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Amaury Cruz

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COMMENT

WHAT'S THE BIG IDEA BEHIND THE IDEA- EXPRESSION DICHOTOMY?—MODERN RAMIFICATIONS OF THE TREE OF PORPHYRY IN COPYRIGHT LAW*

AMAURY CRUZ

Between the idea
and the reality
Between the motion
and the Act
Falls the Shadow
—T.S. Eliot

AN AXIOM of copyright law is that only the expression of ideas, not the ideas themselves, are copyrightable.¹ The Copyright Act of 1976 codifies this axiom by explicitly denying protection to “any idea.”² The subject matters of copyright properly include “original works of authorship,” which include literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic, and

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1. *E.g.*, *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 207 (9th Cir. 1988).

2. The Copyright Act of 1976 provides that:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102(b) (1988). Ideas, however, may be protected under state laws relating to contracts, quasi-contracts, and quantum meruit, as well as fraud, unfair competition, and misrepresentation, provided these laws are not preempted by the Copyright Act. *See, e.g.*, *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353 (N.D. Ill. 1989); *Nimmer, The Law of Ideas*, 27 S. CAL. L. REV. 119 (1954); Note, *Beyond the Realm of Copyright: Is There Legal Sanctuary For the Merchant of Ideas?*, 41 BROOKLYN L. REV. 284 (1974).

sculptural works; motion pictures and other audiovisual works; and sound recordings.³

Ideas, then, are as "free as air,"⁴ but original works of authorship are copyrightable. The "works of authorship" concept, however, did not appear in the copyright statute until 1976.⁵ Historically, the courts have attempted to limit the scope of protection by invoking the sometimes-criticized idea-expression dichotomy.⁶ Therefore, the court's definition of an "idea," as opposed to an "expression," can determine the outcome of a case. But the Copyright Act of 1976 offers no guidance in deciding what is an idea, resulting in jurisprudential uncertainty.⁷ Such uncertainty arises because of the difficulties in grasping the nature of "ideas," a subject that has confounded generations of philosophers and legal scholars.⁸

This Comment will attempt to elucidate the doctrine of the idea-expression dichotomy and support the proposition that the dichotomy is still useful in the resolution of copyright issues, although the courts must be careful in the application of the doctrine to produce coherent decisions. This Comment does not purport to provide the ultimate definition of an idea, but only to expose an angle of a subject befit-

3. 17 U.S.C. § 102(a) (1988).

4. *Fendler v. Morosco*, 253 N.Y. 281, 171 N.E. 56 (1930). The thought that ideas are communal property was first recorded in Seneca's *Epistles* during the first century A.D. Nimmer, *supra* note 2, at 119.

5. The Copyright Act of 1909, echoing the constitutional grant to "Authors and Inventors" of a monopoly to their "Writings and Discoveries," U.S. CONST. art I, § 8, cl. 8, referred to "all the writings of an author." 17 U.S.C. § 4 (1952). Congress modified the language in 1976 partly "to eliminate the uncertainties" resulting from the phrase "writings of an author." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51 (*reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5664). The uncertainties resulted from the possibility of regarding the 1909 Act as identical to the constitutional grant, thus making every copyright decision a question of constitutional interpretation as to whether any new form of expression qualified for protection. *Id.*

6. See, e.g., Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932 (1939) (the doctrine fails to describe the cases and is a "truism"); Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989) (the doctrine is inadequate as presently used; "idea" is nowhere defined; copyright law is exceeding constitutional bounds); *but see, e.g.,* Warner Bros., Inc. v. American Broadcasting Co., 720 F.2d 231, 240 (2d Cir. 1983) ("Though imprecise, [the idea-expression dichotomy] remains a useful analytic tool for separating infringing from non-infringing works . . ."); R. BROWN & R. DENICOLA, *CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS* 256 n.6 (1990) ("We have surveyed the literature and have found that no better formulation has been devised."); Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (the dichotomy is a way to accommodate the competing interests of the first amendment and the copyright clause).

7. Yen, *supra* note 6, at 396-97.

8. Other key copyright terms can be manipulated through semantic and legal arguments, but none is more elusive than the term "idea."

ting the character of copyright (and patent) law as the legal field that is closest to the metaphysics of jurisprudence.⁹

I. PHILOLOGICAL AND ETYMOLOGICAL ROOTS

The word “idea” may be commonplace, but is rarely used with a clear sense of its connotations. The definition of “idea” in Oxford’s unabridged dictionary takes a full page containing over 4000 words¹⁰ relating to twelve principal “acceptations”¹¹ and numerous subcategories. Its first acceptation is “general or ideal form as distinguished from its realization in individuals; archetype, pattern, plan, standard.”¹² This is one of the two most significant acceptations for purposes of our discussion; the other is “mental image, conception, notion,”¹³ which is perhaps most closely associated in the popular mind with the thought processes preceding the making of a “work” by an inventor, artist, or creator.

Terms such as “notion,” “concept,” “conception,” “model,” and “ideal” are related to “idea” but differ in their connotations. “Idea” is the most comprehensive of the terms relating to the “representation of something . . . or as a formulation of an opinion, a plan, or a design.”¹⁴ “Concept” sounds in logic and describes the synthesis of diverse objects through their common elements, allowing abstract understanding, as in, for example, “the concept of a ‘horse,’ ‘table,’ [or] ‘mountain.’”¹⁵ More generally, “concept” also suggests an aspirational model. For example, “we find among the Greeks germinal concepts which are a vital part of modern thought.”¹⁶ “Conception” is similar to “concept,” but implies the intent to reserve the term “concept” for an application in logic¹⁷ and refers especially to “the beginning of some process, chain of events, etc.”¹⁸ The term “no-

9. See *Folsom v. Marsh*, 9 Fed. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (Story, J.). Generally, scholarly pieces treat this subject only tangentially and in relation to narrower copyright issues. The goal of this Comment is to consider the whole picture.

10. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1367 (1975) [hereinafter OXFORD ENGLISH DICTIONARY].

11. “The generally accepted meaning (of a word or expression).” WEBSTER’S NEW WORLD DICTIONARY 8 (1979).

12. OXFORD ENGLISH DICTIONARY, *supra* note 10, at 1367.

13. *Id.*

14. WEBSTER’S NEW DICTIONARY OF SYNONYMS 411 (1973).

15. *Id.*; see also T. BERNSTEIN, THE CAREFUL WRITER, A MODERN GUIDE TO ENGLISH USAGE 113 (1972) (criticizing the tendency “to make the lesser seem the greater and to enfold the commonplace in the mantle of science or philosophy that has a debasing effect on the word *concept*” and explaining that a concept is essentially a general idea derived from particulars).

16. WEBSTER’S NEW DICTIONARY OF SYNONYMS 411 (1973).

17. *Id.*

18. WEBSTER’S NEW WORLD DICTIONARY 293 (1979).

tion” suggests not only vagueness but also whimsical or uncertain apperceptions of actual reality.¹⁹ As a noun, the term “ideal” is akin to model or exemplar.²⁰ As an adjective, the term “ideal” is analogous to Utopian,²¹ suggesting once again the influence of Realistic Greek philosophy.²² The etymology of “idea,” in fact, goes back to the Greek word “idaea,”²³ whose root meaning is equivalent to “beheld” or “seen” and is conceptually related to the Latin term “species,” from which the words *specere* and hence “spectator” are derived.²⁴

II. BRANCHES OF PHILOSOPHICAL DICHOTOMIES

Dichotomies are fundamental in practically every philosophical and religious system, from Manichaeism²⁵ to Christianity,²⁶ and from Confucianism²⁷ to Existentialism.²⁸ Thought processes themselves may follow dichotomous patterns because of the structure and evolution of the human brain.²⁹ In the field of jurisprudence, one influential commentator argued that judicial canons of statutory interpretation always seem to come in pairs,³⁰ a phenomenon reminiscent of Newton’s third law of motion that “for every action there is an equal and opposite reaction.”³¹ Other important—and troublesome—dualities are

19. WEBSTER’S NEW DICTIONARY OF SYNONYMS 411 (1973).

20. *Id.*

21. *Id.*

22. *See, e.g.,* T. MORE, THE UTOPIA (1516).

23. Also transliterated from the Greek as *ideae* or *ideai*.

24. OXFORD ENGLISH DICTIONARY, *supra* note 10, at 1367. The metaphor of “seeing” is prevalent in both fiction and philosophy with respect to perceiving eternal truths, the essence of being, God, salvation, Nirvana, and even the “luminous essence” of human beings. *See, e.g.,* C. CASTANEDA, THE EAGLE’S GIFT (1981); PLATO, *Republic*, in THE COLLECTED DIALOGUES OF PLATO 575 (Bollingen Series LXXI 1961) (metaphor of humans trapped in a cave and, unable to see the light, confusing reality with the shadows).

