

University of Michigan Law School  
University of Michigan Law School Scholarship Repository

---

Articles

Faculty Scholarship

---

1990

## The Public Domain

Jessica D. Litman

*University of Michigan Law School, [jdlitman@umich.edu](mailto:jdlitman@umich.edu)*

Available at: <https://repository.law.umich.edu/articles/222>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Courts Commons](#), [Intellectual Property Law Commons](#), [Legal History Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

Litman, Jessica D. "The Public Domain." *Emory L. J.* 39 (1990): 965-1023.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# EMORY LAW JOURNAL

---

Volume 39

FALL 1990

Number 4

---

## ARTICLES

### THE PUBLIC DOMAIN

*Jessica Litman\**

*Artists have been deluding themselves, for centuries, with the notion that they create. In fact they do nothing of the sort.*

Spider Robinson<sup>1</sup>

Our copyright law is based on the charming notion that authors create something from nothing, that works owe their origin<sup>2</sup> to the authors who produce them.<sup>3</sup> Arguments for strengthening copyright protection, whether predicated on a theory of moral deserts<sup>4</sup> or expressed in terms of

---

\* Associate Professor of Law, Wayne State University. The author would like to thank Jonathan Weinberg, Martin Adelman, Jane Ginsburg, Ralph Brown, Wendy Gordon, Fred Yen, and Harry Litman, as well as her former colleagues — too numerous to list individually — at the University of Michigan Law School, for their extensive and valuable comments on earlier drafts of this article.

<sup>1</sup> S. ROBINSON, *Melancholy Elephants*, in MELANCHOLY ELEPHANTS 1, 16 (1985).

<sup>2</sup> See 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.01[A], at 2-8.1 (1989).

<sup>3</sup> See *id.* § 1.06[A].

<sup>4</sup> See, e.g., Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343, 1442-65 (1989); Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 421 (1983).

economic incentives,<sup>5</sup> often begin with the premise that copyright should adjust the balance between the creative individuals who bring new works into being and the greedy public who would steal the fruits of their genius.<sup>6</sup>

The process of authorship, however, is more equivocal than that romantic model admits. To say that every new work is in some sense based on the works that preceded it<sup>7</sup> is such a truism that it has long been a cliché, invoked but not examined. But the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before;<sup>8</sup> playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters;<sup>9</sup> novelists draw their plots from lives and other plots within their experience;<sup>10</sup> software writers use the logic they find in other software;<sup>11</sup> lawyers trans-

<sup>5</sup> See, e.g., Comment, *A Rose By Any Other Name: Computer Programs and the Idea-Expression Distinction*, 34 EMORY L.J. 741 (1985) [hereinafter Comment, *A Rose*]; Comment, *Copyright Protection for Citations to a Law Reporter: West Publishing Co. v. Mead Data Central, Inc.*, 71 MINN. L. REV. 991 (1987) [hereinafter Comment, *Copyright Protection*].

<sup>6</sup> See, e.g., Burcart, *No Title to Titles: An Analysis of the Lack of Copyright Protection for Literary Titles*, 32 COPYRIGHT L. SYMP. (ASCAP) 75, 102 (1986); Hill, *Copyright Protection for Historical Research: A Defense of the Minority View*, 31 COPYRIGHT L. SYMP. (ASCAP) 45, 60-61 (1984); Kernochan, *Imperatives for Enforcing Authors' Rights*, 11 COLUM.-VLA J.L. & ARTS 587 (1987).

<sup>7</sup> See, e.g., Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 218 (1983); Landes & Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989); Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS., Autumn 1981, at 147, 171-73.

<sup>8</sup> E.g., L. KLEIN & J. MITCHELL, *The Beat of Black Wings*, on CHALK MARK IN A RAINSTORM, side 2, track 2 (Geffen Records, 1988); see, e.g., Propper, *American "Popular" Music and the Copyright Law*, 3 COPYRIGHT L. SYMP. (ASCAP) 165, 180-83 (1940); Ressler, *New Faces: Syd Straw*, ROLLING STONE, Sept. 21, 1989, at 25, col. 2; Rockwell, *From Bits of Jack Benny, a Quasi Opera*, N.Y. Times, Sept. 30, 1989, at 11, col. 1; Pareles, *In Pop, Whose Song Is It, Anyway?*, N.Y. Times, Aug. 27, 1989, § 2 (Arts & Leisure), at 1, col. 1.

<sup>9</sup> See, e.g., D. HWANG, M. BUTTERFLY 4 (1988); C. ZADAN, SONDEHEIM & CO. 243-51 (2d ed. 1989).

<sup>10</sup> See, e.g., Yellin, *A Method That Works (For Me)*, THE WRITER, Oct. 1989, at 18, 19-20; Lew, *Hemingway Typescripts and Letters Are Found*, N.Y. Times, Aug. 17, 1989, at C21, col. 1; James, *The Ayatollah's Other Victim*, N.Y. Times, Feb. 28, 1989, at C17, col. 4 (interview with Marianne Wiggins).

<sup>11</sup> See, e.g., Machrone, *Roots: The Evolution of Innovation*, PC MAG., May 26, 1987, at 166; Samuelson, *Is Copyright Law Steering the Right Course?*, IEEE SOFTWARE, Sept. 1988, at 78; Fisher, *Software Industry in Uproar Over Recent Rush of Patents*, N.Y. Times, May 12, 1989, at A1, col. 5.

form old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already "out there" in some other form.<sup>12</sup> This is not parasitism: it is the essence of authorship. And, in the absence of a vigorous public domain, much of it would be illegal.

Because copyright's paradigm of authorship credits the author with bringing something wholly new into the world, it sometimes fails to account for the raw material that all authors use. This tendency can distort our understanding of the interaction between copyright law and authorship. Specifically, it can lead us to give short shrift to the public domain by failing to appreciate that the public domain is the law's primary safeguard of the raw material that makes authorship possible.

Commentary on the public domain has tended to portray it either as the public's toll for conferring private property rights in works of authorship<sup>13</sup> or as the realm of material undeserving of property rights.<sup>14</sup> The current trend is to characterize material in the public domain as unprotectible or uncopyrightable.<sup>15</sup> This description has important implications, for it inspires the question "Why not?" Proponents of strong copyright protection have challenged the rationales for refusing copyright protection to authors' creations and have called for property rights to be given in material as yet unprotected by copyright law.<sup>16</sup>

---

<sup>12</sup> See, e.g., S. LEE, SPIKE LEE'S GOTTA HAVE IT: INSIDE GUERRILLA FILMMAKING 76-100 (1987); U.S. COPYRIGHT OFFICE, COPYRIGHT IN WORKS OF ARCHITECTURE 195-96 (1989); Marion, *Three Men and a Pop Star*, TV GUIDE, Aug. 4-10, 1990, at 14, 15; Russell, *Conjured by Calder*, N.Y. Times, Oct. 22, 1989, § 2 (Arts & Leisure), at 1, col. 1; Brown, *A City Built for Rock 'n' Roll*, N.Y. Times, Oct. 5, 1989, at C1, col. 4; *Batman's Birth Came in 1939*, Det. Free Press, June 22, 1989, at 4B, col. 1; Anderson, *Critic's Notebook: Dance and the Influence of Others*, N.Y. Times, Apr. 18, 1989, at C15, col. 4; Irwin, *How a Classic Clown Keeps Inspiring Comedy*, N.Y. Times, Apr. 9, 1989, § 2 (Arts & Leisure), at 1, col. 2.

<sup>13</sup> See, e.g., Gorman, *Fact or Fancy? The Implications for Copyright*, 29 BULL. COPYRIGHT SOC'Y U.S.A. 560, 560-61 (1982); Krasilovsky, *Observations on Public Domain*, 14 BULL. COPYRIGHT SOC'Y U.S.A. 205, 210-18 (1967); Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 7 (1987).

<sup>14</sup> See, e.g., B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 45-46 (1967); 1 M. NIMMER & D. NIMMER, *supra* note 2, §§ 2.01[B], 2.03; Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 521-22 (1981); Goldstein, *supra* note 7, at 222.

<sup>15</sup> See *infra* note 189 and accompanying text.

<sup>16</sup> See, e.g., Fleischmann, *The Impact of Digital Technology on Copyright Law*, 70 J. PAT. OFF. SOC'Y 5 (1988); Comment, *A Rose*, *supra* note 5, at 769-76.

To characterize the public domain as a *quid pro quo* for copyright or as the sphere of insignificant contributions, however, is to neglect its central importance in promoting the enterprise of authorship. The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.

This article examines the public domain by looking at the gulf between what authors really do and the way the law perceives them. Part I outlines the basics of copyright as a species of property and introduces the public domain's place within the copyright scheme. Copyright grants authors<sup>17</sup> rights modeled on real property in order to encourage authorship by providing authors with markets in which they can seek compensation for their creations. Because parcels of authorship are intangible, however, the law faces problems in determining the ownership and boundaries of its property grants. In particular, the concept of "originality," by reference to which copyright law purports to define property rights, provides an insufficient guide. The public domain — a commons that includes those aspects of copyrighted works which copyright does not protect — makes it possible to tolerate the imprecision of these property grants.

Part II of this article traces the historical development of the public domain in copyright case law. Courts have gradually come to deny copyright protection to ideas, methods, systems, plots, *scènes à faire*,<sup>18</sup> and (sometimes) facts, even when blatantly copied from plaintiffs' works. The courts have not sought profound theoretical justifications for denying protection, and different classes of cases reveal different motivations. Courts have seemed to invoke the public domain, however, in cases where the breadth of plaintiffs' asserted property rights appeared to threaten the enterprise of authorship by curtailing the ability of authors to pursue their craft.

Part III explores familiar theoretical justifications for the public domain and finds them for the most part unsatisfactory. Therefore, Part IV

---

<sup>17</sup> Throughout this article, I use the terms "author" and "authorship" in their copyright sense, see 17 U.S.C. §§ 102(a), 201 (1988), rather than in the vernacular sense of a person who writes or the process of writing. Thus, I refer to the person responsible for the creation of any copyrightable work as its author. See 17 U.S.C. § 201.

<sup>18</sup> "Scènes à faire" is a term used to describe stock scenes, clichés, and common expressive details. See *infra* notes 127-36 and accompanying text.

returns to the principle of copyright as property. This section argues that originality is a legal fiction. It is inherently unascertainable, and it is not the battleground on which infringement suits are in fact decided. Because authors necessarily reshape the prior works of others, a vision of authorship as original creation from nothing — and of authors as casting up truly new creations from their innermost being — is both flawed and misleading. If we took this vision seriously, we could not grant authors copyrights without first dissecting their creative processes to pare elements adapted from the works of others from the later authors' recasting of them. This dissection would be both impossible and unwelcome. If we eschewed this vision but nonetheless adhered unswervingly to the concept of originality, we would have to allow the author of almost any work to be enjoined by the owner of the copyright in another.

Part V of this article suggests that the public domain provides the solution to this dilemma and examines that solution from the perspectives of potential defendants, potential plaintiffs, and the system of copyright law as a whole. The public domain contains elements of authorship that easily seep into our minds and our language or that for other reasons can be claimed by many authors. A broad public domain protects potential defendants from incurring liability through otherwise unavoidable copying. It protects would-be plaintiffs by relieving them of the impossible and unwelcome obligation to prove the actual originality of all elements of their works. It protects the copyright system by freeing it from the burden of deciding questions of ownership that it has no capacity to answer.

The purpose of copyright law is to encourage authorship. When we embody that encouragement in property rights for authors, we can lose sight of a crucial distinction: Nurturing authorship is not necessarily the same thing as nurturing authors. When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship.

## I. COPYRIGHT AND PROPERTY

Copyright law is a legal scheme, prescribed in the Constitution<sup>19</sup> and put in place by Congress,<sup>20</sup> to encourage the enterprise of authorship.<sup>21</sup> In the 280 years since the enactment of the first copyright statute,<sup>22</sup> the technicalities surrounding copyright have assumed diverse forms,<sup>23</sup> but the essential mechanism has remained constant: The system creates legal rights akin to property rights.<sup>24</sup>

According to a currently popular mode of analysis, property rights in intellectual works are necessary because intellectual creations pose a public goods problem: The cost of creating the works is often high, the cost of reproducing them is low, and once created, the works may be reproduced rapaciously without depleting the original.<sup>25</sup> In a world in which such reproduction is not restrained, an author will be unable to recover the costs of creating a work and will therefore forgo the creative endeavor in favor of something more remunerative.<sup>26</sup> To provide the author with a market in which she can seek compensation for her creation, we establish property rights in her work and allow her to sell or lease these rights to others. Thus, the copyright system encourages authors to create and encourages distributors to purchase rights in authors' creations so that the distributors may sell those creations to the rest of us.

<sup>19</sup> See U.S. CONST. art I, § 8, cl. 8.

<sup>20</sup> See 17 U.S.C. §§ 101-810 (1988).

<sup>21</sup> Commentators have described the purpose of copyright in various ways, such as providing an incentive for authors to create by securing remuneration for their work, see Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982), encouraging the dissemination of knowledge and its addition to the public domain, see Gorman, *supra* note 13, at 560; see also 1 M. NIMMER & D. NIMMER, *supra* note 2, § 1.03[A], at 1-32, and attracting private investment to the production of original expression, see Goldstein, *supra* note 7. The common ground among opposing camps of commentators is that copyright seeks either directly or indirectly to encourage authorship.

<sup>22</sup> Great Britain enacted the world's first copyright law in 1710. Statute of Anne, 1710, 8 Anne 19. See generally A. LATMAN, R. GORMAN & J. GINSBURG, *COPYRIGHT FOR THE NINETIES* 1-4 (1989); L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 143-79 (1968).

<sup>23</sup> See generally A. LATMAN, R. GORMAN & J. GINSBURG, *supra* note 22, at 3-12, 30-40.

<sup>24</sup> See, e.g., 1 M. NIMMER & D. NIMMER, *supra* note 2, § 1.03[A], at 1-32 to -33; Gordon, *supra* note 21, at 1604.

<sup>25</sup> See, e.g., Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1700-05 (1988); Gordon, *supra* note 21, at 1610-13; Landes & Posner, *supra* note 7, at 326.

<sup>26</sup> See, e.g., Brennan, Harper & Row v. The Nation, Inc.: *Copyrightability and Fair Use*, 33 J. COPYRIGHT SOC'Y U.S.A. 368, 375-76 (1985-86).

The model for these property rights is real property.<sup>27</sup> We cast the author's rights in the mold of exclusive rights of control.<sup>28</sup> Invasion of these rights is actionable on a strict liability basis,<sup>29</sup> akin to the traditional formulation of trespass to land.<sup>30</sup> We describe the exceptions to the exclusive control attending ownership as privileges.<sup>31</sup> Copyrights are fully alienable, subject to a copyright statute of frauds.<sup>32</sup> They may be inherited,<sup>33</sup> bequeathed,<sup>34</sup> mortgaged,<sup>35</sup> and distributed equitably upon divorce.<sup>36</sup>

Treating intellectual property as if it were real property, of course, can be problematic. The aspects of intellectual property that create the public goods problems that the property regime is intended to repair also make it difficult to fit intellectual property within the real property rubric.<sup>37</sup> One difficulty, discussed at length in a recent article by Professor Wendy Gordon, is that intellectual property lacks the tangible qualities associated with real property.<sup>38</sup> In the face of intellectual property's lack of "thingness," the law must supply alternative concepts to take the place of physi-

<sup>27</sup> See, e.g., R. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 58 (1925); W. STRONG, THE COPYRIGHT BOOK: A PRACTICAL GUIDE 1 (2d ed. 1984).

<sup>28</sup> See 17 U.S.C. § 106 (1988). The constitutional provision on which U.S. copyright statutes are based is article I, section 8, clause 8, which speaks of exclusive rights:

"The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Professor L. Ray Patterson, however, has argued that the constitutional language, when interpreted within its historical context, directs Congress to establish a regulatory structure rather than a system of property rights. See Patterson, *supra* note 13, at 13-36. Patterson views the modern tendency to equate copyright with property as a dangerous error in interpreting the copyright clause.

<sup>29</sup> See, e.g., *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F.2d 35 (7th Cir.), *cert. denied*, 273 U.S. 738 (1926); Gordon, *supra* note 4, at 1390-91.

<sup>30</sup> See, e.g., Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

<sup>31</sup> See, e.g., Gordon, *supra* note 4, at 1391-92. Thus, the fair use privilege codified in 17 U.S.C. § 107 (1988) shares a kinship with the privilege of necessity.

<sup>32</sup> See 17 U.S.C. § 204 (1988); see, e.g., *Fantasy, Inc. v. Fogerty*, 654 F. Supp. 1129 (N.D. Cal. 1987).

<sup>33</sup> 17 U.S.C. § 201(d) (1988).

<sup>34</sup> *Id.* See generally Nevins, *The Magic Kingdom of Will-Bumping: Where Estates Law and Copyright Law Collide*, 35 J. COPYRIGHT SOC'Y U.S.A. 77 (1988) (estates containing copyright interests cause problems in estate planning).

<sup>35</sup> See 1 Copyright L. Rep. (CCH) ¶ 4100, at 2601 (Sept. 1989).

<sup>36</sup> See *In re Marriage of Worth*, 195 Cal. App. 3d 768, 241 Cal. Rptr. 135 (1st Dist. 1987). See generally Nimmer, *Copyright Ownership by the Marital Community: Evaluating Worth*, 36 UCLA L. REV. 383 (1988).

<sup>37</sup> See Lange, *supra* note 7, at 150.

<sup>38</sup> See Gordon, *supra* note 4, at 1378-79.



cal boundaries.<sup>39</sup>

Consider, for example, the problem of determining ownership. To ascertain who owns a parcel of real property, we look to possession and to the chain of record title. We can rely on the fact that the parcel is unique in assessing possession and can resolve conflicts in the paper title chain with reference to temporally-based priorities.<sup>40</sup> A parcel of intellectual property, however, is neither tangible nor unique. Possession and temporal priority are therefore less than helpful concepts. How then is the law to determine who owns an intellectual property and what that property comprises? Different regimes of intellectual property approach this problem in different ways.

