervading spirit of a great poet is not to be surreptitiously obtained by a plagiarist. The continued imitation of twenty-five centuries has left Homer as it found him.[56]

The meaning found in a work tends to be more universal—dependent on the way society as a whole has structured language, and on the vast accumulation of human experience that is our common heritage. Therefore, copyright should protect the meaning embedded within a work less rigorously than it protects a work's literal elements. It is important to avoid allowing a monopoly on these deeper structures, this universal heritage. Those who make early use of them should not prevent others, who have been exposed to their works, and who may have derived ideas from them, from making use of what belongs to all.

III. SCOPE OF PROTECTION—COPYRIGHTABILITY AND INFRINGEMENT

The line that distinguishes idea from expression cannot be drawn between the form of a work and its substance. Where then is it to be drawn? As Professor Kaplan noted about the decision in *Nichols*,[57] "Hand's explanation does, I think, sharpen our awareness of what we are about, but surely the technique described lacks precision. We are in a viscid quandary once we admit that 'expression' can consist of anything not close aboard the particular collocation in its sequential order."[58]

Unfortunately, the confusing overlap between the notions of copyrightability and infringement makes this quandary even stickier. The basic principle underlying the dichotomy is that expression is protected but ideas are not. These unprotected ideas, however, tend

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56. THOMAS B. MACAULAY, CRITICAL AND HISTORICAL ESSAYS, *quoted in* Umbreit, *supra* note 35, at 949 n.78. *See* Miller v. City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (en banc) (Posner, J., concurring). Judge Posner quotes T.S. ELIOT'S *The Wasteland*: "Highbury bore me. Richmond and Kew/ Undid me. By Richmond I raised my knees/ Supine on the floor of a narrow canoe./ My feet are at Moorgate, and my heart/ Under my feet. After the event/ He wept. He promised 'a new start'/ I made no comment. What should I resent?" *Id.* at 1095. Posner says that the idea that might be extracted from the passage is that sex is sordid and disgusting. "It is the expression that gives the idea impact . . . . The idea in itself is nothing—banal, undeveloped, mostly false . . . . These are just the materials from which the great writer or popular entertainer makes . . . art or popular entertainment." *Id.*

57. *See supra* note 37 and accompanying text.

58. KAPLAN, supra note 26, at 48. Indeed, Judge Hand himself said, in a later case, that "no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*." Peter Pan Fabrics v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

to exist, at least in the context of copyright cases, within works that are copyrightable and copyrighted. Ideas, like facts,[59] scenes a faire,[60] and expressions that can take only a limited number of forms,[61] are termed unprotectible elements within that protected work.[62] Copyright can be thought of as something in the nature of a swiss cheese—full of holes. The unprotectible elements within a work, however, cannot be simply snipped out as with a scissors. Rather, they must be conceptualized out by the perceiver, who will need to make judgments and evaluations.

Thus, any attempt to distinguish protected from unprotected elements within a copyrighted work requires a consideration of the scope of copyright. When we ask to what extent a copyrighted work is protected, we imply another question: what is the work protected against? To what extent may others use elements taken from a copyrighted work without infringement?[63] The scope of copyright protection is interwoven with the question of infringement.

This interweaving is the source of several problems. First, the idea/expression distinction is stated in absolute terms — ideas are not protectible — but dealt with in terms of comparisons. Second, the traditional test for infringement, which requires a showing of ownership of the copyright by the plaintiff and copying by the defendant,[64] does not deal adequately with the scope of copyright protection. This inadequacy is compounded by the use or misuse of intrinsic and extrinsic tests.

A. *Absolutes and Comparisons*

Courts ordinarily apply the distinction between idea and expres-

59. Hoehling v. Universal City Studios, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *see also* BarrisFrazer Enters. v. Goodson-Todman Enters., 5 U.S.P.Q.2d (BNA) 1887 (S.D.N.Y. 1988); Alexander v. Haley, 460 F. Supp. 40 (S.D.N.Y. 1978).

60. Scenes a faire have been defined as "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." Alexander v. Haley, 460 F. Supp. 40 (S.D.N.Y. 1978). *See generally* Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79 (1989).

61. Toro Co. v. R & R Products, 787 F.2d 1208 (8th Cir. 1986); Morrisey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967); BarrisFrazer Enters. v. Goodson-Todman Enters., 5 U.S.P.Q.2d (BNA) 1887 (S.D.N.Y. 1988); Alexander v. Haley, 460 F. Supp. 40 (S.D.N.Y. 1978).

62. *See* Dymow v. Bolton, 11 F.2d 690, 691 (2d Cir. 1926) (The copyright statute protects all copyrightable components of the copyrighted work, which presupposes that there is much in what is called a copyrighted work that remains unprotected).

63. As Professor Nimmer has pointed out, the idea/expression dichotomy is less a limit on a work's copyrightability than "a measure of the degree of similarity which must exist as between a copyrightable work and an unauthorized copy, in order to constitute the latter an infringement." 1 NIMMER & NIMMER, *supra* note 55, § 2.03[D].

64. *See infra* notes 69-71 and accompanying text.

sion in the context of infringement cases,[65] which compare the plaintiff's and defendant's works. This use of comparisons is essential in discussing the distinction, because attempting to identify *the* idea of a work in the abstract makes little sense. What is the idea of Romeo and Juliet? What is the idea of Seurat's Grande Jatte? Is it the idea of painting people in the park on a Sunday afternoon or of using tiny dots of pure color to create a visual image, or both? Perhaps it was painted as an anti-Impressionist manifesto.[66] Many different ideas inhere in any work, depending on how one thinks about it, and who does the thinking. It is impossible to isolate a single unprotected idea within a work. Indeed, when courts state that some element in the plaintiff's work is an unprotected idea, that element usually is chosen for consideration because it was one that was allegedly taken by the defendant.

In the *Nichols* case, Judge Hand spoke of a point in a series of abstractions where expression becomes idea.[67] If we look only at the plaintiff's work, how are the levels of abstraction within that work to be determined? Where, in the many series of possible abstractions, is the line between idea and expression crossed? The variables are endless. If, however, we compare the plaintiff's and defendant's works, the inquiry gains clarity and focus. We can consider the level of abstraction at which the similarities between the plaintiff's work and the defendant's work lie. We can then attempt to determine, in that specific context, whether the similarity lies on the idea or expression side of the line. It is unnecessary to determine at what hypothetical point that line is crossed, or whether other, hypothetical uses would infringe.

Thus, in dealing with the distinction between idea and expression, it is important to remember that the point is not to determine *the* idea of the plaintiff's work or *the* line at which idea shades into expression within the plaintiff's work.[68] Rather, we need to determine

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65. In a few rare situations, the issue of whether a work contains any protectible expression will arise on review of a decision by the Register of Copyrights to refuse registration of a work because in contains no protectible expression. *See* Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989); Brown Instrument Co. v. Warner, 161 F.2d 910 (D.C. Cir.), *cert. denied*, 332 U.S. 801 (1947). Such a refusal is inappropriate, because any work in fixed form must, by definition, contain literal expression. The amount of protectible expression may be so thin that the work will receive little or no protection by virtue of its copyright, but this should be determined in an infringement context.

66. *See* PHOEBE POOL, IMPRESSIONISM 167 (1967).

67. Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930). *See supra* note 37 and accompanying text.

68. In some cases, where courts have tried to determine *the* idea, the results have been unfortunate. *See* Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. 1986) (discussed *infra* notes 149-55 and accompanying text); *see also* McCulloch v. Albert E.

whether that which is copied from the plaintiff by the defendant should be called unprotected idea or protected expression. This should be accomplished by examining the nature of the similarities between the plaintiff's and defendant's works.

B. *Testing for Infringement*

Traditionally, copyright infringement is established when a plaintiff proves ownership of the copyright and copying by the defendant.[69] In the absence of direct proof of copying, such as an admission by the defendant, the plaintiff will seek to establish copying by showing that the defendant had access to the allegedly infringed work and that the defendant's work is substantially similar to the plaintiff's.[70] The extent of similarity between the two works is relevant in determining whether, based upon circumstantial evidence, the defendant's work was independently created or copied.[71]

Not all forms of copying, however, amount to infringment. Copying the "idea" from someone else's work is permissible.[72] In *Nichols*, for example, the plaintiff's play and the defendant's motion picture both concerned a quarrel between a Jewish and Irish father, the marriage of their children, the birth of grandchildren, and a reconciliation.[73] Judge Hand said that even if the defendant copied those elements from the plaintiff, there was no infringement. "Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she

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Price, Inc., 823 F.2d 316, 318-20 (9th Cir. 1987) (the idea of a decorative red plate with floral design and the phrase "You Are Special Today" was honoring someone at dinner); *cf.* Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37 (D. Mass. 1990) (the court was forced into complex contortions because, at least in theory, it had to decide the extent to which the plaintiff's program was protectible without comparing it to the defendant's).

69. *See* 3 NIMMER & NIMMER, *supra* note 55, § 13.01, n.5.1 (prior to 1991, these elements were probably the most oft-cited passage in the Treatise). In the most recent version of the Treatise, the authors state, however, that the term encompasses "copying as a factual proposition" and "improper appropriation, i.e. actionable copying as a legal proposition." *Id.* § 13.03[A].