25. A religious philosophy taught by the Persian Mani and his disciples from the third to the seventh century A.D. and based on the competition between the principles of the Good (Light) and Darkness (Evil). KNOWLEDGE AND VALUE, INTRODUCTORY READINGS IN PHILOSOPHY 437 (E. Sprague & P. Taylor ed. 1959).

26. Heaven and Hell, Body and Soul, God and Satan, etc.

27. For an explanation of the principles of Yin and Yang, equivalent to positive and negative, male and female, day and night, good and evil, and other dichotomies said to underlie the essence of reality in oriental philosophy, *see, e.g.,* THE I CHING OR BOOK OF CHANGES (Bollingen Series XIX 1967) believed to be the first book ever written and the source of both Confucianism and Taoism.

28. *See generally,* SARTRE, BEING AND NOTHINGNESS (1966).

29. *Cf.,* J. JAYNES, THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND (1976) (arguing that human beings were not “conscious” but rather driven by visions and voices until as recently as 5000 years ago, when the two hemispheres of the brain began to operate as a single unit as a result of adaptational forces).

30. Llewelyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

31. I. NEWTON, PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA (1686).

those of law-fact and substance-procedure. The poles of these jurisprudential dichotomies meet at an indeterminate, shadowy area, allowing judges the opportunity to rationalize decisions that may be based actually on “gut feeling,” personal biases, or inchoate mental processes.

It is beyond the scope of this Comment to analyze in any detail the philosophical implications of the notion of dichotomy throughout the ages. It is helpful, however, to preface the discussion of the related legal issues with a cursory exposition of certain seminal ideas of Western philosophy.³²

A. *Plato's Theory of Ideas*

The concept of “ideas” was introduced in Western philosophy through Plato's dialogues.³³ From a linguistic point of view, Plato's dialogues represent an attempt to explain the significance of common nouns, which play a special role by grouping diverse things instead of differentiating a specific thing from other similar things.³⁴ In other words, a number of things share common characteristics in our minds because of our ability to abstract properties or qualities from sensible objects, placing those properties outside any spatiotemporal location.³⁵ The classic explanation for this concept speaks of geometrical forms such as the triangle.³⁶ The triangle we can draw and see on paper is said to be merely an approximation of the “real” triangle defined by the abstract rules of geometry, “a plane figure bounded by three straight lines,” because perfectly straight lines and perfect planes are beyond human perception.³⁷

Plato, therefore, contended that ideas, unlike objects, cannot exist in time or space; they are rather “eternal” or “timeless.”³⁸ Ideas must be apprehended not through our senses but rather through a process of reflection, creating a gap between the Intelligible World and the Sensible World.³⁹ This gap parallels the distinction between ideas and

32. Many ancient Greek ideas seem to be “ideal ideas” and reverberate through the centuries. For an “insider's” view of the professional rivalries between Platonists and Peripatetics at the University of Chicago in recent times, see R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (1974).

33. 2 *DICTIONARY OF THE HISTORY OF IDEAS, STUDIES OF SELECTED PIVOTAL IDEAS* 542 (P.P. Wiener ed. 1973) [hereinafter *HISTORY OF IDEAS*].

34. *Id.* The adjectives applied to common nouns serve the same function. *Id.*

35. *See id.*

36. *See* PLATO, *Meno*, in *THE COLLECTED DIALOGUES OF PLATO* 353 (Bollingen Series LXXI 1961).

37. *HISTORY OF IDEAS* 542.

38. *Id.*

39. *Id.*

expressions. According to Plato, people are born into the world with a stock of preexisting ideas of which they retain but a dim memory and of which they may be reminded by experience and other methods.⁴⁰ In sum, Plato's ideas can be defined as timeless universal constructs that exist only in the mind.⁴¹ This conception is consistent with the intellectual property theory that ideas are free as air—that no one should claim ownership in what one has not created but rather belongs to our common intellectual patrimony.⁴²

B. Aristotle's Bough

Aristotle preferred to use the word *eidos*, perhaps because he disagreed with Plato's theory of ideas and he wanted to fill the gap between the Intelligible and the Sensible worlds.⁴³ Although both *idaea* and *eidos* are derived from the Greek word "to see," the latter is related to and generally translated by the English word "form," which is the object of the seeing implied by the verb.⁴⁴ This nuance of meaning better fit Aristotle's view that Justice, for example, does not exist in the abstract but only in the acts of just people, and that an idea,⁴⁵ though common property, "might be a form in the sense of the pattern that processes exemplify . . . or the shape of finished works of art."⁴⁶ Thus, Aristotle's metaphors, derived essentially from the visual arts and biology, spoke of the *potentialities* of forms, to be realized in their end product.⁴⁷ The form of a chicken, for example, was actual in the living animal and potentially present in the egg.⁴⁸ In the case of sculptures or paintings, the forms of the works of art exist in the minds of the artists before being actualized, and only as a potential inside the marble or the paint; the sculpting or painting then reveals the intelligible form as the sensible, final cause of a process.⁴⁹

40. *Id.*

41. *Id.*

42. For a discussion of ideas and the "Common" in the Lockean sense, see Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 315 (1988) (rejecting the proposition that, because ideas can be used by everyone, whereas physical property can only be used by one entity at a time, there should be no intellectual property).

43. HISTORY OF IDEAS, *supra* note 33, at 543.

44. *Id.*

45. *Id.* at 544. For a full discussion, see ARISTOTLE, *Politica*, THE BASIC WORKS OF ARISTOTLE 1127-1316 (McKeon ed. 1966).

46. HISTORY OF IDEAS, *supra* note 33, at 544.

47. *Id.*

48. *Id.*

49. *Id.* While "efficient causes" are the equivalent of proximate causes in the legal context, final causes are equivalent to "ultimate purpose." See ARISTOTLE, *supra* note 45, at xviii (McKeon ed. 1966). Efficient and final causes imply thinking along linear patterns. *Cf.* THE I CHING

Although both Plato and Aristotle were concerned with the problem of abstract qualities, in essence Plato's approach is inductive; Aristotle's, deductive. This difference in itself represents perhaps the most significant dichotomy in Western thought, leading some commentators to assert that intellectual history after Plato and Aristotle is but a series of footnotes on these two thinkers.⁵⁰ However, Aristotle's conception of potentialities and the deductive method, rather than Plato's metaphysical view of ideas, are the principles that appear useful in the legal analysis of the idea-expression dichotomy.

C. *The Tree of Porphyry*

The Alexandrian philosopher Plotinus, who wanted to harmonize Plato with Aristotle, contributed to the philosophy of ideas by postulating a hierarchy consisting of the "most real," "most general," "best," and "most beautiful" at the pinnacle and the "most particular," "worst," "unreal," and "ugliest" at the base.⁵¹ Plotinus's pupil, Porphyry, later modified this hierarchy in a way that eventually became standard fare in introductory courses in philosophy.⁵² Called the "Tree of Porphyry," the hierarchy began with Substance or Being, divided into Corporeal and Incorporeal; Corporeal was divided into Animate and Inanimate; Animate, into Sensible and Insensible; Sensible, into Rational and Irrational; and Rational, into thinking individuals.⁵³ Classes were subdivided, appropriately enough, by an analytical technique called *dichotomia*, "but neither Porphyry nor anyone else ever explained where one was to cut a class in two."⁵⁴ The metaphor of the tree summarizes the process of abstraction that has preoccupied philosophers and logicians from Plato to the present.

III. THE FOREST OF DICHOTOMY

Linguistic and philosophical distinctions are only a starting point in understanding the role of the idea-expression dichotomy in copyright

OR BOOK OF CHANGES xxi-xxxix (Bollingen Series XIX 1967) (foreword by Carl Jung explaining Chinese thinking along synchronous patterns and perceiving time as a slice of a point-instant, as opposed to the Western concept of causality implying a domino-type of effect through points in time). For a full explanation of the theory of the "point instant" in Buddhist epistemology, see generally J. I. STCHERBATSKY, *BUDDHIST LOGIC* (1962). Although the artist may not be a "planner" with a preconceived design, as in the case of the Romantics, the process of creation brings out even unconscious forms.

50. See, e.g., ARISTOTLE, *supra* note 45.

51. HISTORY OF IDEAS, *supra* note 33, at 545.

52. *Id.*

53. *Id.*

54. *Id.*

law. The contrast between patents and copyrights on the one hand and, on the other, the inherent constitutional conflict between copyright and the first amendment are two of the major elements underlying the legal issues.

