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# BEYOND METAPHOR: COPYRIGHT INFRINGEMENT AND THE FICTION OF THE WORK\*

ROBERT H. ROTSTEIN\*\*

*"After changes upon changes,  
we are more or less the same."*<sup>1</sup>

## INTRODUCTION

It would be unthinkable for a court to decide a patent or a products liability case without at least trying to understand how the new invention works or how the supposedly defective product malfunctioned. Patent courts, for example, do not hesitate to employ the latest scientific and engineering concepts in reaching decisions. In sharp contrast, although copyright law regulates the literary "work," it has largely ignored the insights of contemporary literary criticism—the branch of scholarly investigation that is concerned with how "works of authorship" operate. On the theory that courts cannot make truly intelligent determinations about the subject of copyright without understanding how that subject functions, this Article examines copyright law in light of principles of contemporary literary criticism.

The quotation at the beginning of this Article provides a starting point for that examination. At their 1981 reunion concert in New York's Central Park, singers Paul Simon and Art Garfunkle performed the song *The Boxer* before an estimated crowd of 500,000.<sup>2</sup> On hearing the lines quoted above, the vast audience cheered in unison. At that moment, the audience members were engaged in an act of interpreting a literary work. Translated into copyright parlance, this was an example of "audience response."<sup>3</sup>

During the 1960s, Simon & Garfunkle were highly successful recording artists.<sup>4</sup> They first released a recorded version of *The Boxer* in

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1. PAUL SIMON, *The Boxer*, on THE REUNION CONCERT IN CENTRAL PARK (Columbia Records 1981).

2. *Rhymen' Simon Packs 'em in*, USA TODAY, August 16, 1991, § 1A (reporting on Simon's 1991 solo concert in Central Park and describing the previous 1981 concert).

3. See *infra* text accompanying note 233.

4. See DAVE MARSH, THE HEART OF ROCK & SOUL 509 (1989).

1969, later performing the song at live concerts.<sup>5</sup> In those early live performances, the quoted lines did not elicit any particularly noteworthy response from the audience. In 1970, the pair ended their relationship.<sup>6</sup> The 1981 reunion concert marked the first time that they had performed together in concert since. Between 1969 and 1981, therefore, something had changed, resulting in an audience response to *The Boxer* different from the one that the song had previously elicited.

The example of *The Boxer* reflects concerns raised in much contemporary literary thought, concerns that have significance for the current system of copyright. On the one hand, the song *The Boxer* did not, over the years, have a *single* identity. That is, the audience response to the song was sensitive to context. Indeed, even verbatim renditions occurring only a few years apart evoked different responses and generated, it could be argued, different songs. Put differently, the identity of the song did not depend on something inherent *in* the "song." The audience's response to the song related to factors external to the song—age of the audience, experiences during the 1960s, familiarity with the performers' work, and undoubtedly other cultural and social factors. The question for copyright law becomes whether this mutability of a work of authorship somehow renders a trier of fact unable to make determinations of similarity, determinations that would seem to depend on the works under scrutiny having a fixed identity.

On the other hand, the example of *The Boxer* shows that much about acts of interpretation is determinate within a particular context. Empirically and given a common discourse, a large group of people—an "audience"—can agree on many things about a work's meaning and can even immediately respond to the work in the same way. Many in the large audience in Central Park shared strategies of interpretation and response. Evidence could be brought to bear as to why the audience members responded differently from the way they had in the late 1960s, yet also why the audience nevertheless regarded the two renditions of the song (the song as performed in 1969 and the song as performed in 1980) as "substantially similar" (in fact, identical). The question becomes for copyright whether the law can adequately identify those factors that allow an audience to react consistently to a particular work, such that triers of fact can meaningfully compare two works to determine whether infringement has occurred.

5. *Id.* The original recorded version of the song omitted the verse containing the lines quoted at the beginning of the section. See PAUL SIMON, *The Boxer* (Columbia Records 1969).

6. See DAVE MARSH, *ENCYCLOPEDIA OF ROCK AND ROLL; THE 1001 GREATEST SINGLES EVER MADE* (1991).

The central thesis of this Article is that current copyright dogma does not recognize that so-called "works of authorship" are, as the Simon & Garfunkle example shows, unstable and dependent on context. Copyright law, rather, embraces the notion of the "work"—purportedly an autonomous entity akin to an object. According to copyright law, the "work" supposedly has immutable characteristics that allow judges and juries to determine originality, scope of protection, substantial similarity, and fair use merely by interpreting the words on the page (or the pictures on the screen or the sounds on the recording). Contemporary literary theory has vigorously debated the significance of the mutability of "works of authorship." Most importantly, recent literary thought calls into question copyright law's idea of the "work," instead positing the concept of "text."<sup>7</sup> "The 'text' may be literary, visual, or aural (or any combination of these); whatever form it takes, it is created not in the act of writing but in the act of reading."<sup>8</sup> Unlike the stable and autonomous "work," which the law treats as akin to an object, the text is a process—an act of speech that occurs when a member of an audience (a reader, viewer, listener, computer operator) interacts with the textual artifact (that is, the book, motion picture, song, or computer program).<sup>9</sup> Thus, for example, the song *The Boxer* in 1969 was a different "text" from *The Boxer* in 1981, because the listeners in each case "created" different texts.

It is not surprising that literary theorists themselves have begun to issue direct challenges to the present system of copyright.<sup>10</sup> And indeed, the concerns of contemporary literary thought parallel those of copyright law. Recent theory has questioned the concepts of "work," "author," "audience response," and "similarity," concepts that provide the underpinnings for much of current copyright doctrine. If contemporary critics are correct that the "text" is not immutable, then copyright law's idea of the "work" as an autonomous object capable of consistent interpretation is theoretically unsound.

This Article demonstrates that, in many crucial instances, the belief that the "work" is fixed and autonomous results in wrongheaded reason-

7. E.g., Roland Barthes, *From Work to Text*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 73 (Josue V. Harari ed., 1979) [hereinafter *TEXTUAL STRATEGIES*].

8. Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 *DUKE L.J.* 455, 458 n.9 (1991). This Article will use the term "text" in this sense. It will use the term "work" to refer to the notion that the text has its own autonomy, akin to an object. See *infra* part I.B.

9. See *infra* part I.F. Similarly, while copyright embraces the notion of "author," much contemporary literary theory has questioned the usefulness of this concept. The seminal challenge comes from Michael Foucault, *What Is An Author?*, in *TEXTUAL STRATEGIES*, *supra* note 7, at 141.

10. See, e.g., *infra* note 59 and accompanying text.

ing and unsatisfactory decisionmaking.<sup>11</sup> After briefly tracing the historical development of the literary constructs of "work" and "text," the Article examines the key tenets of copyright—originality, idea/expression, substantial similarity—in light of current literary thought. As to each of these tenets, the Article first examines copyright's view of the text, concluding that the central assumption underlying current copyright doctrine is that the "work" is fixed and autonomous. The Article next posits that, as to each aspect of copyright law, the concept of "work" can lead to highly problematic techniques of decisionmaking. In particular, the concept of "work" fosters the illusion that a judge or jury can find a single valid interpretation of a work in a copyright case and on that basis make sound decisions. As a result, the courts often fail to confront the true policy considerations underlying a particular decision. As to each aspect of copyright, the Article suggests how the insights of current literary thought might provide a more useful framework in copyright for addressing the inevitable instability of the text.<sup>12</sup>

11. Specifically, the assumption in copyright that a "work's" true meaning lies within its four corners allows judges to adopt one of many plausible interpretations and adopt it as *the* valid interpretation of the work. Moreover, even if subconsciously, the very construct of the "work" as a fixed object tends to discourage decisionmakers in copyright cases from examining the policies underlying their decisions. That is, the autonomous "work" often serves as an obfuscatory rhetorical device, permitting courts to deflect policy challenges to certain results. For example, courts have deflected free speech challenges to copyright protection by recasting the First Amendment issue as whether the defendant has misappropriated the "fruits" of the plaintiff's "labor." In this sense, copyright's reification of what is really verbal conduct permits decisionmaking in copyright infringement cases that does not fully air the First Amendment issues, a tendency that some commentators have roundly criticized. *E.g.*, Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L. J.* 1533 (1993).

12. This Article's approach finds precedent in recent attempts to apply literary theory to other areas of the law. For a number of years, both literary and legal scholars have explored the impact of literary criticism on constitutional and statutory interpretation. As just a few examples of the divergent approaches in the realm of literary criticism, see WAYNE BOOTH, *THE COMPANY WE KEEP* (1988); JOHNATHAN D. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); UMBERTO ECO, *THE LIMITS OF INTERPRETATION* 44 (1990); JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989); STANLEY E. FISH, *IS THERE A TEXT IN THIS CLASS: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); E.D. HIRSCH, *VALIDITY OF INTERPRETATION* (1967); *TEXTUAL STRATEGIES*, *supra* note 7; ROBERT E. HOLUB, *RECEPTION THEORY: A CRITICAL INTRODUCTION* (1984); WOLFGANG ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* (1978); STEVEN KNAPP & WALTER B. MICHAELS, *AGAINST THEORY* (W. Mitchell ed., 1982) [hereinafter *AGAINST THEORY*]; ROBERT E. SCHOLES, *TEXTUAL POWER: LITERARY THEORY AND THE TEACHING OF ENGLISH* (1985); *READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM* (Jane P. Tompkins ed., 1980) [hereinafter *READER-RESPONSE CRITICISM*]; *IDENTITY OF THE LITERARY TEXT* (Mario J. Valdes & Owen J. Miller eds., 1985). For analogous legal studies, see, *e.g.*, *INTERPRETING LAW AND LITERATURE: HERMENEUTIC READER* (Sanford Levinson & Steven Mailloux eds., 1988); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); James Boyd White, *What Can a Lawyer Learn from Literature*, 102 *HARV. L. REV.* 2014 (1989); Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 *STAN. L. REV.* 929 (1988); Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 *YALE L.J.* 1773 (1987); Stanley Fish, *Fish v. Fiss*, 36 *STAN. L. REV.* 1325 (1984); Steve Fuller,

In suggesting a reevaluation of how copyright approaches the "work," this Article suggests an alternative structure—a different way of looking at what copyright protects—that can bring the policies underlying the central decisions in a copyright case into sharper focus. In this sense, the Article is descriptive rather than prescriptive. For example, certain of the observations in the Article might seem to call for greater copyright protection for a particular "work" than the present system provides; others might appear to call for less protection. Although the Article suggests certain consequences that might arise out of recognizing that the copyrighted "text" inevitably functions as contemporary literary critics say it does, the pivotal thrust of the Article is that one cannot begin to evaluate the wisdom of various approaches to copyright law—

Comment, *Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549 (1988); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985); Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986); L. H. La Rue, *Posner on Literature*, 85 MICH. L. REV. 325 (1986); John D. Ayer, *The Very Idea of "Law and Literature,"* 85 MICH. L. REV. 895 (1987); *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985).

Only recently have the commentators begun to examine copyright principles in light of modern critical thought. E.g., Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991). Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93 (1992); Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problems of Private Censorship*, 57 U. CHI. L. REV. 1009, 1030-37 (1990) [hereinafter *Jurisprudence of Benefits*]; Jaszi, *supra* note 8; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Laurie Sterns, Note, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513 (1992).

Simultaneously, copyright has come under scrutiny from other quarters. See, e.g., Monroe E. Price, *Reexamining Intellectual Property Concepts: A Glimpse into the Future Through The Prism of Chakrabarty*, 6 CARDOZO ARTS & ENT. L.J. 443 (1988); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987); Neil Harris, *Who Owns Our Myths? Heroism and Copyright in an Age of Mass Culture*, 52 SOC. RES. 241 (1985); Michael D. Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127 (1988). For example, commentators have addressed copyright's ability to cope with advances in technology. E.g., David G. Golden, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 16 INTELL. PROP. L. REV. 365 (1984); Robert Yale Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 16 COPYRIGHT L. SYMP. (ASCAP) 30 (1968); John K. Halvey, Comment, *A Rose by Any Other Name: Computer Programs and the Idea-Expression Distinction*, 34 EMORY L.J. 741 (1985); Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045 (1989); Steven R. Englund, Note, *Idea, Process, or Protected Expression: Determining the Scope of Copyright Protection of the Structure of Computer Programs*, 88 MICH. L. REV. 866 (1990); Susan A. Dunn, Note, *Defining the Scope of Copyright Protection for Computer Software*, 38 STAN. L. REV. 497 (1986); Vance F. Brown, Comment, *The Incompatibility of Copyright and Computer Software: An Economic Evaluation and a Proposal for a Marketplace Solution*, 66 N.C. L. REV. 977 (1988). Others have examined copyright's usefulness as an economic incentive to produce creative material. E.g., Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection for Works of Information*, 90 COLUM. L. REV. 1865 (1990); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

whether the perspective be economic, Lockean, or grounded in freedom of speech—unless one understands what is being evaluated.

## I. LITERARY CRITICISM'S CHANGING VISION OF THE TEXT

In the following pages, this Article suggests that copyright law should not slavishly regard the text as a self-contained, autonomous "work" that has one valid meaning independent of how an audience approaches it. To those who are not steeped in recent literary criticism or who regard current literary thought as a dangerous fad, such a suggestion might seem to be a major departure from the norm. However, the history of critical literary thought shows that, if anything, the concept of the autonomous "work" is the aberration.

The following discussion of historical developments in literary thought is not intended to be exhaustive. Instead, it summarizes the way literary thinkers have conceived of the text, providing a springboard for assessing copyright's current treatment of the "work."

### A. *Criticism from the Classical Period to the Renaissance*

The concept of the text as a mode of action dates back at least to antiquity. Mark Rose writes: "From the classical period through the Renaissance, the dominant conception of literature was rhetorical. A text was conceived less as an object than as an intentional act, a way of doing something, of accomplishing some end such as "teaching and delighting."<sup>13</sup> Plato viewed the artistic text as an imitation of nature that could corrupt the reader.<sup>14</sup> Aristotle described tragedy "as an imitation not only of a complete action, but of events inspiring fear or pity."<sup>15</sup> Other classical critics also focused on the rhetorical aspects of a text, debating matters of technique and the morality of literary production,

13. Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 63 (1988) [hereinafter *Author as Proprietor*]; MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (forthcoming 1993) (manuscript) [hereinafter *AUTHORS AND OWNERS*].

14. Plato, *Ion*, in CRITICAL THEORY SINCE PLATO 15 (Hazard Adams ed., 1992) [hereinafter CRITICAL THEORY]. The Platonic text is not the truth, but can have a "sweet influence" on the recipient. Plato, *Republic*, in CRITICAL THEORY, *supra*, at 35; *Laws*, in CRITICAL THEORY, *supra*, at 45. For Plato, the poet is in effect a plagiarist, since he or she imitates nature, falsely purporting to know the truth.

15. Aristotle, *Poetics*, in CRITICAL THEORY, *supra* note 14, at 55. See also Longinus, *On the Sublime*, in CRITICAL THEORY, *supra* note 14, at 77 ("The effect of elevated language upon an audience is not persuasion but transport."); Horace, *Art of Poetry*, in CRITICAL THEORY, *supra* note 14, at 66 ("[I]f you are nice and careful in combining your words, you may gain the finest effects in language by the skillful setting which makes a well-known word new.").

and emphasizing the audience's behavior in relation to the text.<sup>16</sup> For these critics, the text served as a force acting on the world, not as an object to be deciphered.<sup>17</sup> Response of the reader was action or behavior, not the process of discovering a fixed textual meaning.<sup>18</sup> The conception of the text as an object with a fixed identity had no place during that period.<sup>19</sup>

Critics during the Middle Ages and Renaissance continued to approach the text in terms of its effect on the audience.<sup>20</sup> "The qualities of a poem were to be sought through the study of its effects upon an audience."<sup>21</sup> In light of the patronage system, the text was considered a form of influence, and a means of performing a social task; the text was valued for what it could do.<sup>22</sup> However, critics also began to treat the author as a creator, a "maker" of the text or even a form of deity; the dominant image during this period was paternity, and the text became the child of the author, sowing the seeds of the vision of the text as a "thing."<sup>23</sup> Still, during the late seventeenth and early eighteenth centu-

16. Tompkins, *The Reader in History*, in *READER-RESPONSE CRITICISM*, *supra* note 12, at 204-05.

17. *Id.* at 203.

18. *Id.* at 206.

19. "The text as an object of study or contemplation has no importance in this critical perspective, for literature is thought of as existing primarily in order to produce results and not an end in itself." *Id.* at 205-06; see ROSE, *AUTHORS AND OWNERS*, *supra* note 13, at 22.

20. See, e.g., Manlius Severinus Boethius, *The Consolation of Philosophy*, in *CRITICAL THEORY*, *supra* note 14, at 115 ("[The Muses of Poetry] stifle the fruit bearing harvest of reason with the barren briars of passions; they do not free the minds of men from disease but accustom them thereto."); Giovanni Boccaccio, *Life of Dante*, in *CRITICAL THEORY*, *supra* note 14, at 124 ("In like manner do poets in their works—which we term poetry—sometimes under fictions of various gods, again by the transformation of men into imaginary forms, and at times by gentle persuasion, reveal to us the causes of things, the effects of virtues and of vices, what we ought to flee and what follow; in order that we may attain by virtuous action the end that they, although they did not rightly know the true God, believed to be our supreme salvation."); Julius Cawsar Scaliger, *Poetics*, in *CRITICAL THEORY*, *supra* note 14, at 138 ("By no means are we to accept the popular idea that eloquent speaking, rather than persuasion, is the end of oratory . . ."); Lodovico Castelvetro, *The Poetics of Aristotle, Translated and Explained*, in *CRITICAL THEORY*, *supra* note 14, at 136 ("[P]oetry has been found solely to delight and recreate; and I say to delight and recreate the minds of the vulgar multitude and common people."); Sir Philip Sidney, *An Apology for Poetry*, in *CRITICAL THEORY*, *supra* note 14, at 146 (poets "teach and delight"); Tompkins, *supra* note 16, at 207; ROSE, *AUTHORS AND OWNERS*, *supra* note 13, at 21-22.

21. Tompkins, *supra* note 16, at 207, quoting 2 BERNARD WEINBERG, *A HISTORY OF LITERARY CRITICISM IN THE ITALIAN RENAISSANCE* 801, 805 (1961). This audience consisted of wealthy and highly placed individuals who were in a position to dispense patronage to the producer of the text.

22. *Id.* at 209. E.g., Scaliger, *Poetics*, in *CRITICAL THEORY*, *supra* note 14, at 137 (poetry "imitates that it may teach").

23. ROSE, *AUTHORS AND OWNERS*, *supra* note 13, at 61-62 and examples cited therein. See also Scaliger, *Poetics*, in *CRITICAL THEORY*, *supra* note 14, at 139-40 ("the poet depicts quite another sort of nature, and a variety of fortunes; in fact, by so doing, he transforms himself almost into a second deity"); Castelvetro, *The Poetics of Aristotle Translated and Explained*, in *CRITICAL THEORY*, *supra* note 14, at 135 (the subject matter of poetry should resemble that of history but should



ries, the view of the text as action rather than as object remained firmly embedded in literary theory, particularly because of the prominence of satire, the genre that dominated the writing of the era.<sup>24</sup> Poetic utterance in this period had a dynamic nature and was concerned, again, with action.<sup>25</sup>

Importantly, during these many centuries, copyright law as we know it did not exist.<sup>26</sup> Because the text was conceived, not as some object of property owned by the author, but as action imitative of nature, the concept of protection of a "work" of authorship had no basis for development.<sup>27</sup> Copying, in the sense of imitating previous great poets and writers, was a laudable objective rather than an unethical or immoral act of theft.<sup>28</sup>

### B. *The Emergence of the "Work"*

The concept of "work" as an autonomous object—and the birth of copyright law—arose more or less at the same time. The literary critical conception of a text as autonomous "property" began to develop only during the second half of the eighteenth century, with the breakdown of the patronage system<sup>29</sup> and with the increased audience accompanying the rise of commercial printing.<sup>30</sup> Because the author's subsistence depended on sales of his or her printed "work," the personal relationship that the author had with the audience—formerly, his or her patrons—no

not be identical because the poet "would not deserve that praise by which he is thought to be more divine than human"); Sidney, *An Apology for Poetry*, in *CRITICAL THEORY*, *supra* note 14, at 145 ("Only the poet . . . doth grow in effect another nature, in making things either better than nature bringeth forth, or, quite anew, forms such as never were in nature . . ."); *id.* at 146 (poet is a "maker").

24. Tompkins, *supra* note 16, at 211. Satire was intended to engender action in an audience and thus focused on audience response.

25. *Id.* at 212.

26. See Rose, *Author as Proprietor*, *supra* note 13, at 54-55.

27. "Epic poetry and tragedy, comedy also and dithyrambic poetry, and the music of the flute and of the lyre in most of their forms, are all in their general conception modes of imitation." Aristotle, *Poetics*, in *CRITICAL THEORY*, *supra* note 14, at 48. Similarly, for Plato, the text comes from God; the poet is the imitator. Plato, *Republic*, in *CRITICAL THEORY*, *supra* note 14, at 35.

28. Longinus writes:

This writer shows us, if only we were willing to pay him heed, that another way (beyond anything we have mentioned) leads to the sublime. And what, and what manner of way, may the be? It is the imitation and emulation of previous great poets and writers. . . . Was Herodotus alone a devoted imitator of Homer? No, Stesichorus even before his time, and Archilochus, and above all Plato, who from the great Homeric source drew to himself innumerable tributary streams. . . . This proceeding is not plagiarism; it is like taking an impression from beautiful forms or figures or other works of art.

Longinus, *On the Sublime*, in *CRITICAL THEORY*, *supra* note 14, at 85-86.

29. Rose, *Author as Proprietor*, *supra* note 13, at 55 ("In a complex system of material and immaterial benefits, patrons honored and sustained worthy authors and themselves received honor and status in return.").

30. Tompkins, *supra* note 16, at 214; see Rose, *Author as Proprietor*, *supra* note 13, at 55-56.

longer existed. From the late seventeenth century through the nineteenth century and the coming of the Romantic age, the text evolved into a commodity, a piece of property.<sup>31</sup> In this period, literary criticism became a science, and the text became an object of scholarly and scientific investigation.<sup>32</sup> Moreover, the text—by this time, the “work”—finally began to be conceived as the product of creative genius, measured by its “originality.”<sup>33</sup>

Simultaneously, the idea of the “work” in copyright law “denominating a freestanding abstraction as the subject of literary property” also emerged during the latter half of the eighteenth century, ultimately reflecting (and perhaps arising out of) the individuation of author in literary criticism.<sup>34</sup> The historical development of the notion of “author” and “work” in copyright law in England and the United States has been well chronicled.<sup>35</sup> These historians show that the existence of a system of copyright depended on the characterization of the text as “work,” akin to an object that had stability and permanence and that thus could be “commodified.”<sup>36</sup>

### C. *The Romantic Approach to “Author” and “Work”*

With the emergence of the notion of “work” came the notion of originality and the ascendance of the author-genius as the central focus of critical studies. During the nineteenth century, with criticism’s emphasis on creative originality and genius, literary study focused on the author as the central object of literary studies. For example, Wordsworth wrote that “[p]oetry is produced by a man of more than usual organic sensibility.”<sup>37</sup> According to this Romantic vision of authorship,

31. Tompkins, *supra* note 16, at 218-19.

32. *Id.* at 215-16.

33. Rose, *Author as Proprietor*, *supra* note 13, at 54-55, 75-76; Jaszi, *supra* note 8, at 467.

34. Jaszi, *supra* note 8, at 473.

35. E.g., ROSE, *AUTHORS AND OWNERS*, *supra* note 13; Rose, *Author as Proprietor*, *supra* note 13; Howard D. Abrams, *Historic Foundation of Copyright Law*, 29 WAYNE L. REV. 1119 (1983); L. RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967).