70. *See* ALAN LATMAN, THE COPYRIGHT LAW 161 (5th ed. 1978); 3 NIMMER & NIMMER, *supra* note 55, § 13.01[B]. Substantial similarity exists if "the fundamental essence or structure of one work is duplicated in another." *Id.* § 13.03[A][1].

71. There is no copyright infringement in the absence of copying. An independently created work does not infringe, however similar it is to an earlier work.

72. *See supra* notes 2-5 and accompanying text; *see also* Lewys v. O'Neill, 49 F.2d 603, 607 (S.D.N.Y. 1931) (quoting AUGUSTINE BIRRELL, *Literary Larceny*, *in* SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 167 (1899)) ("Ideas . . . are free as air. If you happen to have any, you fling them into the common stock, and ought to be well content to see your poorer brethren thriving upon them.").

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

wrote. It was only a part of her 'ideas'."[74] Another court[75] said that even if the defendant copied the idea of a remote broadcast interrupted by an armed robber, the copying was not actionable "because it is only of an idea, and the handling, scenes, details and characterization used by plaintiffs and defendants in their works based on this idea are unquestionably not substantially similar."[76]

The need to distinguish idea from expression arises in instances of non-literal copying. The defendant has added something to the plaintiff's material to reshape or recast it. In such a case, it is necessary to determine how far "an imitator must depart from an undeviating reproduction to escape infringement."[77] Thus, infringement involves than ownership and copying. Copyright does not and should not forbid all forms of non-literal copying, all forms of making use of another's copyrighted work.

It is, therefore, important to ask not simply whether there has been copying, but what it is that has been copied. A copyrighted work is protected, but not against every sort of taking. Indeed, there are cases that acknowledge copying, at least in the sense of the defendant making use of the plaintiff's work in creating its own, but where the courts found no infringement.[78] For example, in *Universal Athletic Sales Co. v. Salkeld*,[79] the parties disputed whether the defendants had traced the stick figures in the plaintiff's weight-lifting chart or had merely copied them freehand. Everyone agreed that the defendant copied these figures. Nevertheless, the court found that this copying was insufficiently substantial for infringement.[80] In

74. *Id.* at 122. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936). This case involved several fictional versions of the same murder and trial. Judge Hand said that defendants could use not only material the plaintiffs did not originate, but "even the plaintiffs' contribution itself, if they drew from it only the more general patterns; that is, if they kept clear of its 'expressions'." *Id.* at 54; *see also* Dymow v. Bolton, 11 F.2d 690, 691 (2d Cir. 1926) (even if the defendant copied the plaintiff's plot, he did not infringe; copyright does not protect ideas and fundamental plots).

75. Giangrasso v. Columbia Broadcasting Sys., 534 F. Supp. 472 (E.D.N.Y. 1982).

76. *Id.* at 476.

77. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

78. Narell v. Freeman, 872 F.2d 907 (9th Cir. 1989); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975); Runstadler Studios, Inc. v. MCM Ltd. Partnership, 768 F. Supp. 1292 (N.D. Ill. 1991); Ideal Toy Corp. v. Kenner Prods., 443 F. Supp. 291 (S.D.N.Y. 1977); *cf.* Laureyssens v. Idea Group Inc., 964 F.2d 131, 140 (2d Cir. 1992) (access and similarities at least raise a question of actual copying, leaving unlawful appropriation as the central concern).

79. 511 F.2d 904 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975).

80. The court said that "substantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement. . . . While '[r]ose is a rose is a rose is a rose,' substantial similarity is not always substantial similarity." *Id.* at 907.

Narell v. Freeman,[81] the author of an allegedly infringing novel admitted that she consulted and used the plaintiff's historical book during her research and that she took some language from it. The court did not deem it to be infringement, however, because the defendant copied only facts, ideas, and short, ordinary phrases.[82]

Some courts recognize that proof of copying may not always suffice to show infringement and add a requirement of improper appropriation.[83] The meaning of "improper appropriation," however, like so much in copyright, is ill-defined. Perhaps the closest thing to a definition is the rather circular statement that unlawful appropriation is a taking of "the independent work of the copyright owner which is entitled to the statutory protection."[84] Unlawful appropriation, however, does encompass two limitations on what is considered infringement.

First, some courts focus on the value and importance of what is taken, and thus the effect of the copying upon the plaintiff's market.[85] In *Arnstein v. Porter*,[86] the plaintiff claimed that Cole Porter had infringed a number of musical compositions he had written. Judge Frank, writing for the majority, distinguished two separate elements in a copyright suit: "(a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation."[87] The existence of improper appropriation, said Judge Frank, depends upon the reaction of the audience:

> The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears

81. *Narell*, 872 F.2d at 910.

82. *Id.* at 911.

83. *See, e.g.*, Laureyssens v. Idea Group, Inc., 964 F.2d 131, 139 (2d Cir. 1992); Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 291 (3d Cir. 1991); Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir. 1986); Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975); Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946). *See also* 2 GOLDSTEIN, *supra* note 6, § 7.1 (plaintiff must show that, "taken together, the elements copied amount to an improper appropriation.").

84. *Summit Motor Prods.*, 930 F.2d at 291 (quoting *Salkeld*, 511 F.2d at 908).

85. Dawson v. Hinshaw Music Inc., 905 F.2d 731, 736-37 (4th Cir. 1990); *Salkeld*, 511 F.2d at 907-08; *Arnstein*, 154 F.2d at 468 (2d Cir. 1946); *see also* Midway Mfg., Co. v. Bandai-America, Inc., 546 F. Supp. 125 (D.N.J. 1982).

86. 154 F.2d 464 (2d Cir. 1946).

87. *Id.* at 468.

> of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.[88]

If an artist sits before a painting for days, copying it, but produces something very unlike the original, nothing requiring protection has been taken. Improper appropriation occurs only if the defendant's copying captures the audience and thus the economic rewards that would otherwise belong to the plaintiff.[89]

Other courts focus on the nature of the material taken from the plaintiff's work, distinguishing between protected and unprotected elements.[90] The court in *Walker v. Time Life Films, Inc.*, for example stated that the "[plaintiff] must show that his book was 'copied,' by proving access and substantial[91] similarity between the works, and also show that his expression was 'improperly appropriated,' by proving that the similarities relate to copyrightable material."[92] Similarities that support an inference of copying may also support a finding of improper appropriation, but such a finding is not inevitable.[93] Works may be similar because the defendant makes use of elements in the plaintiff's work such as ideas, facts, or scenes a faire. Because copying such elements is permitted, these similarities, however substantial they may appear, are not sufficient for a finding of infringement. Professor Goldstein deals with this problem, saying: "To prove improper appropriation, the plaintiff must show (a) that at least some of the elements that the defendant copied constitute protected subject matter, and (b) that audiences will find these elements in the defendant's work to be similar to elements in the plaintiff's work."[94] The court in *Dymow v. Bolton*[95] put it slightly differently: it is necessary to decide

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88. *Id.* at 473.

89. *See* 2 GOLDSTEIN, *supra* note 6, § 7.1.2.

90. *See* Narrell v. Freeman, 872 F.2d 907, 910 (9th Cir. 1989) ("The underlying question is whether *protected* elements of Narell's book were copied."); *see also* Laureyssens v. Group Idea, Inc., 964 F.2d 131, 141 (2d Cir. 1992) (considering "whether substantial similarity as to protectible material exists between the works at issue"); Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir. 1986) (similarities must relate to copyrightable material); Atari Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) (copyright precludes appropriation only of protected elements of a work).

91. Professor Latman has suggested that similarity, in order to be probative of copying, need not be substantial. Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1214 (1990). (The issue that must be determined is whether the access and similarity that exist in the case provide sufficient circumstantial evidence of copying.)

92. *Walker*, 784 F.2d at 48.

93. 2 GOLDSTEIN, *supra* note 6, § 7.1. *See* Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975); *supra* note 80.

94. 2 GOLDSTEIN, *supra* note 6, § 7.1.

95. 11 F.2d 690, 692 (2d Cir. 1926).

whether an appropriation (a) is of copyrightable material, and (b) is substantial.

The often recited mantra that copying is the only requirement for infringement is misleading and incorrect. Not all copying is forbidden. When a defendant has been exposed to the plaintiff's work and has made some use of it, we need to determine whether this use is permissible or not. Although some courts have recognized this need, the recognition has been haphazard and erratic. Copying and improper appropriation are separate issues and should be treated as such.