A. Contrast Between Patents and Copyrights

In the landmark case of *Mazer v. Stein*,⁵⁵ the plaintiffs owned the copyright for statuettes of male and female dancing figurines that had been incorporated by the respondents into the bases of table lamps.⁵⁶ The petitioners in *Mazer* challenged the validity of the copyright in the statuettes because they were mass-produced, "utilitarian objects."⁵⁷ The Court, however, summarized the gradual enlargement of copyright in the 1790,⁵⁸ 1870,⁵⁹ and 1909⁶⁰ copyright acts and found significant that the distinctions between aesthetic and useful works in the 1870 act were erased in 1909.⁶¹ In finding for the plaintiffs, the Court further reasoned that "[u]nlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself."⁶² Consequently, anyone could produce statuettes of human figures—or even the Balinese dancers depicted in the table lamp. No one, however, could copy the original statuette, whether or not incorporated into lamps.⁶³

The Court underscored an important distinction between two areas of intellectual property: "The dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and the invention of original and ornamental designs for design patents."⁶⁴ Thus, an inexpensive statue embodying a common idea may be copyrighted, but subsequent makers of statues may also copyright *their* "art"; they would be prohibited only from "copying the copy."⁶⁵ To obtain exclusive rights, the statue manufacturer would have to meet the stricter

55. 347 U.S. 201 (1954).

56. *Id.* at 202.

57. *Id.* at 205. "Their brief accept[ed] the copyrightability of the great carved golden salt cellar of Cellini but add[ed]: 'If, however, Cellini designed and manufactured this item in quantity so that the general public could have salt cellars, then an entirely different conclusion would be reached.'" *Id.*

58. Copyright Act of 1790, c. 15, 1 Stat. 124.

59. Copyright Act of 1870, c. 230, §§85-110, 16 Stat. 198.

60. Copyright Act of 1909, c. 320, 35 Stat. 1075.

61. *Mazer*, 347 U.S. at 210-11.

62. *Id.* at 217.

63. *Id.*

64. *Id.* at 218.

65. For a discussion of Justice Holmes's proscription against "copying the copy," see *infra* text accompanying notes 105-109.

requirement of a patent: discovery or invention of a new and useful process or product⁶⁶ that is non-obvious.⁶⁷

The *Mazer* court further explained the economic philosophy of the copyright and patent clause:

[E]ncouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.⁶⁸

To maintain the distinction between patents and copyrights in the light of the expansion of copyright, however, the courts apply different standards of originality to the art disclosed.⁶⁹ An exclusive right to an invention or discovery is subject to examination by the Patent Office,⁷⁰ and anyone applying for a patent must "make an oath that he believes himself to be the *original* and *first* inventor of the process, machine, manufacture, or composition of matter"⁷¹ In the context of copyright, "original" only means that the work originates with the author, so that "[n]o large measure of novelty is necessary."⁷² This prohibition amounts to "little more than a prohibition of actual copying" by the defendant.⁷³ Therefore, a plurality of valid copyrights can coexist even in identical works, if made independently without actual copying⁷⁴ and by meeting very simple procedural formalities that are essentially self-executing.⁷⁵ In sum, compared to a patent, it is relatively easy to obtain a copyright.

66. 35 U.S.C. § 101 (1982).

67. *Id.* § 103.

68. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

69. *See Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 101-02 (2d Cir. 1951).

70. *Id.* at 102. Such examination is subject to the following rule:

A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made.

35 U.S.C. § 103 (1982). *Cf. Graham v. John Deere Co.*, 383 U.S. 1 (1966) (explaining the addition of the test of non-obviousness, besides novelty and utility, to the 1952 patent statute).

71. 35 U.S.C. § 115 (1982) (emphasis added).

72. *Catalda*, 191 F.2d at 102.

73. *Id.* at 103 (citing *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F.2d 583, 586 (D.C.N.Y. 1929)).

74. *Id.*

75. An author is protected by copyright simply by fixing the work in a tangible medium of expression. 17 U.S.C. § 102(a) (1988). Failure to meet requirements such as registration and deposit is not fatal to a case, *see id.* § 408(a), although such failure can have adverse consequences. *Id.* § 411(a).

A common illustration of the concept of originality is that an independent re-creation of the "Romeo and Juliet" story can be copyrighted as long as the playwright does not copy it from Shakespeare; but that copyright cannot prevent other playwrights from similarly re-creating Shakespeare's original, as in the Broadway play "West Side Story," because it is in the public domain—in the realm of free ideas.⁷⁶ The idea-expression dichotomy is the concept supporting this illustration.

B. *The First Amendment v. Copyright*

The apparent contradiction between the freedom of speech guaranteed by the first amendment⁷⁷ and the copyright clause,⁷⁸ which limits such freedom, creates a unique constitutional conflict. Eminent scholars such as Melville Nimmer and Paul Goldstein, however, maintain that copyright law actually encourages speech by limiting the duration of the monopoly granted to authors.⁷⁹ This argument has determined the course of copyright jurisprudence.⁸⁰ The courts employ it to downplay first amendment concerns, invoking the idea-expression dichotomy as the most important vehicle to limit the expansion of copyright.⁸¹ The underlying theory is that protecting expressions, but not ideas, prohibits only speech that is constitutionally inconsequential.⁸² Because copyright presumably forbids only the literal repetition of what others have expressed, it does not detract from "the marketplace of ideas."⁸³ On the other hand, copyright rewards authors who contribute to the marketplace of ideas by granting them exclusive rights.⁸⁴

76. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931).

77. U.S. CONST. amend I.

78. U.S. CONST. art. I, § 8, cl. 8.

79. Yen, *supra* note 6, at 394 (citing Nimmer, *Does Copyright Abridge First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970)). The copyrights and patents clause reads:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries[.] (emphasis added).

U.S. CONST. art. I, § 8, cl. 8.

80. Yen, *supra* note 6, at 394.

81. *Id.* at 394-95 (citing *Schnapper v. Foley*, 471 F. Supp. 426, 428 (D.D.C. 1979), *aff'd*, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982); *McGraw-Hill, Inc. v. Worth Publishers, Inc.* 335 F. Supp. 415, 422 (S.D.N.Y. 1971)).

82. *Id.*

83. *Id.* at 396. See, e.g., *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977).

84. *Id.* These rights include: the right to reproduce the work; the right to prepare derivative works; the right to distribute copies of the work; the right to perform the work; and the right to display the work publicly. *Id.* at 398 (citing 17 U.S.C. § 106 (1982)).

C. *Seeds of the Idea-Expression Dichotomy and the Doctrine of Merger*

The seminal case of *Baker v. Selden*⁸⁵ is often cited as the source of the idea-expression dichotomy,⁸⁶ although the terms are not used in the opinion, which speaks instead of a distinction between the “art” and the “description of the art.”⁸⁷ The explicit distinction between ideas and expressions apparently was formulated first in another landmark case, *Mazer v. Stein*.⁸⁸

Baker v. Selden is significant, however, for more than the intimation of the idea-expression dichotomy. The case is also cited in support of the so-called “merger” doctrine, which is often invoked to provide copyright protection even to the expression of ideas if the ideas are susceptible to only one or a limited number of expressions.⁸⁹

In *Baker v. Selden*, the plaintiff had published a series of copyrighted books that contained an introductory explanation of a book-keeping system and blank forms consisting of lines, blank columns, and headings in a special arrangement designed to facilitate so-called “double-entry” bookkeeping.⁹⁰ The defendant, whose books were arranged substantially under the same system, contended that the matter alleged to be infringed was not the proper subject of copyright.⁹¹ The court reasoned that, where the art taught by a book cannot be applied without using the methods and diagrams illustrating the book, these

85. 101 U.S. 99 (1880).

86. See, e.g., *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986). Section 102(b) of the 1976 Act is merely a codification of the idea-expression dichotomy developed in the case law. *Id.* at 1211. This section was not meant to “enlarge[] or contract[] the scope of copyright protection Its purpose [was] to restate . . . that the basic dichotomy between expression and idea remains unchanged.” *Id.* at 1212 (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 57 (reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5670)).

87. *Baker v. Selden*, 101 U.S. 99, 104-5 (1880). The “art” referred to was a “peculiar system of book-keeping.” *Id.* at 100.

88. 347 U.S. 201 (1954). “Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.” *Id.* at 217. *Mazer*, which quotes *Baker v. Selden*, has also spawned a voluminous literature.

89. See *Baker*, 101 U.S. at 103-04. Although the *Baker* holding was limited to “blank account books,” this case is usually taken to mean that blank forms are not copyrightable, an important proposition because of its application to computer programs. See, e.g., *Synercom Technology, Inc. v. Universal Computing Co.*, 462 F. Supp. 1003 (N.D. Tex. 1987) (dealing with the use of data cards and holding that input formats are non-protectable ideas); but see *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986) (concluding that the detailed structure of a dental laboratory program is part of the expression, not the idea, of the program).

Note that a Copyright Office regulation specifically denies copyright protection to “[b]lank forms, such as time cards . . . account books . . . bank checks . . . order forms and the like, which are designed for recording information and do not in themselves convey information.” 37 C.F.R. § 202(1)(c) (1989).

90. *Baker*, 101 U.S. at 100.