The patent system recognizes property rights only when the claimant can prove the analogues of uniqueness and temporal priority. The inventor must demonstrate that the invention is new<sup>41</sup> and that the inventor was the first to create it.<sup>42</sup> If the claimant cannot meet this burden of proof, no patent will issue. The inventor must also specify the scope of the rights that she claims in the invention and demonstrate that she is entitled to them.<sup>43</sup>

The trademark system takes a different approach. The trademark claimant proves ownership of a mark by proving that she has actually used it in trade and that the public has come to recognize that mark as her

---

<sup>39</sup> See *id.* at 1378-84. Gordon concludes that the copyright statute provides adequate substitute boundaries in its requirement that a work be fixed in tangible form in order to receive copyright protection and in the limits it places on the subject matter it protects and the rights it extends. See *id.* I am far less sanguine about the adequacy of the doctrines Gordon relies on as substitute boundaries. See *infra* notes 223-54 and accompanying text. The substitute boundaries Gordon identifies are useful in determining whether property rights are claimed in a particular work, but they are of little use in sorting out competing claims to that work's contents.

<sup>40</sup> See generally R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* 711-834 (1984).

<sup>41</sup> See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1 (1966); Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 *YALE L.J.* 177, 185-86 (1987); Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 306-07 (1988).

<sup>42</sup> See Eisenberg, *supra* note 41, at 214-16. The patent statute contains an exception permitting an inventor to obtain a patent on the invention notwithstanding its prior invention by someone else who suppressed or concealed it. See 35 U.S.C. § 102(g) (1988). Normally, however, only the first inventor of an invention will be entitled to a patent.

<sup>43</sup> See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); Adelman & Francione, *The Doctrine of Equivalents in Patent Law: Questions that Pennwalt Did Not Answer*, 137 *U. PA. L. REV.* 673, 704-05 (1989); Eisenberg, *supra* note 41, at 207-16.

signature.<sup>44</sup> The property rights she gains from such a showing are limited to the exclusive use of the mark in circumstances in which the public is likely to perceive it as emanating from her.<sup>45</sup> Thus, ownership of a trademark gives rise to what is, in essence, a homonym. The trademark owner has the exclusive right to use the mark in contexts in which it will be understood in its trademark sense, but has no exclusive rights to the use of the word in other contexts. For example, Proctor & Gamble's exclusive rights in the trademark Tide®, in connection with laundry detergent, do not extend to the use of the word "tide" referring to oceans. Although the common meaning of the word "tide" may well have influenced Proctor and Gamble's choice of it for a detergent mark, Proctor & Gamble's use of Tide®, in connection with laundry detergents, has, in effect, created a homonym with a very different meaning.<sup>46</sup>

Thus, the patent system imposes a real property-like set of uniqueness and temporal priority requirements to determine the ownership and set the boundaries of a patent grant. The trademark system relies on actual use in trade as an analogue to possession to determine ownership, and it sets the boundaries of the exclusive rights to correspond with the public's perception of the meaning of a mark.<sup>47</sup>

What is copyright's analogue to these doctrines? Surprisingly, the system demands no comparable analysis or evaluation until actual litigation

---

<sup>44</sup> The owner of a mark makes this showing either to the Patent and Trademark Office upon registration or in court if she claims rights in an unregistered mark. *See, e.g.*, *California Cedar Prods. Co. v. Pine Mountain Corp.*, 724 F.2d 827 (9th Cir. 1984); *Blue Bell, Inc. v. Farah Mfg. Co.*, 508 F.2d 1260 (5th Cir. 1975). Although the trademark statute, as amended in 1988, permits the claimant of a trademark to file a registration application before actually using the mark in trade, *see* 15 U.S.C. § 1051(b) (1988), the claimant must demonstrate actual use before the registration will issue. *See* 15 U.S.C. § 1051(d).

<sup>45</sup> *See, e.g.*, *Lindy Pen Co. v. Bic Pen Corp.*, 725 F.2d 1240 (9th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

<sup>46</sup> The related state law doctrine of trade secrecy, *see generally* Eisenberg, *supra* note 41, at 190-95, uses a model akin to personal property. The law requires the owner of a trade secret to maintain a degree of actual secrecy in the nature of possession and to assert control over disclosure of the secret to others in the nature of a bailment relationship. Should an identical secret arise from incidents independent of the relationship, as with reverse engineering, its use is not actionable, because the owner of the trade secret owns the secret itself but not its content. *See* Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U.L. REV. 365 (1989).

<sup>47</sup> For a discussion of the relevance of temporal priority in the trademark context, *see* cases cited *supra* note 44. *See also* B. PATTISHALL & D. HILLIARD, TRADEMARKS 40-42, 246-61 (1987).

occurs, and there is remarkably little analysis even during litigation.<sup>48</sup> Copyright vests automatically in your shopping lists, your vacation snapshots, your home movies, and your telephone message slips.<sup>49</sup> There is nothing that you need to prove in order to ensure that your copyright endures until fifty years after your death. To provide the illusion of boundaries confining your property rights, we invoke a copyright postulate: You own only such aspects of your writings as you added, or only what is original with you.<sup>50</sup> Put another way, you own only those portions that you did not copy from someone else.<sup>51</sup>

This concept of originality is a keystone of copyright law.<sup>52</sup> A work is ineligible for copyright protection except to the extent that it reflects original authorship.<sup>53</sup> Authorship is a term used to describe the requirement of a non-trivial amount of creative expression;<sup>54</sup> originality requires that the expression "owe its origin" to the author<sup>55</sup> rather than be copied from another source.<sup>56</sup> Where a work of authorship is based on preexisting sources, copyright will protect only the portions of it that are original.<sup>57</sup>

<sup>48</sup> See Adelman & Francione, *supra* note 43, at 675-76 & n.7, 705-06.

<sup>49</sup> 17 U.S.C. § 201 (1988); see Lange, *supra* note 7, at 157; see also Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 UCLA L. REV. 1070, 1079-80 (1977). Before January 1, 1978, the law required compliance with statutory formalities as a condition of federal copyright protection. See generally A. LATMAN, *THE COPYRIGHT LAW* 110-141 (5th ed. 1979).

<sup>50</sup> See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); 1 P. GOLDSTEIN, *COPYRIGHT* § 2.2.1, at 62 (1989).

<sup>51</sup> See, e.g., 1 P. GOLDSTEIN, *supra* note 50, § 2.2.1, at 62-67; 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.01[A]; W. PATRY, *LATMAN'S THE COPYRIGHT LAW* 22-23 (6th ed. 1986); Ras-kind, *The Continuing Process of Refining and Adapting Copyright Principles*, 31 GERMAN Y.B. INT'L L. 478, 485 (1988).

<sup>52</sup> See, e.g., 1 P. GOLDSTEIN, *supra* note 50, § 1.2.2.3; Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457 (1951).

<sup>53</sup> 17 U.S.C. § 102(a) (1988); see, e.g., *John Mueller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986).

<sup>54</sup> See *Atari Games Corp. v. Oman*, 693 F. Supp. 1204 (D.D.C. 1988), *rev'd on other grounds*, 888 F.2d 878 (D.C. Cir. 1989); accord, e.g., *John Mueller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986).

<sup>55</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

<sup>56</sup> See, e.g., 1 P. GOLDSTEIN, *supra* note 50, § 1.2.2.3, at 14-15.

<sup>57</sup> 17 U.S.C. § 103(b) (1988). Indeed, the common wisdom reflected in the statute, its legislative history, and dictum in the cases is that any portion of such a work that infringes the copyrights in preexisting works may not be copyrighted, even if it incorporates distinguishable variations or improvements. 17 U.S.C. § 103(a); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 57-58 (1976); see, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940). But see *infra* notes 233-40 and accompanying text.

Thus, originality determines the boundaries of the copyright. Its mirror image defines the scope of copyright infringement since the statute protects the author only from another's copying, or use, of the original portion of her work and does not prohibit the independent (and thus original) creation of other similar works.<sup>58</sup>

The principle of limiting copyright protection to only those aspects of a work that are original with its author, while remarkably easy to state, proves to be impossible to apply.<sup>59</sup> We lack the capacity to ascertain the sources of individuals' inspirations. Thus, the boundaries of copyright are inevitably indeterminate. To mitigate the mischief this could cause, we rely on the public domain.

The concept of the public domain is another import from the realm of real property.<sup>60</sup> In the intellectual property context, the term describes a true commons<sup>61</sup> comprising elements of intellectual property that are ineligible for private ownership.<sup>62</sup> The contents of the public domain may be mined by any member of the public.<sup>63</sup>

The lay understanding of the public domain in the copyright context is that it contains works free from copyright.<sup>64</sup> Works created before the enactment of copyright statutes, such as Shakespeare's *Macbeth* or

---

<sup>58</sup> See, e.g., Landes & Posner, *supra* note 7, at 344-45.

<sup>59</sup> See *infra* notes 223-56 and accompanying text.

<sup>60</sup> The term public domain gained widespread use in the late nineteenth century when the Berne Convention adopted the term *domaine public* from the French. In the U.S., we had already been using the phrase "public domain" (apparently derived from the British Royal demesne) to describe lands owned by the federal government intended for sale, lease, or grant to members of the public.

<sup>61</sup> See Hughes, *supra* note 41, at 315-25. See generally Butler, *The Commons Concept: An Historical Concept with Modern Relevance*, 23 WM. & MARY L. REV. 835 (1982); Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

<sup>62</sup> See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). The concept of a vigorous public domain is well recognized as central to the patent law scheme, and the Supreme Court has repeatedly insisted that material that the patent system leaves in the public domain belongs to the public and may not be withdrawn. See *id.* The role of the public domain in the copyright system is less widely acknowledged. See *infra* notes 189-222 and accompanying text.

<sup>63</sup> The public domain in land, in contrast, is no longer a commons. The public domain is, rather, such unreserved land as the federal government holds in fee on the public's behalf. The government administers this land as if it were private property, and no member of the public is entitled to enter the public domain without the federal government's permission. See generally G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* xix-xxxii, 1-17 (1981).

<sup>64</sup> See, e.g., WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1836 (1986).

Pachabel's *Canon*, are available for fourth grade classes across the nation to use for school assemblies without permission from any publisher or payment of any royalties. Another class of old works in the public domain are works once subject to copyright, but created so long ago that the copyright has since expired, such as Mark Twain's *Huckleberry Finn*.<sup>65</sup> An even larger class of uncopyrighted works in this country entered the public domain because they were ineligible for U.S. copyright or failed to comply with a formal prerequisite for securing it. The United States' first copyright statute expressly thrust all published works by foreign nationals into the public domain.<sup>66</sup> That policy continued for the next century, until it was grudgingly replaced with an extension of copyright to foreign works conditioned upon compliance with United States procedures.<sup>67</sup> Both domestic and foreign works fell into the public domain through inadequate compliance with statutory formalities.<sup>68</sup> Although this second class of works became less significant when Congress eliminated most formal prerequisites and international distinctions in 1988,<sup>69</sup> it represents a massive body of public domain works.

But the class of works not subject to copyright is, in some senses, the least significant portion of the public domain. The most important part of the public domain is a part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect. Judge Learned Hand discussed this facet of the public domain in connection with an infringement suit involving a play entitled *Abie's Irish Rose*:

We assume that the plaintiff's play is altogether original, even to an extent that in fact it is hard to believe. We assume further that, so

---

<sup>65</sup> Samuel Clemens registered the copyright in *Huckleberry Finn* in 1884 under the 1831 copyright statute for a term of 28 years. Clemens died in 1910, and in 1912, his daughter Clara Gabrilowitsch renewed the copyright in *Huckleberry Finn* for an additional 28 years. The novel entered the public domain in 1940.

<sup>66</sup> See Act of May 31, 1790, ch. 15, 1 Stat. 124.

<sup>67</sup> See Act of March 3, 1891, ch. 565, 26 Stat. 1106.

<sup>68</sup> See *supra* note 49. J.R.R. Tolkien's *Lord of the Rings* trilogy was but one of many casualties. See J. TOLKIN, *THE FELLOWSHIP OF THE RING* xii-xiii (1965) (author's foreword to authorized paperback edition).

<sup>69</sup> The Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988), removed most of the statutory formalities, including the requirement of copyright notice for works of domestic origin, and eliminated even the registration requirement for works originating in foreign signatories to the Berne Convention. See generally Ginsburg & Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1 (1988).

far as it has been anticipated by earlier plays of which she knew nothing, that fact is immaterial. Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain.<sup>70</sup>

The concept that portions of works protected by copyright are owned by no one and are available for any member of the public to use is such a fundamental one that it receives attention only when something seems to have gone awry.<sup>71</sup> Although the public domain is implicit in all commentary on intellectual property, it rarely takes center stage. Most of the writing on the public domain focuses on other issues: Should the duration of copyright be extended?<sup>72</sup> Should we recognize new species of intellectual property rights?<sup>73</sup> Should federal intellectual property law cut a broad preemptive swathe or a narrow one?<sup>74</sup> Copyright commentary emphasizes that which is protected more than it discusses that which is not. But a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all.

## II. HISTORICAL BACKGROUND

Ever since the first U.S. patent statute, the patent system appears to have incorporated a strong vision of the divide between patentable inven-

---

<sup>70</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930).

<sup>71</sup> See, e.g., Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986); Karjala, *Copyright, Computer Software, and the New Protectionism*, 28 JURIMETRICS J., Fall 1987, at 33; Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989); Reichman, *Computer Programs as Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research*, 42 VAND. L. REV. 639, 696-97 (1989); Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989).

<sup>72</sup> See, e.g., Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 323-29 (1970); Cohen, *Duration*, 24 UCLA L. REV. 1180 (1977); Krasilovsky, *supra* note 13.

<sup>73</sup> See, e.g., Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579 (1985); Lange, *supra* note 7.

<sup>74</sup> See, e.g., Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 579; Brown, *supra* note 49; Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107 (1977).

tions and technology in the public domain.<sup>75</sup> The copyright system, in contrast, has boasted no analogous overarching scheme. Instead, both the scope of copyrightable subject matter and the outlines of the public domain developed gradually by accretion. The first U.S. copyright statute made copyright available for "books"<sup>76</sup> but did not spell out what portions of such books might be subject to copyright protection. When copyright owners brought lawsuits asserting broad claims of ownership, the courts took on the task of defining the nature of the rights in the copyright bundle. In so doing, they drew the contours of the public domain bit by bit. This section of the article will trace this historical development in order to begin to develop the reasons why a public domain is essential to the enterprise of authorship and to establish a common ground for further analysis.

The idea that a statutory copyright carries with it a dedication to the public of aspects of or rights in the copyrighted work emerged in the case law of the mid-nineteenth century as a matter of statutory construction. Early copyright statutes granted limited rights in limited classes of works for a term of short duration.<sup>77</sup> Judicial opinions construing these statutes, and the English law on which they were based, concluded that in order to give effect to the limited statutory term and the "Limited Times" language of the Copyright Clause,<sup>78</sup> statutory copyright must extinguish common law literary rights (which authors and publishers had argued existed as natural rights in perpetuity).<sup>79</sup> The courts reasoned that since Congress had expressed statutory copyright in terms of specific rights, any other literary rights, whether or not they had once been protected at common law, must pass into the public domain upon the vesting of statutory copyright.<sup>80</sup> Publication was the dividing line: Once a work was pub-

---

<sup>75</sup> See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

<sup>76</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124.

<sup>77</sup> The first U.S. copyright statute, for example, granted authors of maps, charts, or books the rights to "print, reprint, publish or vend" for a 14 year term that could be renewed for a further 14 years. Act of May 31, 1790, ch. 15, 1 Stat. 124. See generally L. PATTERSON, *supra* note 13, at 180-221; Patterson, *supra* note 13, at 33-48.

<sup>78</sup> See *supra* note 28.

<sup>79</sup> See *Wheaton v. Peters*, 33 U.S. 223, 8 Pet. 591 (1834); cf. *Donaldsons v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774). See generally L. PATTERSON, *supra* note 22, at 203-12; Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983).

<sup>80</sup> See, e.g., *Holmes v. Hurst*, 174 U.S. 82 (1899); *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514); *Story v. Holcombe*, 23 F. Cas. 171 (C.C.D. Ohio 1847) (No. 13,497).

lished, statutory copyright became available. If the author published her work but failed to avail herself of statutory procedures, the entire work entered the public domain. If she complied with the copyright statute, she gained statutory rights, but any other rights in her work became part of the public domain.

In the 1850s, Harriet Beecher Stowe published *Uncle Tom's Cabin: or Life among the Lowly* and secured statutory copyright under the Copyright Act of 1831.<sup>81</sup> This statute gave authors of books, maps, charts, musical compositions, prints, cuts, or engravings the "sole right and liberty of printing, reprinting, publishing, and vending" their works.<sup>82</sup> Stowe then commissioned a German translation of *Uncle Tom's Cabin* so that she could market her book in Pennsylvania's German-speaking community and secured a copyright in the translation. When a competing, unauthorized, German translation appeared in a Philadelphia German-language newspaper, Stowe sued to enjoin its further publication.<sup>83</sup> The court held that an unauthorized translation did not infringe on Stowe's statutory rights:

By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much publici juris as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, play-rights and poetasters. They are no longer her own — those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished. All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it, and those only can be called infringers of her rights or pirates of her property, who are guilty of printing, publishing, importing or vending without her license, "copies of her book." A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.<sup>84</sup>

---

<sup>81</sup> Act of Feb 3, 1831, ch. 16, 4 Stat. 436.

<sup>82</sup> *Id.* at § 1. The rights subsisted for a term of 28 years, renewable for a further 14-year term. *Id.* at §§ 1, 2.

<sup>83</sup> *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).

<sup>84</sup> *Id.* at 208 (footnotes omitted).