C. *Confusion Compounded—Intrinsic and Extrinsic Tests*

This tangle is further snarled by the distinction that is often made between using extrinsic and intrinsic tests in determining whether infringement exists. The central source of this muddle is probably the Ninth Circuit decision in *Sid & Marty Krofft Television v. McDonald's Corp.*[96] The court recognized that the classic distinction between an idea and its expression provides a means of limiting the scope of copyright.[97] In seeking to provide such a limiting principle, however, the court caused more problems than it solved. The *Krofft* court created a two-part test. The first prong requires a determination of whether the plaintiff's and defendant's works are substantially similar in ideas, using an objective "extrinsic" test, which permits analytic dissection and expert testimony.[98] The second prong requires a determination of whether there is substantial similarity in expression, using a subjective "intrinsic" test, which does not permit such dissection and testimony.[99]

This approach fails to deal adequately with the distinction between idea and expression. Which sorts of similarities should be called idea, requiring the extrinsic test, and which are expression, requiring the unanalytical intrinsic approach? Furthermore, an intrinsic test may work reasonably well in cases like *Arnstein v. Porter*,[100] or *Krofft* itself, where the basic issue is the effect of the defendant's copying on the plaintiff's market.[101] In determining the value and importance of what was taken, the response of the audience

96. 562 F.2d 1157 (9th Cir. 1977).

97. The court was concerned that requiring no more than ownership, access, and substantial similarity could create untenable results. *Id.* at 1162. The idea/expression distinction was seen as providing a needed limiting principle. *Id.* at 1163.

98. *Id.* at 1164.

99. *Id.*

100. 154 F.2d 464 (2d Cir. 1946).

101. *See supra* notes 85-89 and accompanying text.

to the total look and feel of the works is significant.[102] The test is singularly unhelpful, however, in seeking to determine whether the defendant has taken protectible or unprotectible elements from the plaintiff's work. In pursuing this inquiry, analysis and dissection are essential.[103]

Perhaps recognizing this problem, the Ninth Circuit reformulated *Krofft* in later cases, making it more workable by including more and more under the rubric of "idea," thus allowing more analysis.[104] Eventually, in *Shaw v. Lindheim*,[105] the court explicitly stated that, at least in the context of evaluating literary works, the application of the *Krofft* two-part test was "more sensibly described as objective and subjective analyses" of similarity in expression.[106] Thus, the *Shaw* court apparently incorporated into its test for infringement something akin to both kinds of improper appropriation.[107] The court failed, however, to distinguish between the similarity required to prove copying and that necessary to establish improper appropriation.[108]

Other courts, outside the Ninth Circuit, have created similar difficulties. In *Laureyssens v. Idea Group, Inc.*,[109] for example, the court said that a plaintiff must first show actual copying by demonstrating access and substantial similarity.[110] The plaintiff then must demonstrate that the copying amounted to improper or unlawful appropriation by showing that the substantial similarities related to protectible materials.[111] This was an excellent beginning. Unfortunately, the court added that dissection is proper for determining whether copying

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102. *See* Dawson v. Hinshaw Music Inc., 905 F.2d 731, 735 (4th Cir. 1990) ("The lay listener's reaction is relevant because it gauges the effect of the defendant's work on the plaintiff's market.").

103. *See* Runstadler Studios, Inc. v. MCM Ltd. Partnership, 768 F. Supp. 1292, 1297 (N.D. Ill. 1991) (Copyright forbids appropriating only those elements of a work that are protected by copyright, and establishing those parameters requires analytical dissection.).

104. These cases enormously expanded the meaning of idea, saying that the test for substantial similarity of ideas compares "not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters . . . . [It] requires a comparison of plot, theme, dialogue, mood, setting, pace and sequence.' " Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985) (quoting Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985)); *see* Narell v. Freeman, 872 F.2d 907, 912 (9th Cir. 1989).

105. 919 F.2d 1353 (9th Cir. 1990).

106. In Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991), the court said that the *Shaw* holding was limited to literary works.

107. *See supra* notes 83-95 and accompanying text.

108. *See Shaw*, 919 F.2d at 1361-62.

109. 964 F.2d 131 (2d Cir. 1992).

110. The court noted that it is not always necessary to prove substantial similarity in order to prove copying. *Id.* at 140.

111. *Id.* at 139-40.

has taken place but is irrelevant to determining unlawful appropriation.[112] As in *Krofft*, analysis is forbidden in making a most analytical determination.[113]

The importance of the distinction between idea and expression lies in its use to sort actionable takings from those that should be permitted. Because some copying is allowed, it is necessary to determine how much or, conversely, how far exclusive rights should extend. Focusing on similarities in the look and feel of a work, on its overall impression, will likely lead to overprotective results. These similarities may result from the use of elements such as ideas, facts, and scenes a faire. The notion that substantial similarity in expression, not just idea, is required serves the goal of distinguishing between those forms of non-literal copying that are actionable and those that are not. It safeguards the raw material that makes creation possible and avoids unnecessarily curtailing the ability of new authors to create new works.

IV. NATURE OF AN IDEA

As Judge Hand noted, it is impossible to fix the boundary between those things copyright calls ideas and those it calls expression.[114] It may be possible, however, to fathom its mystery, at least a little, by circling around the notion of idea and its distinction from expression. As definition fails, let us speak with the ghosts in a few different contexts.

A. *The Meaning of Idea*

The word "idea" is derived from a Greek term, meaning "a form,

112. *Id.* at 140. *See* Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 291 (3d Cir. 1991) (An extrinsic test is used to determine whether similarities are sufficient to demonstrate copying, but an intrinsic test is used to determine whether improper appropriation exists.).

113. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). Indeed, the court in *Laureyssens* seemingly recognized the problem, commenting that when a design contains both protectible and unprotectible elements, the ordinary observer's inspection must be discerning, ignoring unprotectible aspects of the plaintiff's work when comparing it to defendant's. *Laureyssens*, 964 F.2d at 141. The same concern was expressed in Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982). While dissection is generally disfavored in determining improper appropriation, "the ordinary observer test, in application, must take into account that the copyright laws preclude appropriation of only those elements of the work that are protected by the copyright." *Id.* at 614.

114. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). *See* Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990) (Hand's test, "while a clever way to pose the difficulties [in distinguishing between idea and expression], does little to help resolve a given case.").

the look or appearance of a thing as opposed to its reality, from *idein*, to see."[115] In the *Timaeus*, Plato saw ideas as eternal paradigms, independent objects to which the divine demiurge looks as patterns in forming the world.[116] This was later modified to the religious conception of ideas as the thoughts of God.[117] "It is not a very long step to extend the term 'idea' to cover patterns, blueprints, or plans in anyone's mind, not only in God's."[118] The word entered the French and English vernacular in the 1600s[119] and possessed two meanings. The first was the Platonic meaning of a perfect exemplar or paradigm. The second, which probably has its origin with Descartes, is of a mental concept or image[120] or, more broadly, any object of the mind when it is active.[121] Objects of thought may exist independently. The sun exists (probably) before and after you think of it. But it is also posssible to think of things that have never existed, such as a unicorn or Pegasus.[122] John Locke defined ideas very comprehensively, to include all objects of the mind.[123] Language was a way of translating the invisible, hidden ideas that make up a person's thoughts into the

115. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 901 (2d. ed. 1963); *see* 4 ENCYCLOPEDIA OF PHILOSOPHY 118 (Paul Edwards ed., 1967) ("The word 'idea' is a transliteration of a Greek word of which the root meaning is 'see.' ").

116. 4 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 115, at 118.

117. *Id.*

118. *Id.* at 119.

119. *Id.*

120. "Some of my thoughts are as it were the images of things, and it is only in these cases that the term 'idea' is strictly appropriate . . . ." Rene Descartes, *Mediation on First Philosophy, in* DESCARTES: SELECTED PHILOSOPHICAL WRITINGS 88 (John Cottingham et al. trans., 1988).

121. "I understand [idea] to mean the form of any given thought, immediate perception of which makes me aware of the thought. Hence, whenever I express something in words, and understand what I am saying, this very fact makes it certain that there is within me an idea of what is signified by the words in question." Rene Descartes, *Objections and Replies, in* DESCARTES: SELECTED PHILOSOPHICAL WRITINGS 152-53 (John Cottingham et al. trans., 1988). Some philosophers have a more limited conception of idea. Leibniz, for example, said that an idea is something which exists in our minds, but that many things exist in our minds which are not ideas, such as thoughts, perceptions and affections. "In my opinion . . . an idea consists, not in some act, but in the faculty of thinking, and we are said to have an idea of a thing even if we do not think of it, if only, on a given occasion, we can think of it." GOTTFRIED W. LEIBNIZ, GOTTFRIED WILHELM LEIBNIZ: PHILOSOPHICAL PAPERS AND LETTERS 207 (Leroy E. Loemker ed. & trans., 2d ed. 1970). Ideas were seen, not always as objects of the mind, but also as acts of the mind. Robert McCrae, *"Idea" as a Philosophical Term in the Seventeenth Century*, 25 J. HIST. IDEAS 175, 179-82 (1965).

122. According to Augustine, "the mind has the power to add to or subtract from things, to alter the deposits left in the memory by experience. Thus, if we add to or subtract from the form of a raven, we will imagine a creature that does not exist in nature." UMBERTO ECO, ART AND BEAUTY IN THE MIDDLE AGES 108-09 (H. Bredin trans., 1986).