36. See Jaszi, *supra* note 8, at 473.

37. William Wordsworth, *Preface to the Second Edition of Lyrical Ballads*, in *CRITICAL THEORY*, *supra* note 14, at 435; Rose, *Author as Proprietor*, *supra* note 13, at 54-55, 75-76. What Peter Jaszi describes as this “Wordsworthian vision” of the text, Jaszi, *supra* note 8, at 459 & n.11, pervaded literary criticism of the period. E.g., William Blake, *Annotations to Reynolds’ Discourses*, in *CRITICAL THEORY*, *supra* note 14, at 408 (“genius dies with its possessor and comes not again till another is born with it”); *id.* at 439, 441 (“Poetry is the first and last of all knowledge—it is as immortal as the heart of man . . . [It] is the spontaneous overflow of powerful feelings; it takes its origin from emotion recollected in tranquility.”); John Keats, *Letter to George and Thomas Keats*, in *CRITICAL THEORY*, *supra* note 14, at 474 (“if poetry comes not as naturally as the leaves to a tree it had better not come at all”); Edgar Allen Poe, *The Poetic Principle*, in *CRITICAL THEORY*, *supra* note 14, at 575.

the work that was original reflected the author's genius and enjoyed a privileged relationship *vis-à-vis* the higher arts. The work remained subservient to something "outside" itself, namely, the author-genius, who dominated the critical discourse. Moreover, critical thought continued to consider the reader's response to the work. Although the "work" in the Romantic period was no longer, as in earlier periods, conceived of as a mode of action, Coleridge could nonetheless write that the text permitted the reader "to transfer from [his or her] inward nature a human interest and a semblance of truth sufficient to procure for these shadows of imagination that willing suspension of disbelief for the moment, which constitutes poetic faith."<sup>38</sup>

Given the focus on the author as the creator of the text, academic criticism of the late nineteenth century emphasized biographical and historical study.<sup>39</sup> In this sense, also, the work was not conceived as a *self-contained* object, but took shape within a broader historical and literary context. Extratextual information about the author's life and judgments about the work's place in the aesthetic hierarchy still made factors external to the work relevant to the critical inquiry.

#### D. *Modernism and the New Criticism: The Rise of the Autonomous "Work"*

During the first half of the twentieth century, modernism supplanted Romantic thought as the dominant mode of criticism. Modernism's goal was to develop "objective science, universal morality and law, and autonomous art according to their inner logic."<sup>40</sup> Broadly, modernism denied that works of art were bound by connections to history and context.<sup>41</sup> Such thought was particularly influenced by the New Criticism, which developed as a reaction to the Romantic notion of genius and the academic pre-eminence of historical study. In New Critical theory, "work" replaced "author" as the central unifying force in literary criticism. This version of modernist thought conceived of the creative

38. Samuel T. Coleridge, *BIOGRAPHIA LITERARIA*, ch. 14, reprinted in 5 *ENGLISH LITERATURE: THE ROMANTIC PERIOD* (Albert G. Reed ed., 1929). As discussed later, this passage was quoted in *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990), a case that focuses on the issue of substantial similarity.

39. *CRITICAL THEORY*, *supra* note 14, at 1014.

40. Elizabeth H. Wang, *(Re)Productive Rights: Copyright and the Postmodern Artist*, 14 *COLUM.-VLA J.L. & ARTS* 261, 262 n.12 (1990) (quoting Harbermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 9 (Hal Foster ed., 1983)).

41. Wang, *supra* note 40, at 263 n.12 (quoting Brian Wallis, *What's Wrong With This Picture? An Introduction*, in *ART AFTER MODERNISM: RETHINKING REPRESENTATION* at xiii (Brian Wallis ed., 1984)).

work as autonomous and ahistorical.<sup>42</sup> The New Criticism argued that the literary text was properly considered an object of knowledge, as "meaning" rather than as "doing,"<sup>43</sup> and that literary meaning does not depend on authorial intention<sup>44</sup> or audience response,<sup>45</sup> but that the work is self-contained like architecture.<sup>46</sup> Such modernist literary thought fully objectified the "work," conceiving of it as a self-contained, autonomous object whose identity existed separate from other "works," from an author, and from cultural and historical context.<sup>47</sup>

### E. *The Decline of the Work in Literary Thought*

The modernist notion of the self-contained work proved dubious to literary scholars, who began to attack it in diverse ways. During the 1960s, Structuralist thinkers sought to place the text in a broader context by applying linguistic theories to the study of literary texts.<sup>48</sup> Structuralist criticism characterized the text not as an object that had an identity

42. This, along with other modernist paradigms, is discussed in ASTRADUR EYSTEINSSON, *THE CONCEPT OF MODERNISM* 10-12 (1990).

43. Tompkins, *supra* note 16, at 222. Now, "honest criticism and sensitive appreciation are directed not upon the poet but upon the poetry." T.S. Eliot, *Tradition and the Individual Talent*, in *CRITICAL THEORY*, *supra* note 14, at 761. According to Eliot, the poet has not a personality to express, but a particular medium. *Id.* at 762.

44. W.K. Wimsatt & Monroe C. Beardsley, *The Intentional Fallacy*, in *CRITICAL THEORY*, *supra* note 14, at 945. Authorial intention and design are neither available nor desirable as a standard for judging the success of a work of literary art. According to Wimsatt and Beardsley: "Judging a poem is like judging a pudding or a machine. One demands that it work. It is only because an artifact works that we infer the intention of the artificer. A poem should not mean but be." *Id.* at 1015. See SCHOLES, *supra* note 12, at 47.

45. "The affective fallacy is a confusion between the poem and its results (what it is and what it does) . . ." W. K. Wimsatt & Monroe C. Beardsley, *The Affective Fallacy*, in *CRITICAL THEORY*, *supra* note 14, at 952.

46. CLEANTH BROOKS, *THE WELL-WROUGHT URN: STUDIES IN THE STRUCTURE OF POETRY* 204-05 (1975).

47. Such "text centered" criticism assumes that the literary work of art is unique and valuable; that literary meaning is contained in the words on the page; and that special training in the critical process is necessary if the student of literature is to grasp the full extent of what the work has to offer. Tompkins, *Preface*, in *READER-RESPONSE CRITICISM*, *supra* note 12, at x. As Jonathan Culler describes it, under the New Criticism: "the poem is not simply a series of sentences; it is spoken by a *persona*, who expresses an *attitude* to be defined, speaking in a particular *tone* which puts the attitude in one of various possible modes or degrees of commitment." JONATHAN CULLER, *THE PURSUIT OF SIGNS* 4 (1981). According to Culler, the New Criticism saw literature as an encounter between "innocent reader and autonomous text." *Id.* at 12. Literary response became a meaningless category, "since the chief object of critical concern is not the effects that poems have but their intrinsic nature." Tompkins, *supra* note 16, at 221. Only through objective study of the work itself—and not through study of the reader—could the work's true emotive effect be realized. *Id.* Moreover, literary criticism emerged as a discipline separate from other disciplines, and the critic played the central role in interpreting the work, becoming a teacher of meanings who enabled the audience to have the correct response to the work. See, e.g., Wimsatt & Beardsley, in *CRITICAL THEORY*, *supra* note 14, at 1018. According to Wimsatt and Beardsley, criticism of poetry and author psychology are two different disciplines. The work itself contains internal evidence for its own meaning. *Id.*

48. See CULLER, *supra* note 47, at 25 (describing history of Structuralism and Semiotics, which

separate and apart from the reader, but as a system of signs and conventions that the reader assimilates and that give the text meaning.<sup>49</sup> According to these critics, context is highly significant in interpretation; the text is not self-contained, as the New Critics asserted, but instead can be understood only in light of broader social, cultural, and linguistic concerns.

Structuralism nonetheless sought to preserve the identity of the text, redefining that identity in terms of supposedly ascertainable signs and symbols.<sup>50</sup> Though not a cohesive movement, during the 1970s and 1980s, post-structuralist theorists began to question whether the text had any stable meaning at all, or rather had a meaning that varied depending on the particular reader or reading.<sup>51</sup>

Broadly, critics who questioned the modernist notion of self-contained work were motivated by, among other things, the observation that a diverse group of readers were apparently unable to agree on a single meaning of a text and the inability of even a single reader to reach a consistent conclusion about the meaning of a text upon successive readings.<sup>52</sup> Although the approaches are not uniform or even consistent, several generalizations about post-structuralist thought are salient to copyright law. Most post-structuralist thought emphasizes "the ubiquity of interpretation in the process of reading every text."<sup>53</sup> Particularly salient to copyright scholarship is the shift of critical emphasis from the "work" as an object of study to "reader" (or in the language of copyright, "audience"). The reader in effect creates the text by virtue of the broader context in which he or she exists.<sup>54</sup> For this reason, the text does

"[seek] to describe the underlying systems of distinctions and conventions that enable objects and activities to have meaning").

49. Culler, *Literary Competence*, in *READER-RESPONSE CRITICISM*, *supra* note 12, at 104.

50. ECO, *supra* note 12, at 44.

51. See Wang, *supra* note 40, at 262 n.12.

52. More specifically, the post-structuralist debate began in response to a number of developments in literary theory beginning with the New Criticism. First, the demise of Romantic sources of thought undermined the view of the text as a self-contained organic structure. Second, movements like Structuralism challenged the notion of literature as distinct from other forms of verbal utterance, instead treating all texts as being subject to an overriding linguistic structure. Third, beginning with the New Criticism, genre, tradition, and literary canon weakened. Fourth, the Romantic notion of the individual author as a unifying force suffered its end. Finally, literary theory undermined the critic's role as mediator between audience and text, treating the critic as merely another reader of the text. Miller, *Preface*, in *IDENTITY OF THE LITERARY TEXT*, *supra* note 12, at ix.

53. See Culler, *Introduction: The Identity of the Literary Text*, in *IDENTITY OF THE LITERARY TEXT*, *supra* note 12, at 3.

54. Miller, *supra* note 52, at x. Put differently, the reader "actualizes" the text, which comes into existence only when the reader engages (reads, sees, operates) the textual artifact (e.g., book, film, computer program). Textual identity turns on what the reader brings to the reading process, and because readers differ in their cultural, linguistic, and rhetorical background, texts will differ upon successive readings. For example, Hans Robert Jauss, one of the principals in a primarily

not, as the New Critical model supposed, have a fixed identity.<sup>55</sup> The most radical theorists argue that the text has no identity at all, but instead is in a constant state of flux.<sup>56</sup>

Much post-structuralist criticism, moreover, emphasizes the inevitable interrelationship—termed “intertextuality”—among all texts. Post-structuralist thought posits that intertextuality arises out of both the reading and the writing process. Texts do not exist independently of someone reading them, and the text is never a separate “work,” but is always permeated by other texts that the reader brings to the process of reading.<sup>57</sup> Similarly, post-modernist thought asserts that the text does not arise anew out of the mind of an author-genius, but instead is inevitably a reproduction of other texts. Roland Barthes writes:

We now know that the text is not a line of words releasing a single “theological” meaning (the “message” of an Author—God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from

German movement termed “reception theory,” maintains that “literature should be treated as a dialectical process of production and *reception*.” HOLUB, *supra* note 12, at 57 (discussing Jauss’ theories). See FISH, *supra* note 12. Alternatively, “reader-response critics would argue that a [text] cannot otherwise be understood apart from its results.” Tompkins, *supra* note 47, at ix. The effect of that criticism is to destroy the objectivity of the text, in that way reorganizing the distinctions between text and reader. *Id.* at x.

55. Tompkins, *supra* note 16, at x.

56. For example:

The deconstruction position is of course derived from Jacques Derrida’s theory of polysemy in which he maintains that the semantic operation we call deconstruction is a continuous mode of play with the text by the reader, and its major aim is to destroy the illusory notion of a fixed textual meaning. Every meaning which is presumed to stand by the commentator is shown to be no more than a play between simulation and dissimulation. The true nature of every text therefore is to be in a state of flux as long as it is engaged by the reader and is reduced to a mere trace when the engagement is over because the text has no determinate essence.

Mario Valdes, *Conclusion*, in *IDENTITY OF THE LITERARY TEXT*, *supra* note 12, at 310 n.10.

Alternatively, it has been argued that a reader’s strategies of reading proceed from the “interpretive community” of which he or she is a member. FISH, *supra* note 12, at 14. “Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties.” *Id.* The explanation for the stability of interpretation among different readers is that they belong to the same interpretive community; the reason why a single reader employs different interpretive strategies and “makes” different texts is that he or she belongs to different communities. *Id.* at 14-15, 171. “Utterers” (i.e., authors and speakers) give the hearers and readers the opportunity to make meanings (and texts) by inviting them to put into execution a set of strategies. *Id.* at 173. Even the so-called formal aspects of text are a product of these strategies, because formal patterns are themselves constituted by the interpretive act, which, for example, invests line endings in a poem with importance. *Id.* at 13, 173. Interpretive communities, meanwhile, are no more stable than texts. A person cannot know whether he or she is a member of an interpretive community, since to decide that issue is itself an act of interpretation.

57. Owen Miller, *Intertextual Identity*, in *IDENTITY OF THE LITERARY TEXT*, *supra* note 12, at 19. See Harold Bloom, in *Plagiarism—A Symposium*, N.Y. TIMES LITERARY SUPP., Apr. 9, 1982 at 413 [hereinafter *Plagiarism—A Symposium*].

innumerable centers of culture.<sup>58</sup>

This notion of "intertextuality" therefore squarely challenges the idea of the autonomous work that is the product of authorial originality—an idea central to the current system of copyright.

### F. *Textual Identity Reformulated*

By its blurring of boundaries between "works," its rejection of "originality" and "author" as meaningful concepts, and its preoccupation with how readers interact with texts, post-modernist literary theory poses a considerable challenge to the doctrinal underpinnings of copyright law, which depends on the ability of a judge or jury to analyze and compare literary "works" that have, more or less, a stable identity. Principles of contemporary literary theory necessarily bear on copyright law if for no other reason than that contemporary literary critics have themselves challenged the very logic of a system of copyright. Noting the tension between literary criticism and copyright, Mark Rose writes: "What current literary thought emphasizes is that texts permeate and enable each other, and from this point of view the notion of distinct boundaries between texts, a notion crucial to the operation of the modern system of literary property, becomes difficult to sustain."<sup>59</sup>

#### 1. The Viability of Copyright in Light of Post-Structuralism

Such a direct challenge to an ingrained system of regulation could generate several responses from those interested in copyright law. First, copyright scholars could ignore the literary critics. This approach is unsatisfactory because, as mentioned, the literary critics themselves have questioned the copyright scheme and because, as I discuss in the next sections of this Article, many of the insights of current literary thought might in fact prove useful for copyright. A second response to the most radical literary critics is to accept their challenge to the copyright system uncritically and to abandon the system altogether, on the ground that notions of authorship, originality, and similarity are not meaningful and therefore result in arbitrary legal decisions. Without going into detail, I believe that this radical approach is unsound both theoretically and practically. Thus, this Article explores a third response to the challenge of current literary thought, namely that copyright could do well to assimilate certain insights of contemporary criticism. In this regard, the ques-

58. ROLAND BARTHES, *IMAGE, MUSIC, TEXT* 146 (1967), quoted in CULLER, *supra* note 12, at 32-33.

59. Rose, *Author as Proprietor*, *supra* note 13, at 78.

tion for both modern literary criticism and as discussed below, for copyright becomes "whether it is feasible any longer to conceive of the text as a distinct entity, marked by constituent features and viewed in terms of some sort of analogy with personal identity, which itself to many, appears to be a dubious concept."<sup>60</sup>

## 2. The Text in Copyright as an Event of Speech

Literary criticism itself can begin to provide answers to the question whether a text has a sufficient "identity" to permit meaningful adjudication in a copyright infringement action. Many literary theorists who have assimilated post-structuralist thought have nevertheless sought to preserve the idea of textual identity by characterizing it in a way that accounts for the variables in the reading process. In seeking to locate textual identity, "two central questions emerge. . . (a) What remains the same in the literary text under conditions such as different readings? (b) What is the text's distinctive unifying force?"<sup>61</sup> Though the text is not a fixed artifact with a determinate meaning, the concept of textual identity has been reformulated as a relational rather than as a constitutive notion.<sup>62</sup> "The belief that textual identity is not an a priori given but a process worked out in the act of reading would seem to be a position likely to command fairly widespread acceptance in today's intellectual and cultural climate."<sup>63</sup> Textual identity has been

"broadly . . . defined as a function of the involvement of the text in historical situations and communicative relationship. . . [T]he trajectory from text to work involves the actualization of the inscribed discourse and its subtext. If the identity of the literary text is to be found anywhere, it will have to be contracted (and would simultaneously be distracted) at the intersection of these two different operations. The intersection is the point in history where the linguistic study of the inscribed systems of signs and discourse and the critical understanding of their actualized significance for a moment engage in a reciprocal relationship."<sup>64</sup>

Textual identity depends on a congruence of reader and linguistic sign in a particular context. The text is a speech event involving interaction among a producer (the "author"), a textual artifact (book, movie, song, computer program), and a recipient (reader, viewer, listener). Texts *oc-*

60. Miller, *supra* note 52, at ix.

61. *Id.*

62. *Id.* at xix.

63. *Id.*

64. Robert Weimann, *Textual Identity and Relationship*, in *IDENTITY OF THE LITERARY TEXT*, *supra* note 12, at 289.



*cur* only upon the dynamic interaction of all three.<sup>65</sup>

Thus, despite potential objections from radical post-structuralists, because the text has identity as a speech event, the law of copyright can remain a meaningful system, while at the same time assimilating many of the insights of post-modernist thought. As Umberto Eco notes, "something can be truly asserted within a given universe of discourse and under a given description, but this assertion does not exhaust all the other, and potentially infinite, determinations of that object."<sup>66</sup> Put differently, groups of individuals may share "a manifest cognitive environment."<sup>67</sup> A particular performance of a text—during a popular music concert, or while reading a novel, or in a lawsuit—can therefore have a textual identity in a particular context, if identity is defined as a general agreement about what a text probably means.<sup>68</sup> Returning to the example of Simon & Garfunkle discussed earlier, observers can possibly agree on why many audience members would react the same way to a performance of a text. An infringement action is a universe of discourse in which it is possible as a practical matter to reach agreement on the identity of the text such that copyright law can meaningfully adjudicate.

So, though the text is not stable and autonomous, neither is it, for copyright law, boundless. While recent literary thought teaches that the text has no fixed identity, it also permits an approach to copyright law that seeks to determine what is consistent about the text in a certain context. Such a shift in focus can be useful in copyright analysis.

Significantly, however, any attempt to formulate a pragmatic definition of the text in copyright must start from the premise that texts have the determinacy of an activity rather than of a physical object.<sup>69</sup> Textual interpretation entails probability and guesswork "predicated on practical knowledge of language, conventions, and the situations in which they operate."<sup>70</sup> A text is bounded by, among other things, historical and generic context.<sup>71</sup> Generic conventions "organize most other constituents"<sup>72</sup> of a text. Analysis of codes and context—including generic con-

65. FISH, *supra* note 12, at 43-44.

66. ECO, *supra* note 12, at 37. Or in the jargon of Stanley Fish's reader-response criticism, a text may have identity within a particular interpretive community.

67. Alastair Fowler, *The Future of Genre Theory: Functions and Constructional Types*, in *FUTURE LITERARY THEORY* 291 (R. Cohen ed., 1989); see also Gerald Graff, *Keep Off the Grass*, in *INTERPRETING LAW AND LITERATURE*, *supra* note 12, at 177.

68. Even theorists who treat the text as boundless acknowledge that certain interpretations are more probable than others. See CULLER, *supra* note 12, at 135.

69. Graff, *supra* note 67, at 177.

70. *Id.* at 179.

71. ALASTAIR FOWLER, *KINDS OF LITERATURE* 258-59 (1982).

72. *Id.*

text—permits at least some range of determinacy of meaning (here defined as the ability of judges or juries to agree on what a text probably means).<sup>73</sup>

In summary, current literary thought treats the text as an act of speech. In this regard, contemporary literary criticism poses three central questions for copyright. A first question is whether copyright law in fact conceives of the text differently from the way contemporary criticism does. This Article demonstrates below that, rather than assimilating the concept of dynamic, context-sensitive “text,” copyright has generally embraced the New Critical idea of the “work” as an object with fixed characteristics existing independently of context and audience. According to this concept, the “work’s” characteristics can be discovered through an act of interpretation that reveals the work’s essential meaning. A second question is whether there is anything wrong with copyright’s assimi-

73. *Id.* at 262. This approach to the text finds an analogue in areas of the law governing literature. First Amendment cases, for example, squarely focus on how a particular audience will engage a text in a given context.

The very notion of speech is, of course, incomprehensible outside a cultural and social context. Thus, activities thought to be speech-related need not be so in every setting . . . [A]ctivities not ordinarily thought to have any particular expressive dimension—such as sleeping or camping outdoors—might properly acquire such a dimension in a specific regulatory context . . . . When the acts that trigger a rule’s enactment and that occasion its invocation in the case at hand are both intended to express, and understood by their audience to express, a particular message, it is necessary to subject the rule and its enforcement to some degree of first amendment scrutiny.

LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 831 (2d ed. 1988). See *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (considering context in deciding whether flag burning is expressive); *Schenk v. United States*, 249 U.S. 47, 52 (1919); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). So speech (i.e., text) is an activity that can be defined and regulated only after considering the interaction of the utterer, the textual artifact, and the audience. For example, the common example suggests that a person yells “fire” in a particular context. The effect on the audience—and the law’s decision how to regulate (or “protect”) the text—will vary depending on whether the speaker is a spectator in a crowded theater, a captain in command of a firing squad, a personnel director, or a rock and roll singer in concert. The law can regulate such speech, but only if context is examined.

Defamation law also regards the text as a reader-dependent process. The “verbal formulas” used to define defamation are recipient-oriented, looking at the effect of the communication on those who receive it. RODNEY A. SMOLLA, *LAW OF DEFAMATION*, § 4.02[1], at 4-4.1 (1991). In wrestling with how the reader engages the text, defamation law first tries to identify the codes and conventions at work and then seeks to learn how the audience will behave upon interaction with the text. Significantly, this inquiry requires identification of an audience, itself an act of interpretation that can affect the ultimate “identity” of the text. For example, a determination whether a particular text is hyperbole depends on conventions that the text’s audience understands and invokes in engaging the text. The courts will first look at aspects of the text that may send certain “signals” to the reader. Thus, particular cautionary words, or editorials, cartoons, letters to the editor, and reviews are encoded messages that alert a reader that what is asserted in the text is not to be taken as fact. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 33 (1990) (Brennan, J., dissenting). Defamatory speech—which causes damage to an individual’s reputation—is a product of cultural convention, which can undergo profound change over time. SMOLLA, *supra*, § 4.03[5], at 4-9 (citations omitted). As an example, Smolla notes that, before *Brown v. Board of Education*, 347 U.S. 483 (1954), some courts held it defamatory for a white person to be described as black, whereas today such a holding would be unconscionable.

lating the New Critical vision of the "work" rather than more recent theories of the "text." The question here is whether copyright's notion of the "work" furthers, or rather impedes, the objectives of copyright. The answer is not inevitable: that the concept of the autonomous "work" no longer has validity for literary critics does not mean that it is not useful for copyright. Nevertheless, it is the thesis of this Article that copyright's assimilation of a New Critical approach to the "work" as a self-contained, autonomous object has engendered serious problems in resolving the central issues relating to entitlement to and scope of protection, substantial similarity, and fair use.

These problems lead to the third question that contemporary literary criticism poses, namely, whether copyright's central concepts can be reformulated in a more useful way that takes into account the dynamic nature of the text as a process of speech. As discussed below, recent literary thought can provide a road map for such a reformulation, giving due regard to the interests of the audience in the creation and dissemination of texts.

## II. ENTITLEMENT TO COPYRIGHT PROTECTION

### A. *The Modernist "Work" as the Central Focus in Originality Determinations*

That copyright protects only the "original" elements of a work has become, through repetition, an apparently simple and unremarkable principle.<sup>74</sup> The underlying rationale is that the law, in the public interest, wants to encourage production of original material.<sup>75</sup> Moreover, only "authors" are entitled to copyright protection, no matter how skillful the copyist.<sup>76</sup> These apparently straightforward principles, however, are conceptually troubling and have come under increasing scrutiny.<sup>77</sup>

The word "originality" conjures up the Romantic notion of authorial genius, presumably setting a high standard for copyrightability.<sup>78</sup> In fact, originality in copyright differs markedly from Romantic originality. The law has abandoned creative genius as the test of originality in favor

74. 17 U.S.C. § 102(a) (1988); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); 1 MELVILLE B. NIMMER & DAVID NIMMER, *LAW OF COPYRIGHT*, § 2.01 (1992). Indeed, this requirement has been called "the one pervading element prerequisite to copyright regardless of the form of the work." 1 NIMMER & NIMMER, *supra*, § 2.01, at 2-6.

75. 17 U.S.C. § 102; 1 PAUL GOLDSTEIN, *COPYRIGHT*, § 2.1, at 61 (1989 & supp. 1992); see *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991).

76. 1 NIMMER & NIMMER, *supra* note 74, § 2.01[A], at 2-10.

77. *E.g.*, Jaszi, *supra* note 8; Litman, *supra* note 12.