In 1870, Congress expanded copyright to permit authors to "reserve the right to dramatize or to translate their own works."<sup>85</sup> The analysis of the *Stowe* case, however, outlived its holding on the narrow issue of whether translations infringed. Courts interpreted the scope of the copyright grant narrowly and continued to hold that what Congress did not grant to the author became common property upon publication of the work containing it.<sup>86</sup>

In 1879, the United States Supreme Court articulated this principle in more general terms in *Baker v. Selden*.<sup>87</sup> The plaintiff in *Baker v. Selden* asserted copyright claims in a series of books about bookkeeping and in the bookkeeping system that they described.<sup>88</sup> Plaintiff Selden accused defendant Baker of copying the Selden bookkeeping system and pirating the bookkeeping forms published in Selden's books.<sup>89</sup> The Court held that the copyrights in the books neither conferred rights in the bookkeeping system itself, nor protected the forms required to use the system. Both system and forms belonged to the public:

---

<sup>85</sup> Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212. In the intervening years, Congress had added dramatic compositions and photographs to the list of copyrightable works and established an exclusive right of public performance for dramatic compositions. See Act of Aug. 18, 1856, ch. 169, 11 Stat. 138; Act of March 3, 1865, ch. 126, 13 Stat. 540. The 1870 statute added paintings, drawings, prints, statues, and models to the list of protectible works. Composers of musical compositions did not acquire an exclusive right of public performance until 1897. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

<sup>86</sup> See, e.g., *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908); *Holmes v. Hurst*, 174 U.S. 82 (1899); *Corcoran v. Montgomery Ward & Co.*, 121 F.2d 572 (9th Cir. 1941); *Kreymborg v. Durante*, 21 U.S.P.Q. (BNA) 557 (S.D.N.Y. 1934); *Fitch v. Young*, 230 F. 743 (S.D.N.Y. 1911).

<sup>87</sup> 101 U.S. 99 (1879).

<sup>88</sup> Charles Selden was a Cincinnati accountant who devised a bookkeeping method chiefly valuable for condensing numerous columns of numbers onto only two forms. Selden wrote, published, and copyrighted five books describing his bookkeeping system; each of the books contained copies of the ruled forms Selden had developed. With his copyrights secured, Selden engaged a salesman to travel through Ohio and Indiana and attempt to sell the Selden bookkeeping system to midwestern accountants. According to the testimony given at trial, the salesman gave his sales pitch at the Xenia, Ohio, office of one William C. Baker, the auditor for Green County, and left one of Selden's books for Baker's perusal. Baker allegedly recommended that Green County switch to the Selden system, but the county commissioners balked at paying Selden's price. The following year, Baker apparently developed his own variant of the Selden system and designed his own variant of the Selden condensed ledger forms. After successfully introducing his own forms to Green County, Baker achieved their adoption by county and state government auditors throughout Ohio. Selden discovered Baker's activities but died before bringing suit. His widow sued Baker the following year. See Transcript of Records at 1-19, *Baker v. Selden*, 101 U.S. 99 (1879) (No. 99-184).

<sup>89</sup> Baker's forms were not identical to Selden's, but they adopted the same essential strategy. See Transcript of Records, *supra* note 88, at 16.

The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.<sup>90</sup>

*Baker v. Selden* spawned several overlapping lines of authority on what aspects of a copyrighted work a copyright will not protect. The most straightforward application of *Baker v. Selden* denies copyright to blank forms.<sup>91</sup> A second line of cases denies copyright protection to utilitarian articles.<sup>92</sup> The third, most fundamental line of authority prohibits copyright protection for ideas, theories, processes, or systems.<sup>93</sup> The fourth outgrowth of *Baker v. Selden* is known as the merger doctrine.<sup>94</sup> Where the unprotectible ideas in a work are inseparable from the work's expression, copyright may not prohibit the use of expression necessary to convey the ideas.<sup>95</sup>

In the twentieth century, Congress extended the scope of copyright enormously by granting more expansive rights in an increasingly inclusive array of works.<sup>96</sup> Most of what *Baker v. Selden* and later cases assigned

<sup>90</sup> *Baker*, 101 U.S. at 103.

<sup>91</sup> See, e.g., *M.M. Business Forms Corp. v. Uarco, Inc.*, 472 F.2d 1137, 1139 (6th Cir. 1973); *Bibbero Sys. v. Colwell Sys., Inc.*, 1988 Copyright L. Dec. (CCH) ¶ 26,270 (N.D. Cal. 1988); *Aldrich v. Remington Rand, Inc.*, 52 F. Supp. 732 (N.D. Tex. 1942). But see *Norton Printing Co. v. Augustana Hosp.*, 155 U.S.P.Q. (BNA) 133 (N.D. Ill. 1967).

<sup>92</sup> See, e.g., *Amberg File & Index Co. v. Shea Smith & Co.*, 82 F. 314 (7th Cir. 1897); *Clair v. Philadelphia Storage Battery Co.*, 43 F. Supp. 286 (E.D. Pa. 1941); *Serrana v. Jefferson*, 33 F. 347 (C.C.S.D.N.Y. 1888). But see *Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984).

<sup>93</sup> See, e.g., *Affiliated Enters. v. Gruber*, 86 F.2d 958 (1st Cir. 1936); *Stone & McCarrick, Inc. v. Dugan Piano Co.*, 210 F. 399 (E.D. La. 1914); *Eichel v. Marcin*, 241 F. 404, 411 (S.D.N.Y. 1913). But see *Whelan Assocs. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987).

<sup>94</sup> See, e.g., *W. PATRY*, *supra* note 51, at 32-34.

<sup>95</sup> See, e.g., *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971); *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir.), cert. denied, 358 U.S. 816 (1958); see also *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

<sup>96</sup> See *Litman, Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

to the public domain has nonetheless remained unprotected. Some commentators have attributed this to the innate conservatism of courts and have suggested that *Baker v. Selden* and its progeny be reinterpreted as obsolete constructions of superseded statutes.<sup>97</sup> Others have insisted that Congress relied on the limitations derived from *Baker v. Selden* in choosing to extend copyright's boundaries.<sup>98</sup> In either case,<sup>99</sup> the doctrines that evolved from *Baker v. Selden* have ascended to the level of copyright axioms.<sup>100</sup>

Like most legal axioms, the doctrines derived from *Baker v. Selden* have never been applied with consistency. Courts have denied protection in one case, concluding that a defendant appropriated only the plaintiff's ideas, and found infringement in a seemingly indistinguishable case.<sup>101</sup> Courts have held one work to be fatally utilitarian and then turned around and protected another that seems equally utilitarian.<sup>102</sup> They have refused to enjoin the copying of one blank form while imposing liability for the reproduction of another, equally blank form.<sup>103</sup> The case law does not supply many reliable indicia describing what aspects of a copyrighted work are proprietary and what aspects are common property. Trends in

---

<sup>97</sup> See 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.18[A]-[D]; Goldstein, *supra* note 7, at 228-32. Professor Goldstein's more recent work appears to retreat from this view. See 1 P. GOLDSTEIN, *supra* note 50, at 77-78.

<sup>98</sup> See Patterson & Joyce, *supra* note 71, at 767-69; Reichman, *supra* note 71, at 693 n.288; Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 205-07 (1954).

<sup>99</sup> Analysis of the legislative history accompanying the 1909 and 1976 copyright statutes indicates that the Register of Copyrights and the private parties who negotiated among themselves to arrive at the language of the bills that Congress enacted paid significant attention to these court-crafted limitations although the members of Congress themselves paid little attention to such details. See Litman, *supra* note 96, at 334-37.

<sup>100</sup> See, e.g., Brinson, *Copyrighted Software: Separating the Protected Expression from Unprotected Ideas, A Starting Point*, 29 B.C.L. REV. 803, 811 (1988); Goldstein, *supra* note 7, at 228.

<sup>101</sup> Compare, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930), with *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940).

<sup>102</sup> Compare, e.g., *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985) with, e.g., *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980). See generally Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 736-37 (1983).

<sup>103</sup> Compare, e.g., *Januz Mktg. Communications, Inc. v. Doubleday & Co.*, 569 F. Supp. 76 (S.D.N.Y. 1982), and *Carlisle v. Colusa County*, 57 F. 979 (C.C.N.D. Cal. 1893), with, e.g., *Harcourt Brace & World, Inc. v. Graphic Controls Corp.*, 329 F. Supp. 517 (S.D.N.Y. 1971) and *Brightley v. Littleton*, 37 F. 103 (C.C.E.D.P.A. 1888). See generally Gorman, *supra* note 13, at 580-82.

lines of cases, however, shed some light on the strains to which courts were responding when they consigned particular sorts of material to the public domain.

In the wake of the Copyright Act of 1909,<sup>104</sup> courts developed rules for particular classes of works and determined infringement according to the class of the works in dispute. Three lines of cases, which I will term the systems cases, the motion picture cases, and the directory cases, reveal three different approaches to the public domain.

### A. *The Systems Cases*

The line of cases denying protection to systems followed a common pattern, seen earlier in *Baker v. Selden*. In these cases, plaintiff had secured a copyright in a book, lecture, or chart explaining a system or procedure and sought to parlay the copyright into a monopoly on the use of the system or procedure.<sup>105</sup> Courts consistently held that publication of the work describing the system dedicated the system itself to the public.<sup>106</sup> In order to secure protection of a way of doing things, the courts explained, an author must seek protection under the patent laws.<sup>107</sup> In *Aldrich v. Remington Rand, Inc.*,<sup>108</sup> for example, the author of a manual on municipal tax assessment and collection sued the City of Fort Worth for adopt-

---

<sup>104</sup> Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075-1088 (repealed 1978).

<sup>105</sup> See, e.g., *Dorsey v. Old Surety Life Ins. Co.*, 98 F.2d 872 (10th Cir. 1939) (family group insurance policies); *Selzer v. Corem*, 107 F.2d 75 (7th Cir. 1939) (rules for roller derby races); *Affiliated Enters. v. Gruber*, 86 F.2d 958 (1st Cir. 1936) (promotional lotteries in motion picture theaters); *Brief English Sys. v. Owen*, 48 F.2d 555 (2d Cir. 1931) (shorthand system using Roman characters); *Chautauqua School of Nursing v. National School of Nursing*, 238 F. 151 (2d Cir. 1916) (illustrated twelve-step instruction in hypodermic injections); *Aldrich v. Remington Rand, Inc.*, 52 F. Supp. 732 (N.D. Tex. 1942) (tax bookkeeping system); *Crume v. Pacific Mut. Life Ins. Co.*, 55 U.S.P.Q. (BNA) 267 (N.D. Ill. 1942) (reorganization of insurance company), *aff'd*, 140 F.2d 182 (7th Cir. 1944); *Muller v. Triborough Bridge Auth.*, 43 F. Supp. 298 (S.D.N.Y. 1942) (traffic separation system for bridge on-ramps); *Long v. Jordan*, 29 F. Supp. 287 (N.D. Cal. 1939) (pension system); *Stone & McCarrick, Inc. v. Dugan Piano Co.*, 210 F. 399 (E.D. La. 1914) (piano promotion), *aff'd*, 220 F. 837 (5th Cir. 1915).

<sup>106</sup> See, e.g., *Affiliated Enters. v. Gruber*, 86 F.2d 958 (1st Cir. 1936). *But see Selzer v. Corem*, 26 F. Supp. 892 (N.D. Ind.) (conducting roller derby would be unauthorized dramatization of plaintiff's book describing roller derby rules), *rev'd*, 107 F.2d 75 (7th Cir. 1939).

<sup>107</sup> See, e.g., *Brief English Sys. v. Owen*, 48 F.2d 555 (2d Cir. 1931); *Seltzer v. Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938).

<sup>108</sup> 52 F. Supp. 732 (N.D. Tex. 1942).

ing the system described in his manual and the forms he had devised to illustrate the system. The court dismissed the plaintiff's suit with the following observation:

The basic distinction between rights under patents and rights under copyrights must be constantly kept in mind, one being that the public is not free to use the invention described in a patent, but it is privileged to use whatever information is imparted in a copyrighted book about any system, art or manufacture described in it; furthermore, that such use is the consideration the public receives for the grant of copyright.<sup>109</sup>

The systems cases reflect the notion that the public domain exacts a toll as the price for a statutory copyright and that courts will enforce the public's claim to common property even when the ideas or systems reflected in works are ingenious.

### B. *The Film Cases*

Early cases were protective of the proprietary interests that authors and producers claimed in dramatic material.<sup>110</sup> The growth of the motion picture industry, however, deluged the courts with claims of infringement.<sup>111</sup>

<sup>109</sup> *Id.* at 734.

<sup>110</sup> *See, e.g.*, *Chappell & Co. v. Fields*, 210 F. 864 (2d Cir. 1914); *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

<sup>111</sup> *See Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911); *Barry v. Hughes*, 103 F.2d 427 (2d Cir. 1939); *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939); *Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F.2d 850 (9th Cir. 1938); *London v. Biograph Co.*, 231 F. 696 (2d Cir. 1916); *Kustoff v. Chaplin*, 32 F. Supp. 772 (S.D. Cal. 1940), *aff'd*, 120 F.2d 551 (9th Cir. 1941); *Lynch v. Warner Bros. Pictures, Inc.*, 32 F. Supp. 575 (S.D.N.Y. 1940); *Rapp v. Harold Lloyd Corp.*, 33 F. Supp. 47 (S.D.N.Y. 1940); *Sheets v. Twentieth Century-Fox Film Corp.*, 33 F. Supp. 389 (D.D.C. 1940); *Clancy v. Metro-Goldwyn Pictures Corp.*, 37 U.S.P.Q. (BNA) 406 (S.D.N.Y. 1938); *Collins v. Metro-Goldwyn Pictures Corp.*, 25 F. Supp. 781 (S.D.N.Y. 1938), *rev'd*, 106 F.2d 83 (2d Cir. 1939); *Bein v. Warner Bros. Pictures, Inc.*, 35 U.S.P.Q. (BNA) 78 (S.D.N.Y. 1937), *aff'd*, 105 F.2d 969 (2d Cir. 1939); *Caruthers v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906 (S.D.N.Y. 1937); *Davies v. Columbia Pictures Corp.*, 20 F. Supp. 809 (S.D.N.Y. 1937); *Shipman v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 249 (S.D.N.Y. 1937), *aff'd*, 100 F.2d 533 (2d Cir. 1938); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935); *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896 (S.D.N.Y. 1935); *Patten v. Superior Talking Pictures, Inc.*, 8 F. Supp. 196 (S.D.N.Y. 1934); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 7 F. Supp. 837 (S.D.N.Y. 1934), *rev'd*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940); *Barbadillo v. Goldwyn*, 42 F.2d 881 (S.D. Cal. 1930); *Witwer v. Harold Lloyd Corp.*, 46 F.2d 792 (S.D. Cal. 1930), *rev'd*, 65 F.2d 1 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145

In the typical case, plaintiff was the author of a book, play, or story that had enjoyed only moderate success, and claimed that defendant's motion picture had been based on plaintiff's work.<sup>112</sup> Many of the claims were plausible,<sup>113</sup> and most were sincere.<sup>114</sup> Courts, however, manifested increasing reluctance to find infringement.

Some cases denied relief on the ground that the plot of the plaintiff's work was an old one and could be found in other works already in the public domain.<sup>115</sup> Courts, however, had difficulty articulating why the mere fact that a work incorporated a standard plot should mean that its copying was not actionable. Neither the language of the copyright statute nor the cases construing it seemed to impose a requirement that copyright should protect only that which was new in some absolute sense. Both the statute<sup>116</sup> and the case law<sup>117</sup> extended protection to modest recasting of old material. Motion picture defendants, nonetheless, introduced sundry examples of prior similar works into the record, but were rarely successful

(S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930); *Curwood v. Affiliated Distrib.*, 283 F. 223 (S.D.N.Y. 1922); *Stodart v. Mutual Film Co.*, 249 F. 507 (S.D.N.Y. 1917), *aff'd mem.*, 249 F. 513 (2d Cir. 1918); *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. 2d 556, 90 P.2d 371 (1939); *O'Neill v. General Film Co.*, 171 A.D. 460, 157 N.Y.S. 599 (Sup. Ct.), *modified*, 171 A.D. 854, 157 N.Y.S. 1028 (1916); *Tutelman v. Stokowski*, 44 U.S.P.Q. (BNA) 47 (Pa. Ct. C. P. 1939).

<sup>112</sup> See, e.g., *Witwer v. Harold Lloyd Corp.*, 46 F.2d 792 (S.D. Cal. 1930), *rev'd*, 65 F.2d 1 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933).

<sup>113</sup> See, e.g., *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896 (S.D.N.Y. 1935); *Witwer v. Harold Lloyd Corp.*, 46 F.2d 792 (S.D. Cal. 1930), *rev'd*, 65 F.2d 1 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933).

<sup>114</sup> See, e.g., *London v. Biograph Co.*, 231 F. 696 (2d Cir. 1916); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930).

<sup>115</sup> E.g., *London v. Biograph Co.*, 231 F. 696, 698 (2d Cir. 1916) ("The plot is highly dramatic and calculated to appeal powerfully to reader or spectator. But it is an old one; it appears in Chaucer's *Pardoner's Tale*."); see also *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 23 (9th Cir.), *rev'g on other grounds* 46 F.2d 792 (S.D. Cal. 1930), *cert. dismissed*, 296 U.S. 669 (1933); *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896 (S.D.N.Y. 1935); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930).

<sup>116</sup> Section 4 of the Copyright Act of 1909 extended copyright protection to "all the writings of an author." Copyright Act, ch. 320, 35 Stat. 1075, 1076 (1909). Section 5 included in its enumeration of copyrightable works "directories, gazetteers and other compilations" as well as "[r]eproductions of a work of art." *Id.* at 1076-77.

<sup>117</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); *Burrow Giles Lithographing Co. v. Saroni*, 111 U.S. 53 (1884); *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F.2d 35 (7th Cir.), *cert. denied*, 273 U.S. 738 (1926); *American Code Co. v. Rensinger*, 282 F. 824 (2d Cir. 1922).

in demonstrating that plaintiffs had in fact relied upon them.<sup>118</sup>

Courts might have permitted copying in situations in which the defendant studio could demonstrate that it had drawn its story from Chaucer rather than the plaintiff,<sup>119</sup> but in many cases the evidence that the motion picture producers had in fact relied on the plaintiff's work was compelling.<sup>120</sup> Furthermore, the alleged similarities between the accusing story and the accused motion picture typically went beyond a story's broad outlines and overall themes, encompassing similarities of setting, action, character, and detail that could not easily be attributed to old classics.<sup>121</sup>

Although courts might have wished to seek refuge in a standard that excused unintentional duplication, the principle that unintentional or subconscious copying gave rise to liability had been well settled for some time.<sup>122</sup> Moreover, in some cases the proof of conscious copying was persuasive. Courts, therefore, turned to the rationale that had enabled them to rule for defendants in the systems cases: They claimed plots, themes, titles, characters, ideas, and situations on behalf of the public domain.