123. An idea is "whatsoever is the object of the understanding when a man thinks, . . . whatever is meant by phantasm, notion, species, or whatever it is which the mind can be

external, perceptible world of articulate sounds and visible written symbols that others can understand.[124]

In discussions of the origin of ideas, three kinds of ideas were distinguished: innate, adventitious, and factitious. Innate ideas come from the soul's own depths and are not given to it by the senses.[125] They are ideas "which I find in my mind as already impressed upon it—impressed upon it in its original condition by God."[126] Adventitious ideas are "those I experience as being impressed upon the mind by the actions of bodies outside me," such as the ordinary idea of the sun.[127] Factitious ideas are those which a person produces there, such as the ideas of the sun astronomers construct by reasoning.[128]

However an idea gets into the mind, whether impressed upon it from the outside, produced from within, or innately residing there, "idea" means something that exists within a human mind. This meaning will not suffice, in copyright terms, to divide protectible expression from unprotectible idea. It would leave a work unprotected against all but literal or nearly literal copying. Copyright protects against more than the use of an author's words, lines, color, notes, and the like. Thus ideas, as things existing within a human mind, dwell on the expression side of the idea/expression dichotomy, as well as the side labelled idea. Thus, some ideas are protectible, and others are not.

One court defined an idea as "any conception existing in the mind as a result of mental understanding, awareness, or activity."[129] This sort of idea, however, cannot be copied. When ideas are called unprotected, this means that there is no "monopoly over the unparticularized expression of an idea at such a level of abstraction or generality as unduly to inhibit independent creation by others."[130]

B. *Abstract v. Concrete Ideas*

Because ideas, as they are commonly understood, dwell on both sides of the idea/expression dichotomy, it is necessary to distinguish protectible from unprotectible ideas. Perhaps we can sort unpro-

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employed about in thinking." JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 4 (25th ed., William Baynes & Son 1824) (1690).

124. *Id.* at 291-94.

125. GOTTFRIED W. LEIBNIZ, NEW ESSAYS ON HUMAN UNDERSTANDING, *quoted in* IV ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 115, at 119.

126. McCrae, *supra* note 121, at 184.

127. *Id.* at 184. *See* 4 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 115, at 120.

128. 4 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 115, at 120; *see* McCrae, *supra* note 121, at 184.

129. Gund, Inc. v. Smile Int'l, Inc., 691 F. Supp. 642, 644 (E.D.N.Y. 1988).

130. *Id.*

tectible abstract ideas (labelled ideas) from protectible concrete ideas (labelled expression). The words "abstract" and "concrete" arise in many cases dealing with the idea/expression distinction. The *Nichols* court, for example, found that the defendant's film did not infringe the plaintiff's play because it was "too generalized an abstraction from what plaintiff wrote . . . only a part of her ideas."[131] In *Eichel v. Marcin*, the court said that authors may exploit facts, experiences, field of thought, and general ideas found in another's work, "provided they do not substantially copy a concrete form, in which the circumstances and ideas have been developed, arranged, and put into shape."[132] Judge Hand, in *National Comics Publications, Inc. v. Fawcett Publications, Inc.* said that "no one infringes, unless he descends so far into what is concrete as to invade . . . 'expression.' "[133]

These cases seem to be distinguishing "abstract" ideas from "concrete" tangible embodiments of these abstractions that may be termed expression. However, if the concrete form of a work means more than the literal expression contained within it, it is difficult to determine what is meant by "concrete." *Webster's New Twentieth Century Dictionary of the English Language* provides several meanings for the word concrete. These include: "having a material, perceptible existence; of, belonging to, or characterized by things or events that can be perceived by the senses; real; actual;" and "referring to a particular; specific, not general or abstract."[134] Abstract is defined as: "thought of apart from any particular instances or material objects; not concrete" and "expressing a quality thought of apart from any particular or material object; as, beauty is an *abstract*

131. Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930). *See* Nash v. CBS Inc., 899 F.2d 1537, 1540 (7th Cir. 1990) (scope of protectible expression depends on "the level of abstraction at which the court conceives the interest protected by the copyright.").

132. Eichel v. Marcin, 241 F. 404, 409 (D.C.N.Y. 1913). *See* Barris Fraser Enter. v. Goodson-Todman Enter., 5 U.S.P.Q.2d (BNA) 1887 (S.D.N.Y. 1988) (similarities too common and general to approach the concreteness and particularity deserving of copyright protection); *cf.* Shaw v. Lindheim, 919 F.2d 1353, 1357-58 (9th Cir. 1990) (testing for similarities in a lengthy list of concrete elements cannot be seen as testing for mere similarity of ideas); Narrell v. Freeman, 872 F.2d 907, 912 (9th Cir. 1989) (testing for substantial similarity requires a comparison not of basic plot ideas, but actual concrete elements that make up the total sequence of events and relationships); Berkic v. Crichton, 761 F.2d 1289 (9th Cir. 1985) (same).

133. National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 600 (1951). Judge Hand said that there is a point at which the similarities between plantiff's and defendant's works are so little concrete, and thus so abstract, that they become only the theme, idea or skeleton of the plot, which are always in the public domain. Shipman v. RKO, 100 F.2d 533, 538 (2d Cir. 1938) (Hand, J., concurring); *see also* Warner Bros., Inc. v. American Broadcasting Co., 654 F.2d 204, 209 (2d Cir. 1981) (similarities not sufficiently particular and concrete to represent an appropriation of the plaintiffs' protected expression).

134. WEBSTER'S, *supra* note 115, at 378.

word."[135]

These definitions are not very helpful in sorting what copyright considers to be idea from what it considers expression. Professor Goodman notes:

> The overwhelming case against perception without conception, the pure given, absolute immediacy, the innocent eye, substance as substratum, has been so fully and frequently set forth—by Berkeley, Kant, Cassirer, Gombrich, Bruner, and many others—as to need no restatement here. . . . Although conception without perception is merely *empty*, perception without conception is *blind* (totally inoperative). . . . [C]ontent vanishes without form.[136]

Indeed, it is a mistake to look for a clear dividing line between the "abstract" and the "concrete." Michael Dummett, in discussing abstract objects, has suggested that not every object falls clearly within these two categories.[137] He says that a rough everday method of distinguishing between concrete and abstract objects is to term concrete only those things that can be seen, touched,[138] or pointed to.[139] This, however, would leave colorless gas, sound, and smell on the abstract side of the line.

Dummett suggests that there is a spectrum of objects. Some are fully concrete, such as a coffee pot, that we can point to and see. Others are fully abstract and "can be referred to only by means of a verbal phrase."[140] They can only be introduced by means of language, by using other words. Numbers and universals such as justice are such abstractions. In between the ends of the spectrum are things that cannot be pointed to, but can be tied to more concrete things. Shapes and directions fall in this category, as a shape must be the shape of something, a direction the direction of something.[141] A color tends towards being more concrete, because it need not be understood as the color of anything.

This continuum, like Hand's series of abstractions, does not provide us with a dividing line. It does, however, provide a useful analogy. As we move toward the most abstract end of the spectrum, we also move toward the realm of objects whose existence is largely a

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135. *Id.* at 8.

136. GOODMAN, *supra* note 24, at 6 (citations omitted).

137. MICHAEL A.E. DUMMETT, FREGE: PHILOSOPHY OF LANGUAGE 471-511 (2d ed. 1981).

138. *Id.* at 480.

139. *Id.* at 481.

140. *Id.* at 494.

141. *Id.* at 487.

reflection of the nature of our society and language, of the perspective provided by the community. Objects that dwell closer to the concrete end of the spectrum involve a more dispensable or replaceable use of language, a particular way of offering a work of art to perception.[142] They are things belonging more uniquely to the speaker.

In the *Nichols* case, the plaintiff's and defendant's works had in common lovers whose Irish and Jewish families are at emnity and whose children bring about a reconciliation. This similarity was found to be in unprotected idea.[143] But it is possible to abstract the similarities still further, by leaving out yet more of the detail. Two works could both include lovers whose Irish and Jewish families are at odds; or, more simply, lovers whose families are at odds; or, almost entirely lacking in detail, the idea of star-crossed lovers.[144] The idea of orchestrating a piano piece can be expanded to the more detailed idea of using a particular motif in the third movement, and further expanded to the idea of using a particular percussion instrument in the 47th stanza.[145] In a case involving two spiral sculptures,[146] the plaintiff described the idea of the work as "a spiral sculpture composed of rectangular pieces of glass."[147] The defendants provided a more particularized, less abstract description: "a spiral composed of long and thin rectangular panes of glass that overlie one another, rotating around a common axis and fastened together with invisible glue."[148]

Clearly a work can be abstracted at many levels. This process of abstraction, however, has proved problematic in cases involving computer programs. In *Whelan Associates Inc. v. Jaslow Dental Laboratory Inc.*,[149] the first major case dealing with the scope of their protection, the defendants did not literally copy the plaintiff's pro-

142. *See* ECO, *supra* note 122, at 109 ("Artistic particularity arises from the *manner* in which the order and form are made concrete and offered to perception.").

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

144. In *Nash*, the court notes the importance of the level of abstraction at which a court conceives the interest protected by copyright. If a court choses a low level and protects only the author's words, a copier might take the entire plot and exposition, although this might be the most important ingredients in the earlier author's creation. If a very high level were chosen, an author might claim protection for an entire genre, such as the romantic novel. The appropriate level lies somewhere between the two, but is difficult to locate. Nash v. CBS Inc., 899 F.2d 1537, 1540 (2d Cir. 1930).

145. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 311 (1988).

146. Runstadler Studios Inc. v. MCM Ltd. Partnership, 768 F. Supp. 1292 (N.D. Ill. 1991).

147. *Id.* at 1298.

148. *Id.* The court found in favor of the defendant, denying injunctive relief, on the ground that from the point of view of a sophisticated observer, the two works differed in concept and feel. *Id.* at 1299.

149. 797 F.2d 1222 (3d Cir. 1986).

gram. Rather, it was claimed that they copied the overall structure and organization of the plaintiff's program for managing the operation of a dental laboratory.[150] Holding that the copyright in computer programs, like other literary works, is not limited to protecting against literal copying, the court went on to consider the idea/expression dichotomy. "[T]he purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of the idea."[151] If various means exist to accomplish the desired purpose, the means chosen is expression not idea.[152] The idea of the plaintiff's program was the efficient organization of a dental laboratory.[153] Thus it would appear that copying at any less abstract level would be actionable. This goes absurdly further than the literary cases. It is as if Judge Hand had identified the idea in the *Nichols* case as lovers whose families are at odds, and had held that any more detailed and less abstract elaboration of that idea was actionable. The court in *Computer Associates International v. Altai, Inc.*[154] recognized this problem and disagreed with *Whelan*'s assumption that only one idea underlies a computer program, noting that a given work may consist of a mixture of numerous ideas and expressions.[155]

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150. *Id.* at 1233. Earlier cases had involved literal or near-literal copying and considered whether a variety of computer programs were copyrightable. Challenges based on the idea/expression dichotomy were generally rejected on the theory that alternative means existed for writing the programs involved. *See, e.g.*, Apple Computer, Inc. v. Formula Int'l Inc., 725 F.2d 521 (9th Cir. 1984); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1984); E.F. Johnson Co. v. Uniden Corp., 623 F. Supp. 1485 (D.Minn. 1985). *But see* Synercom Tech. v. University Computing, 462 F. Supp. 1003 (N.D. Tex. 1978).

151. *Whelan Assoc.*, 797 F.2d at 1236.

152. *Id.*

153. *Id.* at 1240. *See* Broderbund Software, Inc. v. Unison World, Inc., 648 F. Supp. 1127, 1132 (N.D. Cal. 1986) (The idea was the concept of creating greeting cards.).

154. 982 F.2d 693 (2d Cir. 1992). Recognizing that the utilitarian nature of a computer program complicates the task of distilling idea from expression, the *Altai* court proposed a three-step procedure to determine whether the non-literal elements of a computer program are substantially similar. First, a court should break down the allegedly infringed program into its constituent structural parts. Second, the court should sift out unprotected material, such as ideas, expression that is necessarily incidental to those ideas, and elements taken from the public domain. Third, it should compare the expressive material that remains with the structure of the allegedly infringing program. This abstraction/filtration/comparison approach has been accepted by a number of courts. *See, e.g.*, Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 834 (10th Cir. 1993); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1525 (9th Cir. 1992); Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 839 (Fed. Cir. 1992).

155. *Id.* (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.03[F] (1990)); *see* Lotus Dev. Corp. v. Borland Int'l, Inc., 788 F. Supp. 78, 89 (D. Mass. 1992) (decisionmaker must focus on alternatives along the scale from the most generalized conception to the most particularized in order to distinguish between idea and expression); *cf.* Plains Cotton Co-op Assoc. v. Goodpasture Computer Serv., 807 F.2d 1256, 1262 (5th Cir.),

The process of abstraction can be seen as involving an omission, a setting aside, as more and more of the detail is left out.[156] Abstraction "involves somehow stripping an idea not just of the 'circumstances' in which its like originally came into one's mind, but also of some of its internal detail."[157] It is those very details or circumstances, stripped from a work by the process of abstraction, that are truly the creations of an author. The more abstract an idea is, the more detail is left out, the more it is a part of the culture as a whole. Even if an abstract idea is original to the author, who may be unaware of its existence in the culture or who may be unconsciously drawing from the commons, it should not be protected against copying. At greater levels of abstraction, the idea is no longer truly representative of the author's unique contribution.

C. *The Idea in the Mind of the Perceiver*

> Art is not a copy of the real world. One of the damn things is enough.[158]

It seems strange to deny copyright protection to what, at first glance, appears to be the core of an author's creation, the artistic center of a work, that noblest of conceptions mentioned by Brandeis.[159] It is not, however, the author's ideas per se that are denied protection by the idea/expression dichotomy. We say that a defend-

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cert. denied, 484 U.S. 821 (1987) (similarities in sequence and organization of cotton marketing software, dictated by the externalities of the cotton market, may constitute ideas). *See also supra* notes 65-68 and accompanying text.

156. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

157. JONATHAN F. BENNETT, LOCKE, BERKELEY, HUME, CENTRAL THEMES 21 (1971). Berkeley criticicized this approach, saying that he can imagine a man with two heads, but cannot conceive the abstract idea of a man, retaining only what is common to all men. *Id.* at 36 (quoting BERKELEY'S, PRINCIPLES INTRODUCTION § 10). Bennett says that "someone can close his eyes and picture a woman's face, neither 'seeing' her as smiling nor 'seeing' her as unsmiling . . . . I play a tune in my head, and I 'hear' it as orchestrated, which is different from 'hearing' it as played on a tin whistle; yet I do not 'hear' it as orchestrated in any completely specific fashion, neither as involving at least three oboes nor as involving fewer than three oboes; and so my auditory idea or image is abstract." *Id.* at 22. He suggests that "one can omit from an induced image of a [theta] only such details as one could fail to *notice* when actually perceiving a [theta] and noticing that it was a [theta]." *Id.* at 41.

158. GOODMAN, *supra* note 25, at 3 (reported as occurring in an essay on Virginia Woolf). Goodman says, "the world is as many ways as it can be truly described, seen, pictured, etc., and . . . there is no such thing as *the* way the world is. *Id.* at 6 n.4.

159. *See supra* note 5 and accompanying text. Interestingly, the ideas found unprotected in the cases are often far from noble and indeed rather trite. Of course, not all ideas are noble; many are banal and far from stirring. *See, e.g.*, Conan Properties, Inc. v. Mattel, Inc., 712 F. Supp. 353 (S.D.N.Y. 1989) (cartoonist cannot obtain the right to the idea of a superhuman muscleman). *See* Umbreit, *supra* note 35, at 949 (quoting BIRRELL, COPYRIGHT 170-71 (1899) (" 'in reading the cases in the Reports for the last hundred years, you cannot overlook the literary insignificance of the contending volumes.' ").

ant has taken an author's ideas, but that is not what happens. The author's ideas remain locked within that author's mind. What the alleged infringer takes is the perceiver's conception of the idea or ideas inhering in the work.

In an early case, the Supreme Court spoke of writings "by which the ideas in the mind of the author are given visible expression."[160] Ideas that exist within the author's skull, however, are not capable of appropriation.[161] Copyright deals with ideas only as they are embodied in a work of authorship. From the author's point of view, to the extent that a temporal relationship exists between what is in the author's mind and what the author produces,[162] an idea will precede the work itself; the literal expression is derived from the underlying idea. That which exists in intangible, conceptual form within the mind of the author is expressed in tangible, perceptible form in the author's work.

The tangible thing, that which is perceived, is expression in the purest sense—the precise words, lines, colors, notes.[163] Anything else, whether termed protectible expression or unprotectible ideas, is a derivation, abstracted from the literal expression, which is the true creation of the author. As Berkeley stated: "[i]n reading a book, what I immediately perceive are the letters, but mediately, or by means of these, are suggested to my mind the notions of God, virtue, truth, etc."[164]

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160. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); *see* Millar v. Taylor, 98 Eng. Rep. 201, 242 (K.B. 1769), where Justice Yates, in his famed dissent, said "[i]deas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion."

161. *See* Holmes v. Hurst, 174 U.S. 82, 86 (1899) (citing Jeffreys v. Boosey, 10 Eng. Rep. 681, 702 (H.L.C. 1854)); Gund, Inc. v. Smile Int'l, Inc., 691 F. Supp. 642, 644 (E.D.N.Y. 1988) (It is impossible to copy a conception in someone's mind.).

162. Such a temporal relationship is not always clear. Conception and making can interact. An author may put on paper ideas that are already conceived and ordered. But sometimes an author may "depend upon the greater perceptibility induced by the activity and its sensible report to direct his completion of the work." JOHN DEWEY, ART AS EXPERIENCE 51 (1934). Art, "nourished by intellectual insight and skilled craftsmanship, involves an arduous process in which physical manipulations do not *follow* the conceptions of the intellect, but *are* the intellect conceiving something by making it." ECO, *supra* note 122, at 111.

163. In art, expression is visually perceptible. Music, as heard, will differ by performance and literature is filtered through comprehension. *See* Richard Wollheim, *Art and Its Objects*, *in* PHILOSOPHY LOOKS AT THE ARTS, *supra* note 45, at 208.