78. *E.g.*, KAPLAN, *supra* note 35, at 23-25 (discussing Edward Young's 1759 essay *Conjectures on Original Composition*, in *CRITICAL THEORY*, *supra* note 14, at 338).

of the principle that a work is original if it merely owes its origin to the author and, if derivative of other works (and not infringing of those other works) shows more than a trivial variation from works that came before it.<sup>79</sup> In the next two subsections, I discuss the second aspect of the inquiry, relating to the amount of creativity necessary for copyrightability, tracing briefly the evolution of the concept of "originality" in copyright law, discussing how the current modernist approach to originality is problematic, and proposing how assimilation of current literary thought could provide useful insights to the issue regarding entitlement to protection. In the succeeding subsection, I discuss the concept of "independent creation" as the basis for entitlement to protection.<sup>80</sup>

### B. *The Emergence of the "Work" as the Central Focus in Originality Determinations*

*Burrow-Giles Lithographic Co. v. Sarony*<sup>81</sup> illustrates the evolution of the notion of originality from a standard requiring a Romantic level of originality to a standard that focuses merely on the existence of variations between works. In *Burrow-Giles*, the Supreme Court for the first time held that copyright extended to photographs. In concluding that a photographer was an "author," the Court stated: "The third finding of fact says, in regard to the photograph in question, that it is a 'useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the [photograph] . . . entirely from his own original mental conception, to which he gave visible form . . .'"<sup>82</sup> Based on this finding, the Court held that the photograph was "an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author."<sup>83</sup>

On the one hand, *Burrow-Giles* reflects a decidedly Romantic approach to the text, focusing on whether an author, in effect, spawned a work that was "entirely" his or her own. Originality, in this sense, emphasizes the work's position in the aesthetic hierarchy.<sup>84</sup> So viewed, the originality inquiry looks outside the work, making Romantic originality the predicate of copyright protection.

79. See *infra* note 97 and accompanying text.

80. See *infra* part II.E.

81. 111 U.S. 53 (1884).

82. *Id.* at 60.

83. *Id.*; see also Jaszi, *supra* note 8, at 480-81.

84. See also *Higgins v. Keuffel*, 140 U.S. 428, 431 (1891) ("It cannot, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."); *J.L. Mott Iron Works v. Clow*, 82 F. 316, 318 (7th Cir. 1897).

On the other hand, *Burrow-Giles* contains the seeds of copyright's later repudiation of author in favor of the self-contained work. This derives from the Court's need to decide whether the photograph, a product of a new technology, could receive copyright protection. The camera seemed to be merely a mechanical device that, in effect, replaced the author as the mode by which the work came into being; at the same time, the photograph seemed merely to depict the real, as opposed to the artistic world.<sup>85</sup> In short, technology appeared to distance the author from his or her work. To overcome this apparent distancing of author from the creative process, the Court turned to the work to decide its own worth, concluding—through observation of the work—that the photograph at issue was “useful, new, harmonious, characteristic, and graceful.” In other words, because characteristics *in* the work had aesthetic worth, the Court could find that the author had exhibited the requisite originality.

Twenty years later, as Romantic thought began to wane, “work” increasingly emerged as the key determinant of entitlement to protection. In *Bleistein v. Donaldson Lithographing Co.*,<sup>86</sup> the Court confronted the issue whether circus posters showed the requisite creativity to be copyrightable. Anticipating the New Criticism,<sup>87</sup> the Court centered its inquiry on the characteristics of the posters themselves to determine their entitlement to copyright protection.<sup>88</sup> According to *Bleistein*, the posters' aesthetic value derived, not from a value judgment about authorial genius, but strictly from a comparison with other *works* considered valuable.<sup>89</sup> The poster in *Bleistein* was copyrightable because it was considered worthy as a self-contained “work,” without regard to either the work's relationship to a broader body of intertextual material or the genius of its authors.<sup>90</sup>

85. 111 U.S. at 59.

86. 188 U.S. 239 (1903).

87. See *supra* part I.D.

88. Peter Jaszi notes that the Court “focused primarily on the characteristics of the posters themselves” in rendering its decision. Jaszi, *supra* note 8, at 483.

89. *Bleistein*, 188 U.S. at 249.

90. The Court justified its finding of originality by noting the danger in having untrained lawyers render decisions about art: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . .” *Id.* at 251. Implicitly, aesthetic evaluation—as the New Criticism held—requires training and should not be left in the hands of the untutored. Nonetheless, Justice Holmes also articulated a somewhat Romantic view of creativity, stating that “personality always contains something unique.” *Id.* at 250. *Bleistein*, therefore, had not yet completely broken the Romantic mold. Because of this Romantic aspect, some commentators characterize *Bleistein* as an example of copyright's embrace of Romantic thought. Yet, rather than elevating the author, *Bleistein* downplays authorship, in the words of Peter Jaszi, “effacing” and “generalizing” the concept. Jaszi, *supra* note 8, at 483.

Justice Harlan's dissent in *Bleistein* provides an interesting counterpoint to the majority's focus on the self-contained work. In contrast to the majority, Justice Harlan would have looked beyond the work in determining its value. He asserted that the work must have "some connection with the fine arts to give it intrinsic value" and that advertisements for a circus did not have this connection.<sup>91</sup> Criticizing the majority's conception of the work as the arbiter of its own meaning (that is, as the source of its own originality), Justice Harlan wrote: "No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities."<sup>92</sup> For Justice Harlan, copyrightability was to be decided by factors external to the work. To be sure, the extratextual material that the dissent would consider derived from Romantic thought: Justice Harlan would have found that the posters had no "intrinsic value" or "original artistic qualities." Nevertheless, in taking this approach, the dissent would look beyond the work to place the posters in a broader context as texts.

*Alfred Bell & Co. v. Catalda Fine Arts, Inc.*,<sup>93</sup> decided at the height of the New Criticism, marks copyright's complete embrace of the notion of the "work" in determinations of copyrightability, and its concomitant repudiation of the Romantic notion of "author." The issue in *Alfred Bell & Co.* was whether mezzotint engravings of paintings of the old masters were entitled to copyright protection. In holding these engravings copyrightable, Judge Frank eliminated the Romantic idea of author from the determination of originality. Now, "[n]o matter how poor artistically the 'author's' addition, it is enough if it be his own."<sup>94</sup> Originality does not mean "startling, novel or unusual"; instead, it merely means that a work "owes its origin" to the 'author.'<sup>95</sup> Authorship means only "ordinary skill and diligence,"<sup>96</sup> and requires only a "trivial variation."<sup>97</sup> Variation is determined by setting up differences between works, no matter how those differences arise:

[E]ven if [the mezzotint engravings'] substantial departures from the [originals] were inadvertent, the copyrights would be valid. A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having

91. *Bleistein*, 188 U.S. at 253 (Harlan, J., dissenting).

92. *Id.*

93. 191 F.2d 99 (2d Cir. 1951).

94. *Id.* at 103.

95. *Id.* at 102.

96. *Id.*

97. *Id.*

hit upon such a variation unintentionally, the "author" may adopt it as his and copyright it.<sup>98</sup>

Like the New Criticism's author, the "author" for Judge Frank takes a back seat to what is "in" the work. The work may have worth quite independently of the author's volition and control. Indeed, rather than creating the work, the author for Judge Frank in a sense becomes so after the work comes into existence; the work may emerge even by accident, in which case, the author becomes such when he or she, after the fact, "adopts" the pre-existing work as his or her own.<sup>99</sup>

Viewed from this perspective, the level of creativity necessary to support copyrightability has little to do with author and everything to do with difference. A work of "authorship" is original if it is different from other works, no matter how slight the difference and no matter how the difference arises. For copyright, it is the attempt to draw boundaries between works that becomes important in deciding whether a work may receive protection.

### C. *Inadequacies in the Concept of the "Work" in Cases Addressing Entitlement to Protection*

Copyright's New Critical notion of the "work" in originality determinations certainly differs from the post-structuralist concept of the fluid, dynamic "text." The question becomes, however, whether copyright's adoption of the New Critical model of the work results in questionable decisionmaking. Current confusion in the case law surrounding the originality requirement suggests that it does.

John Wiley has written that it is anomalous to hinge the originality determination on variations between works.<sup>100</sup> Although he agrees with the ultimate result, Wiley criticizes the seminal *Alfred Bell & Co.* on two grounds.<sup>101</sup> First, he notes that Judge Frank's conclusion that the plaintiff's mezzotint reproductions of the old masters did not intend to (and did not in fact) imitate the paintings that they reproduced "can barely be read with a straight face," especially given Judge Frank's use of the word "reproduced."<sup>102</sup> Second, he describes it as "perverse" to hinge originality determinations on variation, since in many cases of artistic reproduction—presumably, including that presented in *Alfred Bell & Co.*—

98. *Id.* at 105 (footnotes omitted).

99. In recognizing that art can arise from accident, *Alfred Bell & Co.*—while elevating the work to privileged status in copyright—anticipates the post-structuralist demystification of work and author.

100. John S. Wiley Jr., *Copyright At the School of Patent*, 58 U. CHI. L. REV. 119, 137 (1991).

101. *Id.*

102. *Id.* at 135.

variation is a vice.<sup>103</sup>

Copyright's assimilation of the notion of "work" facilitated, if not caused, Judge Frank's emphasis on variation as the standard for originality. According to modernist thought, "characteristic" art was more valuable than "imitative" art.<sup>104</sup> For example, it was believed that *true* artists trying to render the same landscape would always create something different.<sup>105</sup> If, as the New Criticism held, a work of art has an essence and is analogous to architecture or a machine,<sup>106</sup> the most obvious way to demarcate between it and other works of art is to emphasize perceived variations. Given his modernist model of the work, Judge Frank had little choice but to predicate "originality" on the perceived differences between works.

Judge Posner's oft-criticized opinion in *Gracen v. Bradford Exchange*<sup>107</sup> is a second example of how a court's use of the New Critical construct of the "work" can foster problematic opinions. In *Gracen*, the plaintiff entered a contest conceived by her employer to use preexisting photographs of Judy Garland as Dorothy in *The Wizard of Oz*<sup>108</sup> to paint a picture of Dorothy. Gracen used the existing photographs to paint a picture of Dorothy superimposed over an image of the yellow brick road. Her paintings won the contest. The defendant initially called plaintiff "a true prodigy" whose painting "conveyed the essence of Judy's character in the film . . . the painting that left everybody saying, 'That's Judy in Oz.'"<sup>109</sup>

Plaintiff later refused to permit defendant to use her paintings. After commissioning a second artist to "clean up" plaintiff's paintings, defendant sold them. Plaintiff sued, alleging that defendant had infringed her work. The defendant argued that *Gracen's* work was unoriginal, and therefore not copyrightable, because it did not show sufficient variation from the underlying MGM motion picture and photographs. The Seventh Circuit agreed, refusing to grant copyright protection to "a picture created by superimposing one copyrighted photographic image on an-

103. *Id.*

104. See Cassirer, *Art*, in *CRITICAL THEORY*, *supra* note 14, at 996.

105. *Id.* at 999. This preference for the work that was different from other works as against imitative works had its roots in the Romantic concept of authorial genius. ROSE, *AUTHORS AND OWNERS*, *supra* note 13, at 197-99. Yet, works had value, not if they were merely different, but if they were the product of an author-genius. With modernism's rejection of the notion of author-genius, the only remaining basis on which a work could be evaluated was difference.

106. See *supra* note 46 and accompanying text.

107. 698 F.2d 300 (7th Cir. 1983).

108. Metro-Goldwyn-Mayer (1939).

109. 698 F.2d at 301.



other . . . ."<sup>110</sup>

In justifying his decision, Judge Posner first drew a distinction between "artistic originality," on the one hand, and the "legal concept" of originality under the Copyright Act, on the other.<sup>111</sup> So-called "artistic originality" is much like Romantic originality, going to the work's aesthetic qualities.<sup>112</sup> Judge Posner pointed out that so-called "Super Realistic" and Northern European Renaissance paintings—no less than Cubist or Abstract-Expressionist painting—have aesthetic originality, even if they are indistinguishable from photographs.<sup>113</sup> By virtue of this reference to accepted realist art forms, Judge Posner clearly believed that Gracen's paintings—which in a sense were super-realistic—had "artistic originality." If so, the paintings could fairly have been held to satisfy even a Romantic notion of originality.

But, according to Judge Posner, despite their artistic worth, Gracen's paintings did not satisfy the test of what he called "legal originality." Legal originality supposedly exists to "assure a sufficiently gross *difference* between the underlying and the derivative work to avoid entangling subsequent artists depicting the underlying work in copyright problems,"<sup>114</sup> and in that way to prevent "overlapping claims" by several artists who all produce derivative works based on an underlying work.<sup>115</sup> In articulating the distinction between artistic and legal originality, Gracen exhibited an ambivalence toward the issue of variation. At times, Judge Posner seemed concerned that Gracen's work did not vary from the underlying MGM material. At other times, he worried that her paintings might be indistinguishable from some future works also derived from the MGM motion picture or photographs. Regardless, Judge Posner held that a work receives no copyright protection where the lines between it and other works could become blurred. Again, copyright protection turns on "differences," that is, setting one work apart from another.<sup>116</sup>

110. *Id.* at 305.

111. *Id.* at 304.

112. "Artistic originality indeed might inhere in a detail, a nuance, a shading too small to be apprehended by a judge." *Id.* Judge Posner referred to Super Realism and Northern European Renaissance painting, calling them "in a sense—but not an aesthetic sense—less 'original' than Cubism or Abstract Expressionism." *Id.* He continued that "a portrait is not unoriginal for being a good likeness." *Id.* It is interesting that Judge Posner's basis of comparison—Cubism and Abstract Expressionism—are archetypal examples of modernist works.

113. *Id.*

114. *Id.* at 305 (emphasis added).

115. *Id.* at 304.

116. Judge Posner distinguished between derivative works and paintings "from life", *id.* at 305, indicating that his test of originality applies only to derivative works. Peter Jaszi has treated this as a manifestation of Gracen's inclination to apply a Romantic hierarchy in valuing art, prizing that

Judge Posner's opinion assumes that the economic benefit that would result from granting copyright protection to works like Gracen's are outweighed by the costs that would result from entangling subsequent artists depicting the underlying work in copyright infringement litigation.<sup>117</sup> This conclusion has been criticized as unsound economic analysis, as has Gracen's focus on the importance of variation as the threshold of originality.<sup>118</sup>

Admittedly, it is easy to criticize Judge Posner's decision on traditional copyright grounds (arguably, Gracen's painting contained more than a trivial variation from the original) and without analyzing the decision in terms of contemporary literary criticism. Nonetheless, at the very least, copyright's notion of the "work" made it easier for the Gracen court to err. For Judge Posner—as for Judge Frank in *Alfred Bell & Co.*—the New Critical construct of "work" served as a structural tool that fostered unsound reasoning, resulting in what many believe to be an incorrect decision. As noted above, according to the New Critical conception of "work," differences from other "works" are essential to preserving a particular work's autonomy. Because Gracen's paintings did not exhibit this autonomy *vis-à-vis* possible future derivative works—and perhaps *vis-à-vis* the underlying photographs from the *Wizard of Oz*—it was easier for Judge Posner to devalue Gracen's paintings as against the perceived litigation costs that would result from protecting her paintings.

#### D. Entitlement to Protection and Contemporary Literary Theory

The question becomes whether an approach to the text more in keeping with current literary thought could have avoided some of the doctrinal problems of *Alfred Bell & Co.* and *Gracen*—or at least could have refocused the inquiry. I suggest that it could. Under established

taken from imagination over application. Jaszi, *supra* note 8, at 462-63. However, the distinction is merely another manifestation of Gracen's unwillingness to recognize the elusiveness of textual identity. Judge Posner assumed that "real life" differs from what is "in" an underlying "work." However, in the creative process, real life is no less an intertext than a classic "underlying work."

From a different perspective, Jaszi has criticized Gracen as an unfortunate return to the Romantic notion of authorship—and thus as a retreat from the principles set forth in *Alfred Bell & Co.* In this vein, Gracen has been called "a considerable departure from traditional copyright doctrine . . . [that] cannot be adequately explained in terms of the nominal justification offered by Judge Posner," but that, instead, reassembled the Romantic approach to authorship into the originality determination, privileging "art that results from true imagination rather than mere application." On the contrary, Gracen—far from embracing the Romantic notion of originality—once more repudiated that notion as a means to perpetuate the illusion that the work is self-contained and autonomous.

117. Gracen, 698 F.2d at 305; Landes & Posner, *supra* note 12, at 356; Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108, 111 n.7 (1990); Wiley, *supra* note 100, at 137.

118. Wiley, *supra* note 100, at 137.

canon, the originality requirement exists to reward creativity and not mere great skill, training, knowledge, or effort. The creativity standard, however minimal, relates to something that is supposedly inherently valuable about the work as it relates to the broader discourse.<sup>119</sup> Recent cases have focused on variation as the measure of that value. But variation among *works* is not all that matters in deciding a work's creative worth. Rather, as Alastair Fowler has said, "to have any artistic significance, to mean anything distinctive in a literary way, a work must modulate or vary or depart from its generic conventions, and consequently alter them for the future."<sup>120</sup> An emphasis on variation or modulation of convention, however, does not mean that a particular "work" must have distinguishable variations from another "work." Fowler notes that "the most imitative work, even as it kowtows slavishly to generic conventions, nevertheless affects them, if only minutely or indirectly."<sup>121</sup> Indeed, "two verbally identical texts can have completely different meanings when they are framed differently."<sup>122</sup>

By placing the text in its broader context, it is possible to provide a another justification for the result in *Alfred Bell & Co.* and to reassess the opinion in *Gracen*, both within the confines of the law's persistence in requiring authorial "originality." I emphasize that this discussion does not seek to dictate how copyright's approach to originality *should* be, but rather how, in light of contemporary literary theory, the inquiry into "originality" might be refocused to consider the policies underlying the protection of copyrighted texts. Under such an alternative approach, the term "originality" would not merely refer to differences between works, but rather would focus on the extent to which a derivative work serves to modulate or vary broader convention. In *Alfred Bell & Co.*, before the plaintiff created its engravings, the public had limited access to accurate renditions of the original oil paintings. The originals could only be seen by visitors to a museum, gallery, or other building (depending on where the originals hung). The mezzotint copies broadened this access by more faithfully rendering the original paintings.<sup>123</sup> The plaintiff's texts there-

119. 1 NIMMER & NIMMER, *supra* note 74, § 2.01[A] at 2-10; see *Feist Publications, Inc. v. Rural Tel. Ser. Co.*, 111 S. Ct. 1282 (1991).

120. FOWLER, *supra* note 71, at 23.

121. *Id.*

122. Peter W. Nesselroth, *Literary Identity and Contextual Difference*, in *IDENTITY OF THE LITERARY TEXT*, *supra* note 12, at 43. Nesselroth gives several literary examples of this. An oft-cited fictional example of this phenomenon of "transcontextualization" is described in Jorge L. Borges, *Pierre Menard, Author of the Quixote*, in *LABYRINTHS: SELECTED STORIES & OTHER WRITINGS* 36-44 (1964).

123. The plaintiff's reproductions preserved the softness of line characteristic of the original oil paintings. 74 F. Supp. at 975, 979.

fore permitted broader distribution to the public of textual artifacts conventionally accepted as having high aesthetic quality and in that way changed the cultural perception about the originals, which previously had not been reproduced in the same way. This broader dissemination undoubtedly altered the generic and aesthetic conventions surrounding the originals. Moreover, in reaching audience members that perhaps previously had no access to the underlying works at all, the reproductions differed from the underlying works because the audience saw them within a distinct cultural and generic context. Viewed in terms of their effect on broader cultural and generic convention, the mezzotints in *Alfred Bell & Co.* derived their "originality," not from being different from the underlying paintings, but from being faithful reproductions.

The counter-argument to this view of originality is that any type of reproduction—for example, a reproduction on a photocopy machine—would be original, since the dissemination of such copies would vary the generic and cultural conventions permeating the underlying text. The response to this is that certain reproductions may have a *de minimis* effect on existing convention (for example, texts that have already been massed-produced, like a best-selling novel). Moreover, even post-structuralist critics recognize the existence of a speaker of the text, who is more than just a person at a photocopy machine.<sup>124</sup> In this sense, post-structuralist theory allows for differentiation between the producer of the text and one who, for example, through research uncovers a previously undiscovered text.

An approach to originality that had focused on how the text modulates or varies code and convention could also have shed additional light on the deficiencies in Judge Posner's *Gracen* opinion. Importantly, by their very nature, *Gracen's* paintings of Dorothy in Oz in and of themselves challenged the New Critical notion of the work. As a contestant, *Gracen* had to reproduce a preexisting popular icon and to invoke a clear intertextual connection between her paintings and the underlying work. The defendant had instructed the contestants: "We do want *your* interpretation of these images, but your interpretation must evoke all the warm feeling the people have for the film and its actors. So, *your* Judy/Dorothy must be very recognizable as everybody's Judy/Dorothy."<sup>125</sup> The outcome of the contest—and the resulting paintings—turned, not on distinctions among works, but on the artist's ability to create a text en-

124. See Knapp & Michaels, "Against Theory," in *AGAINST THEORY*, *supra* note 12, at 16-17 (recognizing that the existence of an author—in the sense of an intentional agent—must necessarily be inferred by the reader for the text to have meaning).

125. 698 F.2d at 301.

tirely derivative of the preexisting works. As in *Alfred Bell & Co.*, the value of Gracen's paintings lay in how closely she could come to reassembling the original motion picture in her paintings.

Gracen succeeded in her objective, being described as a "true prodigy." This success, moreover, had a strong audience component: an audience member could fully appreciate Gracen's paintings only if he or she had pre-existing knowledge of the popular icon *The Wizard of Oz*. Indeed, Gracen won the contest because her paintings were judged the closest to "everybody's" Dorothy. The term "everybody" referred to the broader culture, which has assimilated the MGM version of the *Wizard of Oz* as its own, a fact underscored by the court's observation that Gracen's paintings were adjudged the best by passersby in a shopping center. By invoking an intertextual relationship with prior works, Gracen's paintings asked the viewer to participate in the actualization of (that is, the creation of) the text by bringing his or her own vision of the *Wizard of Oz* (and the Dorothy character and Judy Garland) to the experience of the paintings.

In *Gracen*, therefore, the derivative work, no matter how much like the underlying work, had "a different meaning" from the original because it was framed in a distinct context.<sup>126</sup> Moreover, the paintings arguably served a useful cultural and social goal by permitting the audience to participate in a new and fresh rearticulation of popular myths. If "originality" in a post-structuralist world means modulation of existing convention, Gracen's paintings were unquestionably original.

In any event, assessing originality in light of the effect on Gracen's works on culture and convention necessarily changes the focus of Judge Posner's economic analysis. If variation is copyright's benchmark of creativity, then it is at least arguable that Gracen's paintings were not original. However, evaluating Gracen's paintings in light of their effect on the broader culture through modulation of existing convention and audience interaction with the text, they have an obvious social and cultural value. While Judge Posner's approach to the work could, within the standards of the New Criticism, disregard the audience's importance in "creating" Gracen's paintings, current literary thought would necessarily argue that the audience played a significant role in creating the paintings, a role that gave rise to a benefit that might more obviously outweigh the costs of litigating cases involving later artists who seek to copy the underlying work. It may be that, for those who subscribe to Judge Posner's position, the cost of litigation arising from protection of Gracen's painting would

126. See *supra* note 122 and accompanying text.

still outweigh the benefit of granting her protection. The point is that an approach to the text more consistent with current literary thought would have refocused the inquiry.<sup>127</sup>

Stretching the outer limits of a contemporary treatment of legal "originality," hypothetically an identical reproduction of an earlier work could under some circumstances be original. This is contrary to traditional approaches to originality. Nimmer writes:

[A]n artist who makes such an exact reproduction of a Rembrandt that even the experts cannot distinguish it from the original, undoubtedly exhibits great skill, training, knowledge and judgment, but in failing to create a "distinguishable variation," he has not produced anything which "owes its origin" to him, and hence has not engaged in an act of authorship.<sup>128</sup>

And yet, it is possible that this artist modulates convention and, indeed, even articulates a different text because of changed context. Suppose, for example, that an artist makes an exact reproduction of Rembrandt's *Night Watch*. Suppose further that the artist exhibits the reproduction with his own paintings of Campbell Soup cans and Marilyn Monroe. Assume that, although each painting is on a separate canvas and is framed individually, they are all hung on a movable wall and treated by the artist as a single, inseparable work. Finally, suppose that the painter is named Andy Warhol. In this situation, the cultural significance of the reproduction and the concomitant modulation of cultural convention become evident. Such a reproduction might easily result in a reassessment of Warhol's work, thus altering conventional assessments of a well-known artist, while at the same time changing cultural views about Rembrandt's

127. A literary critical approach to the "work" might also better justify decisions withholding copyright protection for lack of originality. In *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir.), cert. denied, 429 U.S. 857 (1976), the Second Circuit refused to find that plastic reproductions of public domain cast iron banks depicting Uncle Sam were original. In so holding, the court increased the standard of originality announced *Alfred Bell & Co.*, requiring a "substantial variation, not merely a trivial variation such as might occur in the translation to a different medium." *Id.* at 491. To reach a result that seems proper, the court increased the quantum of originality necessary to obtain protection, further privileging works that show variation over works that seek to be faithful reproductions.