91. *Id.*

methods and diagrams are "necessary incidents to the art" and, therefore, within the public domain.⁹² Consequently, the copyright could not secure "the exclusive right to make, sell, and use account books prepared upon the plan set forth in such a book."⁹³ In the later case of *Morrissey v. Procter & Gamble Co.*,⁹⁴ the plaintiff owned the copyright to a set of rules for a sweepstakes-type promotion based on the social security numbers of the participants, and the defendant Procter & Gamble copied one of the rules almost verbatim.⁹⁵ The court, however, held for the defendant, reasoning that:

When the subject matter is very narrow, so that 'the topic necessarily requires . . .' if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance.⁹⁶

Baker and *Morrissey* thus originated the doctrine of "merger," which has been described as "a close cousin to the idea-expression dichotomy."⁹⁷ These and other cases such as *Continental Casualty Co. v. Beardsley*,⁹⁸ which upheld the copyrightability of more complicated forms,⁹⁹ and *Herbert Rosenthal Jewelry Corp. v. Kalpakian*,¹⁰⁰ which denied protection to jeweled bee pins because the idea and the expression of such pins were regarded as indistinguishable,¹⁰¹ defined "idea" in an oblique way¹⁰²—through the merger doctrine—and set the stage for further developments. These cases are significant because they indicate where abstraction meets concreteness for purposes of copyright.

D. *Variations on a Theme by Holmes*

The Tree of Porphyry extends its branches to modern copyright because "there is nothing new under the sun."¹⁰³ Moreover, in accor-

92. *Id.* at 103.

93. *Id.* at 104.

94. 379 F.2d 675 (1st Cir. 1967).

95. *Id.* at 676.

96. *Id.* at 678.

97. *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986).

98. 253 F.2d 702 (2d Cir. 1958), *cert. denied*, 358 U.S. 816 (1958).

99. *Id.* at 704. The forms here were for "a blanket bond to cover replacement of lost securities which would operate *in futuro*." *Id.* at 703. The court distinguished *Baker v. Selden* on the grounds that the explanation of the accounting system could be treated as separable from account books, whereas the bonds and affidavits of *Beardsley's* plan were inseparable from the language explaining it. *Id.* at 704.

100. 446 F.2d 738 (9th Cir. 1971).

101. *Id.* at 742.

102. *Id.*

103. ECCLES. 1:9.

dance with this biblical precept, none of the tests or methods of analysis devised to deal with the problems of abstraction flowing from the idea-expression dichotomy seems to depart from the fundamental principle of duality, nor does it offer a definitive answer to the question of when to cut a category in two when competing works are being compared. All of these tests seem to be variations on a theme by Justice Holmes, the proscription against “copying the copy,”¹⁰⁴ and to represent a search for the analytical basis of that proscription.

1. *Copying the Copy*

A fundamental property right involved in copyright cases is obviously the right to make copies,¹⁰⁵ although other rights—and obligations—have always attached from the copyright acts. Therefore, copying by the defendant is one of the two essential elements of a copyright claim.¹⁰⁶ This Author submits that one of Justice Holmes’ most quoted phrases, “Others are free to copy the original[;] [t]hey are not free to copy the copy,”¹⁰⁷ amounts to an explanation of the idea-expression dichotomy in its most basic terms. The original is the idea; the copy is the expression of the idea, that is, “the personal reaction of an individual upon nature.”¹⁰⁸ Originals need not be notions existing only in the mind, as in the case of those that may precede the creation of abstract paintings or science-fiction scenes, but things, such as the Grand Canyon of Colorado, or a person modeling a pose, such as Oscar Wilde in the famous Sarony photograph.¹⁰⁹ Thus, any painter may paint the Grand Canyon and any photographer might have pictured Oscar Wilde without infringing any existing copyrights because these things are originals. A photograph of the photograph of Oscar Wilde or a replica of a specific rendition of the Grand Canyon, however, would be a copy of the copy, in other words, not an “original work of authorship.”¹¹⁰

104. See generally *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (Holmes, J.).

105. The first copyright statute in the English world was the Statute of Anne, which was subtitled “An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.” 8 Anne, c. 19 (1710) (*reprinted in* R. BROWN & R. DENICOLA, *CASES ON COPYRIGHT, UNFAIR COMPETITION AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS*, 211 (Stat. Supp. 1990)).

106. *E.g.*, *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1356 (N.D. Ill. 1989).

107. *Bleistein*, 188 U.S. at 249-50 (Holmes, J.) (citing *Blunt v. Patten*, 3 Fed. Cas. 763 (C.C.S.D.N.Y. 1828) (No. 1580)).

108. *Id.* at 250.

109. The “Sarony photograph” was at issue in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

110. *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1213 (8th Cir. 1986).

The test of originality in copyrights, as opposed to the requirement of novelty in trademarks, has a "low threshold" because, as we have seen,¹¹¹ copyright does not protect ideas but rather "the art disclosed."¹¹² A threshold, however, is "still a threshold,"¹¹³ and the party asserting a claim must pass it to prevail, even in the case of a map, for example, where creativity can only be minimal.¹¹⁴ This low threshold simply requires that the author make the work¹¹⁵—that it be an expression and not merely an appropriation.

2. *Substantial Similarity*

But what is a copy as opposed to an original? A photocopy of a book, for example, is obviously a copy.¹¹⁶ If a defendant merely paraphrases a book, however, the paraphrase may still be a copy, which cannot be understood only as a literal reproduction, "else a plagiarist would escape by immaterial variations."¹¹⁷ To deal with this problem, the courts use "substantial similarity" as the standard of infringement.¹¹⁸ A play, for example, "may be pirated without using the dialogue" because "[s]peech is only a small part of a dramatist's means of expression."¹¹⁹ On the other hand, two competing works may be almost identical and not "substantially similar."

111. See *supra* text accompanying notes 68-76.

112. *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

113. *Toro*, 787 F.2d at 1213.

114. See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951). In copyright, an original work is one that "owes its origin" to the 'author.' No large measure of novelty is necessary." *Id.* at 102.

115. *Id.* at 103.

116. Whether the photocopy infringes a copyright is another question. Copying has two distinct meanings under copyright law: factual copying, which may be "fair use," see 17 U.S.C. § 107 (1988), and copying that is infringing. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936). For a discussion of the confusion generated by these two meanings, see *infra* text accompanying notes 175-185.

117. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

118. See 3 NIMMER ON COPYRIGHT § 13.03 (1989). Judge Learned Hand explained that "it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936).

119. *Sheldon*, 81 F.2d at 55. In *Sheldon*, the defendants had made a "picture play" called "Letty Lynton" that tracked the plaintiff's copyrighted play, "Dishonored Lady." Both works dealt with a "wanton" woman who poisons her lover to end an affair "that stood in the way of a respectable marriage." *Id.* at 50. "Dishonored Lady" was based on a real-life Scottish case that became a *cause celebre* and was published in book form in 1927. *Id.* at 49. Even if the original book had been copyrighted, the authors of "Dishonored Lady" were entitled to their copyright because they took from the book only the bare skeleton. *Id.* at 50. In "Letty Lynton," however, the defendants appropriated from "Dishonored Lady" the "confluents of all these means [to build a play], bound together in an inseparable unity . . . which keeps the whole dramatic meaning." *Id.* at 55-56.

In *Franklin Mint Corp. v. National Wildlife Art Exchange*,¹²⁰ for example, a wildlife artist made a painting titled “Cardinals on Apple Blossom” and later assigned his copyright to National Wildlife Art Exchange.¹²¹ Years later, the artist made another painting using some of the same sources, such as preliminary sketches, photos, and a drawing, but using also slides of foliage, cardinal photographs, and stuffed birds not used in creating “Cardinals on Apple Blossom.”¹²² The Art Exchange claimed that the new painting, titled “The Cardinal,” infringed the assigned copyright.¹²³ The court held that even though the ideas were similar, the expressions were not, partly because “in ornithological art . . . minute attention to detail of plumage and other physical characteristics is required and the stance of the birds must be anatomically correct.”¹²⁴

Decisions drawing the line according to the substantial similarity test “must therefore inevitably be *ad hoc*.”¹²⁵ In the case of verbal works, “no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression,’”¹²⁶ while in the case of designs, which depend on the aesthetics of the individual, “the test is, if possible, even more intangible.”¹²⁷

Substantial similarity, therefore, is a troublesome test.¹²⁸ To elucidate it, Professor Nimmer coined the terms “Comprehensive Nonliteral Similarity” and “Fragmented Literal Similarity.”¹²⁹ The first refers to the re-creation of the “fundamental essence or structure of

120. 575 F.2d 62 (3d Cir. 1978), *cert. denied*, 439 U.S. 880 (1978).

121. *Id.* at 63-64.

122. *Id.* at 62-64.

123. *Id.* at 63.

124. *Id.* at 66; *but cf.* *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914). In *Gross*, an artist photographed a model in the nude, sold the copyright, and two years later photographed the same model in the same pose, except that she was smiling and holding a cherry stem between her teeth. *Id.* The court held that the defendant had infringed the copyright by publishing the second photograph. *Id.* at 932; *accord* *Alt v. Morello*, 227 U.S.P.Q. 49 (C.C.S.D.N.Y. 1985) (concerning an advertising photograph of a Cross pen and pencil against a specific background and at a specific angle); *see also* *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380 (S.D.N.Y. 1987) (denying summary judgment to a defendant who created an advertisement by photographing a model with a musical instrument, where the model and the instrument were different, but the background, camera angles, lighting, and other elements were similar).