164. GEORGE BERKELEY, THREE DIALOGUES 12 (Colin M. Turbayne ed., 1954). Berkeley also discussed painting, saying "[When] you behold the picture of Julius Caesar, do you see with your eyes any more than some colours and figures, with a certain symmetry and composition of the whole?" Berkeley noted that a man who knew nothing of Julius Caesar would see as much, but his thoughts would not be directed to the Roman Emperor. Berkeley said the reason for this proceeds from reason and memory. Bennett comments that

Furthermore, the artist's "idea" is forever unknown and unknowable to the perceiver. In the visual arts, for example, the same image can derive from very different intentions. Goodman compares an electorcardiogram with a Hokusai drawing of Mount Fujiyama. The black wiggly lines on white backgrounds may be identical, says Goodman, but they are not the same. "The difference is syntactic: the constitutive aspects of the diagrammatic as compared with the pictorial character are expressly and narrowly restricted."[165] The only important elements of the diagram are the ordinate and abscissa of each of the points the line passes through; thickness of line, depth of color, and intensity are irrelevant. For the sketch, however, thickening or thinning of the line, contrast with the background, size, even quality of the paper, are important.[166]

Danto discusses two works, each two rectangles, one on top of the other. They appear identical. Artist B describes his work as a mass, pressing downward, met by a mass pressing upward. Artist A says that in hers, the line through the space is the path of an isolated particle, and that the path, going from edge to edge, gives a sense of its going beyond.[167] Here are two very different ideas, and two identical works. Could a perceiver tell which was created by which author? Or could either be distingished from a pure abstraction looking exactly like A and B?[168]

From an analyst's point of view, the point of view of a decisionmaker in a copyright case, the work is the starting point. We must start with the literal expression found within the work and from there derive its idea or ideas. Determining the degree of protection provided, which involves ascertaining what sort of copying the work is protected against, requires the exercise of conception, not just perception. The reader/viewer/hearer/perceiver must do some work; it is not possible to compare the allegedly infringed and infringing works in a purely rote fashion, and determine the nature of the similarities between them. The perceiver must abstract from a work and conceive of what it is. This conception may or may not be the same as what the author conceived. She reads/looks/listens and conceives her own

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"background knowledge and the ability to relate it to the sensory present" are involved, but also involved is the knowledge that one is confronted by a picture, "that is, by a physical object which can be touched and moved around, which would look different in various lights, and so on." BENNETT, *supra* note 157, at 141.

165. GOODMAN, *supra* note 25, at 229.

166. *Id.*

167. Arthur Danto, *The Artworld*, *in* PHILOSOPHY LOOKS AT THE ARTS, *supra* note 45, at 154, 160.

168. *Id.* at 162.

notion of the idea(s) of the works. The perceiver engages in reconstructive doing, which involves imagination and conceptual understanding.[169] Perception cannot exist without conception.[170]

> [T]here is no innocent eye. The eye comes always ancient to its work, obsessed by its own past and by old and new insinuations of the ear, nose, tongue, fingers, heart, and brain. . . . It selects, rejects, organizes, discriminates, associates, classifies, analyzes, constructs. It does not so much mirror as take and make; and what it takes and makes it sees not bare, as items without attributes, but as things, as food, as people, as enemies, as stars, as weapons. Nothing is seen nakedly or naked.[171]

There is no single correct way in which to perceive something. Any object can be seen in many ways.

> [T]he object before me is a man, a swarm of atoms, a complex of cells, a fiddler, a friend, a fool, and much more. If none of these constitute the object as it is, what else might? If all are ways the object is, then none is *the* way the object is. I cannot copy all these at once.[172]

The ideas left unprotected by copyright are not the invisible ideas of the author given visible expression in a work. Rather, they are the ideas found in the work by its multiple perceivers. They are reductions from the work, a lessening of its complexity, not its essence. The work is reduced from its totality, what the author put down on paper, or in marble, into the perceiver's idea of the author's idea. Each abstraction is one step further removed from the author's creation.

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169. DEWEY, *supra* note 162, at 51.

170. *See supra* note 136 and accompanying text; *see also* DEWEY, *supra* note 162, at 54 ("For to perceive [as opposed to simply sense], a beholder must *create* his own experience. . . . The artist selected, simplified, clarified, abridged and condensed according to his interest. The beholder must go through these operations according to his point of view and interest.").

171. GOODMAN, *supra* note 25, at 7-8; *see* JOSEPH Z. MARGOLIS, *The Nature of Aesthetic Interests*, *in* PHILOSOPHY LOOKS AT THE ARTS, *supra* note 45, at 1, 4 ("The perception of physiognomic aspects of the lines in a painting, discrimination of the 'movement' of a musical line, the appreciation of scenes depicted in novels or of the motivation of characters in a play all suggest our reliance on abilities that may inform sensory perception but that cannot be characterized merely as such.").

172. GOODMAN, *supra* note 25, at 6-7. The great Mexican muralist, J.C. Orozco said

> In every painting, as in any other work of art, there is always an IDEA, never a STORY. The idea is the point of departure, the first cause of the plastic construction, and it is present all the time as energy creating matter. The stories and other literary associations exist only in the mind of the spectator, the painting acting as the stimulus.
>
> There are as many literary associations as spectators. One of them, when looking at a picture representing a scene of war, for example, may start thinking of murder, another of pacifism, another of anatomy, another of history, and so on.

JOSE C. OROZCO, THE OROZCO FRESCOES AT DARTMOUTH (Albert I. Dickerson ed., 1934).

V. SYMPTOMS OF UNPROTECTED IDEAS

No definition will suffice to separate unprotectible idea from protectible expression. Nor is it possible to set out a set of simple, precise criteria that will inevitably accompany the presence of an unprotectible idea. But we need a means of distinction, to avoid masking conclusions behind overly vague, contentless labels.

Ideas that exist within the human mind, abstractions from the literal creations of an author, are found on both sides of what is called the idea/expression dichotomy. Meaning/content/semantics are protected at their more complex levels. It is not, therefore, accurate to say that ideas are unprotected, at least given the most likely meanings of the word. Some ideas are not protected; others are. Unless copyright forbids only literal copying, or goes to the opposite extreme of forbidding any use of previous works, we need a means to determine which takings are forbidden by copyright.

The basic principle underlying copyright is that providing protection for creative works will promote creation and investment in creation. That determination has already been made, but only in a general sense. The distinction between idea and expression can be used to encourage creation in a more subtle way. "Ideas," meaning unprotected ideas, are left free for others to use, thus avoiding the grant of overbroad rights that would unduly inhibit the independent creations of others.[173] Granting an author the exclusive rights to any possible derivation from his work would curtail the ability of new authors to pursue their own works.[174] It would make the creation of new works more costly without adding sufficient countervailing incentives for the creation of the earlier work.

We need to distinguish between that which should belong to an author and the raw materials that must be left free for others' use. There are three symptoms that tend to be present when elements of an author's work are properly considered unprotected ideas. These symptoms are neither necessary nor sufficient conditions for the exist-

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173. *See* Gund, Inc. v. Smile Int'l, Inc., 691 F. Supp. 642 (E.D.N.Y. 1988); *see also* POSNER, *supra* note 12, at 348 ("The more extensive copyright protection is, the more inhibited is the literary imagination."); Chafee, *supra* note 36, at 514 ("Even the first user of a plot or a human situation should not have a monopoly of it. The public should have the opportunity to see what others can do with it. At the point where the use of material is too close to give the public anything new, the ideal of encouraging independent creation ceases to operate.").

174. *See* KAPLAN, *supra* note 26, at 2 ("[I]f man has any 'natural rights,' not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and 'progress', if it is not entirely an illusion, depends on generous indulgence of copying.").

ence of an unprotectible idea, but tend in conjunction with other such symptoms to be present.[175] They may overlap to some extent, but each protects the public domain from too large a removal.

A. *Simple v. Complex*

Simple ideas are like primary colors or elements of matter. They exist in limited number. Protection inheres in the mixture or arrangement of these elements, the place where they come together.[176] As sentences are built out of words, thoughts are built of ideas. An idea is an atom of meaning.[177] The similarity between the plaintiff's and defendant's works is more or less saturated with detail. The greater that saturation, the more appropriate a finding of infringement.

The objective is to protect ingredients, as ingredients, against monopolization.[178] The simplest ideas are uncompounded, not distinguishable into different ideas.[179] A combination of several simple ideas can build a more complex idea.[180] Even if individual elements of a plot or fictional character are unprotectible ideas, their combination may be subject to protection.[181]

Granting exclusive rights to a basic, single, simple idea removes something of size from the public domain. If an author obtains exclu-

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175. I have borrowed the notion of symptoms of an idea from Goodman's symptoms of the aesthetic. *See* GOODMAN, *supra* note 25, at 252.

176. Lewys v. O'Neill, 49 F.2d 603, 607 ("Ideas . . . are free as air." However, mixtures may not be; there are few primary colors, but many mixtures.). *See* Runstadler Studios, Inc. v. MCM Ltd. Partnership, 768 F. Supp. 1292, 1295 (N.D. Ill. 1991) (combinations of standard shapes may possess the requisite creativity necessary for copyright protection).