However, if *Batlin* had focused on the way in which the text modulates or varies convention in deciding originality, it would not have been difficult to conclude that the plaintiff's works were not original. The underlying works—cast iron banks—had already been mass-produced for some time. Given the maturity of the genre, dissemination of plastic versions of the banks would probably have had only a slight impact on existing generic convention. "[I]t may be that frequent imitation can use up formal possibilities, to the point that a kind no longer offers sufficient fresh variety to promise excellence." FOWLER, *supra* note 71, at 165. The genre in *Batlin* seems to fit that description. For this reason, even under a post-modernist model of the text, it could be argued the works at issue there were not "original." See also *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980).

128. 1 NIMMER & NIMMER, *supra* note 74, at § 2.02[A] at 2-10 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

work, particularly if the hypothetical reproduction of the Rembrandt were considered pastiche, or even, by virtue of its being placed in a pop art exhibit, parody.<sup>129</sup> It is difficult to justify on creative grounds withholding copyright protection from the Warhol reproduction of the Rembrandt.

One could respond that the exhibit is a single work that contains variations from Rembrandt's original *Night Watch*, thus making the entire work original. Yet such an approach would strain the notion of a "work" that contains trivial variations, unless the notion of autonomous work is to be abandoned. The point is that copyright's current approach to originality is rather arbitrary, withholding protection from much that has cultural worth. Admittedly, it may be impossible—as well as undesirable for overriding policy reasons relating to burden of proof<sup>130</sup>—for an artist who makes the exact reproduction of the Rembrandt to prove infringement of the distinctive elements of his or her work (that is, by virtue of the unique context in which the copy is portrayed, it is virtually inconceivable that one could copy the way in which the Warhol reproduction alters the culture's view of Rembrandt or of Warhol's own work).<sup>131</sup> But the example shows how a text can have artistic value—and effect cultural change—even if it does not, under a New Critical view of the "work," vary at all from prior works.

I stress again that the above examples of how "originality" could be approached from the perspective of contemporary literary criticism are not necessarily suggestions about how copyright should be, but are merely examples of how it might be. The essential point is that the current originality requirement, with its New Critical focus on variation (derived from the modernist notion of "work"), as the sole determinant of protection is arbitrary, since variation may be only one indicium of distinctiveness in a text. While, as a matter of policy (problems of proof, economics) it might very well be that the amount of variation between texts should continue to be the sole determinant of originality, the courts and commentators have not focused on the policies that would privilege "variation" over other forms of generic modulation. This discussion thus invites a reassessment of the originality requirement that would consider

129. See Harris, *supra* note 12 (describing how parody alters convention); FOWLER, *supra* note 71, at 188-90 (discussing how satire, including parodic satire, modulates genre).

130. In other words, Judge Posner's policy arguments in *Gracen* may have more weight in a case like this, since the costs of litigation might indeed outweigh the benefits of such an exact reproduction.

131. That is, only the distinctive elements of such a work would be protected by copyright, and it is difficult to conceive of a situation in which those distinctive elements could be infringed by an exact reproduction rendered by someone other than Warhol.

whether, in light of underlying policy considerations (problems of proof, economic issues) the creative value of a text arises out of its relationship to a broader social, cultural, and literary context and not merely from perceived variations from prior works.<sup>132</sup> In short, originality analysis could stand reevaluation because variation from earlier texts is not the only thing that makes a text worthwhile.

### E. Independent Creation and Post-Modernist Thought

A possible response to the argument that the cases place undue emphasis on variation, and by extension on the "work," as a benchmark of originality is that the law will protect exact reproductions so long as the author has not copied from another. In other words, a plaintiff's text is original if it was created independently of prior texts, even if identical to a prior text.<sup>133</sup> Hypothetically, the doctrine of independent creation would protect exact renditions of a preexisting text, therefore permitting copyright protection for rearticulation of texts (like Warhol's fictional *Night Watch*, if Warhol had painted the reproduction without referring to Rembrandt's painting) that have cultural value, while at the same time depriving rank copyists of protection.

There are two problems with the notion of "independent creation." First, approaching the text from the perspective of the audience, it is difficult to see how a reproduction of a Rembrandt that was painted while the artist stood before the original has less cultural significance than an identical painting that was created by an artist who never saw

132. One such policy consideration deserves mention, however. Paradoxically, by fostering decisions that withhold copyright protection, the New Critical construct of the work arguably discourages the dissemination of speech. Often, texts that are most familiar and valuable to a mass culture receive no protection by virtue of their familiarity. For example, Gracen's rendition of *The Wizard of Oz* sought to exploit modern icons and to involve the audience in the creative process. By refusing to acknowledge the worth of such texts, copyright fails to encourage authors to exploit some of its most important popular myths, therefore depriving the culture of important tools of discourse. Cf. Harris, *supra* note 12 (discussing how the Superman character is a modern myth that, by virtue of the copyright laws, is nonetheless not available for exploitation by the culture).

133. *Id.* See 1 GOLDSTEIN, *supra* note 75, § 2.2.1. Put differently: "[T]he originality necessary to support a copyright merely calls for independent creation, not novelty . . . . Originality means only that the work owes its origin to the author, i.e., is independently created, and not copied from other works." 1 NIMMER & NIMMER, *supra* note 74, § 2.01[A], at 2-9. The originality requirement thus folds into the defense of independent creation. "The subjects of copyrightability and infringement . . . are close, almost Siamese, partners." KAPLAN, *supra* note 35, at 38. However:

The two tests [for originality and copyright infringement] differ in important respects. Paraphrases of earlier works that would suffice for originality will often not suffice to avoid infringement. The addition of a new element to a prior work, though it will support originality, will not excuse infringement if the prior work is a copyrighted work. Further, the audience test, which plays an important role in infringement determinations, plays no role in originality determinations.

1 GOLDSTEIN, *supra* note 75, § 2.2.1 at 63 n.6.



Rembrandt's version. Indeed, the audience may assimilate the reproductions in the same way, or in different ways, each of which is nevertheless important to the culture. The concept of independent creation focuses on the author's conduct, rather than on audience response, in a way that makes little sense in light of contemporary literary thought.

More fundamentally, independent creation is a practical impossibility. Northrop Frye writes:

It is hardly possible to accept a critical view which confuses the original with the aboriginal, and imagines that a "creative" poet sits with a pencil and some blank paper and eventually produces a new poem in a special act of creation *ex nihilo*. Human beings do not create in that way. Just as a new scientific discovery manifests something that was already latent in the order of nature, and at the same time is logically related to the total structure of the existing science, so the new poem manifests something that was already latent in the order of words . . . Poetry can only be made out of other poems; novels out of other novels.<sup>134</sup>

Others have made similar points.<sup>135</sup> It is not surprising that some have charged that the originality requirement stifles the creation of texts.<sup>136</sup> The requirement of independent creation does not overcome the

134. NORTHROP FRYE, *ANATOMY OF CRITICISM: FOUR ESSAYS* 97 (1957).

135. See Bloom, *supra* note 57, at 413:

The more deeply and widely we read, the more we become aware that good poems, novels, and essays are webs of allusion, sometimes consciously and voluntarily so, but perhaps to a greater degree without design. This unknowing allusiveness, carried far enough, can become quotation, and no writer ever can be certain precisely when he is quoting.

According to Jessica Litman, all creative works include elements adapted from "raw materials" that the author first encountered in another text. Litman, *supra* note 12, at 1010-11; see Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 218 (1983); Peter Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 UCLA L. REV. 715, 729-33 (1981). Litman notes that no one has the capacity to ascertain the source of individuals' inspirations. Litman, *supra* note 12, at 975. She characterizes the creative process as a combination of "absorption," "astigmatism," and "amnesia," stating that authorship is a process of transformation, some of which is purposeful, some of which is inadvertent, and some of which is the product of the author's "peculiar astigmatic vision." *Id.* at 1010, 1011. She concludes that the idea of the public domain serves to ameliorate the harm that could come from taking the construct of originality too seriously. Indeed, it is even difficult to distinguish articulation of facts (deemed unoriginal) from articulation of material deemed original: "Researchers can thus be said to be composing their facts as they go along. In this sense, facts are no more 'out there' than are plots, words, or sculptural forms." *Id.* at 996-97; see also Jane Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Protection in Works of History After Hoelting v. Universal City Studios*, 29 BULL. COPYRIGHT SOC'Y U.S.A. 647, 658 (1982).

136. FRYE, *supra* note 134, at 96-97; Harris, *supra* note 12, at 266-67; THOMAS MCFARLAND, *ORIGINALITY & IMAGINATION* 22-29 (1985). For example, according to Neil Harris, modern mythic heroes (Superman being the archetype)—central to the culture—have become private property that can only be used if parodied (permitted as a fair use). Harris states: "A self-referencing system of myths which relies upon parodied imitation as one of its central instruments of integration is a product of something beyond creative intention or legal history. And its social implications must be faced both by the courts and by its consumers." Harris, *supra* note 12, at 267. In this view, copyright deprives society full use of some of its most basic and important cultural communication. See Litman, *supra* note 12.

problems inherent in a work-based concept of originality, therefore, because all texts will necessarily reproduce other texts. Independent creation really means only that copyright tolerates some forms of rearticulation of previous texts, while penalizing other forms. Specifically, the law forbids those acts of textual duplication that are perceived to rely on an unduly narrow range of prior texts.

Returning to the example of Rembrandt's *Night Watch*, suppose a first artist painted an exact reproduction while standing before Rembrandt's painting. Now, suppose that an exact reproduction were painted by an artist who undertook an exhaustive study of Rembrandt's technique; who steeped herself in biographical accounts of Rembrandt's life; who studied most of Rembrandt's work; who read detailed verbal descriptions of *Night Watch*; but who had never seen Rembrandt's version. Copyright would find the latter artist's reproduction original, but not the former's. Yet both artists relied on preexisting texts to create their respective reproductions, and neither independently created his or her painting, in the sense of creation on a clean slate. The independent creation requirement seems an arbitrary way of distinguishing between the two reproductions.

The concept of independent creation serves to legitimize a system that values a text that draws on a broad range of anonymous textual material over a text that draws only on identifiable sources—even where the degree of skill and effort of the respective authors is equivalent.<sup>137</sup> This may or may not be desirable social policy.<sup>138</sup> (Undoubtedly, the

137. In *The Public Domain*, Jessica Litman argues that the public domain exists to ameliorate the pressures caused by the problematic concept of originality. Litman, *supra* note 12, 1015. Litman apparently views the public domain as a way of fostering textual production that a strict application of the illusory Romantic concept of originality would prevent. *Id.* at 1012. However, Litman places too much emphasis on the Romantic approach to originality as a governing concept. As noted earlier, copyright has in fact banished the author and originality as the central animating concepts. See *supra* part II.B. What Litman calls the public domain really comprises those elements—supposedly contained in the autonomous work—that are unworthy of copyright protection. The work itself supposedly sets the boundaries of copyright protection, primarily through the idea/expression dichotomy. Indeed, the recent tendency to speak of “protectibility” rather than of “public domain”—a tendency that Litman astutely describes, *id.* at 995—is symptomatic of this privileging of the work over the author. While the “public domain” semantically emphasizes what an author may use that exists outside the work, “protectibility” focuses on elements supposedly in the objective work.

138. In pre-Romantic periods, a second work (in effect, a derivative work) was not considered plagiarism if it added something of value to the earlier work. KAPLAN, *supra* note 35, at 17. So one need not necessarily conclude that such a work has less aesthetic value. Indeed, Harold Bloom has conceived of a system that values the dissemination of worthwhile textual material, even though the person doing the disseminating “copies”:

[O]nly one moral attitude toward plagiarism is possible in a literary context. This is that only great writers should be plagiarized. To copy second-rate authors indeed is immoral. . . . The literary question in regard to supposed plagiarism therefore should always be: what is the quality of the stolen material? If it is commonplace or worse, then we ought to disapprove, and perhaps a copyright holder might contemplate legal action. But

requirement deprives new producers of texts of the ability to use some of society's most important icons.)<sup>139</sup> However, the point here is that the illusion of "independent creation," which depends on a modernist notion of autonomous "work," does not permit a full exposition of the policies implicated in a decision to protect one "work" but not another.

### III. THE "WORK" AND THE SCOPE OF COPYRIGHT PROTECTION

The construct of autonomous "work" also plays a critical role in determinations of scope of copyright protection, that is, how far copyright protection extends to a particular plaintiff's product. Here, also, the concept of work obfuscates rather than enlightens. In this section, the Article discusses how the notion of "work" in fact underlies the inquiry into scope of protection, how the concept permits courts, consciously or subconsciously, to manipulate results and obscure policy decisions, and how the issue of scope of protection could more usefully be considered in light of recent literary thought.

#### A. *The "Idea/Expression Dichotomy" as a Manifestation of the Modernist Image of the "Work"*

The "idea/expression" distinction supposedly establishes the parameters of the work's entitlement to copyright protection. A work's "expression" of an idea is protected; the idea itself is not.<sup>140</sup> So a producer of a second text may refer to an earlier text and permissibly "take" the idea from that earlier text, so long as he or she does not take the expression.<sup>141</sup> This distinction supposedly strikes a balance between the interests of copyright in encouraging production and dissemination of textual material and the competing interest of avoiding monopolies that would inhibit textual production.<sup>142</sup>

There have been many attempts in the cases and commentary to describe and apply the idea/expression distinction. The courts and commentators repeatedly state that the distinction is difficult to apply in practice. Judge Learned Hand distinguished between the abstract and

if the original is of real power and beauty, then our reaction ought not to be either immoral or legal. By calling the original again to our attention, the copyist, however unwittingly, has performed a critical function for us.

Bloom, *supra* note 57, at 413.

139. See Harris, *supra* note 12.

140. 15 U.S.C. § 102(b) (1988); 1 GOLDSTEIN, *supra* note 75, § 2.3. The distinction arose early in American law. See *Daly v. Palmer*, 6 Fed. Cas. 1132, No. 3552 (C.C. S.D.N.Y. 1868).

141. See, e.g., *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930).

142. See, e.g., 1 GOLDSTEIN, *supra* note 75, § 2.3.

the concrete.<sup>143</sup> Professor Chafee identified the "pattern" of the work as its expression, defined in a work of fiction as the "sequence of events and the interplay of characters."<sup>144</sup> Paul Goldstein describes ideas as concepts, solutions, or building blocks.<sup>145</sup>

Despite these attempts to define "idea" and "expression," scholars generally agree that the distinction is elusive. The dichotomy has been called *ad hoc*,<sup>146</sup> mythological,<sup>147</sup> and false.<sup>148</sup> Commentators recognize that an idea cannot be defined without expressing it, thus making the dichotomy illusory.<sup>149</sup> Others have questioned the value of the distinction for deciding the scope of protection in nonverbal media: while the courts have held that the idea/expression distinction applies to musical texts<sup>150</sup> and to computer software,<sup>151</sup> commentators have despaired of identifying an "idea" in these forms.<sup>152</sup>

The idea/expression distinction, as much as any concept in copyright law, embodies the modernist view of the "work" as capable of generating a fixed interpretation independent of context. This approach to the work in idea/expression inquiry underlies Judge Hand's seminal description of the distinction:

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

143. See *infra* note 153 and accompanying text.

144. Zechariah Chafee Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513 (1945).

145. 1 GOLDSTEIN, *supra* note 75, § 2.3.1.1.

146. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). Attempts at expressing the test tend to be circular or vague. For example, Nimmer suggests that the line should be drawn at a place that "is in some degree abstract (omitting dialogue, minor incidents, possibly setting, etc.) but is nevertheless sufficiently concrete so as to contain an *expression* of the sequence of events and the interplay of the major characters." 3 NIMMER & NIMMER, *supra* note 74, § 13.03[A], at 13-28 (citations omitted) (emphasis added). In defining the line between idea and expression by using the word expression, Nimmer fails to explain the dichotomy. Neither are the terms "abstract" and "concrete" self-explanatory.

147. Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551 (1990).

148. Wiley, *supra* note 100, at 122-23.

149. *Id.*; Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 12, at 1023-24 & n.56.

150. *E.g.*, *Baxter v. MCA, Inc.*, 812 F.2d 421, 423-24 (9th Cir. 1987).

151. *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 54 (D. Mass. 1990).

152. Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 443 (1988). ("In music there is no 'idea' or 'expression' to be distinguished."); Halvey, Comment, *supra* note 12, at 743 ("It is in drawing the distinction between the computer programmer's idea and his expression of that idea that the application of conventional copyright principles becomes difficult."). Perhaps the idea/expression dichotomy *seems* to work better in connection with literary and dramatic works because the courts have had long experience in considering them, and can, consistently with legal and cultural expectation, more easily decide what is protected and what is not—i.e., which paraphrases are acceptable and which are not. This arises, however, not because the idea/expression concept adequately describes the constitutive aspects of literary texts, but because the courts are intuitively more aware of what constitutes unprotected convention in such works.

incident is left out. The last may perhaps be no more than the general statement of what the play is about and at times consist of only 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.<sup>153</sup>

In Judge Hand's view, so-called "expression" receives protection because it is, for copyright, the essence of the text. Abstractions of this essence "fit" on the "work," in patterns, but are not the "true work." Certain abstract descriptions of this "work" ultimately become "idea" and receive no protection. But the true work exists independently of attempts to characterize it, and the idea/expression distinction depends on interpretation of the work.<sup>154</sup>

The idea/expression distinction reflects the tendency in New Critical thought to treat the work as if it had a fixed, ascertainable meaning, separate from words that a reader uses to describe it.<sup>155</sup> In words reminiscent of Judge Hand's formulation of the idea/expression distinction, Cleanth Brooks wrote:

The dimension in which the poem moves . . . includes ideas, to be sure; we can always abstract an "idea" from a poem—even from the simplest poem . . . . But the idea which we abstract—assuming that we can all agree on what that idea is—will always be *abstracted*: it will always be the projection of a plane along a line or the projection of a cone upon a plane.<sup>156</sup>

In other words, statements of the "work's" ideas should not be mistaken for the "inner core" of the work.<sup>157</sup> Similarly, in copyright, paraphrase (abstraction) that strays too far from the work's essence becomes unworthy of copyright protection and is termed an unprotected idea.

### B. *Idea/Expression and the Fallacy of the "Work"*

The New Critical concept of "work" in idea/expression analysis leads to an interpretive methodology that increases the likelihood of un-

153. *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (1930) (L. Hand, J.).

154. Ironically, for copyright the essence of the work lies, not at some deep core, but at the surface of the work, i.e., the words on the page. Abstract characterizations of the work, though some may still qualify for protection as "expression," move further and further away from this surface.

155. BROOKS, *supra* note 46, at 192.

156. *Id.* at 205.

157. *Id.* at 206. Brooks continues:

We may, it is true, be able to adumbrate what the poem says if we allow ourselves enough words, and if we make enough reservations and qualifications, thus attempting to come nearer and nearer to the meaning of the poem by successive approximations and refinements, gradually encompassing the meaning and pointing to the area in which it lies rather than realizing it.

satisfactory decisions. Recall that, for the New Critics, the meaning of the text lay within the four corners of its pages, to be discovered through interpretation of the work independent of context.<sup>158</sup> More generally, modernism treated the work of art as having an internal logic.<sup>159</sup> The objection to the New Criticism is that a text does not have only one fixed meaning, but rather that a text's meaning changes depending on the context in which the audience reads it. Yet cases exploring idea and expression continue to assume that the text is susceptible to a valid interpretation, independent of context. For example, John Wiley has described how the elements that Judge Hand described in *Nichols* as merely similarities in idea could just as easily have been categorized as similarity of expression.<sup>160</sup> He notes that the description of what Universal copied in *Nichols* as "the comical story of the conflict between a New York Jewish family and an Irish Catholic family in which the children fall in love, their fathers oppose their marriage plans on cultural and religious grounds, the kids get married secretly, the fathers become furious" is both an idea that can be further elaborated upon and an expression ("a meaningful communication comprised of fixed symbols").<sup>161</sup> Conversely, the script of *Nichols*' play was both expression and an idea that could be further elaborated upon. Wiley concludes that, while Judge Hand chose to call the plot "idea" and the script of the play "expression," he could have switched the assignments.<sup>162</sup>

Judge Hand obviously engaged in an act of interpretation of the works at issue in *Nichols*, reaching a conclusion about the works that was, by reason of the above analysis, not the only plausible interpretation. Yet Judge Hand could treat his interpretation of the works in *Nichols* as the legitimate one because he adopted a modernist notion of the "work" as having a "true" interpretation and a logical structure. The concept of "work" in this way facilitates an unsatisfactory approach to determining the scope of copyright protection.

The uncertainty of interpretation is evident in other attempts at distinguishing idea from expression based on a New Critical model of the work. To take a textbook example, Professor Nimmer relies on thirteen points of similarity to conclude that Shakespeare's *Romeo and Juliet* and the musical *West Side Story*<sup>163</sup> are substantially similar in expres-

158. See *supra* part I.D.

159. *Id.*

160. Wiley, *supra* note 100, at 124-25.

161. *Id.* at 124.

162. *Id.*

163. Arthur Laurents et al., *West Side Story*, in *ROMEO AND JULIET AND WEST SIDE STORY: AN APPRECIATION* (Norris Houghton ed., 1965).

sion.<sup>164</sup> Although acknowledging that the works are dissimilar in many respects and that one could legitimately disagree with the conclusion that the listed similarities are of sufficient concreteness to constitute expression,<sup>165</sup> Nimmer seems to assume that the description of the thirteen points of similarity is valid. However, a plausible alternative interpretation of the very points that seem uncontroversial shows the inadequacy of trying to locate idea and expression in an autonomous "work":

*Nimmer*

*Alternative Interpretation*

1. The boy and girl are members of a hostile group

Maria in *West Side Story* is not a member of a hostile group (the gang) and is indeed unaware of the hostility. The boy in *West Side Story* has withdrawn from the hostile group (the gang). Romeo and Juliet at first both carry the ancient grudge between their families.

2. They meet at a dance.

Romeo, who is despondent, crashes a party on hostile territory, where there happens to be dancing; Tony in *West Side Story* is optimistic, and goes to a dance on neutral territory, a place that he has a right to enter.

3. They acknowledge their love in a nocturnal balcony (fire escape) scene.

The socioeconomic implications of the difference between a mansion balcony and a tenement fire escape are significant.

4. The girl is betrothed to another.

Maria in *West Side Story* is not betrothed to another (the character Chino). Rather, her brother wants her to marry Chino, but has no control. By contrast, Juliet's parents control her destiny.

5. The boy and girl assume the

Romeo and Juliet actually are

164. 3 NIMMER & NIMMER, *supra* note 74, § 13.03[A] at 13-29 to 13-31.

165. *Id.*

marriage vows.

6. In an encounter between the hostile groups the girl's cousin (brother) kills the boy's best friend.
7. This occurs because the boy attempts to stay the hand of his best friend to avoid violence.
8. In retaliation, the boy kills the girl's cousin (brother).
9. As a result, the boy goes into exile (hiding).
10. A message is sent to the boy at his retreat, explaining a plan for him to reach the girl.
- married, causing dramatic conflict when Juliet's father insists that she marry another; Tony and Maria perform a mock ceremony before a dressing dummy and are quickly returned to reality.
- In *Romeo and Juliet*, Mercutio, Romeo's friend, is not a member of a hostile group, but a relative of the Prince, a factor that leads to Romeo's exile; in *West Side Story*, Riff is the leader of the hostile group. These distinctions result in significant dramatic differences.
- Romeo stays the hand of Mercutio on his own; Tony, who initially convinced the gang to have a fist fight without weapons, tries to effect a complete cessation of hostility only at Maria's behest, who therefore implicitly becomes in *pari delicto* with Tony.
- Romeo kills the cousin in self-defense after the cousin returns and tries to kill Romeo; Tony kills the brother in an impulsive act of revenge.
- Romeo is involuntarily ordered into exile by the Prince of Verona under penalty of death; Tony flees voluntarily. Hiding and exile are not the same thing.
- The message to Romeo is carried by a neutral third party; the message to Tony is carried by one hostile to him. This distinction results in a different dramatic impact.