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

126. *Id.*

127. *Id.*

128. While, technically, originality can be found simply where the work constitutes a “distinguishable variation,” substantial similarity “presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalizations.” 3 NIMMER ON COPYRIGHT § 13.03[A] (1989). The concepts of originality and substantial similarity should not be confused. *Id.*

129. 1 NIMMER ON COPYRIGHT § 13.03[A][1]-[2] (1989).

one work" in another, which applies to situations where the similarity is comprehensive but not word-for-word, nor some other type of literal similarity.¹³⁰ The second applies to situations of literal similarity of fragments, though not necessarily word-for-word, where the outline of the plaintiff's work has not been copied.¹³¹ Where literal similarity is found, the difficulty of determining the degree of abstraction where similarity rises to the level of ideas does not exist "because literal similarity by definition is always a similarity as to the expression of ideas."¹³² The problem remains, however, what degree of substantial similarity is an infringement.¹³³ The essential problem of abstraction, therefore, remains unresolved under the Comprehensive Nonliteral Similarity analysis and merely shifts from one field of discourse to another in the application of Fragmented Literal Similarity analysis, that is, substantial versus insubstantial as opposed to idea versus expression.

3. *The Abstractions Test*

Judge Learned Hand formulated his famous "abstractions test" in *Nichols v. Universal Pictures Corp.*¹³⁴ Here, the plaintiff was the owner of a copyright on the play "Abie's Irish Rose," which dealt with a wealthy Jewish father's obsessive desire for his son to marry an orthodox Jewish girl, his son's secret union with a Catholic girl, the father's discovery of the truth, the father abjuring the son, and an eventual reconciliation precipitated by the birth of grandchildren.¹³⁵ The defendant had produced a movie-play, "The Cohens and the Kellys," dealing with two poor families—one Jewish and the other

130. *Id.* at § 13.03[A].

131. *Id.*

132. *Id.*

133. *See id.*

134. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). Here, Judge Learned Hand "authored the most widely quoted distinction between idea and expression," Yen, *supra* note 6, at 404.

Upon any work, and especially upon a play, 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 play is about, and at times might consist only of its title; but there is a point in this series of abstractions where 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.

Nichols, 45 F.2d at 121. The "abstractions test," however, has been criticized as "not a test at all," but rather as "a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality." *Nash v. Columbia Broadcasting Sys., Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990).

135. *Nichols*, 45 F.2d at 120.

Irish—living side by side in a state of enmity, the secret marriage of the Jewish daughter and the Irish boy, the daughter bearing a child, and eventual reconciliation of the two families.¹³⁶ One problem is that, concerning plays, the copying may involve only a scene or part of the dialogue, so that the question becomes whether the part taken is so substantial as to constitute infringement.¹³⁷ When the copy involves an abstract of the whole rather than sections literally lifted from the original, the question is more difficult.¹³⁸

Thus, some ideas may be so abstract that they are no longer protected, but past a certain boundary expressions become sufficiently concrete to constitute infringement.¹³⁹ According to Judge Hand, however, “[n]obody has been able to fix that boundary, and nobody ever can.”¹⁴⁰ *Nichols*, therefore, has been criticized because it did not formulate a principle to divide ideas from expressions; Judge Learned Hand simply compared the two works and “instinctively decided whether the similarity was literal enough to warrant a finding of infringement.”¹⁴¹ Although the abstractions test is regarded as the best effort in dealing with the idea-expression dichotomy,¹⁴² one critique argued that it is no test at all because of Judge Hand’s belated caveat thirty years after *Nichols*.¹⁴³ The caveat, articulated in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*,¹⁴⁴ is the recognition that

136. *Id.* at 120-21. The movie-play, of course, contained variations on the basic “Obstacles to Love” theme. See the 28th Situation in G. POLTI, *infra* note 149. For example, the Jewish father is informed by his lawyer that he has unexpectedly come into a large inheritance. The father and his daughter move to a great house, where he proceeds to chase away his daughter’s poor Irish boyfriend. The two kids secretly marry. The lawyer, however, seeing that his plan to marry the Jewish girl was spoiled, reveals to the father that the fortune really belonged to the Irishman’s family and proposes to hide this knowledge in return for a share of the wealth. *Nichols*, 45 F.2d at 121. The Jewish father’s honest behavior then leads to the reconciliation with the Irish father. *Id.*

137. *Id.* The court in *Nichols* began its analysis by stating:

It is of course essential to any protection of literary property . . . that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. . . . [B]ut, as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that . . . the decisions cannot help much in a new case.

Id.

138. *Id.*

139. *See id.*

140. *Id.* Treating the question as analogous to copying a part of the original is not a satisfactory solution because “though the skeleton is a part of the body, it pervades and supports the whole.” *Id.* In such cases, the problem again is establishing where ideas end and expressions begin. *See id.*

141. Yen, *supra* note 6, at 405.

142. *Id.* at 405.

143. Knowles & Palmieri, *Dissecting Krofft: An Expression of New Ideas in Copyright?*, 8 SAN FERN. V.L. REV. 109, 118 (1980).

144. 274 F.2d 487 (2d Cir. 1960).

“[o]bviously no principle can be stated as to when an imitator has gone beyond copying the ‘idea’ and has borrowed its ‘expression.’ ”¹⁴⁵ The absence of such a principle creates uncertainty where the courts attempt to balance the first amendment with copyright law.¹⁴⁶

Characters and plot are at the center of the controversy in dramatic works.¹⁴⁷ Although characters may be copyrighted, substantial similarity is very difficult to establish in characters because, unless very clearly delineated, they constitute no more than ideas.¹⁴⁸ Do any original plots exist, moreover, for fiction or drama? Novelists, dramatists, and other writers believe that new plots are nonexistent but are rather variations on a relatively small number of basic situations.¹⁴⁹ Margaret Mitchell’s *Gone with the Wind*, for example, combines two standard situations, “Daring Enterprises”¹⁵⁰ (often employed in modern adventure stories such as Frederick Forsyth’s *The Day of the Jackal*), and “Obstacles to Love.”¹⁵¹

Sid & Marty Krofft Television Productions v. McDonald’s Corp.,¹⁵² recognized the difficulty involved in “distill[ing] the unprotected idea from the protected expression” and endorsed Judge Learned Hand’s

145. *Id.* at 489.

146. See Yen, *supra* note 6, at 420. The author uses the metaphor of a “slippery slope,” which implies an undesirable position at the bottom, but recognizes that, at best, the idea-expression dichotomy can be used “to properly limit copyright law.” *Id.* at 405.

147. Knowles & Palmieri, *supra* note 143, at 489.

148. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931), where Judge Learned Hand said in often-quoted dicta:

If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare’s “ideas” in the play

Id. at 121; see also Berman & Boxer, *Copyright Infringement of Audiovisual Works and Characters*, 52 S. CAL. L. REV. 315, 325-26 (1979) (discussing the effect of the “Sam Spade” case, *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955), which was cited as authority for the proposition that characters as such are not copyrightable); but see, e.g., *Walt Disney Prods. v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972) (finding copyright infringement of Disney cartoon characters by bawdy “counterculture” versions of the characters); 1 NIMMER ON COPYRIGHT § 2.12, at 2-175 (1988) (cartoon characters or other graphic representations are more easily protected than “word portraits”).

149. G. POLTI, *THE THIRTY-SIX DRAMATIC SITUATIONS* 3 (1986). “[The 18th century Italian dramatist Carlo] ‘Gozzi maintained that there can be but thirty-six tragic situations. Schiller took great pains to find more, but he was unable to find even so many as Gozzi.’ ” *Id.* at 7.

150. Polti’s ninth situation. *Id.*

151. *Id.* at 36, 93. The latter is Polti’s 28th situation. The essential elements of the ninth situation, see *supra* note 149 and accompanying text, for example, are a bold leader, an object, and an adversary. *Id.* at 36. The conflict in this situation is clearly drawn and undisguised, and involves “[a] clever plan, a bold attempt, sangfroid[]—and victory!” *Id.*

152. 562 F.2d 1157 (9th Cir. 1977).

“abstractions test,” which requires copying not only the expressions of the idea, but also the idea itself for a finding of substantial similarity.¹⁵³ But the test for “substantial similarity” is more complex when expressions must be distinguished than when ideas are distinguished; therefore, the test for similarity of ideas is “a factual one, to be decided by the trier of fact.”¹⁵⁴ The inquiry, then, is whether the expression provides something new or contributes to the idea.¹⁵⁵ This inquiry is equivalent to determining whether the work is based on the original or the copy, except that it purports to subtract the idea portion from the whole and to consider only the expressions. The test, however, fails to resolve the problems of abstraction, does not provide a definition of an idea, and fails to recognize that numerous ideas, rather than a single Platonic form, go into the making of an original work of authorship.