177. BENNETT, *supra* note 157, at 2.

178. *See* Stevenson v. Harris, 238 F. 432 (S.D.N.Y. 1917) (Originality lies in the association and grouping of incidents; similar incidents used in different ways should not infringe.); *see also* Harold Lloyd Corp. v. Witwer, 65 F.2d 1 (9th Cir. 1933); Simonton v. Gordon, 297 F. 625 (S.D.N.Y. 1924); *cf.* Holmes v. Hurst, 174 U.S. 82, 86 (1898) (Words are "as little susceptible of private appropriation as air or sunlight." The right is to arrangement of words which the author has selected to express ideas.).

179. LOCKE, *supra* note 123, at 61-62; *see* DAVID HUME, A TREATISE OF HUMAN NATURE 50 (Ernest C. Mossner ed., Penguin Books 1984) (1739) ("Simple . . . ideas are such as admit of no distinction nor separation. The complex are the contrary to these, and may be distinguished into parts.").

180. *See* LOCKE, *supra* note 123, at 96.

181. In Frankel v. Irwin, 34 F.2d 142, 143 (S.D.N.Y. 1918), the court held that incidents cannot be literary property, but piracy may consist in taking such incidents in combination. *See* Warner Bros. v. American Broadcasting Cos., 720 F.2d 231, 243 (2d Cir. 1983) ("A character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of the combination."); Barris/Fraser Enters. v. Goodson-Todman Enters., 5 U.S.P.Q.2d (BNA) 1887 (S.D.N.Y. 1988) ("[E]ven though a television game show is made up entirely of stock devices, an original selection, organization, and presentation of such devises can nevertheless be protected, just as it is the original combination of words . . . .").

sive rights to a more complex idea, far less is denied to later authors. A complex idea, which combines a number of simple ideas, takes from the public domain only the small area in which the simple ideas intersect, and only when this intersection is ordered in a particular way. This can be visualized as a series of ovals, each representing a simple idea, that overlap only over a small area. The complex idea may contain all that is within these ovals, but it is only the tiny area in which they overlap that is protected against copying.

Protecting an author's particular way of combining constituents will not significantly hinder the ability of new authors to make use of what exists in the culture. Nor will it increase unduly the costs of creation. This is not true if constituents themselves or, probably, very simple combinations receive exclusive rights. Such rights would inhibit creation and increase transaction costs for those who do create.[182] Conversely, allowing others to use these simple constituents does little to discourage creation of the earlier works that embody them. Allowing such appropriations in the regular course would not excessively diminish the market for the works of earlier authors.[183] These authors may reap their economic reward through the right to prevent copying of their literal expression and of abstractions from their works at more complex levels.

Simple ideas can be seen as part of a public commons. Locke's labor theory of property says that in a state of nature, the individual turns what exists in the commons into private property by the labor exerted upon it.[184] This appropriation would not prejudice anyone else because there was still "enough and as good" left for others.[185] The problem with allowing an author exclusive rights to simple ideas, even though these rights exist only against those who have been exposed to that author's work, is that "enough and as good" would not remain available to others.[186] When an author seeks to avail herself of an early creator's work, not merely to benefit from another's

182. *See supra* notes 16-20 and accompanying text.

183. *See* Nash v. CBS, Inc., 899 F.2d 1537, 1541 (7th Cir. 1990).

184. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, 19-20 (Thomas P. Peardon ed., The Liberal Arts Press, Inc. 1952) (1690).

185. *Id.* at 20 ("Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst."); *see* Hughes, *supra* note 145, at 297.

186. *See* Hughes, *supra* note 145, at 297. Hughes says that "the enough and as good condition is an equal opportunity provision leading to a desert-based, but *noncompetitive* allocation of goods: each person can get as much as he is willing to work for without creating meritocratic competition against others." *See also* Wendy J. Gordon, *Realilty as Artifact: From Feist to Fair Use*, 55 J. L. & CONTEMP. PROBS. 93, 102-04 (1992) (discussing an equality-based entitlement to depict reality).

pains,[187] but to add to it and create something of her own through her own pains, forbidding that use will give her fewer options than her predecessors. Later authors will be deprived of the ability to use the raw materials of creation on equal terms. A new author, exposed to an earlier author's works, should not be forced into unnatural contortions in order to design around the simple ideas, the basic building blocks of creation, contained within it.[188]

Furthermore, the meaning and structure of complex ideas are built out of simple ideas.[189] Simple ideas tend to be derived from experience and impressions—from the direct impact of that which exists in the world surrounding the author. More complex ideas are more the creation of the author, who can take simple ideas and "repeat, compare, and unite them, even to an almost infinite variety, and so can make at pleasure new complex ideas."[190] The human mind "has great power in varying and multiplying the objects of its thoughts infinitely, beyond what sensation or reflection furnishes it with; . . . it can . . . put together those ideas it has, and make new complex ones, which it never received so united."[191] Taking simple ideas from an earlier author's work takes less of its essential nature than taking more complex ones. Any nonliteral appropriation from a work involves an association or pairing of elements from that work with other things. Where simple ingredients are taken, this pairing is far more likely to change core features of the earlier work.

B. *General v. Specific*

General ideas tend to be indiscriminate and incomplete, rather than entire and delineated. Locke said that the mind, having received an idea, abstracts it, then puts a name to it.[192] When children realize that there are other things in the world that in some ways resemble their father and mother,

> they frame an idea, which they find those many particulars do partake in; and to that they give, with others, the name man for example. And thus they come to have a general name, and a general idea. Wherein they make nothing new, but only leave out of the complex idea they had of Peter and James, Mary and Jane, that which is peculiar to each, and retain only what is common to them

187. LOCKE, *supra* note 184, at 20-21.

188. *Cf.* Kurtz, *supra* note 60, at 94.

189. *See supra* notes 47-53 and accompanying text.

190. LOCKE, *supra* note 123, at 62-64.

191. *Id.* at 96-97.

192. *Id.* at 277.

all.[193]

This idea can be advanced (or reduced) still further to the more general one of animal, "which new idea is made, not by any new addition, but only, as before, by leaving out the shape, and some other properties signified by the name man, and retaining only a body, with life, sense, and spontaneous motion."[194] General ideas are abstract and partial ideas of more complex ones. The idea of "horse" leaves out those particulars in which individual horses differ and retains only those wherein they agree.[195] The idea of a bird on a tree ignores those specifics in which individual birds and trees differ, and retains only those in which they agree. The idea of feuding families whose children marry and produce grandchildren similarly retains only the few specifics in which such families agree. Below a certain level of specificity, meaning (semantics) should be considered unprotected idea.[196]

If the use of general ideas is forbidden, more will be denied to others than is denied by a prohibition against using more specific ideas. Any bird on any tree encompasses far more than a specific bird on a specific tree, although even the latter is probably too general to be protected. Nor is it necessary to protect the more general ideas derived from a work in order to provide an incentive to create. An author remains able to prevent others from copying her more specific elaborations of these ideas, and this ability provides a substantial incentive.

Authors do not create in a vacuum, using only the contents of their own minds. Their ideas do not spring full grown, like Athena from the head of Zeus. "Worldmaking as we know it always starts from worlds already on hand; the making is a remaking."[197] Authors create from what they know, from what they have seen, heard, read, felt, and experienced within the context of their cultures, including

193. *Id.* at 296.

194. *Id.*

195. *Id.* at 296-97. According to the Cartesians, "to have an abstract idea is to think of some feature or features of the perceptible without attending to other features which it has . . . ." 4 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 115, at 120.

196. A number of cases have discussed protecting particularities, but not generalities. *See, e.g.*, Walker v. Time Life Films, Inc., 784 F.2d 44, 48-49 (2d Cir. 1986); Mattel v. Azrak-Hamway Int'l, Inc., 724 F.2d 357, 360 (2d Cir. 1983); Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 617 (7th Cir.), *cert. denied*, 459 U.S. 889 (1982); Warner Bros. Inc. v. American Broadcasting Co., Inc., 654 F.2d 204, 208-09 (2d Cir. 1981); Reyher v. Children's Television Workshop, 533 F.2d 87, 91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936); Davis v. United Artists, Inc., 547 F. Supp. 722, 726 (S.D.N.Y. 1982); Miller Brewing Co. v. Carling O'Keefe Breweries, 452 F. Supp. 429, 439 (W.D.N.Y. 1978).

197. GOODMAN, *supra* note 24, at 6.

the works of other authors.[198] This is the commons from which all may draw.[199] "The literary imagination is not a volcano of pure inspiration but a weaving of the author's experience of life into an existing literary tradition."[200]

Ideas that are general and abstract represent an accumulation of thought, the long history and development of language and perspective. They are, at least to some extent, part of what is provided to an author by the environment in which she operates. They reflect human nature, the human condition, the nature of the society and the culture in which we live. They involve concepts, situations, and ways of seeing the world that experience suggests. "We look upon art as a focus of lived experiences, given order and form by our normal imaginative processes. Artistic particularity arises from the *manner* in which the order and form are made concrete and offered to perception."[201]

The deeper structures of a work, its most general ideas, belong the least to its author. It is the more specific ideas, which may be termed expression, that tend to embody an author's individual departure and most genuine creation. Seeing in the mind's eye or hearing in the mind's ear is different from the sensory state of actual perception.[202] Any idea derived from a work, however general or specific, is at least one step removed from the work itself. As an idea becomes more and more general or abstract, it becomes further removed from the work itself, from that which the author provides.