- |   |  |
|---|--|
| 11. The message never reaches the boy.                                | Romeo's message never reaches him because, through unforeseen circumstances, the messenger is delayed; Tony's messenger reaches him, but she spitefully provides misinformation. |
| 12. The boy receives erroneous information that the girl is dead.     | Accurate   |
| 13. In grief the boy kills himself (or permits himself to be killed). | In <i>West Side Story</i> , Tony at first asks to be killed, but he sees that Maria is alive and thus desires to live. However, his will to live comes too late to save him.     |

Under the alternative interpretation, even without arguing about the line between idea and expression, the very elements of alleged similarity need not necessarily be accepted as similar at all. The point of this exercise is not to show that one interpretation is better than another. Rather, it is to show that even an interpretation that seems straightforward and merely descriptive of a plot line is subject to challenge when the source of the interpretation is only the text itself.

The instability of interpretation arises in more recent cases that seek to distinguish between idea and expression. In *Litchfield v. Spielberg*,<sup>166</sup> the Ninth Circuit considered whether Stephen Spielberg's *E.T.—The Extraterrestrial* infringed plaintiff's play *Lokey from Maldemar*. The following characterization of the facts, while accurate, emphasizes the similarities between the works. The plaintiff's play was an adventure of two aliens who, while temporarily stranded on earth, befriend children, display psychokinetic and other extraordinary extraterrestrial powers, learn English and heal the sick. In *E.T.*, an alien, while temporarily stranded on Earth, befriends children, learns English, displays powers, and heals the sick. In both texts, the aliens help fight the establishment.<sup>167</sup> The court found that any similarities merely related to unprotected idea, thus affirming a judgment for defendant.

While I believe that *Litchfield* reached a justifiable result, it nonetheless shows the danger inherent in seeking to differentiate idea from expression by interpreting an autonomous "work." The court found an absence of substantial similarity of *expression* by defining supposed inher-

166. 736 F.2d 1352, 1356-57 (9th Cir. 1984).

167. *Id.* at 1355.

ent features of the “work”—namely, “plot,” “theme,” “setting,” and “character”—as unprotected idea.<sup>168</sup> This definitional approach to the “work’s” ostensible literary structure made *Litchfield’s* holding for defendants virtually inevitable.

Perhaps the approach in *Litchfield* would not be troubling if terms like plot, theme, setting, and character had, as the court assumed, stable meanings that could lead to meaningful interpretation of the work. The case could just as easily have been decided the other way had the court chosen to interpret plot, theme, setting, and character as “expression.” Such a choice would have been easy to make: only seven years earlier, the same court held in another opinion that “characters,” “setting,” and “plot” fall on the expression side of the dichotomy.<sup>169</sup>

The construct of the “work” promotes decisions whose questionable reasoning creates the risk that the culture will be deprived of the tools necessary for the dissemination of speech. For example, while *Nichols* and *Litchfield* both reached what most believe to be the correct result, they used methodologies that could as easily have supported a contrary outcome. Similarly, according to Professor Nimmer, if *Romeo and Juliet* were copyrighted, Shakespeare could, under a methodology seeking to interpret the autonomous work, have prevented the dissemination of *West Side Story*, a result that might not obtain under the above alternative interpretation.

The difficulty in trying to interpret “works” as if they were autonomous objects also underlies the courts’ attempts to identify “expression.” Although the cases treat expression as the most valued portion of the text, they rarely say what expression is. Rather, expression is generally what is left over after “idea”—the chaff of copyright—is removed. Recently, in *Computer Associates International, Inc. v. Altai, Inc.*,<sup>170</sup> the Second Circuit applied such a reductive process to a case involving alleged infringement of computer software, proposing that infringement of software be determined by a three-step process involving “abstraction,” “filtration,” and “comparison.” The “abstractions” step essentially restates Judge Hand’s test, and suffers from the inadequacies of identifying when a paraphrase becomes so abstract that it becomes “idea.” The “filtration” step specifically seeks to filter the protected expression from the unprotected.<sup>171</sup> Under that approach, so-called “elements dictated by ef-

168. *Id.* at 1356.

169. *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977).

170. 982 F.2d 693 (2d Cir. 1992).

171. *Id.* at 706-707.

iciency," "elements dictated by external factors," and "elements taken from the public domain" are unprotected:<sup>172</sup>

Once a court has sifted out all the elements of the allegedly infringed program which are "ideas" or are dictated by efficiency or external factors, or taken from the public domain, there may remain a core of protectible expression. In terms of a work's copyright value, this is the golden nugget.<sup>173</sup>

Yet though this "golden nugget" supposedly remains inherent in the "work," the court in *Computer Associates* never attempts to define it. "Expression" remains virtually indescribable, akin to a precious stone. Interpretation according to the New Critical construct encourages either unstable readings or no readings at all.

### C. *Idea and Expression Reconsidered in Light of Contemporary Literary Thought*

Nothing about the nature of the text requires that issues of "idea" and "expression" be decided according to a New Critical construct of the "work." As Paul Goldstein has noted, the terms "idea" and "expression" really constitute metaphors for competing policy concerns.<sup>174</sup> The idea/expression dichotomy is most often justified as the best way to balance copyright's goal of encouraging the proliferation of texts (with its inherent limits on speech) against free speech interests.<sup>175</sup> So-called ideas receive no protection because protecting them would inhibit free speech; ideas should therefore be available to all.<sup>176</sup> Protecting "expression," it is assumed, will somehow encourage dissemination of information.

Restated in terms of the dynamic text,<sup>177</sup> the idea/expression dichotomy prohibits a producer of a chronologically later text from utter-

172. *Id.* at 707.

173. *Id.* at 710.

174. Professor Goldstein states:

The line between idea and expression imports a significant policy judgment about the original contributions that creators in a particular field should be allowed to monopolize and those that properly belong in the public domain free for use by others working in the same field. As a consequence, the line between idea and expression in a particular type of work will respond to the particular conventions and aspirations that characterize that type of work. . . . '[I]dea' and 'expression' should not be taken literally, but rather as metaphors for a work's unprotected and protected elements, respectively.

1 GOLDSTEIN, *supra* note 75, §§ 2.3.1, 2.3.1.1. Peter Jaszi describes the terms as an example of replacing a pair of starkly contrasting terms (public v. private) by terms that downplay the fundamental contradictions at stake, namely the public's right to use textual material as against the author's rights to protect it. Jaszi, *supra* note 8, at 465, citing CLAUDE LEVI-STRAUSS, *The Structural Study of Myth*, in *STRUCTURAL ANTHROPOLOGY* 224 (C. Jacobsen & B. Shoepf trans., 1963).

175. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985); 1 NIMMER & NIMMER, *supra* note 74, § 1.10[B].

176. 1 NIMMER & NIMMER, *supra* note 74, § 1.10[B].

177. See *supra* part I.F.2.

ing "expression" in the same way as the copyright holder, while permitting this producer of the later text to utter "idea" in the same way. The doctrine of *scènes à faire*, well established as a principle in copyright, provides a starting point for describing what is apparently at work in copyright's idea/expression dichotomy. The so-called *scènes à faire* doctrine affords no protection to patterns and situations that are "bound to recur"<sup>178</sup> in a text.<sup>179</sup> *Scènes à faire* are thus said to be the "common stock of literary composition."<sup>180</sup> The doctrine has been defined to comprise "situations and incidents which flow naturally from a basic plot premise,"<sup>181</sup> and as "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."<sup>182</sup>

Copyright has traditionally approached the *scènes à faire* doctrine in modernist terms. Although the doctrine seems concerned with genre and convention—context-dependent areas of inquiry—the cases describe the

178. 3 NIMMER & NIMMER, *supra* note 74, § 13.03[B], at 13.62.2.

179. *E.g.*, See *v. Durang*, 711 F.2d 141 (9th Cir. 1983); *Berkic v. Crichton*, 761 F.2d 1289 (9th Cir. 1985); *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir. 1976); 3 NIMMER & NIMMER, *supra* note 74, § 13.03[B], at 13-69.

180. *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 278 (S.D. Cal. 1945) (Yankwich, J.).

181. *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985).

182. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982). Historically, the *scènes à faire* concept developed in a way that mirrored copyright's growing preoccupation with the autonomous "work." What sounds like an early expression of the doctrine emerges in American law as early as 1845 in *Emerson v. Daly*, 8 F. Cas. 615 (D. Mass. 1845) (Story, J.) ("[I]f the similitude [between two works] can be supposed to have arisen from accident, or necessarily from the nature of the subject . . . , the defendant is not answerable.") (emphasis added) (quoting *Roworth v. Wilkes*, 1 Camp. 94, 170 Eng. Rep. 889 (K.B. 1804)). As applied, however, the concept of similarities flowing necessarily from the nature of the subject had a decidedly Romantic cast. In a case considered to be an early application of the *scènes à faire* doctrine, the court held that two stories based on a centuries old Oriental tale were not similar enough to establish copyright infringement. In describing certain similarities between the texts, the court stated:

Of course in transferring the action of this story, centuries old, to modern times, the criminals will not be Orientals, but highwaymen or burglars; their home will not be in a cave or a hut in a wood, but in a rented room in a modern building; their surroundings will be squalid, not comprising a separate kitchen; they will perpetrate their crimes according to modern methods; if they are to be given poison, it will presumably be conveyed in meat or bread, coffee or whisky. Resemblance between the story and the play in such minor incidents are unimportant; not a single one of them is dramatic, exciting, or attractive . . . The copyright cannot protect the fundamental plot, which was common property long before the story was written.

*London v. Biograph Co.*, 231 F. 696, 698-99 (2d Cir. 1916). See *Litman, supra* note 12, at 123 n.127; *Leon R. Yankwich, Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 462 (1951). Here, what later came to be called *scènes à faire* were not worthy of protection because they were unimportant—not the product of creative genius—and were "common property," existing outside the text. See also *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896, 901 (S.D.N.Y. 1935); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145, 149 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir. 1930); *Roe-Lawton v. Hal E. Roach Studios*, 18 F.2d 126, 127 (S.D. Cal. 1927) (stating that similarities "all belong to the character of natural and expected happenings, considering the normal action of animals and persons placed as the characters are in the environment which we find them"). These unprotected elements in these earlier cases come from nature or common sources outside the text.

doctrine otherwise. Rather than attempting to place a particular text in the context in which the reader engages it in light of particular literary, social, technical, and cultural norms, in copyright the autonomous work itself determines the existence of *scènes à faire*, which like idea and expression are assumed to be elements contained in the work.<sup>183</sup> At the same time, the doctrine of *scènes à faire* constitutes an implicit criticism of copyright's notion of the autonomous work, necessarily entailing an inquiry that looks beyond the four corners of the text. In *Computer Associates International, Inc. v. Altai, Inc.*,<sup>184</sup> the Second Circuit applied a variant of the *scènes à faire* doctrine to withhold from protection "elements" in a computer program "dictated by external factors." The court acknowledged that the programmer's "freedom of design choice" is often dictated by mechanical specifications, compatibility with other programs, manufacturer's design standards, demands of the industry being serviced, and widely accepted programming practices within the computer industry.<sup>185</sup> These considerations necessarily require that copyright look beyond the work to extratextual factors in a way consistent with the principles of contemporary literary thought.<sup>186</sup>

183. Judge Leon Yankwich, who is credited with coining the term "*scènes à faire*," writes:

The other small details, on which stress is laid, such as the playing of the piano, the prayer, the hunger motive, as it called, are inherent in the situation itself. They are what the French call '*scènes à faire*.' Once having placed two persons in a church during a big storm, it was inevitable that incidents like these and others which are, necessarily, associated with such a situation should *force themselves upon the writer in developing the theme*.

*Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942) (emphasis added). According to Judge Yankwich, the "work" holds the preeminent position, actually "forcing" certain elements on the author. This approach stands the Romantic priority of author as the creator-genius of the work on its head: the "work" imposes itself on the author, controlling how the author produces the text.

184. 982 F.2d 693, 709 (2d Cir. 1992).

185. *Id.* at 709-10, citing 3 NIMMER & NIMMER, *supra* note 74, § 13.03[F], at 13-73.

186. In contrast, one of the earliest opinions on software, *Whelan Ass'n, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 497 U.S. 1031 (1987), sought to determine the scope of protection of a computer program by limiting the inquiry to the confines of the work. In *Whelan*, the defendant had allegedly infringed nonliteral elements of plaintiff's computer program for management of a dental laboratory. Attempting to apply the idea/expression distinction based merely on the supposed inherent features of the copyrighted work, the court defined "idea" as the work's utilitarian function and "expression" as "everything that is not necessary to that purpose or function." *Id.* at 1236. The court continued that, where there are various means of achieving the desired purpose, then the particular means chosen is not necessary to the purpose and constitutes expression, concluding that the idea of the program at issue was merely the efficient management of a dental laboratory. *Id.*

*Whelan* thus approached computer software as other courts approach more traditional works, seeking to delineate idea from expression by engaging in an act of interpretation and selecting a particular paraphrase as "idea," while calling the rest "expression." The opinion in *Whelan* has received much criticism, both from the courts and the commentators. See *Computer Assoc., Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992), and authorities cited therein. I would suggest that, once again, the tendency of the courts to treat the work as autonomous contributed to what many believe to be a poorly reasoned opinion.

Thus, the *scènes à faire* doctrine, although framed in terms reminiscent of the New Criticism's approach to the "work," implicitly recognizes that the text is a context-sensitive process of speech. *Scènes à faire* receive no protection because they are codes, conventions, and formulas that should be available to all as the tools of discourse. According to this approach, the "*scènes à faire*" doctrine, rather than merely describing a form of unprotected expression, informs the concept of unprotected idea. "Idea" refers to those textual utterances that are ingrained in the social and cultural fabric.<sup>187</sup> Put differently, "idea" is a shorthand term for the codes and conventions at work in a given act of textual utterance.

Often, it might not seem difficult to find general agreement on what constitutes an unprotected convention. For example, until recently it has generally been accepted that "facts" should receive no copyright protection.<sup>188</sup> Courts commonly justify this result on the ground that facts exist and are merely discovered.<sup>189</sup> And yet, even such an ingrained rule of law has come into question, providing a testament to the instability of the text. Scholars have recently recognized that facts have no necessary stable existence, but are themselves texts.<sup>190</sup> The distinction between so-called "facts" and "creative works," therefore, rests on differing conventions as to how to treat "fact" texts and "literary" texts, and not on any inherent qualitative difference between the types of texts. Copyright thus withholds protection from facts because it is conventionally accepted that "fact" texts are necessary for discourse and belong to the culture. The distinction is not merely semantic. To recognize that facts receive no protection because of convention is also to recognize that convention can change. The current treatment of facts as existing outside of the text obscures this point.<sup>191</sup> "Expression," conversely, can usefully describe

187. See, e.g., 1 NIMMER & NIMMER, *supra* note 74, § 1.10[B], at 1-75 ("If writers and other creators could not build upon the ideas of their predecessors, not only would free speech be stifled, but the creative processes themselves—the copyright side of the definitional balance—would also be severely circumscribed."); Litman, *supra* note 12, at 1015 (public domain exists to reserve raw materials of authorship for common usage).

188. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991). In *Feist*, the Supreme Court addressed the scope of protection that copyright affords to directories and compilations. The Court, almost by rote, set forth the old doctrines of originality and protection of facts, eventually holding that the plaintiff was not entitled to copyright protection because its alphabetical listing was not sufficiently "original" or "creative." *But see* Ginsburg, *supra* note 12.

189. *Feist*, 111 S. Ct. at 1287.

190. See Ginsburg, *supra* note 12.

191. At first look, language—certainly, a source of the raw materials on which texts draw—would not seem entitled to copyright protection. Yet, at least one court has suggested that some languages, or even coined words, can receive copyright protection, a proposition that has particular salience to copyright protection for computer software. *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 72 (D. Mass. 1990). See also *Reiss v. National Quotation Bureau, Inc.* 276 F. 717 (S.D.N.Y. 1921) (L. Hand, J.). So what at first seems to be a rule about protection based on the

how a given textual utterance varies or modulates or departs from code and convention, giving a text its distinctiveness.<sup>192</sup>

This characterization of the idea/expression distinction is consistent with how audiences engage texts. A text is necessarily governed by contexts—linguistic, rhetorical, cultural, and social. Analysis of genre, code, and convention allows one to locate the text's conventionality and its individuality *vis-à-vis* convention.<sup>193</sup> A reader on engaging a text will try as closely as possible to identify the codes at work.<sup>194</sup> At this stage, the

nature of the text (languages are not protected because they are "building blocks") is in fact a rule based on an accepted norm that certain languages receive no protection, a norm that may be in the process of changing.

192. Benjamin Kaplan wrote twenty-five years ago:

Copyright law wants to give any necessary support and encouragement to the creation and dissemination of fresh signals or messages to stir human intelligence and sensibilities: it recognizes the importance of these excitations for the development of individuals and society. Especially is copyright directed to those signals which are in their nature "fragile"—so easy of replication that incentive to produce would be quashed by the prospect of rampant reproduction by freeloaders. To these signals copyright affords what I have called "headstart," that is, a group of rights amounting to a qualified monopoly running for a limited time.

KAPLAN, *supra* note 35, at 74-75.

In computer software design, for example:

[P]rogramming can be likened to the creation of a play or novel; while the plot may seem somewhat familiar (i.e., the same topic has been treated by more than one author) the way the writer says something is new, or at least the writer has new insights into a particular topic.

Richard A. Beutel, *Software Engineering Practices and the Idea/Expression Dichotomy: Can Structured Design Methodologies Define the Scope of Software Copyright?*, 32 JURIMETRICS J. 1, 4 (quoting B. LIFFRICK, *THE SOFTWARE DEVELOPERS SOURCEBOOK: FROM CONCEPT TO COMPLETION* x-xii (1985)). This "something new" actually refers to a shared view in a particular audience about what is "new." Unless this "new" element is deemed so important to the dissemination of future texts that it can be called, e.g., "essential to efficiency"—therefore immediately becoming conventional—it constitutes, for the law, expression.

Put another way, expression arises out of a textual producer's "misreading" of precursors. *Cf.* Bloom, *supra* note 57, at 413 (production of creative works consists of author's misreading of predecessors). The skilled textual producer, in copying his or her forerunners, "makes many interesting mistakes" that give the text its distinctiveness. Imaginative error and rhetorical trope may be two phrases that come to much the same thing, which can mean that an authentic writer is never in much danger of legal plagiarism." *Id.*

193. *Id.* at 262. For a practical example, see Lubomir Dolezel, *Literary Text, Its World and Its Style, in IDENTITY OF THE LITERARY TEXT*, *supra* note 12, at 198. Dolezel attempts to show how, in *THE TRIAL*, Kafka's use of naming—which has definite generic conventions—gives the text a specific identity.

194. In receiving a work, the reader has to construct every feature in its level, by interpreting signals at a lower level of organization. From ink marks we infer letters, phonemes, word-segments, and other constituents, according to a system of learned conventions. And if the conventions have not been learned, transmission may fail altogether, or the work may be misconstrued and consequently misconstrued. If we cannot read Elizabethan handwriting, or know insufficient medieval grammar, or have never met William Carlos Williams' line-break conventions, we may not get far enough to grasp what the features of a work are, let alone interpret them.

FOWLER, *supra* note 71, at 257. These codes and conventions are not fixed elements in a static work. Rather, they are the aspects of communication that make some level of understanding possible, aspects that differ depending on context.

reader asks, what signals were sent, what vocabulary selections were made, what conventions are used, what variations are present?<sup>195</sup> The reader imposes an identity upon the text after answering these questions.

This view of copyright protection conflates the idea/expression dichotomy into a single inquiry as to how the copyrighted text acts in light of existing convention. Copyright permits rearticulation of the conventional aspects of a text and prohibits rearticulation of the unconventional aspects.<sup>196</sup> Describing the terms "idea" and "expression" in terms of how a text employs the conventional aspect of the language gives due regard to the dynamic, provisional nature of text identity. It does not seek to determine idea and expression within the four corners of the page, but rather looks to broader intertextual and extratextual material. To reiterate, such an approach is not one of choice; rather, it is inevitable that courts and juries will bring to their engagement with the text such intertextual and extratextual material. The discussion here merely calls for greater awareness about how texts function.

This is not to say that such a reassessment of "idea" and "expression" would not have profound effects on what copyright law protects. The current formulation of the idea/expression distinction serves to obscure strongly conflicting policy considerations in copyright cases. If "idea" and "expression" are in fact not in themselves meaningful concepts, but are really metaphors for "convention" and "modulation of convention," then decisions about the same text could conceivably vary from case to case. That is, conventions—generic, cultural, moral—may differ from person to person and group to group and change over time.<sup>197</sup> Textual utterances that are in their early stages unconventional can become conventional.<sup>198</sup> Intensive imitation of a paradigm tends to influ-

195. *Id.* at 256.

196. Indeed, strictly speaking, the term "protection" is an inappropriate term, elevating yet again the plaintiff's work to privileged status in copyright law. More accurately, copyright law permits a defendant to utter certain speech and forbids him or her from uttering other speech.

197. *E.g.*, FOWLER, *supra* note 71, at 11, 18, 170-90. As noted earlier, the conventions of defamation have varied with political and social change. *See supra* note 73. Indeed, it is arguable that the law's ability to regulate textual material reaches a crisis point when the cultural codes governing textual construction are experiencing significant alteration. For example, the conventions allowing courts to decide whether a text was obscene began to break down as cultural mores changed. Likewise, the current questioning of copyright law mirrors cultural and technological changes relating to the nature of the text.

198. *See* Harris, *supra* note 12, noting that the character of Superman has become part of the culture and arguing that copyright restricts creativity by continuing to protect a modern mythic character that should belong to the culture. Indeed, one explanation for a finite period of copyright is a recognition that, after a certain period, a text becomes conventional. Before the Copyright Act of 1976, 17 U.S.C. § 301 (1988), was enacted, common-law copyright of potentially unlimited duration existed for unpublished works, arguably because an unpublished work could not become part of the culture's tools of speech. 1 GOLDSTEIN, *supra* note 75, §§ 4.6, 15.1, at 471.



ence the genre by reducing the distinctiveness of earlier texts in the eyes of the next generation of readers.<sup>199</sup> In different contexts, a copyrighted text utters different things. When this happens, texts change.

Once more, *Nichols v. Universal Pictures Corp.* illustrates a possible consequence of recognizing that the idea/expression dichotomy in fact seeks to identify convention. At the time of the lawsuit in *Nichols*, the stock figures of "low comedy Jew and Irishmen" had existed for many decades,<sup>200</sup> obviously constituting conventional literary figures. Indeed, it is arguable that, with the great popular success of Nichols' play *Abie's Irish Rose*, the conventionality of the characters—and the "plot line"—reached its apex. Understandably, Judge Hand found neither the conventional characters nor the common plot line protected by copyright.

The question arises, however, whether the characters and plot line could under any set of circumstances have been considered "expression." I would suggest that, in light of the nature of the text, such characters might have possibly have been deemed to be "expression" in a different context. For example, had the characters and plot line first appeared in an American Romantic poem written in New England during the early part of the nineteenth century and showed no obvious antecedents, they could have conceivably varied existing convention. When the characters and plot line later became conventional figures, they became "idea."

It is more likely, however, that the ethnic stereotypes portrayed in *Abie's Irish Rose* derived from the successive waves of Irish and Jewish immigration into New York City during the nineteenth and early twentieth centuries, which immigration inevitably gave rise to tensions resulting from different ethnic groups living in close proximity. Because the original stock characters arose out of racial prejudice and ethnic humor—and perceived "facts" about Irish and Jews, as prejudiced as those facts may seem now—it is probable that the characters in Nichols' play were always conventional and never "expression," as copyright law conceives that term.<sup>201</sup> That is, under a dynamic view of the text, certain textual elements can always be conventional from their first appearance in a text. For example, because facts are treated as conventions, free to all, Nichols' use in her play of supposedly fact-based ethnic characteristics are simply "borrowed" tools of convention and are conceived of as

199. FOWLER, *supra* note 71, at 275.

200. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930). The district court opinion in *Nichols*, 34 F.2d 145 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir. 1930), discusses other literary works using similar characters.

201. Indeed, the stereotype of the Jewish character may have had roots in Shakespeare's *The Merchant of Venice*.

fair game for subsequent authors. Moreover, the popularity of Nichols' play tended even more strongly to conventionalize her characters and plot line, making them more like "idea."