In *Nichols v. Universal Pictures Corp.*,<sup>123</sup> for example, the plaintiff

---

<sup>118</sup> See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940); *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896 (S.D.N.Y. 1935); see also *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916) (plaintiff's song repeats chorus from *HMS Pinafore*, but there is no evidence that plaintiff ever heard *HMS Pinafore*).

<sup>119</sup> See *London v. Biograph Co.*, 231 F. 696, 698 (2d Cir. 1916).

<sup>120</sup> See, e.g., *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896 (S.D.N.Y. 1935); *Witwer v. Harold Lloyd Corp.*, 46 F.2d 792 (S.D. Cal. 1930), *rev'd*, 65 F.2d 1 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930). Other cases were decided on the assumption that any similarities were the result of copying, thereby permitting the court to enter judgment on the pleadings and avoid a full trial. See, e.g., *Caruthers v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906 (S.D.N.Y. 1937); *Shipman v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 249 (S.D.N.Y. 1937), *aff'd*, 100 F.2d 533 (2d Cir. 1938).

<sup>121</sup> See, e.g., *London v. Biograph Co.*, 231 F. 696 (2d Cir. 1916); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935); *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896 (S.D.N.Y. 1935); *Witwer v. Harold Lloyd Corp.*, 46 F.2d 792 (S.D. Cal. 1930), *rev'd*, 65 F.2d 1 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930).

<sup>122</sup> See, e.g., *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924); *Haas v. Leo Feist, Inc.*, 234 F. 105, 129 (S.D.N.Y. 1916). *But cf.* *Harold Lloyd Corp. v. Witwer*, 65 F. 2d 1, 17 (9th Cir.) (although unintentional copying is actionable, plaintiff's complaint alleges only deliberate copying), *cert. dismissed*, 296 U.S. 669 (1933).

<sup>123</sup> 34 F.2d 145 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930).

claimed that the film *The Cohens and the Kelleys* infringed her successful play *Abie's Irish Rose*. Both the play and the motion picture were romantic comedies about a Jewish family and an Irish Catholic family whose children had secretly married. Nichols presented evidence that Universal Pictures had tried to purchase the motion picture rights to *Abie's Irish Rose*, that Universal screenwriters had studied the play in preparing the movie scenario, and that Universal had advertised *The Cohens and the Kelleys* as an *Abie's Irish Rose* for the screen.<sup>124</sup> The trial court agreed that Universal had relied on Nichol's play in making its film, but held that it had taken only that which anyone was entitled to use.<sup>125</sup> On appeal, the Second Circuit expressly declined to base its affirmance on the theory that the plaintiff had harvested her plot from older sources in the public domain and could therefore not claim to own it. The court assumed that everything in the play owed its origin to Nichols, but held that the play's broad outlines and the ideas it expressed nonetheless were part of the public domain.<sup>126</sup>

Assimilating the broad outlines of a story's plot to the systems and ideas in the public domain, however, did not suffice to dispose of many claims. Plaintiffs commonly drew the courts' attention to a variety of similarities of a more detailed nature.<sup>127</sup> The courts excused many of those similarities on the grounds that they were trite,<sup>128</sup> stock,<sup>129</sup> common,<sup>130</sup> or cliché.<sup>131</sup> In the early 1940s, Judge Leon Yankwich, a literate francophile sitting on the federal district court for the Southern District of California, gave these sorts of details the name *scènes à faire*.<sup>132</sup> *Scènes à faire*, Judge

<sup>124</sup> *Id.* at 150.

<sup>125</sup> *Id.* at 148-50.

<sup>126</sup> *Nichols*, 45 F.2d at 122.

<sup>127</sup> *See, e.g.*, *London v. Biograph Co.*, 231 F. 696 (2d Cir. 1916); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935).

<sup>128</sup> *See, e.g.*, *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896 (S.D.N.Y. 1935).

<sup>129</sup> *See, e.g.*, *Nichols*, 34 F.2d 145.

<sup>130</sup> *See, e.g.*, *London v. Biograph Co.*, 231 F. 696 (2d Cir. 1916); *Caruthers v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906 (S.D.N.Y. 1937).

<sup>131</sup> *See, e.g.*, *Gropper v. Warner Bros. Pictures, Inc.*, 38 F. Supp. 329 (S.D.N.Y. 1941); *accord Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935).

<sup>132</sup> *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942):

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, associ-



Yankwich explained, "are the common stock of literary composition — 'cliches' — to which no one can claim literary ownership."<sup>133</sup>

Analyzed within this framework, most motion picture claims evaporated.<sup>134</sup> The defendant studio may have availed itself of plaintiff's ideas, themes, and general plot and may have expressed those ideas, themes, and plot through the same standard scenes and common details that plaintiff had used, but these aspects of plaintiff's work were public property.

What accounts for the courts' reluctance to resolve these plagiarism claims in plaintiffs' favor? Some courts were undoubtedly responding to their perceptions of economic realities. Even if Harold Lloyd had appropriated the plot for his film *The Freshman* from H.C. Witwer's magazine story, the film's million-dollar success owed more to Lloyd's performance than it did to Witwer's plot.<sup>135</sup> Similarly, the success of the film *Stowaway* had more to do with its star, Shirley Temple, than with the premise that Twentieth Century-Fox allegedly plagiarized from Joan Storm's play *Dancing Destiny*.<sup>136</sup> Beyond the courts' sensitivity to the financial equities in particular cases, however, there also appears to be an awareness of the limitations inherent in dramatic and film art forms. The motion pictures before the court and the stories that were claimed to inspire them were typical. If one motion picture infringed because it told a familiar story, other films not before the court were equally vulnerable.

---

ated with such a situation should force themselves upon the writer in developing the theme. Courts have held repeatedly that such similarities and incidental details necessary to the environment or setting of an action are not the material of which copyrightable originality consists.

See also *Bradbury v. Columbia Broadcasting Sys.*, 174 F. Supp. 733 (S.D. Cal. 1959), *rev'd*, 287 F.2d 478 (9th Cir.), *cert. dismissed*, 368 U.S. 801 (1961); *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270 (S.D. Cal. 1945). See generally Yankwich, *supra* note 52.

<sup>133</sup> *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 278 (S.D. Cal. 1945).

<sup>134</sup> See, e.g., *O'Rourke v. R.K.O. Radio Pictures, Inc.*, 44 F. Supp. 480 (D. Mass. 1942); *Groppe v. Warner Bros. Pictures, Inc.*, 38 F. Supp. 329 (S.D.N.Y. 1941). But see *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940); *Stonesifer v. Twentieth Century-Fox Film Co.*, 48 F. Supp. 196 (S.D. Cal. 1942), *aff'd*, 140 F.2d 579 (9th Cir. 1944).

<sup>135</sup> See *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933); *id.* at 46-47 (McCormick, J., dissenting).

<sup>136</sup> See *Dezendorf v. Twentieth Century-Fox Film Corp.*, 32 F. Supp. 359 (S.D. Cal. 1940), *aff'd*, 118 F.2d 561 (9th Cir. 1941).

### C. *The Directory Cases*

In the systems and motion picture cases, the solicitude of the courts for the creative process led them to assert public ownership of creative material. One might have expected such courts to be especially reluctant to protect facts under the rubric of copyright. Surprisingly, however, courts gave copyright protection to facts without seriously questioning the propriety of doing so.<sup>137</sup>

The uncopyrightability of facts themselves is well settled today,<sup>138</sup> but was far from certain early in the century. News was thought to be uncopyrightable,<sup>139</sup> but that proposition remained untested for many years because of the impracticality of daily registration.<sup>140</sup> Neither courts nor commentators generalized from the public domain status of news to any conclusion about whether other facts or information could be protected.<sup>141</sup> The question of the copyrightability of facts *qua* facts was not squarely raised before a U.S. court until the 1919 decision in *Myers v. Mail & Express Co.*<sup>142</sup> Judge Learned Hand's opinion in *Myers* concluded that facts recorded in a historical work were dedicated to the public and could be used freely by subsequent authors.<sup>143</sup> None of the authority on which

<sup>137</sup> See generally Lurvey, "Verifying" from Prior Directories — "Fair Use" or Theft? *Delicate Distinctions in the Protection of Copyrighted Compilations*, 13 BULL. COPYRIGHT SOC'Y U.S.A. 271, 282-89 (1967).

<sup>138</sup> See, e.g., 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.11[A]; Denicola, *supra* note 14, at 524-26; Francione, *supra* note 71, at 520-21, 551-75; Shipley & Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C.L. REV. 125 (1984).

<sup>139</sup> See *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797, 798 (7th Cir. 1921); *Davies v. Bowes*, 209 F. 53, 55-56 (S.D.N.Y. 1913), *aff'd on other grounds*, 219 F. 178 (2d Cir. 1915); R. BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW* 87-89 (1912).

<sup>140</sup> See *International News Serv. v. Associated Press*, 248 U.S. at 233.

<sup>141</sup> See, e.g., *American Trotting Register Ass'n v. Gocher*, 70 F. 237 (C.C.N.D. Ohio 1895); *List Publishing Co. v. Keller*, 30 F. 772 (C.C.S.D.N.Y. 1887); E. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 394-99 (1879); see also T. SCRUTTON, *THE LAW OF COPYRIGHT* 110-23 (4th ed. 1903) (British law).

<sup>142</sup> 36 C.O. Bull. 478 (S.D.N.Y. 1919). One earlier decision, *Kennerley v. Simonds*, 247 F. 822 (S.D.N.Y. 1917), presented the same question but was decided on other grounds. Defendant Simonds had written a history book and assigned the copyright to a publisher. Simonds subsequently wrote another history book on the same subject, and the publisher brought suit for copyright infringement. The court held for Simonds on the ground that in writing the second book he had consulted the same preexisting sources that he had used for his earlier book, rather than copying the book itself. See *id.* at 826.

<sup>143</sup> *Myers*, 36 C.O. Bull. at 478-79.

Hand relied, however, was squarely on point, and the *Myers* decision remained unreported until 1970.<sup>144</sup> Two years after *Myers*, in an opinion involving competing directories of jewelers' trademarks, Judge Hand repeated his conclusion that facts themselves are common property.<sup>145</sup> He suggested in dictum, however, that the author of a factual directory was not entitled to copy its information from a competing directory.<sup>146</sup> On appeal, the Second Circuit went further, resting its decision on the holding that the reproduction of information from a copyrighted directory was itself infringement.<sup>147</sup> The Ninth Circuit relied on the Second Circuit's analysis in ruling that the reproduction of information from a copyrighted telephone directory was infringement.<sup>148</sup> Other courts followed.<sup>149</sup>

The directory cases predicated protection of factual works on the labor involved in compiling facts.<sup>150</sup> A subsequent compiler was not permitted to rely on a copyrighted directory, although she was free to publish an identical collection of facts if she first obtained those facts through consultation of preexisting sources.<sup>151</sup> There was nothing innovative about these cases: A long line of British cases had protected factual compilations against competing second-comers,<sup>152</sup> and nineteenth-century American cases had followed their British counterparts.<sup>153</sup> What makes the directory cases noteworthy is their coexistence with cases holding facts to be unprotectible in other contexts. During the same period that courts took a protectionist view in directory cases, opinions considering historical fiction, drama, and film insisted that facts belonged in the public domain.<sup>154</sup>

<sup>144</sup> See 36 C.O. Bull. at iii.

<sup>145</sup> *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932, 935 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922).

<sup>146</sup> *Jewelers'*, 274 F. at 935.

<sup>147</sup> See *Jewelers'*, 281 F. at 92-95.

<sup>148</sup> See *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937).

<sup>149</sup> See, e.g., *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809 (7th Cir. 1942); *Sammons v. Larkin*, 38 F. Supp. 649 (D. Mass. 1940).

<sup>150</sup> See, e.g., *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 88 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922); see also *Denicola*, *supra* note 14, at 529 & n.64; Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. (forthcoming 1990).

<sup>151</sup> See, e.g., *Produce Reporter Co. v. Fruit Produce Rating Agency*, 1 F.2d 58 (N.D. Ill. 1924).

<sup>152</sup> See cases cited in *Lurvey*, *supra* note 137, at 273-76.

<sup>153</sup> See, e.g., *American Trotting Register Ass'n v. Gocher*, 70 F. 237 (C.C.N.D. Ohio 1895); *List Publishing Co. v. Keller*, 30 F. 772 (C.C.S.D.N.Y. 1887); cases cited in *Lurvey*, *supra* note 137, at 276-81.

<sup>154</sup> See, e.g., *Caruthers v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906 (S.D.N.Y. 1937);

While courts in the motion picture cases dissected similarities between works to determine whether the similarities involved copyrightable expression rather than unprotectible plot, theme, *scène à faire*, or fact,<sup>155</sup> the same courts in directory cases engaged in no comparable inquiry.<sup>156</sup> If plaintiff could prove that defendant had used plaintiff's directory as the source of its own, then plaintiff recovered for copyright infringement without regard to the copyrightability of the copied material.<sup>157</sup> Although these cases are still followed today,<sup>158</sup> the modern view is that their reasoning was aberrant.<sup>159</sup>

Courts and commentators have advanced a variety of theories to explain the paradox between protecting information in compilations of facts and insisting that facts are public property in connection with other works.<sup>160</sup> I will offer my own modest suggestions for reconciling these cases in a subsequent section of this article.<sup>161</sup> For now, it is enough to note that the three lines of cases turned to the refuge of the public domain in response to different sorts of pressure.

In the systems cases, authors sought to establish ownership of an entire way of doing things through the simple expedient of writing a book about it. Although the patent statute offered a rigorous procedure for claiming property rights in innovative solutions and proving the scope of one's entitlement, these authors sought to cripple their competitors while avoiding the rigors of the patent system. Courts responded by advancing the *quid pro quo* argument that the public exacts a toll in return for statutory

Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632 (S.D. Cal. 1935); Maddux v. Grey, 43 F.2d 441 (S.D. Cal. 1930). See generally Denicola, *supra* note 14, at 535-36.

<sup>155</sup> See, e.g., Caruthers v. R.K.O. Radio Pictures, Inc., 20 F. Supp. 906 (S.D.N.Y. 1937); Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632 (S.D. Cal. 1935).

<sup>156</sup> See, e.g., Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Produce Reporter Co. v. Fruit Produce Rating Agency, 1 F.2d 58 (N.D. Ill. 1924).

<sup>157</sup> See, e.g., Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937).

<sup>158</sup> See, e.g., United Tel. Co. v. Johnson Publishing Co., 855 F.2d 604 (8th Cir. 1988); National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982); Northwestern Bell Tel. Co. v. Bedco of Minn., Inc., 501 F. Supp. 299 (D. Minn. 1980).

<sup>159</sup> See, e.g., Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1369-70 (5th Cir. 1981); 1 M. NIMMER & D. NIMMER, *supra* note 2, § 3.04; W. PATRY, *supra* note 51, at 63-64; Gorman, *supra* note 13, at 573-76.

<sup>160</sup> See National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982); Denicola, *supra* note 14, at 527-35; Ginsburg, *supra* note 150; Gorman, *supra* note 13; Lurvey, *supra* note 137, at 286-300; Raskind, *supra* note 51, at 484-99.

<sup>161</sup> See *infra* notes 285-89 and accompanying text.

copyright. In the film cases, courts struggled with competing claims to exclusive ownership of themes and embellishments common to myriad fictional works. They replied by holding the familiar elements incapable of private appropriation. Finally, in the directory cases, authors claimed ownership in material they could not plausibly assert that they had originated, but that they had nonetheless expended significant labor in collecting. Courts granted protection to the labor involved.

The courts' strategy seems to have been a reactive one, and it yielded no blueprint of the public domain's outer limits and no overall rationale for its existence. There is, however, a common thread in these three lines of cases. Courts invoked the public domain when the breadth of plaintiffs' asserted property rights threatened, as a practical matter, to prevent many other authors from pursuing their craft. Courts thus seem to have recognized, at least implicitly, that copyright should promote the enterprise of authorship and that this goal may at times be inconsistent with protecting or rewarding individual authors.

#### D. Statutory Codification

By the late 1950s, when Congress began the revision process that culminated in the 1976 Copyright Act,<sup>162</sup> the outlines of the public domain in copyrighted works were reasonably clear. Some of the rules defining the public domain were incorporated into the 1976 statute;<sup>163</sup> other aspects were expressed in Copyright Office regulations.<sup>164</sup> Still more aspects appeared only in the case law.<sup>165</sup>

Copyright did not protect ideas, methods, systems,<sup>166</sup> facts,<sup>167</sup> utilitarian

<sup>162</sup> Pub. L. No. 94-533, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810 (1988)).

<sup>163</sup> See 17 U.S.C. § 102(b) (1988) (ideas, systems); 17 U.S.C. §§ 101, 113 (useful articles); 17 U.S.C. § 105 (works of the federal government).

<sup>164</sup> See, e.g., 37 C.F.R. § 202.1(a) (1989) (words and short phrases); 37 C.F.R. § 202.1(c) (blank forms).

<sup>165</sup> See, e.g., *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir.) (*scènes à faire*), *cert. denied*, 429 U.S. 980 (1976).

<sup>166</sup> See, e.g., *Gayle v. Gillis*, 167 F. Supp. 416 (D. Mass. 1958).

<sup>167</sup> See, e.g., *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688 (2d Cir. 1938); *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *Lake v. Columbia Broadcasting Sys.*, 140 F. Supp. 707 (S.D. Cal. 1956).

objects,<sup>168</sup> titles,<sup>169</sup> themes,<sup>170</sup> plots,<sup>171</sup> *scènes à faire*,<sup>172</sup> words, short phrases and idioms,<sup>173</sup> literary characters,<sup>174</sup> style,<sup>175</sup> or works of the federal government.<sup>176</sup> This hodgepodge of unprotectible matter was without overarching justification then, and it remains so today.