As with simple ideas, general ideas should be left free for use in order to prevent the removal of basic building blocks from the public domain, to avoid depleting the stock of raw materials available for use by others. General ideas are building blocks because they are part of human experience and our notions of the world. No author, by developing a general idea, should be granted the ability to prevent others exposed to his work from making use of it. This is true, even when it is original to the author, in the sense that the author has not copied it, and it is new to him.[203]

There is an additional, practical reason for refusing protection to

198. *Cf.* Gordon, *supra* note 186, at 99 ("When an artist sends an artifact into the world, it affects other people and becomes part of their reality. To depict their reality accurately, and deal with the power others' images would otherwise have over them, audiences may need to reproduce artifacts in which copyright subsists.").

199. Chafee, *supra* note 36, at 514.

200. POSNER, *supra* note 12, at 348.

201. ECO, *supra* note 122, at 109.

202. BENNETT, *supra* note 157, at 39.

203. "Copyright only protects original works of authorship. The standard for originality is low, however. A work need not be novel, highly creative or aesthetically appealing. Originality merely requires that the work owe its origin to its author—that it be independently

more general ideas. It is difficult to determine whether a defendant has copied such an idea from the plaintiff or originated it independently. As Professor Litman has noted, even the most creative works are likely to "include some elements adapted from raw material that the author first encountered in someone else's works."[204] Indeed, because copying can be subconscious, a defendant may be unaware of whether he has copied.[205] The things an author has experienced, seen, heard, felt and thought are not separated, within her mind, into neat boxes labelled "things I am copying" and "things I thought up."[206] Given the nature of this process, providing protection for more general ideas would have a particularly pernicious affect on the creative process. The fact that it is difficult to determine the source of such ideas exacerbates the risk of denying basic building blocks to new authors.

C. *Standard Quality*

There are ways in which we are used to looking at things. The standard way of doing things is the usual, obvious, normal, ordinary, "natural" way. Goodman has said that the realism of representation in art depends not on how closely the object is duplicated in a work of art, but on the system of representation that is standard for a given culture.[207] What we call literal representation, even in visual works, depends upon convention and assumes a commonly acceptable framework. For pictures that are seen as realistic, the key to viewing them is readily at hand—"by virtually automatic habit; practice has rendered the symbols so transparent that we are not aware of any effort, of any alternatives, or of making any interpretation at all."[208] Other

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created and not copied from other works." Kurtz, *supra* note 60, at 96; *see* 1 NIMMER & NIMMER, *supra* note 55, § 2.01[a].

204. *See* Litman, *supra* note 9, at 1011.

205. *Id.* at 1010 ("[T]ransformation is the essence of the authorship process. Some of this transformation is purposeful; some of it is inadvertent; much of it is the product of an author's peculiar astigmatic vision.").

206. *Id.* at 1010 (An author's views of the world "are shaped by her experiences, by the other works of authorship she has absorbed (which are also her experiences), and by the interaction between the two. Her brain has not organized all of this into neat, separable piles entitled 'things that happened to me,' 'things I read once,' and 'things I thought up in a vacuum' to enable her to draw the elements of her works of authorship from the correct pile. She did not, after all, experience them so discretely.").

207. GOODMAN, *supra* note 25, at 37-38.

208. *Id.* at 36. What we see as realistic may change over time. "What counts as emphasis, of course, is departure from the relative prominence accorded the several features in the current world of our everyday seeing. With changing interests and new insights, the visual weighting of features of bulk or line or stance or light alters, and yesterday's level world seems strangely perverted—yesterday's realistic calendar landscape becomes a repulsive caricature." *Id.* at 11. Specific conventions imposed on certain kinds of works may also be important. For

works of art, however, require "discover[ing] rules of interpretation and apply[ing] them deliberately."[209] The realism of the picture depends on the standard quality of the system of representation employed by the artist.

> If representation is a matter of choice and correctness a matter of information, realism is a matter of habit. . . . That a picture looks like nature often means only that it looks the way nature is usually painted.[210]

A painting of a person does not really look like a person. It looks like a flat surface covered with paint. Nobody will confuse a piece of canvas with a flesh and blood human being.[211] Yet, a viewer might term the portrait "realistic." Properties that are standard "are ordinarily irrelevant to what we take it to look like or resemble in the relevant sense, and hence to what we take it to depict or represent."[212] For example, a marble bust of a Roman emperor will seem to resemble a man with an aquiline nose, wrinkled brow, and an expression of grim determination, not a perpetually motionless man of marble color, who is severed at the chest. These last qualities are standard and therefor irrelevant to what we interpret the statue to represent.[213] In a painting, flatness and a painted look are standard; colors and shapes are what are taken as relevant in determining what, if anything, the work represents.

We tend to overlook the familiar or standard. A drawing by Katharine Sturgis shows a hockey player in motion by using a single charged line.[214] "[W]e find what we are prepared to find (what we look for or what forcefully affronts our expectations), and . . . we are likely to be blind to what neither helps nor hinders our pursuits. . . ."[215] Nor is this blindness limited to the visual arts. Wittgenstein said: "The aspects of things that are most important for us are hidden because of their simplicity and familiarity (One is unable to notice something because it is always before one's eyes). The real

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example, conventions in ornithological art require minute attention to detail of plumage and other physical characteristics of a bird. Franklin Mint Corp. v. National Wildlife Art Exch., 575 F.2d 62, 66 (3d Cir. 1978).

209. GOODMAN, *supra* note 25, at 36.

210. *Id.* at 38-39. In dealing with the visual arts, writers have differed on whether there are favored resemblances to which the human eye is prone, for example whether linear perspective is natural or conventional. *See* Joseph Z. Margolis, *Representation in Art*, *in* PHILOSOPHY LOOKS AT THE ARTS, *supra* note 45, at 279.

211. *See* Kendall L. Walton, *Categories of Art*, *in* PHILOSOPHY LOOKS AT THE ARTS, *supra* note 45, at 53, 60.

212. *Id.*

213. *Id.*

214. GOODMAN, *supra* note 24, at 14.

215. *Id.*

foundations of his enquiry do not strike a man at all."[216]

Standard conventional perspectives are more likely to be considered idea than those that depart from convention.[217] These perspectives are the most common, ordinary, or usual. They arise from the way we look at the world and provide the perceiver with a readily acceptable framework that is ignored because of its familiarity.[218] They are not owned and no good reason exists to protect them except against a nearly literal form of copying. A less readily comprehensible way of looking at the world that moves away from these unspoken assumptions is more likely to be considered expression. If an author's way of looking at things deviates from the standard, if she chooses an unusual, nonobvious, abnormal, extraordinary, unnatural way to express her ideas, she can expect to be protected against a wider array of imitators and more abstract forms of copying.

VI. CONCLUSION

> The evil of the idea idea is that its use . . . engenders an illusion of having explained something. And the illusion is increased by the fact that things wind up in a vague enough state to insure a certain stability, or freedom from further progress.[219]

The topics dealt with in this article do not lend themselves to neat conclusions. Copyrights approach what "may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile and refined, and, sometimes, almost evanescent."[220] Nowhere is this more true than in the distinction between idea and expression. We may hunt the raccoon, and learn about the territory explored, but we cannot trap it.

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216. Ludwig Josef Johann Wittgenstein, *quoted in* OLIVER W. SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT 43 (Perennial Library Edition 1987).

217. The court in Franklin Mint Corp. v. National Wildlife Art Exch., 575 F.2d 62, 65 (3d Cir. 1978) recognized a variation on this theme. The court did not focus on what makes a picture look realistic, but did state that an artist who produces a particularly "realistic" picture "may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique." In the impressionist's work, however, "the lay observer will be able to differentiate more readily between the reality of subject matter and subjective effect of the artist's work."

218. One reason courts have had so much difficulty in determining the scope of protection appropriate for computer programs is that there are no clearly accepted conventions. *See supra* notes 149-55 and accompanying text. In dealing with literature, motion pictures, television, music, and the visual arts, judges are working from sets of reasonably well understood and shared perceptions—perceptions that remain unexplained because they are well understood. In dealing with computer programs, they do not have the benefit of a readily available framework and seem to be trying to reason out an appropriate set of conventions—a difficult task.

219. WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 48 (2d ed. 1964).

220. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

In seeking to sort what copyright calls idea from what it calls expression, it is important to remember the principles that make the distinction significant. Not all borrowings from the work of another are forbidden, nor should they be. When protection against a form of copying interferes too much with the ability of others to create their own works, clogging the channels of creativity and commerce, that protection should not be provided. Properly used, the idea/expression distinction makes the basic building blocks of creation available to authors who have encountered them in another work. It protects the most individualized contributions of the author rather than what the author draws from society, language and artistic convention.