An approach to texts as speech whose meanings take shape in light of code and convention could help overcome the conceptual problems arising from attempts to interpret the "work." I return to *Nichols* and *Litchfield*, each of which could have been interpreted differently under copyright's current approach. *Nichols* could easily have been explained as a situation in which the defendant took only unprotected code and convention from the plaintiff's text, an explanation of the opinion that John Wiley has essentially given.<sup>202</sup> Similarly, *Litchfield*, though without much analysis, justified its decision because some of the similarities constituted no more than "stock scenes."<sup>203</sup> For example, both works in *Litchfield* portrayed the characters as beneficent even though they at first looked unattractive to humans. This has been a generic convention in science fiction for some years.<sup>204</sup> Moreover, it has been noted that a host of science fiction stories have portrayed aliens as the salvation of mankind<sup>205</sup> (as did, to some degree, the texts in *Litchfield*). Likewise, the concept of aliens and humans learning to communicate with each other is a characteristic code of science fiction.<sup>206</sup>

Acknowledging that the terms "idea" and "expression" really mean "convention" and "modulation of convention" could encourage a debate over whether certain elements of highly successful texts should, in fact, receive less protection than the current system of copyright affords. Those literary critics who challenge the copyright system bemoan the artist's inability to exploit cultural icons (for example, the "Superman" character). If the issue is cast in terms of "idea" and "expression," it is easy for a court bound to a modernist notion of "work" to characterize such popular characters as "expression," thus affording copyright protection to the owners of the characters without exploring in any detail the countervailing social policies favoring lesser protection. Yet if, as I have suggested, "idea" means "convention," then the copyright system must confront the question whether a character like Superman has become a cultural convention, and if so, whether that necessarily means that Superman should be available to all. The answer does not necessarily flow

202. Cf. Wiley, *supra* note 100, at 160-61 (concluding that Judge Hand decided that Nichols herself was a borrower rather than a creator).

203. 736 F.2d at 1352.

204. Mark ROSE, ALIEN ENCOUNTERS 80 (1981).

205. *Id.*

206. *See id.*

from characterizing the character as conventional. Rather, such a characterization is but a first step in analyzing the scope of protection in such instances. Protectionists might still persuasively argue from (for example) an economic perspective that, if characters like Superman do not receive copyright protection even after they become cultural conventions, then the dissemination of texts will be inhibited. The counterargument to this might be that a text, like Superman, that has become highly conventional will ordinarily have reaped huge financial benefits for the copyright owners. It would thus not be unfair to permit the culture, which has, through mass consumption of the text (for example, through such diverse activities as repeated viewing of the text, word-of-mouth, idolization) adopted aspects of the text as its own, to exploit those conventional aspects. Again, the point here is not to suggest that one approach is more appropriate than another. Rather, I merely argue that the insights of contemporary criticism could allow courts and scholars to consider more fruitfully the major policies underlying a particular decision about scope of protection.

Treating the "idea/expression" distinction in terms of code and convention might also raise the question whether copyright should protect textual elements that were once conventional, but that have been lost or forgotten. That is, textual elements once conventional can become unconventional. By way of example, this has apparently happened to *Abie's Irish Rose*. In 1972, a television series entitled *Bridget Loves Bernie* aired nationally on the CBS Television Network.<sup>207</sup> The series portrayed in a comedic fashion the lives of a newlywed couple, a Jewish husband and an Irish Catholic wife. The husband was a struggling young writer who supplemented his income by driving a cab; his wife was a school teacher whose parents were wealthy. The show turned around the ethnic differences of the family and the attempts of the families to reconcile for the sake of the young married couple.<sup>208</sup> Television critics have noted the resemblance between the show and Nichols' *Abie's Irish Rose*.<sup>209</sup>

Yet because of changes in social attitudes, the portrayal of the ethnic stereotypes had changed. Nichols' original play traded in blatant ethnic stereotypes—for example, emphasis on accent, mocking of views about dietary laws—that to many today would seem blatantly prejudiced.<sup>210</sup> The television show did not portray the Jewish and Irish characters in

207. TIM BROOKS & EARLE MARSH, *THE COMPLETE DIRECTORY TO PRIME TIME NETWORK TV SHOWS* 106 (1988).

208. *Id.*

209. *Id.* at 107.

210. *E.g.*, ANNE NICHOLS, *ABIE'S IRISH ROSE* 101-03 (1924).

the same harsh manner. Nevertheless, despite good ratings,<sup>211</sup> *Bridget Loves Bernie* was canceled at the end of its first season. Undoubtedly, the objection of religious groups to the show's condoning and publicizing interfaith marriages played a role in the cancellation.<sup>212</sup> So, the culture began in the early 1970s to "deconventionalize" the stock characters of Jew and Irishman—even in a toned-down version—in response to changing mores and greater sensitivity to religious and racial prejudice.<sup>213</sup> What was once part of the common cultural fabric may soon be lost.

If cultural codes and conventions can become unconventional, the question thus arises whether a later author who "rediscovers" what were previously generic conventions may obtain copyright protection. Again, copyright's current vision of the "work" as containing "idea" and "expression" obscures the policy issues behind this question, focusing on what is "in" the "work" rather than on how a particular textual utterance relates to the broader culture. On the one hand, one might argue that, as a matter of First Amendment policy, once a textual element becomes conventional, an author should not be able to monopolize it, even if the genre was lost and the convention long forgotten. Put differently, even if a cultural tool for dissemination of information becomes rusty, it would nonetheless forever belong to the culture. A contrary argument would posit that copyright should encourage the dissemination of lost conventions by giving protection to the "author" of those conventions. For example, the United States Supreme Court has permitted a private organization to remove from the culture the word "Olympic,"<sup>214</sup> and another court has questioned whether a once generic term can later be appropriated as a trademark by a private entity.<sup>215</sup> Once more, the metaphor of "idea/expression" as currently treated in copyright law has not permitted a full exposition of these issues, which could more usefully be analyzed in light of the history of the textual convention and the reason it faded as such.

Copyright's approach to interpretation of the text facilitates misconceptions in the cases because it artificially limits the range of intertextual and contextual material available to a court, paradoxically increasing the range of potential interpretations of a text and thus enhancing the pos-

211. BROOKS & MARSH, *supra* note 207, at 107.

212. *Id.*

213. Similar social and cultural changes have altered the notion of what constitutes defamatory speech. See *supra* note 73.

214. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987).

215. *The New Kids on the Block v. News Am. Publishing*, 971 F.2d 302, 306 n.4 (9th Cir. 1992) ("An interesting question is whether a word, although once generic, may become protectable.")

sibilities of manipulation of the cases' outcomes. The concept of the autonomous "work" can be problematic in another way, by serving as a powerful rhetorical device that allows a court more easily to disregard certain policy concerns. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*<sup>216</sup> is salient. In granting the United States Olympic Committee a property right in the word "Olympics," the Supreme Court stated that it would not allow the defendant to "appropriate the harvest of what others have sown."<sup>217</sup> The Court deflected the free speech challenge by describing the most elemental tool of speech—the word—as if it were a tangible *object* that could be "sown" and "harvested," and thus stolen. The imagery of basic agrarian labor completely refocused the issues at stake. While the Court, more consistently with contemporary theories of literature, could have treated the word "Olympics" as a conventional text that has become part of the cultural fabric, such an approach would not have served the ultimate result of transforming an act of speech into an object of property.

In summary, the discussion here has not called for any particular new system of copyright that would grant more (or less) protection than the current system provides. Rather, it has sought to provide a structure for analyzing the scope of protection that is more useful than the oft-criticized idea/expression distinction. Because judges, jurors, lawyers, and commentators are all readers, they are inevitably governed by contextual factors—generic, cultural, and social code and convention—when engaging the text in a copyright case. Attempting to explain the "work" in terms of "idea" and "expression" can obscure the true issues in a copyright case; examining the text in light of underlying conventions at work can shed light on those issues.

#### IV. SUBSTANTIAL SIMILARITY AND LITERARY THOUGHT

##### A. *Substantial Similarity and the "Work"*

Ultimately, the critical question in an infringement case turns on whether two texts share a certain "similarity." In one sense, in similarity analysis, copyright law departs from its strict adherence to the notion of the autonomous "work," rather attempting to account for how an audience engages a text. And yet, ultimately, the modernist notion of "work" limits similarity analysis, resulting in unsatisfactory reasoning. Similarity determinations are particularly pragmatic decisions, dependent on an

216. 483 U.S. 522 (1987).

217. *Id.* at 541.

audience's generic, cultural, and social assumptions.<sup>218</sup> The central metaphor of copyright's similarity inquiry is the term "substantial similarity." Broadly, the cases have used the term in two separate, though often confused, ways. First, proof of copyright infringement requires that a plaintiff show "copying," that is, that the defendant actually saw, heard, or read the plaintiff's "work" and somehow modeled his or her work after the plaintiff's work.<sup>219</sup> Some courts have held that "substantial" similarity, along with a showing of access (reasonable opportunity to see or hear plaintiff's "work") will give rise to an inference of copying.<sup>220</sup> In this sense, the inquiry into similarity is directed at assessing human behavior, namely whether a defendant actually saw a plaintiff's product. The assumption is that certain textual footprints—for example, common errors or verbatim similarity—make it improbable that the defendant created his or her text without relying on plaintiff's text.<sup>221</sup>

The term "substantial similarity" also describes the standard for when a defendant has "taken" so much of plaintiff's protected expression that copyright infringement has occurred.<sup>222</sup> Used in this sense, the concept of "substantial similarity" seeks to draw the line between a defendant's lawful use of a plaintiff's text and his or her misappropriation of that text.

Both "probative similarity" and "substantial similarity" raise problems in application. The courts and commentators have noted that the concepts are often confused, and variously describe the inquiry into substantial similarity as nebulous,<sup>223</sup> difficult,<sup>224</sup> and meaningless.<sup>225</sup> Because the concept is central to copyright, this Article will focus on "substantial similarity" as the test of how much of a plaintiff's text a defendant must take to be found liable for misappropriation.

218. See ECO, *supra* note 12, at 178 ("It is the user who decides the 'description' under which, according to a given practical purpose, certain characteristics are to be taken into account in determining where two objects are 'objectively' similar and consequently interchangeable.").

219. Alan Latman, "Probative Similarity" As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1189 (1990); Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990); 2 GOLDSTEIN, *supra* note 75, § 7.2.1; 3 NIMMER & NIMMER, *supra* note 74, § 13.03[A], at 13-25.

220. Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990); 3 NIMMER & NIMMER, *supra* note 74, § 13.03[1]; 2 GOLDSTEIN, *supra* note 75, § 7.2.1.

221. Alan Latman has suggested that this type of inquiry should more appropriately be called "probative" similarity. Latman, *supra* note 219, at 1189.

222. Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990); 2 GOLDSTEIN, *supra* note 75, § 7.2.13; NIMMER & NIMMER, *supra* note 74, § 13.03[1].

223. Robert F. Fleming, *Substantial Similarity: Where Plots Really Thicken*, 19 COPYRIGHT L. SYMP. 252, 262 (1971).

224. 3 NIMMER & NIMMER, *supra* note 74, § 13.03[A], at 13.03 (what constitutes "substantial and hence infringing similarity presents one of the most difficult questions in copyright law").

225. Cohen, *supra* note 12.

The courts engage in remarkably little analysis of what it means for two texts to be "substantially similar." Much of the discussion of substantial similarity focuses on what the doctrine does not require. For example, it is said that trivial similarities are not substantial, that two works need not be identical to be substantially similar, and that a defendant need not repeat *all* of plaintiffs' work for substantial similarity to exist.<sup>226</sup>

In seeking to create an affirmative definition of substantial similarity, the cases have identified two different approaches. The first posits that texts can be substantially similar by virtue of some "objective test,"<sup>227</sup> "extrinsic test,"<sup>228</sup> or "analytic dissection test."<sup>229</sup> This approach attempts to analyze the characteristics of autonomous "works."<sup>230</sup> Supposedly, experts can assist a trier of fact in identifying these objective similarities. So characterized, the objective approach to substantial similarity approximates the New Critical view that trained critics are most capable of analyzing the work.

Within the context of a trial, however, the expert testimony on similarity does not inform the trier of fact about what is "in" the "work," but instead acts as a contextual force that in effect changes the texts under consideration. Ironically, moreover, the objective approach to substantial similarity, by permitting analysis and expert testimony, inevitably exceeds the boundaries of the autonomous "work." Experts testifying about a particular text generally invoke broader genres and prior texts to support their testimony, thus placing the texts at issue in the lawsuit against a broader intertextual context.

Copyright takes a second approach to the substantial similarity issue, one that seems to break from the modernist notion of the self-contained work. To prove substantial similarity, a plaintiff generally must show that an audience will *respond* to the "works" at issue in a particular way. In this sense, copyright recognizes to some extent that an audience plays a role in actualizing the text—in other words that works in a copyright case have what might be called a "rhetorical" aspect.

226. *E.g.*, 3 NIMMER & NIMMER, *supra* note 74, § 13.03[A]. Nimmer views the problem as one of "line drawing." In fact, the problem is copyright's inability to assimilate more useful notions of how texts function.

227. *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990).

228. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

229. *E.g.*, *Universal Athletic Sales v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

230. *Krofft*, 562 F.2d at 1164. Paul Goldstein refers to this approach as the "protected expression" test. 2 GOLDSTEIN, *supra* note 75, § 7.3, at 24-25 n.6.

In seeking to identify the rhetorical aspect of texts at issue in litigation, the courts apply what they have called the "subjective,"<sup>231</sup> "intrinsic,"<sup>232</sup> "audience,"<sup>233</sup> or "ordinary observer"<sup>234</sup> test. This subjective approach seeks to identify a stereotypical recipient of textual information and then to determine how that reader will react to the texts at issue. In creating the construct of the ordinary lay observer, the subjective approach values the supposedly pristine immediate response of a hypothetical reader, unsullied by expert analysis.<sup>235</sup>

Many have criticized the subjective approach to substantial similarity.<sup>236</sup> Some fear that the trier of fact will viscerally find substantial similarity even where the defendant has taken only the unprotected portions of the plaintiff's work.<sup>237</sup> Conversely, others argue that the trier of fact will fail to recognize infringement where the defendant cleverly changes the text such that the response of the ordinary observer to each text differs.<sup>238</sup> Applying the subjective test, courts and commentators often take the rather tautological approach of defining substantial similarity in terms of whether an audience would recognize the texts at issue as substantially similar.<sup>239</sup>

Although the subjective approach to similarity attempts to consider the rhetorical aspect of the text, the approach fails precisely because copyright conceives of the text as a self-contained, stable artifact—as "work." *Shaw v. Lindheim*<sup>240</sup> provides an example of this. In *Shaw*, the Ninth Circuit considered the subjective approach in some detail, holding that, once it is determined that works are substantially similar under an objective standard, it remains for the jury to give a "subjective" assessment of the "concept and feel" of the two works.<sup>241</sup> The court stated:

This subjective assessment is not a legal conclusion; rather it involves

231. *Shaw v. Lindheim*, 919 F.2d 1353, 1359-60 (9th Cir. 1990).

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

233. 2 GOLDSTEIN, *supra* note 75, § 7.3.2.

234. *E.g.*, *Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co.*, 509 F.2d 64, 65 (2d Cir. 1974); *Krofft*, 562 F.2d at 1164 (holding that the intrinsic test depends on the response of the ordinary observer); 2 GOLDSTEIN, *supra* note 75, § 7.3.2.

235. *E.g.*, *Krofft*, 562 F.2d at 1164; *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

236. *E.g.*, *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Cohen*, *supra* note 12, at 737; Gary L. Francione, *Facing the Nation: The Standards for Copyright Infringement and Fair Use of Factual Works*, 134 U. PA. L. REV. 519, 557-67 (1986); Manuelian, Note, *supra* note 12.

237. *E.g.*, Manuelian, Note, *supra* note 12, at 181, 187-90.

238. *E.g.*, 3 NIMMER & NIMMER, *supra* note 74, § 13.03[E]; Fleming, *supra* note 223, at 274-75.

239. *E.g.*, *Ideal Toy Co. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966) (stating that substantial similarity is present when the average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work).

240. 919 F.2d 1353 (9th Cir. 1990).

241. *Id.* at 1360.



the audience in an interactive process with the author of the work in question, and calls on us "to transfer from our inward nature a human interest and a semblance of truth sufficient to procure for these shadows of imagination that willing suspension of disbelief for the moment, which constitutes poetic faith." S.T. Coleridge, *BIOGRAPHIA LITERARIA*, ch. 14, *reprinted in 5 ENGLISH LITERATURE: THE ROMANTIC PERIOD* (A. Reed ed. 1929). This interactive assessment is by nature an individualized one that will provoke a varied response in each juror . . . .<sup>242</sup>

Essentially, the court concluded that, because of the necessarily subjective response of the reader, a court can never as a matter of law adjudicate the "rhetorical" similarity of two "works."<sup>243</sup>

*Shaw* represents a noteworthy attempt to account somehow for varying reader response. However, by continuing to distinguish between objective and subjective tests, the court assumes that, in one type of inquiry ("objective" or "extrinsic") the reader's subjective responses do not play a role. But the background of an audience (whether judge or jury) influences its conclusions about so-called "objective" similarities as much as it influences supposed "subjective" responses. Indeed, all responses of an audience are internalized, and are in that sense "subjective."

Moreover, *Shaw's* attempt to describe audience response rests on a rather outmoded notion of author and work. The court quotes from Coleridge, perhaps the quintessential Romantic poet and critic—who has, ironically, been generally regarded as a "neurotic plagiarist."<sup>244</sup> In *Shaw*, the *author* and the audience interact in a Romantic, metaphysical way that makes analysis impossible. The court in *Shaw* seems to eliminate the textual artifact from the rhetorical aspect of the inquiry. At the same time, the "work" remains autonomous in *Shaw*, its fixed identity preserved: supposedly, it is the reader whose responses are varied, not the text that changes identity.

In addition, in attempting to find a standard for applying the "ordinary observer" test—which rests on the assumption that a "work" generates a typical response in a stereotypical person—*Shaw* actually denies the possibility that such a response exists. Quoting Shakespeare, *Shaw* says: "[W]hat makes the unskillful laugh, cannot but make the judicious grieve."<sup>245</sup> The court therefore emphasizes the diversity and subjectivity

242. *Id.*

243. That is, once a court finds a triable issue of fact on "objective" similarity, it may not grant summary judgment.

244. MCFARLAND, *supra* note 136, at 22. The court in *Shaw*, 919 F.2d at 1360, also quotes from Shakespeare, who himself borrowed liberally from other writers. MCFARLAND, *supra* note 136, at 26.

245. 919 F.2d at 1360 (quoting WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 2, lines 27-28).

of the individual response, mystifying the reading process. This approach raises the question whether, in the name of seeking the typical response of the ordinary observer, it is fair to hinge the most important of decisions in a copyright case on unpredictable supposed affective responses of the individual jurors.

Finally, in focusing on the "concept and feel" of the works at issue, the Ninth Circuit again returns to the "work" as the autonomous source of its meaning. An audience supposedly engages the texts at issue in an infringement action "subjectively" as a way of determining characteristics—"concept" and "feel"—that inhere in the work. But the court never defines what "concept" and "feel" of texts are, or why they emanate from the "work" rather than from the audience.

So while the cases attempt to acknowledge the audience's role in connection with the text, the subjective test remains constrained by the notion of the iconic "work." Only the "work" can be known through analysis; the audience is a passive, unfathomable body on which the "work" acts and whose immediate, superficial response to the "work" is what really counts. By prohibiting any close analysis of audience, copyright stops short of actually considering the role of the reader in similarity analysis.

### *B. Weakness of Current Similarity Analysis*

Determinations of substantial similarity require, it would seem, that a judge or jury, in light of the best available evidence, make complex decisions about the texts at issue *and* about the audience that interacts with the text. But under the common formulation of copyright's ordinary observer test, the audience is merely a passive, amorphous body that responds to the work, which acts upon the audience member.<sup>246</sup> Indeed, governed by the principle that audience response must be subjective and unanalytical, courts will refuse to intervene when the response of the ordinary observer is at issue, even automatically refusing to permit summary judgment on the question whether an ordinary observer could reasonably find two texts substantially similar.<sup>247</sup> In this way, the ordinary observer test fosters a form of legal nihilism that could have chilling effects on potential defendants who disseminate textual material (for example, publishers and members of the entertainment media), ultimately depriving the public of valuable texts.

For example, proponents of author's rights and economic theories

246. *Id.*

247. *Id.*

alike focus on why the producer of a text should receive the benefits attendant copyright protection at the expense of hypothetical copyists who would, if copyright did not exist, exploit the author's product. The more immediate problem, however, is much different. Copyright infringement cases against major motion picture studios, highly successful musical composers, record companies, and computer software vendors brought by non-mainstream "authors" are common. This means that the most successful producers of creative texts are both the major *targets* of copyright infringement suits and potential plaintiffs who need to be rewarded for their efforts. In part, because tests of substantial similarity may preclude the possibility of a summary disposition, these major creators of copyrighted material often go to great pains to avoid even the chance of liability. For example, it is entertainment industry practice not to accept unsolicited manuscripts, for fear of a later copyright suit in the event of coincidental creation. Established producers of texts have a huge competitive advantage, since they have already gained acceptance in the community and can get their material read and disseminated more easily than those who are not established. In this way, the present copyright system does not so much encourage textual production as reward production that maintains the status quo.

More recent cases, implicitly recognizing the difficulties with the "ordinary observer," choose other approaches to audience. Spurred by developments in complex technology, courts and commentators have recognized the need to identify a *particular* audience.<sup>248</sup> One court has suggested that, where the texts at issue fall within an arcane genre, substantial similarity depends on the response of an "intended" audience.<sup>249</sup> Other courts attempt to predict the response of the average child<sup>250</sup> or teenager.<sup>251</sup>

Problems arise, however, in trying to identify the reasoning behind the courts' conclusions about how a particular audience will react. For example, the choice of an "intended" audience raises conceptual problems in identifying intent. If intent means the "author's" intent, ambiguities arise because the plaintiff/author may, at the time of creation, have had no audience in mind, but instead may have created the text for

248. Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 734-36 (4th Cir. 1990); Michael F. Sitzers, Note, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385, 392 (1981); see Whelan Assoc. Inc., v. Jaslow Dental Lab. Inc., 797 F.2d 1222 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

249. Dawson, 905 F.2d at 736.

250. Krofft, 562 F.2d at 1166.

251. Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204, 210 (9th Cir. 1988).

purely personal reasons. Conversely, the ultimate consumer of the text may not have been the one that the plaintiff consciously intended. A producer of a text may subjectively intend to communicate to one group, only to have another group act as recipient.

Moreover, while cases seeking to identify an intended audience often draw complex conclusions about the interaction between a text and a particular group—attempting to forecast, for example, behavior of children or teenagers—these conclusions frequently depend entirely on what the court perceives is contained “in” the “work,” and not on evidence about how an audience might actually respond.<sup>252</sup> And even those courts that rely on extrinsic evidence to predict how a particular audience will respond to a text often seem to act arbitrarily. For example, one court permitted testimony from a celebrity psychologist about children’s responses to a doll, but rejected survey evidence of such responses.<sup>253</sup>

In short, the law’s methodology for deciding how an audience will interact with the texts at issue in a copyright case is often ill-defined. Courts applying the traditional ordinary observer test have occasionally abdicated responsibility for decisionmaking altogether by concluding

252. *E.g.*, *Krofft*, 562 F.2d at 1164 (opining on how children will respond to puppets, but not stating the basis of the conclusion); *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 210 (9th Cir. 1988) (predicting the response of the “17.5 year-old boy”). In *Krofft*, the Ninth Circuit, based only on the “work” and the court’s subjective conclusion, decided whether a hypothetical audience of children could find similarity between plaintiff’s puppet-like characters and defendant’s puppet characters. Apparently without considering evidence on the issue, the court first called the reaction of children to works “subjective” and “unpredictable.” 562 F.2d at 1166. In rejecting defendant’s argument that the characters were dissimilar, the court concluded that “[w]e do not believe that [a] reasonable person, let alone a child, viewing these works will even notice that [plaintiff’s] Pufnstuff is wearing a cummerbund while [defendant’s] Mayor McCheese is wearing a diplomat’s sash.” *Id.* at 1167-68.

*Krofft*’s example about a comparison between cummerbund and sash punctuates the problem: contrary to *Krofft*’s conclusion, a difference in an article of clothing on a costumed character may be the *very* thing that a small child focuses on in making comparisons and in noting distinctions. For example, over the past several years, the animated television series *Teenage Mutant Ninja Turtles* has garnered great popularity among small children, generating two feature length motion pictures and vast merchandising revenues. The protagonists are four green humanoid reptiles who, for all intents and purposes, appear (visually) indistinguishable except for two things: a letter on their belt buckles standing for their first names and the color of their masks and arm bands. For small children who cannot recognize letters, the color of a mask or arm band seems crucial. The point is that, without some evidence of how an audience of children “makes meaning,” there is no reason to accept *Krofft*’s conclusion about how children would react. Certainly, that evidence is not to be found “in” the “work.”