Some commentators argued that *Krofft* provides the missing link in the abstractions test through an application of the “extrinsic” and “intrinsic” tests,¹⁵⁶ sometimes seen as another version of *Arnstein v. Porter’s*¹⁵⁷ bifurcated method for proving copying and substantial similarity. Such tests, according to those commentators, obviate Judge Hand’s invitation to make ad hoc decisions and allow the courts to draw a distinct line on the “idea-expression continuum.”¹⁵⁸ Adding to the complexity of the previous intellectual scaffolding, then, determining substantial similarity between ideas, according to *Krofft*, calls for an “extrinsic test,” which depends not on the trier of fact’s reactions but on objective criteria—including “the type of artwork involved, the materials used, the subject matter, and the setting for the subject.”¹⁵⁹ In turn, the test to determine substantial similarity between expressions is “intrinsic” because it depends on the perspective of the ordinary reasonable person.¹⁶⁰ Under the intrinsic test, therefore, analytic dissection and expert testimony are inappropriate.¹⁶¹

153. *Id.* at 1163.

154. *Id.* at 1164.

155. *See Sid & Marty Krofft Television Prods. v. McDonald’s Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977). Thus,

Michaelangelo’s David is, as an idea, no more than a statue of a nude male. But no one would question the proposition that[,] if [it were] a copyrighted work[,] it would deserve protection even against the poorest of imitations. This is because so much more was added in the expression over the idea.

Id. at 1168. One could argue, however, that the additions themselves are ideas too and that the statue embodies *many* ideas.

156. Knowles & Palmieri, *supra* note 143, at 119.

157. 154 F.2d 464 (2d Cir. 1946).

158. Knowles & Palmieri, *supra* note 143, at 119.

159. *Krofft*, 562 F.2d at 1164.

160. *Id.*

161. *Id.* *Krofft* embraced the standard of “total concept and feel,” *infra* note 197, a catchy

In the *Krofft* case, the plaintiffs had created a children's television program that became highly successful when broadcast Saturday mornings.¹⁶² One year after introducing the show, the plaintiffs were approached by one of the defendants, an advertising agency that was trying to obtain the account of the McDonald's restaurant chain, to work on a project using the "Living Island" theme and "H.R. Pufnstuf" characters of the television series.¹⁶³ Following several rounds of negotiations, the advertising agency eventually told the plaintiffs that the advertising campaign had been cancelled, when in fact the agency had already obtained the account and was going forward with its so-called "McDonaldland" project.¹⁶⁴ The agency also hired former employees of the plaintiff to make the costumes and supply some of the voices for the characters.¹⁶⁵

The defendants argued that, even though they copied the idea of the television series—a fantasyland of various fanciful characters—their expression was too dissimilar for a finding of infringement.¹⁶⁶ The defendants' argument was based on a "dissection" of such elements as the characters, setting, and plot of the television series.¹⁶⁷ The court of appeal, however, upheld the jury finding of infringement¹⁶⁸ and rejected the proposed dissection because such an approach ignored the idea-expression dichotomy,¹⁶⁹ even though characters do not easily receive protection,¹⁷⁰ the plot of a television commercial is insubstantial at best, and the setting could have been regarded as *scenes a faire*, which are unprotected.¹⁷¹ The defendant's dissection approach, the court reasoned, "ignore[d] the idea-expression dichotomy alluded to in *Arnstein*,"¹⁷² which lead to the creation of the two-step determination: the "extrinsic," objective test allowing analytic dissection and

161. *Id.* *Krofft* embraced the standard of "total concept and feel," *infra* note 197, a catchy phrase some commentators believe leads to a slippery slope where copyright is unfortunately extended to undeserving subject matter. See 3 NIMMER ON COPYRIGHT § 13.03[A][1][c] (1989); Yen, *supra* note 6, at 397, 412, 416, 419-20.

162. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1161 (9th Cir. 1977).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 1165.

167. *Id.*

168. *Id.* at 1175.

169. *Id.* at 1165.

170. See Berman & Boxer, *supra* note 148, at 325-30.

171. *E.g.*, Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204, 208 (9th Cir. 1988).

172. Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1165 (9th Cir. 1977) (referring to *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), which created a bifurcated test to establish infringement requiring that both ideas and expressions have been copied).

expert testimony to determine whether the similarities are sufficient to prove copying,¹⁷³ and the “intrinsic,” subjective test “depending on the response of the ordinary reasonable person” to determine substantial similarity.¹⁷⁴

4. *Copying versus Copying*

Why not simply say that the defendant copied the copy? The answer, articulated in *Stillman v. Leo Burnett Co.*,¹⁷⁵ lies at the root of the semantic confusion regarding another ambiguous term, “copying.” This elementary term receives two totally different meanings in cases such as *Atari v. North American Philips Consumer Electronics Corp.*¹⁷⁶ Here, in following another basic two-step in the analysis of a copyright claim—proving ownership of the copyright in a work and proving the copying of the copyrighted work in the creation of another work¹⁷⁷—the Seventh Circuit Court of Appeals established a circular framework.¹⁷⁸ The plaintiff, in that framework, had to prove substantial similarity to prove copying and had to prove copying to prove substantial similarity.¹⁷⁹ The circularity resulted from the application of the second essential element to a copyright claim, “that the defendant copied from the plaintiff’s work and [] [that] the copying, if proven, went so far as to constitute an improper appropriation.”¹⁸⁰

The confusion resulted because of the two different meanings of “copying” as an element of a copyright claim and “copying” as the second prong of substantial similarity.¹⁸¹ In the first usage, copying refers to “whether the defendant violated the copyright laws by reproducing protectible [sic] expression from the plaintiff’s work.”¹⁸² In the second usage, copying refers to “the purely factual issue of whether the defendant used the plaintiff’s work as a starting point for his own.”¹⁸³ It follows that a defendant may copy as a factual matter but not in the legal sense that would make him or her liable.¹⁸⁴ The defen-

173. *Arnstein*, 154 F.2d at 468.

174. *Krofft*, 562 F.2d at 1164.

175. 720 F. Supp. 1353 (N.D. Ill. 1989).

176. 672 F.2d 607 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982).

177. *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1356 (N.D. Ill. 1989) (citing 3 NIMMER ON COPYRIGHT § 13.01 (1989)).

178. *Stillman*, 720 F. Supp. at 1357.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

dant must have copied something protected by the copyright laws, "specifically, the plaintiff's expression of his ideas," to be liable.¹⁸⁵

Therefore, the *Stillman* court would escape from *Atari's* circular trap by explaining that the actual meaning had to be that "the plaintiff must establish at least permissible copying as a prerequisite to proving illicit copying."¹⁸⁶ But even after *Stillman* cut this Gordian Knot, the *Atari* court was out on a limb on the dual meaning of "substantial similarity."¹⁸⁷

On the one hand, "substantial similarity can refer to the likeness between two works sufficient to give rise to an inference, when supported by evidence of access, that the defendant took ideas from the plaintiff's work."¹⁸⁸ On the other hand, the courts use it as a term of art "relating to the unlawful nature of the similarities between two works."¹⁸⁹

The problem with *Atari* is that it refers to substantial similarity in the sense related to likeness while it introduces the type of test necessary to establish unlawful nature.¹⁹⁰ The obfuscation supposedly dissolves with the assertion that the copying-unlawful appropriation distinction is simply a consequence of the idea-expression dichotomy, or the decision not to protect ideas, procedures, and concepts.¹⁹¹ But the problems of abstraction refuse to disappear because "the intrinsic-extrinsic analysis . . . does not fully encompass the infringement inquiry."¹⁹² Although the response of two works on the ordinary observer may be the same, that response may be due to the *ideas* common to both rather than their *expressions*.¹⁹³

5. Total Concept and Feel

An increasingly popular test for substantial similarity asks whether the defendant has captured the "total concept and feel" of the work. The Ninth Circuit Court of Appeals introduced that test in *Roth Greeting Cards v. United Card Co.*¹⁹⁴ and now regards it as

185. *Id.*

186. *Id.*

187. *Id.* at 1357-58.

188. *Id.* at 1358.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1359.

193. *Id.* at 1360.

194. 429 F.2d 1106 (9th Cir. 1970). *Roth* dealt with the copyrightability of greeting cards and is significant only for the introduction of the total concept and feel standard.

the test for substantial similarity of expression.¹⁹⁵ *Reyher v. Children's Television Workshop*¹⁹⁶ and *Krofft*¹⁹⁷ are key cases in this area of the law.