In the years since the enactment of the 1976 Copyright Act, litigation has put increasing pressure on the public domain. The 1976 Act's expansion of subject matter eligible for copyright protection has multiplied copyright cases and nurtured new claims to exclusive rights in the basic building blocks of a variety of different forms of expression.<sup>177</sup> The statute's protection of television broadcasts, for example, has led to litigation over how much of what we see on television can be claimed as property.<sup>178</sup> The extension of federal copyright protection to unpublished works has created disputes over what aspects of the content of unpublished works are proscribed to the researcher.<sup>179</sup> Copyright protection of computer software

<sup>168</sup> See, e.g., *Fulmer v. United States*, 103 F. Supp. 1021 (Ct. Cl. 1952).

<sup>169</sup> See, e.g., *Weissman v. Radio Corp. of America*, 80 F. Supp. 612 (S.D.N.Y. 1948); *Lone Ranger, Inc. v. Cox*, 39 F. Supp. 487 (W.D.S.C. 1941), *rev'd on other grounds*, 124 F.2d 650 (4th Cir. 1942); *Affiliated Enters. v. Rock-Ola Mfrs. Corp.*, 23 F. Supp. 3 (N.D. Ill. 1937); *Bronfield v. Paramount Pictures Corp.*, 200 N.Y. Misc. 883, 107 N.Y.S.2d 698 (N.Y. Sup. Ct. 1951).

<sup>170</sup> See, e.g., *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533 (2d Cir. 1938); *Warshawsky v. Carter*, 132 F. Supp. 758 (D.D.C. 1955); *Roe-Lawton v. Hal E. Roach Studios*, 18 F.2d 126 (S.D. Cal. 1927); *Ware v. Columbia Broadcasting Sys.*, 155 U.S.P.Q. (BNA) 413 (Cal. App. 1967).

<sup>171</sup> See, e.g., *Scott v. WKJG, Inc.*, 376 F.2d 467 (7th Cir.), *cert. denied*, 389 U.S. 832 (1967).

<sup>172</sup> See *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270 (S.D. Cal. 1945).

<sup>173</sup> See, e.g., *Morris v. Wilson*, 189 F. Supp. 565 (S.D.N.Y. 1960), *aff'd*, 295 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 1004 (1962).

<sup>174</sup> See, e.g., *Warner Bros. Pictures v. Columbia Broadcasting Sys.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955); *Lone Ranger, Inc. v. Cox*, 39 F. Supp. 487 (W.D.S.C. 1941), *rev'd on other grounds*, 124 F.2d 650 (4th Cir. 1942); *Burtis v. Universal Pictures Co.*, 40 Cal.2d 823, 256 P.2d 933 (1953).

<sup>175</sup> See, e.g., *Franklin Mint Corp. v. National Wildlife Art Exch.*, 575 F.2d 62 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978).

<sup>176</sup> See, e.g., *Scherr v. Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); B. RINGER & P. GITLIN, *COPYRIGHTS* 19 (1965).

<sup>177</sup> See, e.g., *Raskind*, *supra* note 51, at 479-80.

<sup>178</sup> See, e.g., *National Assoc. of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 378-80 (D.C. Cir. 1982) (football games); *id.* at 377 (order of programs in broadcast day); *Novak v. NBC*, 716 F. Supp. 745 (S.D.N.Y. 1989) (comedy sketches about Tarzan and Frankenstein); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887 (S.D.N.Y. 1988) (format of TV game show); *Chuck Blore & Don Richman, Inc. v. 20/20 Advertising Inc.*, 674 F. Supp. 671 (D. Minn. 1987) (style of commercial and use of particular actress).

<sup>179</sup> See, e.g., *New Era Publications Int'l v. Henry Holt & Co.*, 884 F.2d 659, 660-61 (2d Cir.

has generated lawsuits claiming that copyright provides exclusive rights to the "look and feel" of programs<sup>180</sup> or to the user interfaces they employ.<sup>181</sup>

Some courts have responded to the flood of litigation and to the breadth of asserted claims by expanding the boundaries of categories of public domain material. The Second and Ninth Circuits have extended the doctrine that facts are common property to encompass analysis of facts, theories about facts, and ordinary ways in which facts may be described.<sup>182</sup> Courts have revived the *scènes à faire* doctrine, invented in the context of motion picture infringement cases,<sup>183</sup> and applied it to a variety of new contexts.<sup>184</sup> Other courts, in contrast, have questioned the policies underlying the law's failure to recognize property rights in valuable categories of public domain material<sup>185</sup> or have interpreted the scope of such categories narrowly.<sup>186</sup>

1989) (Miner, J., concurring in denial of rehearing *en banc*); *id.* at 662-63 (Newman, J., dissenting); Lucas, *A Ruling that Hobbles Historians*, N.Y. Times, July 27, 1990, at A11, col. 2.

<sup>180</sup> See, e.g., *Apple Computer, Inc. v. Microsoft Corp.*, 717 F. Supp. 1428 (N.D. Cal. 1989); Samuelson & Glushko, *Comparing the Views of Lawyers and User Interface Designers on the Software Copyright "Look and Feel" Lawsuits*, 30 JURIMETRICS J., Fall 1989, at 121; *Taking the Stand: The Look-and-Feel Issue Examined*, PC MAG., May 26, 1987, at 155.

<sup>181</sup> See Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045, 1079-83 (1989); see also, e.g., *Telemarketing Resources v. Symantec Corp.*, 12 U.S.P.Q.2d (BNA) 1991 (N.D. Cal. 1989).

<sup>182</sup> See *Narell v. Freeman*, 10 U.S.P.Q.2d (BNA) 1596 (9th Cir. 1989); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir. 1984); *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Ginsburg, Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after Hoehling v. Universal City Studios*, 29 BULL. COPYRIGHT SOC'Y U.S.A. 647 (1982).

<sup>183</sup> See *supra* notes 127-33 and accompanying text. In the years between 1959, see *Bradbury v. Columbia Broadcasting Sys.*, 174 F. Supp. 733 (S.D. Cal. 1959), *rev'd*, 287 F.2d 478 (9th Cir.), *cert. dismissed*, 368 U.S. 801 (1961), and 1976, see *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976), the *scènes à faire* doctrine was cited by no court and appeared to be moribund.

<sup>184</sup> See, e.g., *Narell v. Freeman*, 10 U.S.P.Q.2d (BNA) 1596 (9th Cir. 1989) (historical non-fiction); *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204 (9th Cir. 1988) (computer games); *Durham Indus. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980) (dolls); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.) (same), *cert. denied*, 449 U.S. 841 (1980); *Hartman v. Hallmark Cards, Inc.*, 639 F. Supp. 816 (W.D. Mo. 1986) (greeting cards), *aff'd*, 833 F.2d 117 (8th Cir. 1987).

<sup>185</sup> See, e.g., *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982).

<sup>186</sup> See, e.g., *Whelan Assocs. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *E.F. Johnson Co. v. Uniden Corp. of America*, 623 F. Supp.

### III. THEORETICAL JUSTIFICATIONS

Copyright protection, once limited to maps, charts, and books,<sup>187</sup> now extends to an extraordinary variety of products that saturate our society. Copyright cases no longer can be classified within subject-matter lines, and courts and commentators have sought to articulate general principles dividing what copyright protects or should protect from what it does not or should not.<sup>188</sup>

Meanwhile, the term "public domain" has fallen out of fashion as a description of unprotectible aspects of copyrighted works. Courts and commentators speak instead of "uncopyrightable" or "nonprotectible" material.<sup>189</sup> The distinction is a minor one, but the new vocabulary obscures the positive rationale for denying copyright protection and, instead, draws attention to the negative rationales. As Congress has enacted statutes expanding the range of subject matter entitled to copyright,<sup>190</sup> the categories of material that copyright does not protect have struck many as increasingly anomalous.<sup>191</sup> Protectors of the public domain have found themselves on the defensive. When they have explained why it is that copyright should not protect ideas, facts, stock scenes, titles, or characters, they have attempted to explain what aspects of copyrightable works of authorship it is that ideas, facts, stock scenes, titles, or characters lack.<sup>192</sup> These arguments have in turn been vulnerable to attack.

1485, 1498 (D. Minn. 1985). See generally Karjala, *supra* note 71.

<sup>187</sup> See *supra* note 77.

<sup>188</sup> See, e.g., *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983); 1 P. GOLDSTEIN, *supra* note 50, § 2.3; OFFICE OF TECHNOLOGY ASSESSMENT, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* 59-94 (1986); Goldstein, *supra* note 7; Hughes, *supra* note 41; Landes & Posner, *supra* note 7.

<sup>189</sup> See, e.g., *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. 1981); A. LATMAN, *THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT* 29-45 (5th ed. 1979); 2 M. NIMMER & D. NIMMER, *supra* note 2, § 8.01[D]; Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1130-33 (1951).

<sup>190</sup> See generally A. LATMAN, R. GORMAN & J. GINSBURG, *supra* note 22, at 8-12, 31-32; Litman, *supra* note 96.

<sup>191</sup> See, e.g., 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.15 (typeface designs); *id.* § 2.16 (titles); Birmingham, *A Critical Analysis of the Infringement of Ideas*, 5 COPYRIGHT L. SYMP. (AS-CAP) 107, 125 (1954) (ideas); Fleischmann, *supra* note 16, at 15-16 (individual recorded musical notes); Hill, *supra* note 6, at 58-59 (facts); Note, *Copyright Infringement: An Argument for the Elimination of the Scènes à Faire Doctrine*, 5 COMM/ENT L.J. 147 (1982).

<sup>192</sup> See, e.g., 1 P. GOLDSTEIN, *supra* note 50, § 2.7.3; B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 45-46 (1967).



The debate over copyright in factual works furnishes one example of this phenomenon. Copyright does not protect facts, theories about facts, or the research that yields them, it is said, because facts are not original.<sup>193</sup> The late Professor Melville Nimmer described it this way:

The "discoverer" of a scientific fact as to the nature of the physical world, an historic fact, a contemporary news event, or any other "fact," may not claim to be the "author" of that fact. If anyone may claim authorship of facts, it must be the Supreme Author of us all. The discoverer merely finds and records. He may not claim that facts are "original" to him, although there may be originality and hence authorship in the manner of reporting, *i.e.*, the "expression" of the facts. Since copyright may only be conferred upon "authors," it follows that quite apart from their status as "ideas," discoveries as facts per se may not be the subject of copyright.<sup>194</sup>

Thus articulated, the argument invites its own rebuke. As Professor Jane Ginsburg has aptly demonstrated, such an analysis rests on what Ginsburg has dubbed the "Platonic fact precept."<sup>195</sup> The fallacy of the Platonic fact precept is its tenet that facts are already there, suspended in the ether for the hapless researcher to stumble upon.<sup>196</sup> Facts, however, do not exist independently of the lenses through which they are viewed. Those lenses may be theoretical, methodological, or perceptual; they may be colored by experience or bias or may be shaped by the scope of the researcher's inquiry.<sup>197</sup> Researchers seeking to unearth facts must sift through available evidence, design new avenues of inquiry, choose among myriad conflicting indicia, and supply interpretive paradigms to structure incoherent collections of minutia.<sup>198</sup> Researchers can thus be said to be composing their facts as they go along.<sup>199</sup> In this sense, facts are no more

---

<sup>193</sup> See, e.g., *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981); 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.11[A]; Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 TEMP. L.Q. 133, 136 (1988); Denicola, *supra* note 14, at 525; Gorman, *supra* note 13, at 571 n.29.

<sup>194</sup> Nimmer, *The Subject Matter of Copyright Under the Act of 1976*, 24 UCLA L. REV. 978, 1015-16 (1977) (footnotes omitted).

<sup>195</sup> Ginsburg, *supra* note 182, at 658.

<sup>196</sup> See *id.*

<sup>197</sup> See, e.g., S. GOULD, *Wonderful Life: The Burgess Shale and the Nature of History* 240-77 (1989).

<sup>198</sup> See, e.g., *id.* at 277-91.

<sup>199</sup> See, e.g., Gleick, *Survival of the Luckiest*, N.Y. Times, Oct. 22, 1989, § 7 (Book Review), at 1, col. 3 (review of S. GOULD, *supra* note 197).

“out there” than are plots, words, or sculptural forms.<sup>200</sup> If one discards the Platonic fact precept, it is hard to maintain the position that facts and theories about facts are still less original than other works of authorship that copyright protects.<sup>201</sup> Denial of protection must be predicated on some alternate ground.

A proponent of the economic analysis of law might argue that because copyright's purpose is to provide incentives for the creation of works that are valued by society at large, copyright should protect the portions of such works that society most values.<sup>202</sup> Because the most valuable contribution of many factual works is the facts themselves, she might continue, copyright ought to protect those facts. Its failure to do so arguably deters the appropriate level of investment in fact-finding, which results in underproduction of valuable fact-based works.<sup>203</sup> A rival economist might retort that non-copyright incentives already encourage a plethora of fact-based works;<sup>204</sup> a third might suggest that protecting facts would impose inefficient transaction costs on later authors who wish to incorporate the same facts in their works.<sup>205</sup> Each of these economic arguments has been persuasive to at least one court.<sup>206</sup>

The unruly brawl among these hypothetical economists illustrates a problem endemic to their approach. Their models are most helpful when empirical data is available to test their conclusions. In the absence of empirical data, the result of economic analysis is dictated by the model's

<sup>200</sup> Cf. Kakutani, *Books of the Times: A Cast of Characters on History's Indifferent Sea*, N.Y. Times, Sept. 29, 1989, at C33, col. 1 (review of J. BARNES, A HISTORY OF THE WORLD IN 10½ CHAPTERS (1989)).

<sup>201</sup> See, e.g., Hill, *supra* note 6, at 58-59.

<sup>202</sup> See, e.g., *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982); Squires, *Copyright and Compilations in the Computer Era: Old Wine in New Bottles*, 24 BULL. COPYRIGHT SOC'Y U.S.A. 18, 44-45 (1977).

<sup>203</sup> See, e.g., Abramson, *supra* note 193, at 142-45; Jones, *Copyright: Factual Compilations and the Second Circuit*, 52 BROOKLYN L. REV. 679 (1986); cf. Comment, *Copyright Protection*, *supra* note 5, at 1023.

<sup>204</sup> Cf. Breyer, *supra* note 72, at 309-21 (arguing that abolishing copyright for textbooks would not seriously affect production).

<sup>205</sup> See, e.g., Landes & Posner, *supra* note 7, at 353.

<sup>206</sup> Compare, e.g., *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982), with *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986), and *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987). Cf. *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983).

placement of the burden of proof. Economists who begin with the assumption that the copyright incentive should be no greater than necessary to encourage authorship will conclude that the case for increased protection is, at best, "not proven."<sup>207</sup> Economists who start with the assertion that any diminution of or condition on the copyright incentive should be eschewed until its proponents demonstrate that it will not, at the margin, deter authorship, will similarly leave the argument unpersuaded.<sup>208</sup> Most arguments over the appropriate scope of copyright protection, unfortunately, occur in a realm in which empirical data is not only unavailable, but is also literally uncollectible.

The weary proponent of a vigorous public domain in general, and of a public domain in facts in particular, turns to precedent as a justification. We should not protect facts, she argues, because a long line of copyright cases forbids it.<sup>209</sup> This argument dissolves when the directory cases are raised.<sup>210</sup> Indeed, even if the directory cases are dismissed as *sui generis* and fundamentally misconceived, there is ample precedent deciding almost every copyright issue in almost every conceivable direction.<sup>211</sup> The myriad variations among decisions make it possible to assemble long lines of cases to support — or refute — any position. The copyrightability of works of fact is no exception.<sup>212</sup>

This weakness in the common justifications offered in support of the public domain takes different forms with respect to different categories of unprotected material. When explaining courts' failure to protect *scènes à faire*, some commentators have explained that *scènes à faire* are indispensable to the expression of common themes.<sup>213</sup> This explanation, if accurate, would pose a particular case of the idea/expression merger prob-

<sup>207</sup> See, e.g., Breyer, *supra* note 72, at 321-23, 350-51; Fisher, *supra* note 25, at 1717-19.

<sup>208</sup> See, e.g., Brennan, *supra* note 26.

<sup>209</sup> See, e.g., Francione, *supra* note 71, at 537-39; *Leading Cases, The Supreme Court, 1984 Term*, 99 HARV. L. REV. 120, 220-22 (1985).

<sup>210</sup> See, e.g., *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 95 (N.D. Ill. 1982).

<sup>211</sup> See *supra* notes 91-103 and accompanying text.

<sup>212</sup> See generally Shipley & Hay, *supra* note 138, at 129-51, and cases cited therein. Thus, all commentators arguing for or against protection of particular works or particular rights have some case law on their side and have been arguing not with each other but past each other.

<sup>213</sup> See, e.g., Brinson, *Copyrighted Software: Separating the Protected Expression from Unprotected Ideas, A Starting Point*, 29 B.C.L. REV. 803, 814 (1988); Note, *Screen Displays are Proper Subject Matter for Copyright Protection*, 1988 U. ILL. L. REV. 757, 766.

lem,<sup>214</sup> denying protection to expression to avoid giving a monopoly in unprotected ideas. Only when one examines the cases to ascertain what sorts of *scènes à faire* have been denied protection does the explanation dissolve. A German beer hall scene may be an expected embellishment in a work exploring who caused the explosion of the Hindenburg dirigible,<sup>215</sup> but it would be difficult to characterize it as indispensable. Nor is it plausible that the use of sand dollars for currency or seahorses for transportation would strike a trial court as essential to express the idea of an underwater civilization.<sup>216</sup> The lack of protection given to *scènes à faire* seems to lie more in their triteness than their necessity.<sup>217</sup> But why that should be so is rarely explained.<sup>218</sup>

Indeed, the justifications for the public domain become least satisfactory at the most fundamental level. Why is it that copyright does not protect ideas? Some writers have echoed the justification for failing to protect facts by suggesting that ideas have their origin in the public domain.<sup>219</sup> Others have implied that "mere ideas" may not be worthy of the status of private property.<sup>220</sup> Some authors have suggested that ideas are not protected because of the strictures imposed on copyright by the first amendment.<sup>221</sup> The task of distinguishing ideas from expression in order to explain why private ownership is inappropriate for one but desirable for the other, however, remains elusive.<sup>222</sup>

<sup>214</sup> See *supra* notes 94-95 and accompanying text.