253. *Original Appalachian Artworks, Inc. v. Blue Box Factory (USA) Ltd.*, 577 F. Supp. 625, 627-28 (S.D.N.Y. 1983) (accepting the testimony of Dr. Joyce Brothers). Of course, as an evidentiary matter, courts can consider extratextual evidence of the actual markets for the texts of defendants and plaintiffs. However, as Professor Goldstein notes, the audience test requires only a potential market. 2 GOLDSTEIN, *supra* note 75, § 7.3.2, at 33 n.36. Thus, such extratextual evidence will not invariably be available, and the choice of audience must result from other considerations.

that a court can never predict how an audience will respond. Even courts that attempt to examine a target audience have engaged in haphazard and conclusory analysis. In the next section, this Article proposes a methodology that could encourage a more analytical approach to audience response.

### C. *Reassessing Substantial Similarity as a Function of Audience*

#### 1. The Audience as an Interpretive Choice

If, indeed, the text is a dynamic event governed by code and convention, it would be useful in deciding whether two works are substantially similar to consider the issue in light of such code and convention. However, conceiving a text in terms of cultural and social code and convention has little meaning if these terms are treated as inherent features of the text. Rather, an approach to similarity based on the notion of a dynamic text must consider the interaction between textual artifact and audience. While copyright tries to account for this "rhetorical aspect" in similarity determinations through the construct of the ordinary observer, it has done so with limited success.<sup>254</sup>

In the final analysis, the issue relating to the proper audience by which to test copyright infringement is not one of identification, but one of choice. Choice of audience implicates policy decisions about how the law will limit the range of readings available in a copyright suit, with a concomitant effect on how speech is regulated. A choice of audience necessarily affects the interpretation of the text, since the reader determines the textual identity.

I would suggest that, as a matter of policy, there is good reason for copyright to focus on what might be termed the "generically competent" audience, that is, the audience that has the necessary linguistic, generic, and rhetorical competence to perceive and understand the codes at work in particular texts.<sup>255</sup> "Generic or rhetorical competence . . . presupposes a knowledge of rhetorical and literary norms in order to permit the recognition of deviation from those norms that constitute the canon, the institutionalized heritage of language and literature."<sup>256</sup> If a particular audience—say, the "lay" observer—lacks the knowledge of the generic, rhetorical, and linguistic codes at work in the texts being compared in a copyright case, it would not be prudent or fair for that audience to serve as the yardstick by which substantial similarity is measured. Such an

254. See *supra* part IV.A.

255. See LINDA HUTCHEON, A THEORY OF PARODY 93 (1985).

256. *Id.* at 94.

observer does not always know what to look for or how to listen, just as one who cannot read a foreign language cannot usefully (for copyright purposes, at least) pass judgment on a text written in that language. Moreover, a generically competent audience would normally include the market for the plaintiff's text, though it would not be limited to that market. And the generically competent audience has the ability to discriminate between convention and modulation of convention, thus avoiding precipitous conclusions of similarity that an audience unfamiliar with a genre may draw.<sup>257</sup>

So rather than speaking of a "lay" observer or of an "intended" audience (unless this means a generically competent audience) copyright infringement could more usefully be tested against the audience with competence in the particular genres at issue in litigation. For example, where highly technical texts are at issue, it makes more sense to test questions of substantial similarity against the expectations and response of an audience that has competence in the genre.<sup>258</sup> Similarly, an infringement case involving children's television programs would test similarity in the context of the audience with the most competence, that is, children.<sup>259</sup>

One might object to a system of copyright that would focus on the generically competent audience by arguing that such a focus would further complicate an already complex legal process. According to this argument, such an approach would embroil a judge or a trier of fact in arcane debates about which audience should be "imagined" and how that imaginary audience would respond. The problem with this argument is two-fold. First, simplicity in a legal system is not a virtue if it results in unsatisfactory reasoning or problematic decisionmaking. Second, choice of the target audience does not necessarily raise complexities, and indeed, finds precedent in copyright and in other areas of the law. For example, even apart from those cases attempting to identify an "intended" audience,<sup>260</sup> in fair use and damage inquiries, copyright cases have attempted

257. For example, two sounds in a particular musical genre may seem the same to an audience unfamiliar with the genre—the uninitiated may believe that all "Rap" music sounds the same. By contrast, the generically competent audience may find that the two "Rap" songs sound completely different. It could be said that, for each audience, different signs and codes are at work. Copyright makes a significant policy decision in selecting the audience as against which the text is examined.

258. See *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

259. See *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). As another example, a generically competent audience would seem to be essential to test whether a defendant may prevail on a fair use defense based on parody. This assumes a dual competence: knowledge of the codes and conventions of the texts at issue and knowledge of the codes of parody. See HUTCHESON, *supra* note 255, at 94.

260. See *supra* note 249 and accompanying text.

to identify an actual or potential market for a particular text.<sup>261</sup> Similarly, in deciding whether a woman has suffered sexual harassment in employment, courts have attempted to predict the response of a "reasonable woman."<sup>262</sup> And as mentioned earlier, in the First Amendment and defamation context, the courts traditionally attempt to predict how a *particular* audience will respond to a specific text.<sup>263</sup>

Choosing the generically competent audience is as critical to deciding a copyright infringement case as analyzing the works at issue. The selection of a generically competent audience will in the end depend on acts of interpretation, themselves open to challenge. Nonetheless, by attempting to identify, both through textual and extratextual evidence, the generic competence of a group likely to engage a work, the law can go beyond its present reliance on constructs that obscure the true issues in an infringement case and that act as restraints on the audience, devaluing its role in the textual process.

Problematically, the courts confuse the construct of the target audience with the trier of fact, and under various labels (intrinsic test, subjective test, ordinary observer test) insist that the trier of fact respond without expert testimony or close analysis.<sup>264</sup> This confusion arises because the target audience *seems* to make its decisions spontaneously, immediately, and without resort to analysis. But the target audience already has a generic, linguistic, and rhetorical competence that allows it to engage the text with a threshold level of understanding. In other words, the generically competent audience already knows what it needs to know.

A jury, however, will probably not consist completely of generically competent individuals. Logically, the trier of fact would receive education so that it can assess the works in a lawsuit from the perspective of a generically competent audience member. This requires evidence not only about the text, but also about the audience itself. The requirement that the judge or jury base the ultimate finding of similarity on a visceral reaction fails to give due regard to the role of the observer in making textual meaning: the generically competent audience, it could be said, makes a different text from the uninitiated audience, and the uninitiated must gain some level of competence before they can decide infringement. This

261. See *infra* note 340 and accompanying text.

262. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1990).

263. See *supra* note 73.

264. See *supra* notes 241-43 and accompanying text. Of course, notwithstanding this insistence, the trier of fact always plays a role in making the text, based on its own cultural and social background, as well as on the other textual material that it assimilates during trial.

competence can only come from an educative process, analyzing both audience and text.

Neither should the generically competent audience be confused with the "expert" or the "critic." While the audience is a construct (though a construct based on evidence of how real people behave) the expert (or critic) acts as an alternative reader whose testimony may shape the trier of fact's engagement with the text. The expert can help educate the trier of fact about the linguistic, rhetorical, and generic codes that the generically competent audience has assimilated in connection with a particular text. He or she can also opine about the conventions at work in a particular textual experience and about how a text may vary convention. Expert testimony thus constitutes extratextual information that the law, as a matter of policy, will permit the trier of fact to consider. But the ultimate determination of substantial similarity depends on what a trier of fact—which does not necessarily (and, indeed, may not ordinarily) consist of generally competent individuals—would conclude about the hypothetical audience's responses to the text, and not on how experts "interpret" it.

Adopting the generically competent audience as the focus of the inquiry into substantial similarity could as a practical matter break the artificial confines of the autonomous "work" and encourage an interdisciplinary approach to copyright law. The process of identifying a "generically competent" audience, far from leaving copyright issues to the visceral reactions of jurors (who, depending on the court, will supposedly either always react differently from each other or will automatically reflect the response of the reasonable person) would permit courts to examine the text's rhetorical aspect from a more concrete perspective. For example, an analysis of audience response could involve a rhetorical, scientific, literary, and psychological assessment of how a particular hypothetical audience, familiar with a genre, would engage a text, seeking to identify those things on which audience members might generally agree.

Significantly, this approach is neither "objective" nor "subjective," terms that themselves have little meaning when trying to explain how people engage texts. The objective and the subjective tests are not really distinct at all. As a practical matter, one cannot describe how a text functions—for example, by identifying how it uses certain generic codes—without deciding how a reader (audience) will respond to the text, that is, without identifying how a generically competent audience engages the copyrighted text. To "dissect" a text—to describe how it



works—necessarily also describes how the audience would respond to the text, and entails an examination, not only of the text, but of the audience.

## 2. Toward a Definition of Substantial Similarity: Plagiarism as Genre

Ultimately, a trier of fact in a copyright infringement case must decide whether, because of a certain amount of similarity between texts, a defendant has uttered prohibited speech. Two presuppositions underlie this determination. First, the law must have a working definition of "similarity" between works. Second, copyright must indicate what it means for similarity to be "substantial" (that is, enough to penalize the defendant's speech). The cases never really say what it means to be similar and how much similarity is "substantial."

Semantically, the term "substantial similarity" coincides with the concept of the work as a fixed object of property whose "taking" a trier of fact can quantify: the term "substantiality" specifically implies "amount." But if the text is viewed as a dynamic speech event, the issue of substantial similarity more logically entails a qualitative inquiry into how a particular hypothetical audience would respond when engaging two competing texts in an infringement action.

The cases rarely define what it means for two texts to be "too much alike." To begin to find a practical definition, it is important to recognize that actionable similarity—plagiarism<sup>265</sup>—is akin to a genre itself, governed by social and cultural codes and conventions.<sup>266</sup> To ask whether two texts at issue in a case are substantially similar is really to ask whether the codes and conventions at work in a second text lead to the conclusion of plagiarism. However, this has remained implicit; the law has not attempted to identify these codes and conventions.

Such an approach to plagiarism would seek to identify the generic codes that leave the observer with the impression that one text has copied another text and that so-called "protected expression" has been copied. The purpose of such an inquiry goes beyond a mere literary critical interest in plagiarism. Rather, it seeks to focus on the policies behind the various invocations of the term "substantial similarity" as a means of regulating the text.

265. Differently from many other definitions, I use the term "plagiarism" to mean the belief of a reader, viewer, or listener that one text has been stolen from another. As used here, the term includes piracy and subconscious copying. Importantly, the definition in the Article focuses on the reaction of an audience.

266. See Meiners, in *Plagiarism—A Symposium*, *supra* note 57, at 414 ("The idea of plagiarism still raises extravagant passions in our community. It is therefore salutary to remember that the concept is not absolute, but socially conditioned.").

Importantly, the plagiaristic codes and conventions can vary depending on the underlying genre of a particular text and the salient audience conduct. For example, an audience competent in the science fiction genre will have a conception of plagiarism that differs from that of an audience competent in computer software genre. In other words, as it creates the underlying text, the audience plays a role in setting the boundaries of plagiarism.

Literary criticism provides a firm basis for studying text that treats plagiarism as a genre. Scholars have written studies on the closely related areas of artistic forgery,<sup>267</sup> parody,<sup>268</sup> pastiche,<sup>269</sup> and satire.<sup>270</sup> It has been stated that genres are "types," in that a specific text in a genre need not share the same characteristics with every other work in the genre.<sup>271</sup> Consistently with this formulation, plagiarizing texts may share certain traits with other plagiarizing texts, but yet differ markedly in other respects.

Moreover, "in literary communication, genres are functional: they actively form the experience of each work of literature."<sup>272</sup> This ties in closely with copyright's audience test: the character of the text varies, depending on whether the necessary predicates for plagiarism exist.

Another characteristic of a genre is that it changes.<sup>273</sup> Plagiarism has this characteristic. As noted before, plagiarism did not exist before the Renaissance.<sup>274</sup> Thus, Shakespeare could borrow nearly verbatim from Plutarch without raising in the minds of his audience thoughts of plagiarism,<sup>275</sup> because plagiarism simply did not exist as a genre. Such verbatim similarity meant something other than what it might mean today.

It is true that a somewhat circular relation exists between a cultural notion of plagiarism and the legal system of copyright. The law responds to cultural codes of plagiarism, yet at the same time, shapes them by its statutes and judicial decisions. In this sense, the law itself serves as a text that modifies those codes. Nonetheless, it would seem that something

267. ECO, *supra* note 12, at 174-202.

268. HUTCHEON, *supra* note 255.

269. *Id.* at 38, citing various studies of pastiche.

270. *Id.* at 43 and authorities cited therein.

271. FOWLER, *supra* note 71, at 38.

272. *Id.*

273. *Id.* at 11.

274. See *supra* note 26 and accompanying text.

275. See MCFARLAND, *supra* note 136, at 25-26 (noting that some writers who are considered plagiarists do not follow their source any more closely than does the speech of Shakespeare's Volumnia, CORIOLANUS, act 5, sc. 3, lines 94-124, but that Shakespeare is not ordinarily regarded as a plagiarist).

about certain texts, as a matter of convention, leads a particular reader to respond that copying (or illicit copying) has occurred. Exploring these codes of plagiarism could better define the boundaries of "substantial similarity," revealing the effect of the concept on speech regulation.

Few literary critical studies of plagiarism exist; those that do generally either are anecdotal or fail to delve into plagiarism as genre.<sup>276</sup> A full-blown literary critical study of plagiarism lies beyond the scope of this Article. However, the following discussion suggests some tentative conclusions about the plagiaristic codes.

First, plagiarism would appear to be "restricted in focus."<sup>277</sup> Its repetition is always of another discursive text.<sup>278</sup> Like parody, for example, the reader cannot perceive the plagiaristic codes without some knowledge of a pre-text. Unlike parody and pastiche, however, the plagiarizing text does not invoke a pre-text, but rather suppresses it. An element of deceit is inscribed in the text and forged by virtue of the intertextual relationship. The plagiarizing text conveys a false sense of reality relating to its position *vis-à-vis* prior texts.

Such suppression of truth exists in other textual forms. A contemporary example is the so-called docudrama, that is, the motion picture that purports to be based on reality, but that instead "fictionalizes" certain of the events. Like plagiarism, docudrama that critics believe to have unduly suppressed reality can generate cries of moral outrage, often in language not unlike that used to condemn the copyright infringer.<sup>279</sup> Like plagiarism, these complaints result from the belief that a more valid prior text—a greater "truth"—exists.<sup>280</sup>

Second, to find plagiarism, the reader of two texts must conclude

276. *E.g.*, THOMAS MALLON, *STOLEN WORDS* (1989); NEIL HERTZ, *Two Extravagant Teachings, in THE END OF THE LINE: ESSAYS ON PSYCHOANALYSIS AND THE SUBLIME* 144 (1989); FRYE, *supra* note 134, at 97; *Plagiarism—A Symposium, supra* note 57, at 413-15.

277. *See* HUTCHEON, *supra* note 255, at 40, 43.

278. *Id.*

279. Witness the criticism of Oliver Stone's motion picture *JFK*, depicting the investigation of the assassination of President John F. Kennedy. *Compare* George F. Will, '*JFK*: *Paranoid History*', WASH. POST, Dec. 26, 1991, at A23 (in which George F. Will calls the film a "travesty" and "an act of execrable history and contemptible citizenship by a man of technical skill, scant education and negligible conscience," and states that Stone "falsifies so much that he may be an intellectual sociopath, indifferent to truth") and Kenneth R. Clark, *Filling in Fact with Fiction: Makers of TV Docudramas Say 'JFK' Plays on a Different Channel*, CHI. TRIB., Jan. 30, 1992, at C1 (Stone's crime, in the eyes of the critics, is that he took a historical event, hired actors to recreate the action, made up dialogue where he could find no account of necessary conversations, and invented characters to keep his storyline moving") with Michael Moore, *Counterpunch: 'Roger,' 'JFK' and Me: The Official Story*, L.A. TIMES, Feb. 3, 1992, at F3 ("The furor that gets kicked up over films like 'Roger & Me' and 'JFK' has everything to do with the fact that these films challenge the 'official story' and encourage their audiences to put down their Goobers and Twizzlers and do something.").

280. Analogously, classical Platonic philosophy condemned art as a corruption of reality. *See supra* note 14.

that the same codes and conventions are at work, and importantly, the same variations and modulations. This self-evident proposition focuses the inquiry on the key aspects of the texts at issue and ultimately allows the law to define for the trier of fact the boundaries between permitted and restricted textual utterance.

Third, the codes of plagiarism would postulate that there are no codes and conventions that overbear the codes that would otherwise point to plagiarism. Parody provides an example of a genre containing codes that conflict with codes of plagiarism. Parody, like plagiarism, repeats another discursive text, but the parodying text suggests an encoded intention to imitate an earlier text with critical irony.<sup>281</sup> In contrast, the plagiarizing text suggests an intention to deceive or falsify.<sup>282</sup> An approach to plagiarism as a genre helps explain why current copyright law treats certain texts as infringing and others as not. For example, it is assumed, both legally and culturally, that a verbatim identity between a plaintiff's work and a defendant's work is highly indicative of plagiarism. However, this assumption results, not from any inherent characteristics in the two works, but in a conventionally accepted belief that such verbatim identity constitutes plagiarism. As discussed earlier, even a verbatim rendition of what is thought of as a single text can be transcontextualized, that is, can change.<sup>283</sup> Nonetheless, as a matter of convention, an audience assumes that two different textual acts are the same if they share a verbatim identity.

Conversely, verbatim repetition of a plaintiff's text does not invariably constitute plagiarism, depending on the particular genre and audience. Where verbatim repetition is formulaic or highly conventional, a reader familiar with the underlying genre will not employ the codes that lead to the conclusion of plagiarism. That is, a reader familiar with codes of a particular genre will recognize verbatim similarities as merely generic codes and not as plagiaristic similarities (as, for example, in the words in children's stories "once upon a time" and "they lived happily

281. HUTCHEON, *supra* note 255, at 40-41. As a generic, if not a legal matter, such critical irony distinguishes parody from plagiarism.

282. The reader recognizes still other signals in the plagiarizing text. Culturally, if not legally, an audience will tend to recognize plagiarism where it perceives that a plaintiff engaged in significant labor in articulating his or her text, labor that the defendant avoided by copying. "In a moral sense [plagiarism] means something that makes use of somebody else's efforts and exertions." Goodman, in *Plagiarism—A Symposium*, *supra* note 57, at 413. Yet, the cases purport to exalt "originality" over labor. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991) (rejecting "sweat of the brow" doctrine of protection for compilations of facts). Similarly, as cases recognize, a probable code of plagiarism seeks to determine whether defendant's text will reduce the market for plaintiff's. *E.g.*, *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914).

283. *See supra* note 122 and accompanying text.

ever after"). And, a verbatim rendition of the plaintiff's text as a "fragment" of the defendant's text will not give rise to a finding of plagiarism if the plaintiff's textual material played an insignificant part in the plaintiff's text, or if the plaintiff's textual material is generic.<sup>284</sup>

Moreover, it is generally recognized in many genres that nonverbatim rearticulations of a text can still be plagiarism if significant textual material modulates or varies underlying generic code in the same way. This conclusion turns on whether, as a matter of convention, the audience concludes that the similarity in modulation is a significant aspect of the text at issue and that the differences in modulation are not. In other words, what makes a variation important is a product of the primary codes at work in the texts under examination; a reader or viewer for cultural and social reasons will consider a particular characteristic of a text more important than others. For example, the so-called "hook" is ordinarily the most memorable aspect of a popular song. Whether a passage is the hook of a song depends, in turn, on generic and rhetorical convention regarding what gives a particular passage value (for example, whether the lyric accompanying the music contains the song's title, whether the passage is part of a refrain, how often the passage is repeated, whether the passage begins the song). The generic code of plagiarism in a music copyright case would posit that plagiarism is more probable where the defendant's musical text repeats the hook of the plaintiff's song, even though the texts otherwise differ.<sup>285</sup>

The suggestion that the law consider codes and convention in deciding substantial similarity—a suggestion that calls for a semiotics of plagiarism—seeks a standard for delineating the legal elements that determine whether an audience will perceive two works as substantially similar. Some elements are familiar and more easily stated—for example, verbatim similarity means copying unless the textual similarities are mere formulas or conventional similarities. Yet there are undoubtedly numerous other factors that, in the present cultural setting, lead to the conclusion that one text plagiarizes another. As a matter of legal principle and evidentiary proof, identifying these elements is critical in reaching a reasoned conclusion as to when and why two texts are substantially similar.

Yet again, an examination of Judge Hand's opinion in *Nichols* can

284. Of course, the question whether textual material in the plaintiff's text is important or not itself requires an examination of plaintiff's text in term of its own generic and rhetorical codes and conventions.

285. Cf. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976) (finding infringement where, among other things, defendant's song "My Sweet Lord" repeated the musical passage that began plaintiff's song, that was frequently repeated in plaintiff's song, and that accompanied plaintiff's title lyrics "He's So Fine").

show how choice of audience and the codes underlying plagiarism can help a court or trier of fact reach similarity opinions. In the 1920s, when Anne Nichols' play was at the height of its popularity and the conventional stock figures of Jew and Irishman were well known by the popular culture, the choice of audience construct may have properly focused on the average person generally familiar with the popular media. In comparing *Abie's Irish Rose* with defendant's *The Cohens and the Kellys*, the audience would, for example, have probably recognized the comedic Yiddish dialect and harsh portrayal of the Jewish fathers as a conventional humorous treatment that had no pejorative social or political implications. The similarities in character portrayal would therefore not necessarily have signaled plagiarism to such an audience. However, an audience of the 1990s unfamiliar with the generic codes and conventions of the 1920s might view the similarity analysis quite differently. Nichols' depiction of the Jewish father and the other Jewish characters, rather than being seen as humorous and benign, might appear to such an audience to be highly offensive, as did the depictions in the more prosaic *Bridget and Bernie* television series of the 1970s.<sup>286</sup> Because the stereotypes of Nichols' play are no longer conventional, their portrayal could, to a 1990s audience not competent in the genre of 1920s ethnic comedy, seem an important and striking indicium of similarity between *Abie's Irish Rose* and *The Cohens and the Kellys*, tending to cause this audience to invoke codes of plagiarism where they otherwise should not have. In such a situation, it would be important to identify the target audience and to educate the trier of fact about the genre of the 1920s. Significantly, however, the example shows how texts and notions about similarity can change.

## V. FAIR USE AND THE CONCEPT OF THE "WORK"

It may be argued that any rigidity caused by copyright's notion of the autonomous "work" could be ameliorated by copyright's traditional "safety valve," that is, the defense of fair use, and that as a result, a reassessment of copyright in light of recent literary thought is unnecessary. Indeed, the defense of fair use is often cited as the means by which to avoid rigid application of the copyright laws when such application would stifle the very creativity that the law is designed to foster.<sup>287</sup> In this section, this Article briefly discusses the fair use doctrine, showing

286. See *supra* notes 207-13 and accompanying text.

287. 3 NIMMER & NIMMER, *supra* note 74, § 13.05 at 13-80 (quoting *Iowa State University Research Found., Inc. v. Am. Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980)).

that the concept of autonomous "work" also undercuts the doctrine of fair use.

According to Professor Nimmer, in its meaningful sense fair use comes into play as a defense only where two texts have already been deemed substantially similar.<sup>288</sup> However, even though the fair use doctrine supposedly alleviates what would otherwise be an unbending concept of property, the construct of the "work"—the reification of the text—provides a built-in bias toward the plaintiff's work.

As a rhetorical device, the very term "fair use" demonstrates how the idea of the "work" carries with it a presumptive moral aspect about texts in a copyright case. The term "use" presupposes something akin to a physical object of property that one can "occupy." Use implies a taking of a "thing" belonging to another. Indeed, rarely, if ever, has the law employed the term "use" in connection with something other than a property interest. This presumption reflects a conception of the text as an object of property, belonging to an "author." The plaintiff's status as "author" immediately elevates his or her position vis-a-vis the defendant, who is a mere "user," no matter how creative the second work may be. A defendant who seeks to "use" that object without permission is viewed with initial suspicion, unless he or she falls within the anointed categories of, for example, "scholar," "educator," or "critic."<sup>289</sup> Similarly, the adjective "fair" reflects a particularly moralistic view of copyright infringement. Indeed, the defendant's "good faith" is a factor that the courts will consider when deciding if the defense applies.<sup>290</sup> It is not surprising that, in determining whether the defense of fair use applies in a particular case, the courts often resort to morally judgmental terms. For example, fair use "distinguishes between 'a true scholar and a chiseler who infringes for personal profit.'"<sup>291</sup> The Supreme Court has declined to find fair use where the defendant "scooped," "pirated," "exploited," and "purloined" plaintiff's manuscript.<sup>292</sup> Another court declined to apply the fair use defense where the defendants' lyrics were "dirty."<sup>293</sup>

288. 3 NIMMER & NIMMER, *supra* note 74, § 13.05 at 13-800.