In *Reyher*, the author and the illustrator of a copyrighted children's book, *My Mother is the Most Beautiful Woman in the World*, sued for infringement the television network that produced the popular "Sesame Street" program. On appeal, the author explained that her mother had told her the story of the book as a folk tale during the author's childhood in Russia.¹⁹⁸ The tale concerned a little girl who becomes separated from her mother and, coming upon some villagers who asked what her mother looked like, describes her mother as the most beautiful woman in the world.¹⁹⁹ One of the defendants also testified that he remembered the theme from a script based on a story he had told his sister in the distant past, and had never seen the author's work.²⁰⁰ The illustrator, likewise, said that he remembered reading the folk tale during his childhood but had not seen the supposedly pirated illustrations and that the similarities between the drawings were coincidental.²⁰¹

The court first rejected a claim that the second work was derivative,²⁰² reasoning that, if borrowed material consists only of ideas, even if a work is derived partly from earlier works, it is not a derivative work.²⁰³ The court then decided that "in addition to the essential sequence of events, we might properly consider the 'total concept and feel' of the work in question."²⁰⁴ The inquiry was whether the defendant had used simply the idea of the first author or descended into the realm of concrete expression.²⁰⁵ Because the stories were addressed to children and thus were simpler than the type of work usually submit-

195. See, e.g., *Atari v. Northern Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir. 1982), cert. denied, 459 U.S. 880 (1982). The Ninth Circuit Court of Appeals, however, qualified that test in *Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485 (9th Cir. 1985). See *infra* notes 212-18 and accompanying text.

196. 533 F.2d 87 (2d Cir. 1976), cert. denied, 429 U.S. 980 (1976).

197. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). In *Krofft*, the court decided that the defendant's works were substantially similar to the plaintiffs' because "they captured the 'total concept and feel' of the Pufnstuf show." *Id.* at 1167.

198. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 88-89 (2d Cir. 1976), cert. denied, 429 U.S. 980 (1976).

199. *Reyher*, 533 F.2d at 92.

200. *Id.* at 89.

201. *Id.* at 89.

202. Derivative works are also protected by copyright. 17 U.S.C. § 103 (1988).

203. *Reyher*, 533 F.2d at 90.

204. *Id.* at 91.

205. *Id.*

ted to pattern analysis, the essential sequence of events was not the decisive question.²⁰⁶ Consequently, the extrinsic test was invalid because experts play no part in the ordinary observer analysis. But the intrinsic test or ordinary observer analysis cannot be thrust upon children incapable of grasping evanescent copyright postulates. The result was that the court found no infringement even though the two works narrated similar events, which were labeled *scenes a faire* or obligatory follow-ups to basic dramatic situations.²⁰⁷

More significantly, however, was the difference in *total feel*,²⁰⁸ explained as dissimilarity in mood, detail, and characterization. What the works shared was only the "thematic concept" that the mother's face is, subjectively, the most beautiful in the world to a child.²⁰⁹ *Reyher*, therefore, approaches the Platonic concept of preexisting ideas.²¹⁰ Perhaps its most important contribution is the advancement of "concept" and "feel" in the analysis of copyright issues where previous law clearly established that expressions—not concepts—and objective dissection—rather than subjective tests—establish substantial similarity in the sense of infringement.

The "total concept and feel" cases spawned by *Roth* and *Krofft* have been criticized for enforcing vague claims of copyright and causing a "massive restructuring of the distinction between idea and expression that Judge Hand defined [through the abstractions test]."²¹¹ Perhaps aware of the problems inherent in its strong view of protected expression in *Krofft*, the Ninth Circuit Court of Appeals modified its approach to substantial similarity in subsequent decisions. In *Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc.*,²¹² for example, the court rejected a copyright infringement claim brought by the publisher of a radiator catalog against a competitor that had published a nearly identical work.²¹³ Factual works, the court reasoned, are fundamentally different from more artistic works.²¹⁴ Alluding to the merger doctrine, the court added that in the case of radiator catalogs, the range of possible expressions is "extremely narrow."²¹⁵ In such a case, the use of the intrinsic test for substantial similarity established in *Krofft*

206. *Cf. id.*

207. *Reyher*, 533 F.2d at 92. For example, a happy reunion usually follows the protagonist lost children when they eventually find their parents.

208. *Id.*

209. *Id.*

210. See *supra* text accompanying notes 36-39.

211. Yen, *supra* note 6, at 407, 410.

212. 777 F.2d 485 (9th Cir. 1985).

213. *Id.* at 493.

214. *Id.* at 491.

215. *Id.*

is not appropriate.²¹⁶ Thus, the plaintiff's contention that a reasonable observer would find the catalogs in question indistinguishable was irrelevant.²¹⁷ "What is important is not whether there is substantial similarity in the total concept and feel of the works . . . , but whether the . . . protectible expression [in the copyrighted work] is substantially similar to the equivalent portions [in the work of the alleged infringer]." ²¹⁸

In *Aliotti v. R. Dakin Co.*,²¹⁹ where the plaintiff claimed copyright infringement in her line of stuffed toy dinosaurs, the Ninth Circuit Court of Appeals expanded on this qualification. In a situation reminiscent of *Krofft*, the plaintiff and her employer contacted the defendant about buying the entire company and its product line. The defendant looked at the plaintiff's designs, but decided against buying the company. The defendant developed its own product line, which was generally similar to the plaintiff's.²²⁰ The court, in spite of *Roth* and *Krofft*, rejected the infringement claim,²²¹ reasoning that "[n]o copyright protection may be afforded to the idea of producing stuffed dinosaur toys or to elements of expression that necessarily follow from the idea of such dolls."²²² Therefore, similarity in the "physiognomy of dinosaurs" and "the nature of stuffed animals" was irrelevant.²²³ Other courts, however, have not adopted this limitation, which strengthens the concept of idea as a counterbalance to the enlarged concept of expression²²⁴ effected by *Roth* and *Krofft*.²²⁵ The "total concept and feel" standard, then, presents serious difficulties.²²⁶

216. *Id.* at 492.

217. *Id.* at 493.

218. *Id.*; see also, e.g., *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1359 (N.D. Ill. 1989) ("[W]hen the similarity between two works arises exclusively from the use of the same process or technique—for example, the similar 'concept and feel' of two impressionistic paintings—it cannot form the basis for a copyright claim.").

219. 831 F.2d 898 (9th Cir. 1987).

220. *Id.* at 900.

221. *Id.* at 901-02.

222. *Id.*; accord *Data East USA, Inc. v. Epyx, Inc.* 862 F.2d 204, 208 (9th Cir. 1988) (No substantial similarity will be found where, as in the case of a video game dealing with the sport of karate, the idea and the expression are inseparable, to prevent granting a monopoly on the idea to the copyright owner.).

223. *Allioti*, 831 F.2d at 901.

224. Yen, *supra* note 6, at 412.

225. See, e.g., *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127 (N.D. Cal. 1986) (identifying the "idea" of two competing computer programs with the "purpose" of creating a number of graphic and textual displays).

226. See, e.g., 3 NIMMER ON COPYRIGHT § 13.03[A], at 13-35 (1989) ("'Concepts' are statutorily ineligible for copyright protection; for courts to advert to a work's 'total concept' as the essence of its protectible [sic] character seems ill-advised in the extreme. Further, the addition of

These difficulties multiply in computer software cases where the courts, apparently inspired by the "total concept and feel" standard, have confused protected expression with the program code and unprotected ideas with the program's function.²²⁷ Because few judges or juries understand the concepts underlying the production of computer software, the ordinary observer test is again rendered inadequate.²²⁸ If the infringing program resembles the original, "it is tempting to equate the unprotected ideas with overall program function, avoiding the necessity of looking inside [the programs]."²²⁹ This is the mistake of *Whelan Associates, Inc. v. Jaslow Dental Laboratories, Inc.*,²³⁰ a widely criticized decision.²³¹

In *Whelan*, the trial court found that copyright could be extended beyond the literal computer code of a program to non-literal elements such as its sequence and organization—its structure.²³² The court of appeals upheld the finding after evaluating the evidence of substantial similarity between the overall structures of the programs and concluding that it was sufficient,²³³ even though the district court did not find any copying of the source or object codes and the plaintiff did not allege such copying.²³⁴ Citing *Krofft* and *Nichols*, among other cases, the court reasoned that computer programs are classified as literary works, which can be infringed even in the absence of substantial similarity in the works' literal elements.²³⁵

Alluding to *Baker v. Selden*,²³⁶ the court then proposed a rule to distinguish ideas from expression in computer programs that may be an improper introduction of the metaphysical concept of "final causes"²³⁷ into copyright law:²³⁸ "the purpose or function of a utilitar-

'feel' to the judicial inquiry, being a wholly amorphous referent, merely invites an abdication of analysis." (citation omitted)).

227. Brinson, *Copyrighted Software: Separating the Protected Expression from Unprotected Ideas, A Starting Point*, 29 B.C.L. REV. 803 (1988).

228. See *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232 (3d Cir. 1986).

229. Brinson, *supra* note 227, at 831.

230. 797 F.2d 1222 (3d Cir. 1986).