<sup>215</sup> See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

<sup>216</sup> See *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813 (S.D. Fla. 1988).

<sup>217</sup> *Accord Ginsburg, supra* note 182, at 664.

<sup>218</sup> One might argue that the very triteness of *scènes à faire* dispels the inference that they were copied from plaintiff's work, were it not for the fact that the doctrine is most frequently invoked to privilege copying that has been otherwise established. See, e.g., cases cited *supra* note 184.

<sup>219</sup> See, e.g., *Patterson, supra* note 13, at 7; see also *Hughes, supra* note 41, at 311-15 (exploring same suggestion in the context of Lockean labor theory).

<sup>220</sup> See, e.g., 3 M. NIMMER & D. NIMMER, *supra* note 2, § 13.03[A].

<sup>221</sup> See, e.g., M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.05[C][2][b], at 2-62 to -69 (1984); *Denicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283, 289-91 (1979).

<sup>222</sup> Indeed, most courts and commentators are satisfied to invoke Learned Hand's explanation that there is no way to draw such a line: "Nobody has ever been able to fix that boundary, and nobody ever can." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930). In a recent article, Justin Hughes suggests that a useful reformulation of the distinction between ideas and expression within the context of Lockean labor theory would assimilate the expression portion of the distinction to the portion of a work that requires labor in its execution. See

## IV. ON ORIGINALITY

To return to first principles, let us go back to the concept of copyright as property. The realm protected by copyright is privately owned; the unprotected realm is the public domain.<sup>223</sup> What we rely on in place of physical borders, to divide the privately-owned from the commons and to draw lines among the various parcels in private ownership, is copyright law's concept of originality.<sup>224</sup>

Copyright's threshold requirement of originality is quite modest. It requires neither newness nor creativity, but merely creation without any copying.<sup>225</sup> The classic formulation is Judge Learned Hand's oft-quoted aside:

Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an "author"; but if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author," and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.<sup>226</sup>

The man who never knew Keats but composed an identical *Ode* by magic is a mythical fellow who has not yet troubled the courts, but he is useful for illustrating black-letter law. Imagine a slight variation: two schoolboys encounter Keats' *Ode* when their teacher reads it aloud to them in class. Neither pays close attention. The first of the boys forgets the *Ode* utterly; the second has no conscious memory of the poem, but Keats' turns of phrase stick in his subconscious mind. Both boys grow up to be poets with no further contact with the works of Keats, and each composes the *Ode on a Grecian Urn* with no awareness that Keats has anticipated him. The similarities of the first poet's poem to that of Keats are sheer coincidence, and he is entitled to copyright his poem. The second poet, of course, relied unknowingly on his subconscious memory, and he is not entitled to a

---

Hughes, *supra* note 41, at 305-14.

<sup>223</sup> See *supra* notes 60-71 and accompanying text.

<sup>224</sup> See *supra* notes 52-58 and accompanying text.

<sup>225</sup> See, e.g., *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.01[A]; W. PATRY, *supra* note 51, at 23-24.

<sup>226</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940); see, e.g., Olson, *Copyright Originality*, 48 Mo. L. REV. 29, 32 n.16 (1983).

copyright because he copied his poem, albeit subconsciously, from Keats.

Examine another variation that is slightly more plausible. Each of our young men has joined the Quality Paperback Book Club. The Club periodically sends them unsolicited books; each glances at them, perhaps reads them through, and shelves them according to his mood. One Quality Paperback selection received by both is a historical novel recounting the lives of a family of black slaves and their descendants. Both of our subjects glance through the novel before consigning it to the bookshelf. As in the prior example, the first fellow banishes it entirely from his mind. The second has no conscious recollection of the book, but portions of it lurk in his subconscious memory. Both men proceed to write and publish historical novels about enslaved families, and the author of the Quality Paperback Book Club selection sues both of them for copyright infringement. The books are undeniably similar to hers in various expressive details. Both defendants testify honestly that they were not aware of copying anybody's prior book. According to settled authority, the second is liable for copyright infringement; the first is not.<sup>227</sup>

By now it should be obvious that the law purports to draw lines on the basis of "facts" that cannot be ascertained. While our two fictitious authors may call for opposite legal conclusions in the world of black-letter law, we have no way of telling them apart in the real world. The problem is not merely that we must determine the credibility of an author's account of his intentions; rather, the problem is that the author's intentions are irrelevant to the determination of originality versus copying.<sup>228</sup> Copyright infringement requires neither bad motive nor guilty mind.

The determination of originality, however, is our benchmark for ascertaining the scope of an author's private property in the contents of her works. The determination of copying is our gauge for ascertaining whether she has trespassed on another author's rights. And only when we can be sure that she has never encountered the similar work of a prior author can we confidently detect the difference between the two. Courts

---

<sup>227</sup> See *Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978); see, e.g., *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924).

<sup>228</sup> See, e.g., *W. PATRY*, *supra* note 51, at 203-04. The author's intentions are relevant in calculating damages, see 17 U.S.C. § 504(c)(2) (1988), but not in determining liability for infringement.

have avoided confronting this paradox through the use of procedural devices and presumptions that allocate the burden of proof. But where an ultimate fact is unknowable, the allocation of the burden of proof is determinative.

Thus, in an infringement action, a plaintiff may prove that the defendant copied her work by introducing evidence that the defendant had access to her work and produced a work that is substantially similar.<sup>229</sup> According to most authorities, the plaintiff's evidence of access and substantial similarity shifts the burden of persuasion to the defendant to disprove copying.<sup>230</sup> The defendant is permitted to rebut the inference by introducing evidence that the accused work was independently created, that is, not even *subconsciously* copied from the plaintiff's.<sup>231</sup>

If the defendant cannot disprove exposure to the plaintiff's work, however, it is difficult — to say the least — for her to demonstrate that the similarities between the works reflect neither conscious nor unconscious copying.<sup>232</sup> Lacking such evidence, the defendant might try another strategy, realizing that no plaintiff's work could surmount the test of copying to which defendants' works are subjected. If the plaintiff's work is not itself original, then the plaintiff is not entitled to a copyright.<sup>233</sup> Defendant, therefore, tries to introduce evidence impeaching the originality of the plaintiff's work by producing similar works to which plaintiff had access

---

<sup>229</sup> See, e.g., *ABKCO Music, Inc. v. Harrison's Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). Access is typically defined as a "reasonable opportunity to view." See 3 M. NIMMER & D. NIMMER, *supra* note 2, § 13.02[A]. Evidence that plaintiff's work has been widely disseminated will suffice. See *id.* at 13-13 & n.15. The probative value of the combination of access and substantial similarity as circumstantial evidence of copying has eroded significantly in the years since the test developed because of the increasingly broad dissemination of myriad works. A reasonable opportunity to hear a copyrighted song, for example, was a more significant event before the development of nationwide radio and television broadcasting. In today's world, most of us have "access" to any work that has received even slight commercial exploitation. Courts have not, however, altered their definition of access or the access-plus-substantial-similarity equation to take account of the modern explosion in the dissemination of works.

<sup>230</sup> See, e.g., *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); *Roth Greeting Cards v. United Cards Co.*, 429 F.2d 1106 (9th Cir. 1970). See generally 3 M. NIMMER & D. NIMMER, *supra* note 2, § 13.01[B]; W. PATRY, *supra* note 51, at 202-203 & n.50, and cases cited therein. But see *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063 (4th Cir. 1988).

<sup>231</sup> See, e.g., *Herbert v. Wicklund*, 744 F.2d 218 (1st Cir. 1981).

<sup>232</sup> See 2 P. GOLDSTEIN, *supra* note 50, § 7.2.2, at 21.

<sup>233</sup> See *supra* notes 52-58 and accompanying text.

and probably subconsciously copied.<sup>234</sup> Plaintiff, however, waves her certificate of copyright registration (a prerequisite to suit),<sup>235</sup> which is prima facie evidence of the validity of her copyright, including the originality of her work.<sup>236</sup> Since defendant cannot produce direct evidence that plaintiff copied the prior similar works and does not receive the benefit of an access-plus-substantial-similarity inference, the attack on the plaintiff's copyright comes to naught.<sup>237</sup> And defendant's own certificate of registration has no probative value as a defensive measure.<sup>238</sup>

Without questioning the value of such presumptions and procedural devices as housekeeping measures to make resolution of copyright infringement suits possible, I should mention that the Copyright Office has granted the certificate of registration for plaintiff's work without making any determination of the work's originality.<sup>239</sup> Indeed, how could it?<sup>240</sup>

---

<sup>234</sup> See, e.g., *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940); *Baron v. Leo Feist, Inc.*, 78 F. Supp. 686 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 288 (1949); *Ornsteyn v. Paramount Prods., Inc.*, 9 F. Supp. 896 (S.D.N.Y. 1935).

<sup>235</sup> See 17 U.S.C. § 411 (1988). Registration prior to suit is optional only for suitors claiming infringement of works that originated or were first published in countries other than the United States. See *id.*

<sup>236</sup> See 3 M. NIMMER & D. NIMMER, *supra* note 2, §§ 12.11[A], 13.01[A]. The statute provides that a certificate of registration obtained within five years of the first publication of the copyrighted work is "prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c) (1988). The evidentiary weight of less prompt registration certificates is left to the court's discretion. *Id.*

<sup>237</sup> See, e.g., *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988).

<sup>238</sup> See 3 M. NIMMER & D. NIMMER, *supra* note 2, § 12.11[A], at 12-80.1 n.14. My usage of plaintiff and defendant refers to the typical case; in some cases the parties may be realigned. Thus, courts have given evidentiary effect to certificates of registration introduced by nominal parties defendant who assert copyright infringement counterclaims or defend their ownership of registered copyrights against the claims of former employees. See, e.g., *Murray v. Gelderman*, 566 F.2d 1307 (5th Cir. 1978); *Sandwiches, Inc. v. Wendy's Int'l, Inc.*, 654 F. Supp. 1066 (E.D. Wis. 1987).

<sup>239</sup> See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 156-57, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5773. Indeed, under the Copyright Office's "rule of doubt," it will frequently register copyright in a work that it believes to lack the requisite original authorship. See, e.g., *Ronald Litoff, Ltd. v. Am. Express Co.*, 621 F. Supp. 981 (S.D.N.Y. 1985). A certificate of registration granted under the Copyright Office's rule of doubt is nonetheless prima facie evidence of the validity of plaintiff's copyright. See, e.g., *id.*

<sup>240</sup> But see a short story about a Copyright Office that does: S. ROBINSON, *supra* note 1. In the story, the rate of copyright registration applications decreased significantly. Even so, the Copyright Office rejected two out of every five musical works submitted for registration after a preliminary computer search and refused to register many more musical works after diligent inquiry. Composers' productivity plummeted and the best of them committed suicide. See *id.* at 16-17.



There are two conclusions I wish to draw from the foregoing discussion. The first is that the concept of originality is a poor substitute for tangible boundaries among parcels of intellectual property because it is inherently unascertainable. The second conclusion is more controversial: The concept of authorship (within the meaning of the copyright law) and the concept of infringement (also within the meaning of the copyright law) are, for practical purposes, synonymous. I will discuss each of these conclusions in turn.

### A. *The Myth of the Non-Infringing Ode*

Originality, it is said, is the means that copyright uses to bound the property that an author may claim under copyright.<sup>241</sup> Prominent commentators discuss originality as if it were an actual legal condition that a court could ascertain.<sup>242</sup> Judicial decisions similarly invoke the concept of originality. They do not, however, essay the task of determining whether and to what extent a plaintiff's work is original.<sup>243</sup> The procedural devices mentioned earlier permit them to avoid that particularly slippery task.<sup>244</sup>

The corollary that copyright tolerates a plurality of similar works so long as none of them is the product of unauthorized copying is also a bedrock concept of the law and is equally chimerical. Learned Hand's author of a second, identical *Ode on a Grecian Urn* could not successfully rebut Keats' claim of copying with evidence of independent creation be-

<sup>241</sup> See, e.g., Yankwich, *supra* note 52, at 457.

<sup>242</sup> See, e.g., 1 P. GOLDSTEIN, *supra* note 50, § 1.2.2.3; 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.01; W. PATRY, *supra* note 51, at 22-24.

<sup>243</sup> Two notable exceptions are the decisions in *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983), and *Donald v. Zack Meyer's T.V. Sales & Serv.*, 426 F.2d 1027 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971), in which each court held plaintiff's work to be insufficiently original to qualify for copyright at all. The only context in which courts have commonly examined the originality of plaintiff's work is when plaintiff claims a copyright on an adaptation of an identified preexisting work. See, e.g., *L. Battlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976). Such courts have frequently equated the required originality with the presence of a non-trivial variation from the underlying work. See, e.g., *id.* See generally W. PATRY, *supra* note 51, at 24-28. Although a number of recent cases have upheld the Register's refusal to register a work on the grounds of insufficient original authorship, see, e.g., *John Mueller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986); *Atari Games Corp. v. Oman*, 693 F. Supp. 1204 (D.D.C. 1988), *rev'd on other grounds*, 888 F.2d 878 (D.C. Cir. 1989), they have rested their determination on insufficiency of authorship rather than on absence of originality.

<sup>244</sup> See *supra* notes 229-40 and accompanying text.

cause the finder of fact routinely presumes that close similarity *itself* negates any evidence of independent creation.<sup>245</sup>

This is not to suggest that every copyright claim succeeds, or even that most succeed. It is merely to suggest that despite the esteem which the concept of originality commands in copyright law, the concept is irrelevant to the resolution of actual cases. Instead, courts have evolved flexible principles that allow the finders of fact to decide infringement cases in accord with their gut impressions.

The first of these principles is the rule that the similarity between a plaintiff's and a defendant's works must be "substantial" to support an inference of copying.<sup>246</sup> Substantiality has both qualitative and quantitative elements.<sup>247</sup> The determination of substantial similarity is largely subjective, thus permitting the finder of fact to give effect to its intuitive judgment of the perceived equities in a case.<sup>248</sup>

The second principle allowing resolution of actual cases on subjective grounds is the privilege of fair use.<sup>249</sup> Fair use is the darling of the commentators, who routinely nominate it to assuage any danger of overprotection;<sup>250</sup> it has received much more limited application by contemporary

<sup>245</sup> *E.g.*, *Bradbury v. Columbia Broadcasting Sys.*, 287 F.2d 478 (9th Cir.), *cert. dismissed*, 368 U.S. 801 (1961); *see* 2 P. GOLDSTEIN, *supra* note 50, § 7.1, at 4-5, § 7.2, at 9, 13; *see, e.g.*, *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988); *Champion Map Corp. v. Twin Printing Co.*, 350 F. Supp. 1332 (E.D.N.C. 1971); *Miller Studios, Inc. v. Pacific Import Co.*, 39 F.R.D. 62 (S.D.N.Y. 1965); *Baron v. Leo Feist, Inc.*, 78 F. Supp. 686 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 288 (1949).

<sup>246</sup> *See, e.g.*, *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). *See generally* Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987). There has been longstanding confusion among courts and commentators about the relevance of substantial similarity if there is other evidence of copying in the record. *Compare, e.g.*, *Arnstein v. Porter*, 154 F.2d at 472 ("Assuming that adequate proof is made of copying, that is not enough; for there can be 'permissible copying' which is not illicit."), *with id.* at 476 n.1 (Clark, J., dissenting) ("If there is actual copying, it is actionable, and there are no degrees; what we are dealing with is the claim of similarities sufficient to justify the inference of copying."). *See also, e.g.*, *Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081, 1086 (7th Cir. 1990) ("Establishing substantial similarity is necessary only when direct evidence of copying is unavailable.").

<sup>247</sup> *See* W. PATRY, *supra* note 51, at 193; Cohen, *supra* note 246, at 741-44.

<sup>248</sup> *See* Cohen, *supra* note 246, at 735-44.

<sup>249</sup> 17 U.S.C. § 107 (1988); *see* Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. COPYRIGHT SOC'Y U.S.A. 167, 167 (1989) ("It is now my duty to explain to you what we mean by fair use. And do you know what, ladies and gentlemen of the jury, I can't. No one can. We don't know.").

<sup>250</sup> *See, e.g.*, Denicola, *supra* note 14, at 538-40; Ginsburg, *supra* note 182, at 671-73; Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 16 COPY-

courts.<sup>251</sup> It can operate as a safety valve to rescue worthy defendants from the perceived injustice of an infringement judgment should the substantiality wicket fail to operate.<sup>252</sup>

In practice, these two principles are often conflated,<sup>253</sup> but they allow the system to achieve rough justice in actual disputes. The fact that the borders supposedly supplied by the concept of originality are entirely illusory has not much hampered courts in deciding the cases before them. If the concept of originality in copyright cases, however, is indeed as chimerical as I have described, then its status as the *sine qua non* of copyright<sup>254</sup> raises intriguing questions.

What is it about the concept of originality that so inspires our confidence that we ignore the fact that it fails to perform the tasks we assign to it? In other property contexts, we might find that more disturbing. Imagine, for example, that the land on which my house sits is adjacent to my neighbor's, and that somewhere between our houses is an apple tree. Both of us avail ourselves of its apples, but we do not know to which of us it belongs. Should the issue arise, we believe that somewhere in the bowels of the City Office of Deeds is a recorded document that supplies the answer. Believing that to be the case, neither I nor my neighbor bothers about actually visiting the Office of Deeds to determine who owns the tree. If the Office of Deeds is in fact a mere myth, a sign on the door of an

---

RIGHT L. SYMP. (ASCAP) 30 (1968); Patterson, *supra* note 13.

<sup>251</sup> See Leval, *supra* note 249; Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 896-99 (1987); Reichman, *supra* note 71, at 691; *infra* note 252.