289. *See infra* part V.A.1.

290. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

291. Wainwright Sec., Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (quoting Hearings on Bills for the General Revision of the Copyright Law before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pt. 3, 1706 (statement of John Schulman)). Harper & Row, Publishers, Inc., 471 U.S. at 563, favorably quotes this statement.

292. Harper & Row, Publishers, Inc., 471 U.S. at 556, 562-64. The Court's wisdom in using these condemnatory words has been questioned. Wright v. Warner Books, Inc., 953 F.2d 731, 743 (2d Cir. 1991) (Van Graafeiland, J., concurring).

293. MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981).

The law need not inevitably approach the fair use doctrine in this way, however. All textual producers rely on texts of their predecessors.<sup>294</sup> The conduct at issue in copyright in general, and in "fair use" analysis in particular, can in light of recent literary thought be described in terms far different from "use." For example, rather than "using" a plaintiff's text, a defendant can be said to have "transformed" an earlier text.<sup>295</sup> Or the defendant's text may constitute another "reading" (or "misreading") of a predecessor.<sup>296</sup> Or the texts at issue in fair use analysis may exist as competing utterances, spoken in different contexts. Significantly, none of these characterizations rely on the objectification of the work—as the term "use" does—and each has a less pejorative connotation.

Semantically, by reifying the text as "work," its "use" becomes theft, with all the attendant moral connotations. By contrast, the interests at stake may seem far different if a copyright infringement case is viewed as a resolution of the competing right of speakers to engage in acts of speech—a more realistic view in light of contemporary literary thought. It is simply more palatable to impose liability against one who steals a "work" than it is to impose liability on someone who is "speaking" a text.<sup>297</sup>

The modernist concept of the "work" underlies practical attempts to define the scope of the fair use defense. Section 107 of the Copyright Act of 1976<sup>298</sup> sets forth the nonexclusive factors to be considered in fair use determinations. Each of these is problematical because of the law's insistence that the text is an autonomous work.

### A. *The Character and Purpose of the Defendant's Work*

#### 1. Scholarship, Teaching, News Reporting, Criticism: The Anointed Defendants

In deciding whether a defendant may avail himself or herself of the fair use defense, the courts and Congress have focused on the nature and purpose of the defendant's text. Section 107 gives several examples of texts whose "purposes" may warrant a finding of fair use. These include "criticism, comment, news reporting, teaching (including multiple copies

294. See *supra* part II.E.

295. Cf. Litman, *supra* note 12, at 975 (describing process of authorship).

296. Bloom, *supra* note 57, at 413.

297. See L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT* 131 (1991) ("In copyright litigation . . . an accusation that a defendant has stolen the plaintiff's property is much more powerful than the claim that a defendant is exercising a free-speech right.")

298. 17 U.S.C. § 107 (1988).



for class room use) scholarship, or research.”<sup>299</sup> It follows that works of these types enjoy a preferred status in copyright.

The emphasis on traditionally academic endeavors reflects the modernist, New Critical tendency to privilege some types of readings over others. Copyright, like the modernist approach to the work, makes the critic sovereign at the expense of both author and reader.<sup>300</sup> Neither authorial intention nor audience response have validity under this theory; rather, interpretation becomes the anointed object of literature.<sup>301</sup> And the favored group under this approach becomes the critic—the scholar who makes criticism a science. The critic finds validation, however, only if he or she can interpret something akin to an object with a fixed identity: the “work.” Post-modernist thought, however, demystifies the critic, who becomes just another reader. The critic is no longer conceived as a person with special knowledge who can learn the true meaning of a work, but rather as another reader of a text whose interaction with it depends on the context in which this reader engages the text. The fair use exception for educational or scholarly works, therefore, reflects a preference in copyright law for the supposed hieratic, to the prejudice of the demotic.<sup>302</sup> This policy, however, rests on nothing inherent in the nature of copyrighted “works.” For example, in *Stewart v. Abend*,<sup>303</sup> the Court rejected defendants’ contention that the re-release of the Alfred Hitchcock motion picture “Rear Window” was educational rather than commercial. The Supreme Court dismissed this contention out-of-hand. Yet the motion picture is generally considered a work of high aesthetic quality, while the underlying short story is virtually unknown and in fact now owes whatever fame it has to the motion picture. It is hard to understand why the re-release, and therefore broad dissemination, of a classic work of art is not more edifying than a little known short story, or for that matter, an academic monograph about a little known literary genre. The point is that words like “scholarly” and “educational” are merely

299. *Id.*

300. *See supra* note 47.

301. *See supra* notes 44-47 and accompanying text.

302. This preference extends beyond the fair use doctrine. In similarity analysis, perceived artistic works—though the artistic work may be nothing more than a decorative plate with the words “You Are Special Today”—are considered more worthy than factual works. *McCulloch v. Albert E. Price, Inc.* 823 F.2d 316, 321 (9th Cir. 1987). Similarly, in determining whether a particular work meets the threshold level of originality, the courts have shown a bias against protecting “low” forms of art. *See, e.g., L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (denying protection to mass-produced commercial “Uncle Sam” banks, though plaintiff’s work seemed to satisfy the “trivial variation” criterion for originality of *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)).

303. 495 U.S. 207, 227 (1990).

labels that give the impression that one can distinguish between worthy and unworthy texts.

## 2. Parody

Copyright's ambivalence toward the status of parody also reflects the law's preference for "higher" works. While it is generally accepted that parody is entitled to some fair use protection, the courts have faced difficulty in deciding when parody constitutes fair use.

Parody tends to break down the objectivity of the work, changing its meaning by recontextualizing it for a subsequent audience.<sup>304</sup> Parody, furthermore, strongly depends on the audience's interaction with the text: "Parody . . . can therefore be said to require a certain institutionalized set of values—both aesthetic (generic) and social (ideological)—in order to be understood, or even to exist. The interpretive or hermeneutic situation is one based upon accepted norms, even if those norms only exist to be transgressed . . ." <sup>305</sup> Copyright views parody differently, failing to recognize the importance of audience and context. Rather than focusing on the audience and the rhetorical aspect of parody, the cases rely on "work" and "author" as a means of determining when parody constitutes fair use.

Courts addressing the scope of protection for parody generally assume that the issue of fair use does not arise unless the defendant's work has "taken" or "appropriated" from the original.<sup>306</sup> The law's choice to use the terminology of "taking"—a semantic choice that is not inevitable—at the outset of the inquiry focuses on a presumptive "object" (the "work") rather than on a dynamic text.

Although parody is context-dependent, the parody opinions do not even purport to consider audience response. Instead, the cases supposedly decide whether a defendant's text constitutes parody merely by examining the objective characteristics of the two works at issue. But by definition, parody does not inhere "in" the work, but instead depends on the convergence of texts and audience in a particular context.

Certain parody opinions focus on authorial intent in deciding whether a work constitutes a parody protected by the fair use doctrine, in this way also ignoring the audience's role in actualizing the parodic text.

304. See Harris, *supra* note 12.

305. HUTCHEON, *supra* note 255, at 95.

306. E.g., Rogers v. Koons, 751 F. Supp. 474, 479 (E.D.N.Y. 1990), *modified*, 777 F. Supp. 1 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 301 (2d Cir. 1992); Fisher v. Dees, 794 F.2d 432, 434-35 n.2 (9th Cir. 1986) (rejecting claim that taking was *de minimis* and stating "[h]ere, the appropriation would be recognized instantly by anyone familiar with the original").

In *MCA, Inc. v. Wilson*,<sup>307</sup> plaintiffs contended that defendant's "Cunnilingus Champion of Company C" infringed the song "Boogie Woogie Bugle Boy of Company B." In rejecting the parody defense, the court stated:

At trial, defendant Wilson testified that, at the time he wrote Cunnilingus Champion, he did not intend it to be either a burlesque or a satire. He stated that, sometime during the rehearsals that followed the song's unveiling, he formed the intent that the song would be a burlesque of the music of the 1940's.<sup>308</sup>

The court seemed to believe that, at the time of creation, the identity of the "work" was fixed and that subsequent authorial expression of intention was irrelevant. This highlights the problems inherent in trying to find textual identity based on authorial intention. The court rather arbitrarily limited the author's intention to a specific period, based on the false notion that once a work comes into existence, its features never change.<sup>309</sup> In this way, the cases objectify, not only the copyrighted work, but also the allegedly infringing work, treating the defendant's text as a "thing" that has immutable properties.<sup>310</sup>

Neither is the courts' definition of parody consonant with the way literary thought approaches the parodic text. Some courts require the defendant's work to "poke fun" at social or cultural norms.<sup>311</sup> Others imply that the plaintiff's work must be the "target" of the parody.<sup>312</sup> And as a legal matter, parody seems to require "comic effect" and "ridicule."<sup>313</sup> In fact, however, parody is an "imitation by ironic inversion, not always at the expense of the parodied text. . . . Parody is, in another formulation, repetition with critical distance, which marks difference rather than similarity."<sup>314</sup> By insisting that parody ridicule, therefore, the law draws arbitrary lines regarding what constitutes parody.

307. 677 F.2d 180, 182 (2d Cir. 1981).

308. *Id.*

309. E.D. Hirsch would call the author's second expression of "intent" merely an interpretation of his own work. HIRSCH, *supra* note 12, at 6-8. However, this approach is problematic in copyright, since Hirsch chooses the original intent as the valid meaning of a text for ethical reasons, not because of the text's ontological status. *Id.* at 24.

310. This reliance on authorial intention raises another fundamental problem. Modern literary theory teaches that authorial intention is an elusive construct. Despite what Wilson "thought" about his song, there seems no question that a particular audience could interpret his work as a parody of plaintiff's work. Yet the court entirely eliminated the audience from the inquiry.

311. *E.g.*, *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

312. *E.g.*, *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992), *cert granted*, 61 U.S.L.W. 3545 (March 29, 1993); *MCA, Inc. v. Wilson*, 677 F.2d 180, 184 (2d Cir. 1981).

313. *See Acuff-Rose Music, Inc.*, 972 F.2d at 1435; *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517 (S.D.N.Y. 1988).

314. HUTCHEON, *supra* note 255, at 6.

### 3. Commerciality of the Use

Another aspect of the inquiry into a work's purpose focuses on whether a defendant's use is of a commercial nature or rather is for non-profit educational purposes.<sup>315</sup> Works of a commercial nature receive less protection under the fair use doctrine. Here, too, the notion of the "work" dominates fair use analysis, this time in the conception of the supposedly *infringing* work.

The concept of "commerciality" is inseparable from the notion of objective property. Historically, the text became objectified as "work" only when a market for texts came into existence.<sup>316</sup> Under the fair use doctrine, the defendant's text that has no commercial purpose—for example, that is not fixed in a tangible medium or is not widely distributed for profit—is in some sense less a "thing" than a defendant's work that has as its target a commercial market. Only where the defendant's work becomes fully reified—through its commercial purpose—does it pose a threat to the plaintiff's work, which the law has already reified. The "work"—in fact, a metaphor—becomes an end in itself, worthy of preservation.<sup>317</sup>

Moreover, the concept of "commerciality" does not adequately establish the parameters of the fair use doctrine. As others have noted, attempts to characterize a particular text as commercial or not is an act of interpretation that strongly depends on context and audience engagement with the text.<sup>318</sup> The concept of "commercial purpose" is therefore an interpretive construct rather than a property of a particular infringing work. The contemporary critical realization that texts have no fixed identities therefore calls into question the distinction between "commercial" and "noncommercial" purposes, just as critical thought has ques-

315. 17 U.S.C. § 107(1) (1988).

316. See ROSE, *AUTHORS AND OWNERS*, *supra* note 13, at 55-56. Similarly, the history of real property law demonstrates that the vision of real property as a "thing" arose when the feudal system ended and a market for real property developed.

317. A recent Sixth Circuit opinion, *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3545 (March 29, 1993), reflects this view. In that case, the court, reversing a district court opinion, held that a song by the group 2 Live Crew was not a fair use of the Roy Orbison song "Pretty Woman." In emphasizing the commercial nature of the defendants' use of plaintiff's "work," the court stated: "It is likely, for example, that an identical use of the copyrighted work in this case at a private gathering on a not-for-profit basis would be a fair use." *Id.* at 1439. The commodification of the text, according to this view, supposedly transforms it.

318. See *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 425 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1988) quoted in 3 NIMMER & NIMMER, *supra* note 74, § 13.05[A], at 13-84; See also Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 VA. L. REV. 627 (1990). Kozinski and Banner note that some modern television "commercials" cannot be determined to be such by referring either to the work itself or to the intent of the creator. *Id.* at 639-43. Attempts to apply the distinction in fair use doctrine raises similar problems.

tioned the concept of the objective "work." So the tendency to grant fair use protection to one "type" of "work," but not the other, becomes dubious, suggesting that the policies behind the original distinction need reexamination.

### B. *Nature of the Work*

The courts are also supposed to inquire into the "nature" of the plaintiff's work in deciding fair use. This inquiry has two aspects. First, a court will examine whether or not the plaintiff's text is a creative product.<sup>319</sup> Second, it will ask whether the plaintiff has published the work.<sup>320</sup> That a plaintiff's text is "creative" or "unpublished" weighs against a finding of fair use.

In privileging so-called "creative" or "fictional" texts in fair use analysis, the doctrine once more shows a preference for so-called "literary" discourse. That is, the law assumes that it can distinguish between creative or artistic works on the one hand, and more common discourse on the other. The latter receives less copyright protection. The distinction between the literary and nonliterary, characteristic of modernist thought,<sup>321</sup> now proves to be a questionable one. Even the distinction between "facts"—which supposedly exist independently of the text—and creative works has become difficult to sustain.<sup>322</sup> This undercutting of the concept of hierarchies of discourse poses a challenge to the fair use doctrine's attempt to distinguish between the creative and the noncreative.

Unpublished works also receive greater protection under the fair use doctrine than published works. The language that the opinions use in justifying this greater protection recalls the sixteenth century metaphor of paternity, during which the work was viewed as the offspring of an author.<sup>323</sup> For example, the Supreme Court has stated that "the period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor."<sup>324</sup> This greater protection for unpublished works does not depend solely on what might be considered an extratextual fact, to wit, the author's right of privacy. Even an author with no interest in privacy may avoid a fair use defense because a work is unpublished.<sup>325</sup> Instead, the central metaphor

319. *E.g.*, *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

320. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551 (1985).

321. *See supra* part I.D.

322. *See Gordon, Reality as Artifact, supra* note 12, at 98-100; Ginsburg, *supra* note 12, at 1913-16.

323. *See supra* note 23 and accompanying text.

324. *Harper & Row, Publishers, Inc.*, 471 U.S. at 554.

325. *Id.* at 554-55.

of the published/unpublished distinction is the notion that the unpublished work has an embryonic status *vis-à-vis* the later published work. By limiting application of the fair use doctrine in cases of unpublished works, the law ensures that the text will, ultimately, become the "work," that is, that it will be fixed in a tangible medium of expression and placed into the market, in that way taking on the character of an object.

In this sense, fair use doctrine again draws questionable lines. The law's treatment of the unpublished work as the offspring of the author fails to account for the audience's central role in "creating" the text. That is, upon the defendant's dissemination of a heretofore unpublished text, the audience actualizes it, adopting it as its own. If neither "work" nor "author" have an ontological status, then no reason—other than, perhaps, extratextual privacy concerns—justifies limiting fair use protection for a defendant who uses an unpublished work. To withhold such protection in effect deprives the audience of its rights to "create" the text.

### C. *Substantiality of the Use*

The "substantiality" of the use is also relevant in fair use doctrine.<sup>326</sup> Although in substantial similarity inquiry, the law at least attempts to consider the text's rhetorical aspect,<sup>327</sup> it does not do so when determining whether a use is substantial for fair use purposes.

Rather, in assessing the "substantiality" of the use, the cases look to both the quantity and the quality of the use.<sup>328</sup> Quantitatively, the courts focus on either the percentage of the defendant's text that is derived from the plaintiff's text,<sup>329</sup> or on the amount "taken" from the plaintiff's text.<sup>330</sup> This approach reduces the text to an object whose words need only be counted to see how much was "taken."

Courts also inquire into the "qualitative" nature of the defendant's use.<sup>331</sup> For example, the defendant's use has been found unfair where he or she has taken passages that are "powerful";<sup>332</sup> that go to the "heart" of the plaintiff's work;<sup>333</sup> that take plaintiff's "unique setting, characters, plot, and sequence of events";<sup>334</sup> or that are an "important ingredi-

326. 17 U.S.C. § 107(3) (1988).

327. *See supra* part IV.A.

328. *E.g.*, *Harper & Row, Publishers, Inc.*, 471 U.S. at 566.

329. *Id.*

330. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 738 (1991) (plaintiff used a very small portion of letters that she had received from author Richard Wright).

331. *Harper & Row, Publishers, Inc.*, 471 U.S. at 565.

332. *Id.* at 564-65.

333. *Id.*

334. *Stewart v. Abend*, 495 U.S. 207, 238 (1990).

ent" of defendant's work.<sup>335</sup> Use tends to be fair where the plaintiff's material has "no identifiable core";<sup>336</sup> or where the defendant's work does no more than take enough to accomplish its parodic purpose.<sup>337</sup> Yet again, underlying these catch-phrases is the assumption that texts have fixed characteristics (a heart, a core) independent of an audience. Though these terms allow for *ad hoc* policy decisions while at the same time conveying the impression of meaningful interpretation, they fail to say anything useful about the text.

### D. *Effect of Defendant's Use on the Market*

Finally, the effect of the defendant's use on the market for plaintiff's text is "the single most important element of fair use."<sup>338</sup> Undoubtedly, this factor permits consideration of evidence that could be considered "extratextual," for example, market data or projections as to the impact on past and future sales of plaintiff's text.<sup>339</sup>

Yet this inquiry, too, is problematic, often focusing not on extratextual issues, but on textual interpretation as a way of determining whether the defendant's work has had an effect on the market for the plaintiff's work.<sup>340</sup> The concept of "potential" market poses the greatest difficulties. In *Rogers v. Koons*,<sup>341</sup> the defendant created a sculpture using plaintiff's photograph of a group of puppies. Although apparently no evidence existed that the plaintiff could ever license his photographs to another sculptor, the Second Circuit held that the defendant's work adversely affected the potential market for plaintiff's work, concluding that it was not implausible that another sculptor would have been willing to purchase plaintiff's rights, and that, because defendant profited from use of the plaintiff's work, such an adverse effect on the market was presumed.<sup>342</sup>

*Rogers'* treatment of the potential market results in a circular application of the "effect on the market" factor. The court reached its conclu-

335. *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987).

336. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 738 (1991) (quoting *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1263 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987)).

337. *Fisher v. Dees*, 794 F.2d 432, 439 (1986).

338. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

339. *E.g.*, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451-52 (1984).

340. In *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981), the Second Circuit found an adverse economic impact merely because both parties were in the entertainment business, both works were sold as printed copies, and both sounded the same. *Wilson* analyzes economic effect by defining the relevant audience so broadly that it can find an adverse impact. As discussed earlier, choosing an audience is as much an act of textual interpretation as are attempts to ascertain the text's character. *Id.*

341. 960 F.2d 301 (2d Cir. 1992).

342. *Id.* at 312.

sion that it was not "implausible" that another sculptor would have sought plaintiff's rights in the photographs, not based on evidence extrinsic to the text, but merely because the defendant's text existed. The textual construct of "potential market" thus again derives from an attempt to find a valid interpretation of the autonomous "work." If a reader (in law, a court) can conceive of a potential market for something not ordinarily considered an "object," the "something" immediately becomes objectified, and is therefore more easily considered property. For example, although human organs are not ordinarily thought of as objects of property, they may become so when a "potential" market for organ transplantation is conceived to exist.<sup>343</sup> In fair use doctrine, a plaintiff's text without a true market tends to lose its character as a reified "object"; the concept of potential market permits the reobjectification of the work. Yet the conclusion that a potential market exists often derives merely from a judge's "reading" of a text, in which he or she interprets the text in such a way as to "create" a potential market.

## VI. CONCLUSION

This Article has discussed how copyright continues to rely on a modernist notion of the autonomous "work."<sup>344</sup> Contemporary criticism

343. I am indebted to Peter Jaszi for this analogy.

344. The conception of the autonomous work is not limited to the case law. Commentators who have recently inquired into the justifications for copyright also often rest their assumptions on out-moded notions of the text. Wendy Gordon states that copyright imposes boundaries through, among other ways, the fixation requirement and the idea/expression distinction. Gordon, *Jurisprudence of Benefits*, *supra* note 12, at 1380-83. (Professor Gordon also identifies the statutory grant of only a limited set of rights as a third boundary of copyright. *Id.* at 1382-83). Supposedly, these boundaries "by and large, substitute well for physical boundaries, both in regard to promoting transactions and to keeping liability within tolerable limits." *Id.* at 1380 (citations omitted). While these boundaries are supposedly less precise than physical boundaries, they are said to function as boundaries in the same way as the edges of personal property or the physical boundaries of real property do. *Id.* at 1383. So this approach once again relies on the traditional copyright notion of the "work": the assumption that a text has a fixed identity, that the physical embodiment (the book) matters in textual actualization, and that idea and expression can be located *in* the work with enough certainty to permit creators to create and to avoid intolerable findings of infringement for liability. Such a view of the work is inconsistent with current literary thought.

A similar view of the text underlies economic theories of copyright. Landes and Posner argue that protecting expression encourages production of copyrighted works, but that protecting ideas might actually discourage it, because supposedly, the availability of ideas is critical to producing works. See Landes & Posner, *supra* note 12, at 347-53. They also argue that an author neither creates nor buys stock characters and situations, but only the means of expressing them. *Id.* at 349-50. Instead, because ideas and *scènes à faire* are supposedly "out there," the author is said to acquire them at zero cost, "either from observation of the world around him or from works long in the public domain." *Id.* Giving the author copyright protection for ideas (for Landes and Posner, stock characters and situations) would "increase the cost of expression of later authors without generating offsetting benefits." *Id.* at 350. However, to describe the author as acquiring stock characters and situations at zero cost, while investing value in the means of expressing them, begs the question, resting on the dubious assumption that idea is an ascertainable element outside the work, while



has emphasized how the autonomous "work" is a dubious concept that facilitates questionable decisions that seem to rest on the valid interpretation of the work, but that in reality do not because, within the confines of the "work," no single interpretation is valid. Moreover, the concept of autonomous "work" tends to ignore the audience's active role in creating the text, thus depriving the broader culture of its right to participate in the interactive speech process that is the text.

In addition, courts have used the notion of autonomous "work" as a rhetorical device, recharacterizing an act of speech as an object of property. By this reification of the text as "work," opinions can employ other rhetorical tools to justify a particular result. If the text can be treated as akin to a tangible object, then the terms "theft," "appropriation," "pirate," "harvest," and "sown" can easily flow from a judge's pen. The threat that these powerful rhetorical devices pose to speech should not be ignored, particularly because the seminal concept—the autonomous work—does not accurately reflect textual function.

But copyright's image of the text differs in important ways from the modernist, New Critical approach to the text. The New Criticism embraced the autonomous work as a way of mystifying it, emphasizing the special nature of the aesthetic object (its complexity, ambiguity, etc.). In contrast, copyright's approach to originality protects even the trivial, in that way demystifying the text.<sup>345</sup> Moreover, by attempting to consider the response of the audience in deciding substantial similarity, copyright law at least to some extent recognizes that the reader plays a role in the textual process. So at the same time that it champions the autonomous "work," copyright contains the seeds of the destruction of this autonomy.<sup>346</sup> Copyright law might yet accommodate an approach to the text that pays due regard to the interest of culture's representatives—the audience—in the creative process, recognizing that audiences, as well as authors, make texts.

expression lies solely "in" the work. Again, each articulation is a text whose separation from other textual material (including the so-called public domain) cannot be fixed. Authors may invest much in what Landes and Posner call "idea": the success of the producer of a text might be in his or her very ability to observe the world and the public domain and to make prudent choices. This is no less the author's text than is the so-called means of expressing them. Indeed, the distinction between method of expression—which sounds much like "form"—and stock situations ("content") is a questionable one: modern literary thought—building on the New Criticism—rejects the traditional division between form and content. Because content derives its reality from the structure of the text, the dichotomy is illusory. Harari, *Preface*, in *TEXTUAL STRATEGIES*, *supra* note 7, at 27.

345. See *supra* notes 93-99 and accompanying text. I am indebted to Mark Rose for pointing out these distinctions.

346. Jane Gaines writes: "Copyright doctrine poses a greater danger to traditional literary theory since it negates the contradictory philosophical foundations of traditional literary theory." JANE M. GAINES, *CONTESTED CULTURE* (1991).