231. Yen, *supra* note 6, at 414 (citing Note, *Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software*, 35 UCLA L. REV. 723 (1988)); G. Davis, *Computer Software—The Final Frontier: Clones, Compatibility and Copyright*, COMPUTER LAW (June 1985); Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119 (1986).

232. *Whelan*, 797 F.2d at 1224-25, *aff'g* 609 F. Supp. 1307 (E.D. Pa. 1985), *cert. denied*, 479 U.S. 1031 (1987).

233. *Id.*

234. *Id.* at 1233.

235. *Id.* at 1234.

236. 101 U.S. 99 (1880). See *supra* text accompanying notes 85-93.

237. See *supra* note 49.

238. See, e.g., Brinson, *supra* note 227.

ian 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."²³⁹ In *Whelan*, the court of appeals adopted the lower court's conclusion that the purpose of the program was simply the efficient operation of a dental laboratory.²⁴⁰ The court also adopted the lower court's reasoning that other programs on the market serving the same purpose were evidence that the idea was subject to many different expressions;²⁴¹ therefore, *Baker v. Selden's* concept of merger was inapplicable.

By adopting a definition of "idea" limited to program function, however, everything in a program at a lower level of abstraction amounts to protected expression.²⁴² The *Whelan* court apparently ignored the way in which computer programmers write programs—proceeding from more abstract levels of function to more concrete problem-solving steps that put many ideas, not a single idea, to work.²⁴³ As a consequence of defining idea at the level of overall program function and failing to recognize the presence of many ideas in a computer program, the court "deprive[d] later program developers of their rightful use of the ideas used in the original program."²⁴⁴ The *Whelan* case, therefore, stands as a major example of the improper application of the idea-expression dichotomy, because it fails to apply the limiting principle of the dichotomy that ideas are not protected.²⁴⁵ The *Whelan* court, however, could have applied traditional "levels of abstractions" analysis to one substantive area—computer programming—that is particularly well suited for such analysis.²⁴⁶

239. *Whelan*, 797 F.2d at 1236 (emphasis removed). This rule would have no application to "works of literature or 'non-functional' visual representations [where] defining the purpose of the work may be difficult." *Id.* at 1238.

240. *Id.* at 1238-39.

241. *Id.* at 1238; but see *Plains Cotton Coop. v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256 (5th Cir. 1987), cert. denied, 484 U.S. 821 (1987) (affirming that the sequence and organization of software designed to help cotton sales were ideas determined by the characteristics of the cotton market); *Synercom Technology, Inc. v. University Computing Co.*, 462 F. Supp. 1003 (N.D. Tex. 1978) (holding that the organization and structure of input formats or the configurations of data that go into a program are not copyrightable because they merge with the underlying idea).

242. *Brinson*, *supra* note 227, at 831.

243. See *id.* at 830-31. In other software cases dealing with the idea-expression dichotomy, the courts have recognized that software contains many uncopyrightable ideas. See *id.* at 834 and cases cited therein.

244. *Id.* at 847. This method of analysis could stifle so-called "clean-room" procedures by software developers. See *id.* at 852-53.

245. See *id.* at 831; but see Note, *Differentiating Idea and Expression in Copyrighted Computer Software: The Tests for Infringement*, 6 J.L. & Com. 419 (1987) (concluding that the *Whelan* opinion formulates a test that "will be useful in the future" but recognizing that "a new law has been created").

246. See generally *Brinson*, *supra* note 227.

6. Other Major Tests

Professor Nimmer recommends Professor Chafee's "pattern" test as the answer to "this most difficult question":

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.²⁴⁷

Chafee's pattern test operates in conjunction with Judge Hand's abstraction test²⁴⁸ but "does little more than Judge Hand's" formulation because, like other tests, it fails to explain where to divide the branches of the tree of abstractions²⁴⁹ and simply appears to restate Professor Nimmer's Comprehensive Nonliteral Similarity test,²⁵⁰ which is in turn "substantially similar" to Judge Hand's "abstractions test."²⁵¹ What none of the tests provide, however, is the basic "W's" of Who, When, and How.²⁵²

A natural outgrowth of the "total concept and feel" standard is the increasingly popular "look and feel" standard.²⁵³ In one line of cases, "look and feel" relates to computer screens that can be copyrighted individually or as part of a program.²⁵⁴ A screen, also called "user interface," is the design of the video image and the way it presents information.²⁵⁵ These cases deal especially with enhancements to existing programs and, therefore, present the problem of separating the cumulus of free ideas in the public domain that go into the writing of the program from the specific expression, but not process, technique, system, procedure, principle, discovery, or method of operation, which are in the same category as ideas under the 1976 Act.²⁵⁶

In another line of cases, "look and feel" relates to materials such as stuffed teddy bears, dinosaurs, fabric designs, or photos of fabric designs. One court in a teddy bear case noted that analytic dissection is inappropriate and that *Krofft* rejected expert analysis of dissimilarities

247. 3 NIMMER ON COPYRIGHT § 13.03[A][1][b] (1989) (citing Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513-14 (1945)).

248. *Id.*

249. *See id.*

250. *Supra* text accompanying notes 129-32.

251. *Supra* note 134.

252. *Id.* To which one might add Where and Why, completing journalism's traditional pentad.

253. Abramson, *Look and Feel of Computer Software*, 95 CASE & COMMENT 3 (1990).

254. *Apple Computer, Inc. v. Microsoft Corp.*, 717 F. Supp. 1428 (N.D. Cal. 1989).

255. *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173 (9th Cir. 1989).

256. 17 U.S.C. § 102(c) (1988).

and differences among characters in television productions, asking instead whether the defendant has captured the "total look and feel" of the original work.²⁵⁷ What the courts seem to be doing in these cases is using pattern analysis with an emphasis on the aural and visual aspects of substantial similarity, which the courts have historically ignored in favor of "literary analysis."²⁵⁸ Thus, in these cases, tables of similarities become irrelevant; what is important is the overall impression of the works on the ordinary observer.²⁵⁹

The element of "look" may be satisfactory for works such as films and television programs, where the cumulus of audiovisual expressions is greater than the sum of their parts,²⁶⁰ and perhaps also for teddy bears and stuffed dinosaurs, which can be said to embody a certain "look." It is doubtful, however, that the "look" of "user interfaces" or computer screens can be the proper focus of an analysis of substantial similarity when a programmer can easily copy the plaintiff's source code program and make it look different from the original by making trivial changes and using other tricks.²⁶¹ The element of "feel," moreover, is not appropriate for either stuffed dinosaurs or computer screens for the same reason it is not appropriate for other works: as "a wholly amorphous referent, [it] merely invites an abdication of analysis."²⁶²

Nevertheless, apparently emboldened because the *Krofft* court relied on an audiovisual analysis more than a literary analysis,²⁶³ some courts have taken the mildly revolutionary step of emphasizing the visual aspects of the works in their comparisons. Thus, the courts may have returned to a notion of "idea" suggestive of the original Greek meaning but have not yet defined a standard by which to fix the appropriate level of abstraction establishing substantial similarity.

IV. CONCLUSION

One of the two essential elements of a copyright claim is unlawful copying of a copyrighted work by the defendant. To establish unlawful copying where the competing works are not identical, the courts apply the standard of "substantial similarity," which requires the separation of protected expression from unprotected ideas. Such separa-

257. *Spectravest, Inc. v. Mervyn's Inc.*, 673 F. Supp. 1486 (N.D. Cal. 1987).

258. *Berman & Boxer*, *supra* note 148, at 315.

259. *See id.* at 324.

260. *See id.*; but *see supra* notes 117-19 and accompanying text (Even in literary works, Judge Hand recognized that the synthesis of elements creates "an inseparable unit.')

261. *Brinson*, *supra* note 227, at 827.

262. 3 NIMMER ON COPYRIGHT § 13.03[A], at 13-35 (1989).

263. *Berman & Boxer*, *supra* note 148, at 323.

tion involves the problems of abstraction that have preoccupied generations of philosophers and legal scholars. As illustrated by the Tree of Porphyry, the problems of abstraction are difficult to resolve because no one has been able to state a rule defining the point at which a category is to be subdivided, in other words, at what level of abstraction things cease to be similar. Because legal, as well as philosophical principles, seem to come in pairs, dichotomies will always be a factor in legal analysis, and indeterminate areas of the law will subsist. Judge Hand's admonition that decisions must be ad hoc appears to be a reasonable assessment of the situation. Decisions, however, need not be unprincipled; the courts must have a clear sense of the terms and standards applicable in specific types of cases. They must also recognize that original works embody many ideas (identified through analysis) rather than a single Platonic form (intuited through reflection).

In sum, criticisms directed at the idea-expression distinction deal more with its application than with the distinction itself. The distinction, when properly invoked, can adequately balance the competing interests of copyright law and the first amendment, as well as the internal conflict of copyright law: promoting the advancement of science and the arts through access to the marketplace of ideas, while rewarding authors and writers for their efforts by granting them, for a limited time, exclusive rights to their works.