<sup>252</sup> Fair use excused a wide variety of uses found technically infringing during the 1960s, 1970s, and early 1980s. See, e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980); Rosemont Enters. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1982); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968). In two decisions in the mid-1980s, however, the Supreme Court sharply restricted the availability of the fair use privilege for defendants engaged in commercial endeavors by establishing a presumption that any commercial use of a copyrighted work was not fair. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984). Some courts have allowed defendants to rebut the presumption of unfairness with a modest showing, see, e.g., Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986), but most courts have interpreted the presumption to block the availability of the fair use privilege by any defendant in commercial competition with plaintiff. See, e.g., West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). The decreased availability of the fair use privilege has increased the pressure on the public domain.

<sup>253</sup> See, e.g., Cohen, *supra* note 246, at 745-46; Francione, *supra* note 71, at 575-79.

<sup>254</sup> E.g., Kamar Int'l, Inc. v. Russ Berrie & Co., 657 F.2d 1059 (9th Cir. 1981).

untenanted office, neither of us will discover that fact, and neither will worry that the boundaries of our properties cannot be proved.

One day, however, some folks across the street go to court in a dispute over which of them owns a cherry tree. Both confidently expect the evidence from the Office of Deeds to resolve the litigation; instead, however, the court decides the case by awarding the tree to the party who makes the best cherry pie. One would expect such a ruling to cause concern; at the least, one would expect real estate lawyers, realtors, and banks to begin to advise their customers to take up baking with a vengeance. After a series of similar rulings, scholars would write articles bemoaning the failure of courts to consult the Office of Deeds; courts would comment that the system seems unjust. Landowners inept at baking and the banks that hold their mortgages would soon insist on some alternative method for settling title to trees. Newspapers would publish editorials exhorting the city either to put a real Office of Deeds in the room with that sign on the door or to replace it with something equally concrete.

In the alternate universe of copyright law, of course, no analogous commotion has occurred. The continued esteem for the concept of originality as the rule for settling title to copyrights cannot stem from its pragmatic advantages in drawing actual boundaries, so it must be attributable to its other characteristics. Two such characteristics come to mind. The first is that the concept of originality must have enough symbolic power to subdue its vaporous reality. This symbolic power is rooted in its apparent reflection of what we would like to believe about authors and the authorship process. The second characteristic is that it must have a companion, some other force in its universe that dissipates the pressure to draw reliable boundaries. That companion, of course, is the public domain. The two characteristics are not unrelated.

### *B. About Authorship*

Let me return to the conclusion that I labeled controversial earlier: Copyright law defines authorship and infringement so that they are indistinguishable in a concrete world.<sup>255</sup> An author transforms her memories,

---

<sup>255</sup> A critic might object that the paradigmatic case of copyright infringement involves intentional piracy, and that I rely too heavily on the fact that copyright imposes liability for unintentional copy-

experiences, inspirations, and influences into a new work. That work inevitably echoes expressive elements of prior works.<sup>266</sup> Whether it infringes the copyrights in the prior works depends upon the conscious and subconscious processes within the author's mind. We cannot verify them; neither can she. If this author's work lands in a copyright suit, the legal conclusions that will be drawn will depend in the first instance on facts (such as whether she is suing or being sued and whether she is holding a certificate of registration) that have nothing to do with the nature of the authorship process.

Why does this not seem more disturbing? Perhaps because the story seems so hypothetical. It might describe a quandary faced by the author of *Terror in Bermuda* who confesses to a glancing acquaintance with the earlier *Danger in Jamaica*, but it is not going to happen to real authors. The idea that subconscious copying occurs rarely and only at the margin springs from a fancy that I term the "romantic model of authorship." According to the romantic model, creative processes are magical and are, therefore, likely to produce unique expression.<sup>267</sup> The expression is unique because the real author is using words, musical notes, shapes, or colors to clothe impulses that come from within her singular inner being.<sup>268</sup> This mysterious inner being may be the repository of impressions, experiences, and the work of other authors,<sup>269</sup> but the author's individual sensibility recasts that raw material into something distinct and unrecognizable.

Indeed, some would deny that "recast" is an appropriate verb to use in

ing. Imposition of liability without regard to intent might merely reflect an understanding that intent is easy to deny and difficult to prove. I confess that I find the fact that intent is not an element of copyright infringement to be central to the copyright scheme; it is one of the most important facets of copyright's property-like nature. I am also, I expect, much less cynical than some others about the motives animating the behavior of most defendants in plagiarism suits. My reading of the cases persuades me that few defendants in this sort of suit set out to break the law or to steal someone else's creations. They seem to succeed in doing so despite, rather than because of, their designs.

<sup>266</sup> See *supra* notes 7-12 and accompanying text; *infra* text accompanying note 266.

<sup>267</sup> See, e.g., R. CURTIS, *BEYOND THE BESTSELLER: A LITERARY AGENT TAKES YOU INSIDE THE BOOK BUSINESS* 38 (1989). For the proposition that coincidental similarity of expression is so unlikely that we can safely disregard it, see, for example, 2 P. GOLDSTEIN, *supra* note 50, § 7.2.1, at 9; Landes & Posner, *supra* note 7, at 344-46.

<sup>268</sup> See, e.g., Hersey, *Introduction to THE WRITER'S CRAFT* 3, 7-9 (J. Hersey ed. 1974).

<sup>269</sup> See, e.g., Bowen, *Notes on Writing a Novel*, in *THE WRITER'S CRAFT*, *supra* note 258, at 81.

describing the creative process. An author's artistic sensibility may be affected or shaped by what she experiences, they would argue, but the images of those experiences enter her subconscious on a one-way journey. What the subconscious disgorges is no mere recasting of preexisting material, but something wholly new. Anything less would be theft.<sup>260</sup>

This romantic model of authorship is implicit in much commentary about copyright,<sup>261</sup> and it underlies our tolerance for the presumptions and procedural devices that seem to make the concept of originality do the work that the law assigns to it. Because this model establishes the distinction between creation and copying as central to our conception of authorship, copyrightability is identified with originality: A work is copyrightable if and to the extent that it is original, or created, rather than copied. We know that real authors create rather than copy, so we are comfortable with a presumption that the works they register for copyright are original. We believe in the idea that expression is created from thin air<sup>262</sup> and the correlative notion that the universe of creative expression is infinite, so we are ready to conclude that similarity of expression must reflect plagiarism.<sup>263</sup> And we worry not a bit that our conclusions are unverifiable because they reflect our intuitive beliefs about reality.

---

<sup>260</sup> See, e.g., T. MALLON, *STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM* (1989).

<sup>261</sup> See, e.g., Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 605-26 (1987); Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1561-62; Ladd, *supra* note 4; Bowker Memorial Lecture by Barbara Ringer, *The Demonology of Copyright*, in New York City (Oct. 24, 1974), reprinted in *MODERN COPYRIGHT FUNDAMENTALS: KEY WRITINGS ON TECHNOLOGICAL AND OTHER ISSUES* 24 (B. Weil & B. Polansky 1985).

<sup>262</sup> This intuitive endorsement of the concept of originality may be in part responsible for the unease over copyright in works that are interpretations of preexisting works. See, e.g., *Gracen v. Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983). Conductors' interpretations of the musical works that their orchestras perform surely reflect authorship. Actors' portrayals of the roles that they act, directors' productions of the scripts that they mount, and violinists' renditions of the sonatas that they play cannot be distinguished convincingly from the other sorts of authorship that secure copyright protection. See, e.g., Note, *Copyright in the Stage Direction of a Broadway Musical*, 8 COLUM.-VLA J. ART & L. 309 (1982). The copyrightability of such authorship nonetheless remains controversial. See *id.*; U.S. COPYRIGHT OFFICE, *TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES AND OTHER AUDIOVISUAL WORKS* 161 (1989). The statute does grant copyright to sound recordings of preexisting musical works, see 17 U.S.C. § 102(a)(7) (1988), but gives them fewer and more conditional rights than it accords to other works of authorship. See 17 U.S.C. § 114. Because it is difficult to isolate the contribution of an author interpreting a preexisting work from the expression already embodied in or dictated by that work, copyright protection for conductors, actors, directors, or violinists may seem inappropriate to some adherents of the romantic model of authorship.

<sup>263</sup> See, e.g., T. MALLON, *supra* note 260, at 111, 120.

Let me offer, however, a competing metaphor for the authorship process, drawn from the case of *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*<sup>264</sup> In discussing the copyrightability of mezzotint engravings that reproduced public domain paintings, Judge Jerome Frank observed: "A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it."<sup>265</sup> This formulation depicts authorship as a more modest achievement. Of course, Judge Frank was addressing the specific situation of the author who imperfectly reproduces a preexisting work, but this image of the individual whose apparent creativity is the product of imperfect eyesight, flawed execution, or unrelated circumstances can serve as a metaphor for authorship in general. The metaphor suggests that transformation is the essence of the authorship process. Some of this transformation is purposeful; some of it is inadvertent; much of it is the product of an author's peculiar astigmatic vision.

An author, be she writer, composer, or sculptor, seeks to communicate her own expression of the world. Her views of the world are shaped by her experiences, by the other works of authorship she has absorbed (which are also her experiences), and by the interaction between the two. Her brain has not organized all of this into neat, separable piles entitled "things that happened to me," "things I read once," and "things I thought up in a vacuum" to enable her to draw the elements of her works of authorship from the correct pile. She did not, after all, experience them so discretely. A snatch of a tune she heard was infected by the shape of the place where she was sitting when she heard it; her sense of a pattern she saw was colored by that day's weather; a conversation she overheard was tainted by the book that she was reading at the time. Her memories of the song, the pattern, the conversation, filtered through her experience, may in fact seem quite unlike the objects she believes they represent. The counterpoint between a sound from one memory and a smell from another may express something quite different from what either seems to say alone. But when the author mines the raw material for her next work, significant portions of it will be the stuff of the outside world mediated by her experience. It is unsurprising, then, that parts of her work will echo

---

<sup>264</sup> 191 F.2d 99 (2d Cir. 1951).

<sup>265</sup> *Id.* at 105 (footnotes omitted).

the works of others.<sup>266</sup>

To the author engaged in finding concrete form for immaterial impulses, each phrase, tone, or configuration of expression may seem new at the moment it takes shape. The author will often not recognize the antecedents that she has absorbed in the past and recasts and recombines as she works. Such amnesia about the sources of one's diction is a blessing that enables the work to proceed without the paralysis that would follow from examining each accretion for echoes of prior works.

My characterization of authorship as a combination of absorption, astigmatism, and amnesia is not intended to diminish its merit. Indeed, my position is that this mixture is precisely the process that yields the works of authorship we wish to encourage through the copyright law. The strong form of this argument is that all authorship is the product of astigmatic repackaging of others' expression, but this strong form is unnecessary for our purposes. We can rely instead on a milder and hardly controversial variation: All works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else's works.<sup>267</sup> If this description is accurate, it implies that the romantic model of authorship, taken seriously, would do grave disservice to the authors it seeks to describe.

Were we to take the legal concept of originality seriously, we would need to ensure that authors' copyrights encompassed only those aspects of their works that were actually original. We could not draw the boundaries of an author's property in the contents of her work until we had dissected

---

<sup>266</sup> Compare G. LIGHTFOOT, *If You Could Read My Mind*, on IF YOU COULD READ MY MIND (Reprise 1970) with M. MASSER & L. CREED, *The Greatest Love of All*, on WHITNEY HOUSTON (Arista 1985). See also Chow, *Locus Looks at Books: Reviews by Dan Chow*, LOCUS, Sept. 1989, at 27, 27-28 (reviewing D. SIMMONS, *HYPERION* (1989) as a repackaging of Ingmar Bergman's screenplay *The Seventh Seal*); Miller, *Locus Looks at Books: Reviews by Faren Miller*, LOCUS, Sept. 1989, at 15, 64 (calling same book a "literary farrago" with elements of "Chaucer, Keats, Gibson, Niven (and more)."); Whitmore, *Locus Looks at Books: Reviews by Tom Whitmore*, LOCUS, Sept. 1989, at 25 (reviewing same book as "a strange mix of John Keats, Geoffrey Chaucer, apocalyptic religion, time travel and interstellar political intrigue."); Kakutani, *Books of the Times: World War II Los Angeles, as a Boy Sees It*, N.Y. Times, Oct. 3, 1989, at C21, col. 1 (review of R. DEMARINIS, *THE YEAR OF THE ZINC PENNY* (1989), noting "echoes throughout the narrative of the movies 'Radio Days', 'Hope and Glory' and 'Empire of the Sun'").

<sup>267</sup> See, e.g., Goldstein, *supra* note 7, at 218; Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 UCLA L. REV. 715, 729-33 (1981); Landes & Posner, *supra* note 7, at 332.



her authorship process to pare the preexisting elements from her astigmatic recasting of them. I argued earlier that such a dissection would be impossible in practical terms.<sup>268</sup> If it were possible, I am confident that authors would not welcome it.<sup>269</sup>

Absent such dissection, however; we risk granting broad and overlapping property rights in the subject matter of copyright.<sup>270</sup> If each author's claim to own everything embodied in her work were enforceable in court, almost every work could be enjoined by the owner of the copyright in another.<sup>271</sup> That prospect is at least as repellent as the spectre of merciless dissection raised above.

To avoid choosing between the two, we rely on the public domain. Because we have a public domain, we can permit authors to avoid the harsh light of a genuine search for provenance, and thus maintain the illusion that their works are indeed their own creations. We can tolerate the grant of overbroad and overlapping deeds through the expedient assumption that each author took her raw material from the commons, rather than from the property named in prior deeds.

## V. EXPLORING THE COMMONS

The historical development of the public domain began as a straightforward problem in statutory construction and proceeded through ad hoc articulation in series of cases decided under successive statutes.<sup>272</sup> Traditional explanations of the public domain have failed to justify the cases on principled grounds. When the public domain is viewed as a commons that rescues us from our choice to grant fuzzy and overlapping property rights in unascertainable material, however, some of the apparent contradictions in lines of cases become more transparent.

---

<sup>268</sup> See *supra* notes 228-29, 255-67, and accompanying texts.

<sup>269</sup> See *infra* notes 293-94 and accompanying text.

<sup>270</sup> See, e.g., Reichman, *supra* note 71, at 683-87.

<sup>271</sup> Accord Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 556 & n.232 (1990). Landes and Posner pose this problem differently, as imposing licensing and other transaction costs on authors seeking to obtain permission to copy prior works. See Landes & Posner, *supra* note 7, at 332. Their formulation requires that such authors be aware, or at least capable of discovering, from whom they are copying. I argue that in most cases they are not.

<sup>272</sup> See *supra* notes 75-186 and accompanying text.

One traditional justification for the public domain is that the public domain is the public's price for the grant of a copyright. The public is said to grant the copyright as an incentive to persuade the author to create and publish original works that will enrich the public domain.<sup>273</sup> Thus, copyright endures only for limited times. Some aspects of copyrighted works are thought to be so important to the public that society demands unrestricted access to them immediately, without waiting for the copyright to expire. Ideas and works of the federal government are said to possess these qualities.<sup>274</sup>

This reasoning explains the systems cases well. Systems are important — so important that the public is reluctant to grant a fuzzy property right in systems to anyone claiming an interest. Instead, we have the patent statute under which a claimant can obtain a firmer property right, but only after making a significantly more specific showing of the basis for her claim.<sup>275</sup> In the absence of such a showing, the public claims even original systems as its own.

Neologisms furnish another straightforward example. Coined words are not copyrightable<sup>276</sup> despite the fact that some of them are demonstrably original.<sup>277</sup> I am unaware of any who would dispute that neologisms belong in the public domain, but one could not plausibly argue that they originated there. Granting copyright protection to an invented word would seem at first blush to be utterly harmless, for it would remove nothing from the commons that was there before the word's author created it. Individual words, however, tend to seep into the language. We hear them, absorb them, and use them; we think in them whether they are old, familiar words or new, familiar words. Language is sufficiently crucial that we insist on unrestricted access to words, even new words. We do have a trademark system for establishing property rights in words, but again we

---

<sup>273</sup> See, e.g., *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984); *Patterson & Joyce*, *supra* note 71, at 790-91; sources cited *supra* note 13.

<sup>274</sup> See, e.g., 1 P. GOLDSTEIN, *supra* note 50, §§ 2.3.1.1, 2.5.2; 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.03[D]; W. PATRY, *supra* note 51, at 30-35, 51-55; Denicola, *supra* note 14, at 523-24.

<sup>275</sup> See *supra* notes 41-43 and accompanying text.

<sup>276</sup> See 37 C.F.R. § 202.1(a) (1989).

<sup>277</sup> See G. BRANDRETH, *THE JOY OF LEX: HOW TO HAVE FUN WITH 860,341,500 WORDS* 9 (1980) (aerosol; automation); W. SAFIRE, *ON LANGUAGE* 9 (2d ed. 1981) (deplane); *id.* at 282 (up-tight); *id.* at 289 (pseudoevent). Consider also "palimony," "yuppie," "significant other," and "Ms."

require a stronger and more specific showing to support the claimant's title.<sup>278</sup> The trademark statute permits a word to be withdrawn from the public domain only if, and only to the extent that, it has acquired a proprietary meaning.

The current dispute over copyright protection for computer software user interfaces<sup>279</sup> raises analogous issues. User interfaces are themselves languages — the languages people use to operate their computers.<sup>280</sup> Because user interfaces have the attributes of languages, users learn them as if they were languages.<sup>281</sup> To the extent that individual commands or keystrokes<sup>282</sup> in popular user interfaces are understood by users as individual words, they must belong to the public domain simply because they are elements of language.<sup>283</sup> The public's demand for unrestricted use of language will not tolerate private ownership of words or word-analogues under the rubric of copyright.

This quid pro quo justification, however, cannot explain the cases denying protection to *scènes à faire*.<sup>284</sup> Moreover, it cannot account for the line of cases granting protection to facts in directories and catalogs while denying protection to facts in other sorts of works. Indeed, under traditional justifications for the public domain, the directory case law makes no sense. If we decline to protect information because the law assimilates facts to ideas and systems,<sup>285</sup> then the cases should rigorously dissect the information in directories and catalogs from the form in which the information is expressed. If protection is denied to information because facts are not original,<sup>286</sup> then works conveying information in unoriginal form (alphabetical, for example) should receive little or no protection under the copyright law.

<sup>278</sup> See *supra* notes 44-46 and accompanying text.

<sup>279</sup> See, e.g., *Telemarketing Resources v. Symantec Corp.*, 12 U.S.P.Q.2d (BNA) 1991 (N.D. Cal. 1989). See generally Menell, *supra* note 181; Samuelson & Glushko, *supra* note 180.

<sup>280</sup> Indeed, in common parlance, user interfaces are the means by which users "communicate with" their computers.

<sup>281</sup> See, e.g., Seymour, *Who Owns the Standards?*, PC MAG., May 26, 1987, at 174.

<sup>282</sup> E.g., pressing the function key "F7" to exit the program.

<sup>283</sup> See Menell, *supra* note 181, at 1098-1102.

<sup>284</sup> See *supra* notes 128-33, 213-18, and accompanying texts.

<sup>285</sup> See, e.g., 1 P. GOLDSTEIN, *supra* note 50, § 2.14; Denicola, *supra* note 14, at 525-26.

<sup>286</sup> See, e.g., 1 M. NIMMER & D. NIMMER, *supra* note 2, § 2.11[A]; Denicola, *supra* note 14, at 525; Gorman, *supra* note 13, at 571 n.29.

Had the cases denying copyright protection for facts begun from a firm consensus that facts belonged to the public domain, they would likely have developed along precisely those lines. Most of the cases defining the public domain, however, involved courts carving out exceptions to authors' claimed property rights in order to alleviate pressure exerted by the breadth of plaintiffs' claims. That pressure, which strained the integrity of copyright law, was imposed not by plaintiffs' greed but by the inherent limits of the concept of originality. To illustrate how originality generates this pressure and how the courts' resort to the public domain helps to dissipate it, I propose to look again at the public domain case law from the viewpoints of potential defendants, potential plaintiffs, and the system of copyright law as a whole.

#### A. *Protecting Potential Defendants*

The dangers of overbroad and overlapping property rights in works of authorship seem most obvious when considering the plight of inadvertent infringers. Ideas, systems, themes, and plots are not easily traced. It is difficult to ascertain the source of an idea and impossible to prove its provenance in any meaningful sense. A court cannot unzip an author's head in order to trace the genealogy of her motifs; indeed, the author herself usually cannot pin down the root of her inspiration. Giving an author a copyright in something that is a basic building block of her art thus risks denying that basic building block to all other authors who come into even fleeting contact with the first author's work. It is our inability to trace or verify the lineage of ideas that makes it essential that they be preserved in the public domain.

Facts seem more verifiable. To the extent that they are drawn from preexisting sources, the sources may be checked. The question "Where is that fact from?" is a question that often seems to have an answer. Nonetheless, protecting facts can pose a separate problem. We often learn the facts we encounter and incorporate them into our views of the world in which we live. Once they have taken residence, they will color the things we believe that we see, and we are helpless to pry them out again in order to sit down and create works of authorship. A rule requiring authors effectively to forget the facts learned from other authors would be destructive and impossible to enforce.

Courts nonetheless imposed just such a rule in the directory cases. The current prevailing rule requires the author of a second directory first to go out and duplicate the original research and only then to consult the pre-existing directory for verification.<sup>287</sup> This is a wasteful rule, certainly, but perhaps it is a comprehensible one. Courts may have responded to an intuitive sense that it would be unlikely for an author to make inadvertent use of directory listings because we do not normally learn the contents of directories. When courts in the directory cases, then, protected the facts in plaintiffs' directories, they did not prohibit defendants from consulting the same preexisting sources that plaintiffs had consulted.<sup>288</sup> As a result, plaintiff's copyright did not remove facts from the public domain; it simply prohibited a single, albeit more efficient, route to unearthing them.<sup>289</sup>

From the viewpoint of analytical order, it seems indefensible to protect the facts in directories with a zealotry unparalleled in other cases of factual works. If, however, one is in the business of defining exceptions in cases in which asserted property rights would cripple the enterprise of authorship, the distinctions that courts drew have some intuitive appeal. If the chief threat of defining the borders of property in works of authorship is that it will penalize defendants for inadvertent or inevitable use of common building blocks, then the directory cases seem to pose no danger.

Thus, the fact cases can be reconciled if we understand the principle of seepage: Some aspects of works of authorship are easily absorbed, and once we have absorbed them, we are likely to make them our own and lose sight of their origins. Ideas, information, short phrases, simple plots, themes, stock scenes, and utilitarian solutions to concrete problems all

---

<sup>287</sup> See, e.g., *Illinois Bell Tel. Co. v. Haines & Co. Inc.*, 905 F.2d 1081 (7th Cir. 1990); *United Tel. Co. v. Johnson Publishing Co.*, 671 F. Supp. 1514 (W.D. Mo. 1987), *aff'd*, 855 F.2d 604 (8th Cir. 1988); *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982); *Northwestern Bell Tel. Co. v. Bedco of Minn., Inc.*, 501 F. Supp. 299 (D. Minn. 1980); *cf.* *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145 (7th Cir. 1985) (maps), *cert. denied*, 474 U.S. 1061 (1986).

<sup>288</sup> Plaintiffs recovered for copyright infringement only when they succeeded in proving, typically by showing common errors, that defendants had copied their directories from plaintiffs rather than independently collecting their facts. See, e.g., *List Publishing Co. v. Keller*, 30 F. 772 (C.C.S.D.N.Y. 1887). See generally *Lurvey*, *supra* note 137.

<sup>289</sup> See *Denicola*, *supra* note 14, at 541. The distinction is, of course, a largely illusory one in the real world. Requiring a second author to obtain facts from independent sources *before* consulting plaintiff's work is functionally indistinguishable from granting copyright protection to the facts in plaintiff's work.

share this characteristic. It makes them difficult to trace. That difficulty should make us leery of granting exclusive property rights in such things without requiring the claimant to offer significant proof in support of her claim of ownership. We have, however, elected to adopt a system that confers property rights without requiring any concrete proof of ownership, because we value the property rights and recognize that in many cases such proof would be impossible to obtain. To keep such a system from defeating its ends, we leave the elements subject to such absorption free from private claims, even in cases in which we could determine their initial source. But we do not concern ourselves with this problem in situations in which the works in question seem unlikely to be absorbed. In such cases, there seems to be no imperative reason for separating protectible from unprotectible elements.

Despite its intuitive appeal, however, the picture of the public domain that emerges from the distinctions among the fact cases is too limited. It emphasizes defendants' motives, supporting a vision of the public domain as a commons that exists chiefly for the benefit of the defendant copying unintentionally and in good faith. The danger of such a view is that it tempts us to abandon the commons whenever proof of copying seems less circumstantial. But here it is useful to recall that many of the cases defining the borders of the public domain involve no such ambiguous situation.

Indeed, if we look only at the interest of potential defendants in avoiding liability for copying that they would be powerless to prevent, then the film cases make no sense at all. In some of the film cases, defendants had provisionally admitted copying for the purpose of a motion to dismiss.<sup>290</sup> In others, the evidence of intentional copying was compelling.<sup>291</sup> Yet courts carved out a commons that immediately benefited parties who had apparently made deliberate use of others' works. The solution to this apparent paradox is the realization that the public domain is not merely a haven for well-meaning potential defendants. It benefits potential plaintiffs as well.

---

<sup>290</sup> See, e.g., *Caruthers v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906, 907 (S.D.N.Y. 1937); *Shipman v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 249 (S.D.N.Y. 1937), *aff'd*, 100 F.2d 533 (2d Cir. 1938).

<sup>291</sup> See, e.g., *Ornstein v. Paramount Prods., Inc.*, 9 F. Supp. 896, 901 (S.D.N.Y. 1935); *Witwer v. Harold Lloyd Corp.*, 46 F.2d 792, 794 (S.D. Cal. 1930), *rev'd*, 65 F.2d 1 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145, 150 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930).

### B. *Protecting Potential Plaintiffs*

The commons provides significant advantages for parties plaintiff. Because we can rely on the commons, we do not require plaintiffs to prove the originality of their works.<sup>292</sup> We could take another approach, of course: We could insist that plaintiffs bear the burden of demonstrating their works' originality before enforcing their claims. As we currently define originality, however, most plaintiffs would be unable to muster the evidence required, and few would recover.

The principle of seepage is not limited to such material as will inevitably seep from the works of potential plaintiffs into the works of potential defendants. It is equally likely that such material seeped into the works of the potential plaintiffs themselves.<sup>293</sup> To the extent that such elements seeped into plaintiffs' works from other prior works, any property rights in these elements will overlap the claims of others significantly. To resolve the overlap, it would be necessary to require plaintiffs to prove the bases for their claims. If we permit them to do so, we invite the introduction of evidence purporting to prove — or disprove — *actual* originality. Even raising the possibility that such elements could be protected if plaintiff could only prove their provenance would effectively impose that test on all such cases. A plaintiff required to prove originality of all aspects of her work in order to recover for copyright infringement would be well advised to decline to bring suit.

The absence of a public domain would make copyright meaningless for most plaintiffs if we were to require them to bear the burden of proof on the originality of their works, at least as long as proving originality remained impossible as a practical matter. A second implication is more subtle: Even if proving originality were not impossible, it would be exceedingly unpleasant. It would take the magic away. Authors could no longer safely give free rein to their subconscious minds, and their muses would need to be available for deposition. Many would discover that creations they believed were their own were, at least in the eyes of the law, mere copies of the works of others.

---

<sup>292</sup> See *supra* notes 267-71 and accompanying text.

<sup>293</sup> Others have argued that facts, ideas, or *scènes à faire* are by their nature unoriginal. See sources cited *supra* notes 192-94. My point is a little different: It is not that that these elements are necessarily unoriginal, but rather that they may be.

Such a system would probably not endure for long. Forced to face the flaws of a system based on actual proof of originality, we would undoubtedly abandon the concept. But, to the extent that the idea of originality embodies things that we would like to believe, the presence of the public domain has made it possible for us to do so.

The essence of my argument is this: Originality is a conceit, but we like it. To the extent that we are tempted to forget that originality is a conceit, it can be a dangerous principle on which to base a system of property. Most authors would agree in the abstract that the raw material that authors use in their work must be left free for all authors to use. Individual authors can nonetheless dispute the applicability of this abstract principle to a situation in which they see something that they think of as their own in a later author's work. We could force each copyright owner to demonstrate her right to claim such aspects of her work by requiring her to prove their originality, but we would have to accept that she would often be unable to do so in any meaningful way. We could instead tolerate a world in which all authors must seek permission from each of their predecessors, but few new works of authorship would be likely to appear in such a system.<sup>294</sup> Instead, we rely on a commons, and we draw the boundaries of that commons by recalling the fact that the concept of originality we purport to rely on is a mere apparition that we cannot afford to test.

### C. *Rescuing the System*

There is a third set of interests threatened by the phantasm of originality: the copyright system's interests in preserving its own integrity. The problem of overlapping claims, alluded to above, invites gridlock in the courts as parties request judicial resolution of insoluble disputes. This set of interests, I think, best explains the recent impulses of some courts to expand the borders of the commons.<sup>295</sup> To illustrate this problem, I offer a final parable.

Imagine the familiar plot of a novel for children. You remember this book: Our heroine (hero) is an unpopular, bookish sort, small for her age and, typically, bullied by her more popular classmates. One day in the

---

<sup>294</sup> See, e.g., Yen, *supra* note 271, at 556.

<sup>295</sup> See cases cited *supra* note 184.



public library she finds a book she has never seen before: worn, plump, and red. (For some reason, the book always seems to be red.) It is a magic book. Indeed, it seems to be written especially for our heroine (hero). She reads the book, certain at first that it is some sort of joke, but then discovers that the magic in the book really works. It takes her to strange alternate universes, where she meets alien creatures and ultimately performs brave deeds that save at least a small part of the world.<sup>286</sup> The class bullies no longer trouble her.

Imagine as well a contemporary author of books for children who has just finished a manuscript along these lines. Her lawyer remarks in passing that she recalls reading something of this ilk to her son. (The son was entranced.) Indeed, now that she thinks of it, she has a vague recollection of enjoying a similar book borrowed from the library some thirty years ago. Our author becomes concerned.

A dedicated paralegal spends two days in the municipal public library and turns up twelve versions of this plot. In each, the book is red. The author, who cannot recall having read any of them, but is unable to rule out the possibility, asks her lawyer to explore the question whether any of these twelve authors would object to publication of her book. When contacted, the first of them assures the lawyer that he has no objection, as long as the novel's hero is a young fellow, with a large dog, getting over his parent's recent divorce. The second author is similarly obliging, on the condition that the book's central character be a young Hispanic woman with a part-time job in a diner. The third demands a Native American, the fourth a Jew, the fifth a WASP.

At this point, our author and her lawyer would like to file an action to determine with whose conditions she must comply. Imagine now that they file an interpleader suit, depositing the plot of the novel with the court and joining the dozen prior authors as defendants. Each of the dozen files a counterclaim to quiet title in the plot; five other authors of similar stories seek to intervene.<sup>287</sup>

---

<sup>286</sup> See, e.g., D. DUANE, *SO YOU WANT TO BE A WIZARD* (1983); E. EAGER, *SEVEN-DAY MAGIC* (1962). *But cf.* M. ENDE, *THE NEVERENDING STORY* (1983) (book is bound in copper silk); W. ROBERTS, *THE MAGIC BOOK* (1986) (book is blue).

<sup>287</sup> For other variations on the magic book story with books in different hues, see, for example, L.F. BAUM, *GLINDA OF OZ* (1920); R. GRAVES, *THE BIG GREEN BOOK* (1962); E. NESBIT, *The Book of Beasts*, in *THE LAST OF THE DRAGONS AND SOME OTHERS* (1975); P. O'SHEA, *THE*

The court before which this suit is brought faces a quandary. There is no rule of decision that can resolve the issues in dispute. Theoretically, each of the authors before the court may be entitled to claim ownership of the plot on the ground that she originated it; it is, after all, the sort of plot that any bookish child with a taste for fantasy might have thought up on her own. On the other hand, any or all of the authors may have consciously or subconsciously copied the plot from some prior source. The question cannot be determined directly, and the presumptions and procedural devices that usually make this determination unnecessary are of no assistance here, because the court has no basis on which to apportion the benefits and burdens of the procedural devices among the parties before it.

When we are confronted with an insoluble problem in overlapping deeds, pragmatic concerns may outweigh doctrinal ones. It ceases to matter why this plot is claimed by so many authors; the important thing is that it is. The court could dismiss the case on procedural grounds — the plot of a novel is after all an unfamiliar res. This rescues the court from the spectre of having to make any decision, but it leaves the children's book industry in disarray. Next week, some composers are sure to show up with a dispute over chord progressions. The court could instead award exclusive rights in the plot to one particular author — perhaps the one who bakes the best cherry pie. This solution would seriously inconvenience the other authors, who would presumably incur liability for their use of the plot unless they could disprove access to that author's book. The court could avoid that particular difficulty by awarding the plot to all of the authors before it. This answer would, of course, hinder the authors of the future, but perhaps the world has enough literature about magic books already. Finally, the court could decide that without some principle on which to base a decision, the plot must belong to the commons. This decision relieves the parties of having to produce inconclusive evidence of originality, relieves the court of having to reach a decision with no basis for doing so, and relieves the law of having a predicament posed by overlapping deeds.

My parable is about plots, of course, but it is also a metaphor for *scènes à faire*. *Scènes à faire* are common; they are the property shared

---

HOUNDS OF THE MORRIGAN (1985). See also D. DUANE, HIGH WIZARDRY (1990) (text of magic book shows up on heroine's portable computer).

among the overlapping deeds. Some *scènes à faire* are common because they are trite; some become trite because they are common; for others it is hard to figure out why they appear so frequently.<sup>298</sup> There is no particular reason why a magic book should be red; if the book is always red or even often red, however, that is a *scène à faire*. When we grant deeds without doing title searches, we risk significant overlap. We can often fashion rules to permit us to decide between two or three competing claimants, if not necessarily on strictly doctrinal grounds.<sup>299</sup> At some point, however, the frequency of overlapping claims to something in particular will itself become the problem. Assigning that something to the commons is the copyright law's most practical defense.

This leads me to an observation about some recent cases. Some courts have been increasing their resort to the *scènes à faire* doctrine during the last decade.<sup>300</sup> These courts have been responding to a real and troubling trend. If *access* to a prior work is the basis for presuming that similarities represent actionable copying,<sup>301</sup> then one would expect a marked increase in everybody's access to everything to carry with it increasing inferences of infringement. The copyright law has defined access as "reasonable opportunity to view" since before the development of modern methods of mass dissemination.<sup>302</sup> Disproving access is, in most cases, no longer possible.<sup>303</sup> It is not surprising, then, that the pressure of overlapping claims to common material has increased and that the courts have felt it necessary to rely on the public domain in ever more sorts of cases. We may be approaching an era in which familiar solutions to the chimera of originality become insufficient; there may soon come a day when we have to give the notion up.

---

<sup>298</sup> Thus, four theatrical motion pictures based on nearly identical age-switching premises were released in the U.S. during the 1987-88 season. *Compare Big* (Fox 1988) with *18 Again* (New World 1988), *Vice Versa* (Columbia 1988), and *Like Father, Like Son* (TriStar 1987). Producers and critics attributed the similarities among the films to "something in the air." See, e.g., Maslin, *Today's Alter Has a Smaller Ego*, N.Y. Times, June 12, 1988, § 2 (Arts & Leisure), at 29, col. 1; Sterritt, *A Plot Gimmick That May be Ready to Retire*, Christian Sci. Monitor, Apr. 29, 1988, at 33, col. 1; Kempley, *The Vices of "Versa,"* Wash. Post, Mar. 11, 1988, at D7, col. 1.

<sup>299</sup> See *supra* notes 246-52 and accompanying text.

<sup>300</sup> See *supra* note 184 and accompanying text.

<sup>301</sup> See *supra* notes 229-31 and accompanying text.

<sup>302</sup> See *supra* note 229.

<sup>303</sup> See, e.g., T. MALLON, *supra* note 260, at 221.

## CONCLUSION

Copyright law purports to define the nature and scope of the property rights that it confers by relying on the concept of originality. In fact, originality is an apparition; it does not, and cannot, provide a basis for deciding copyright cases. The vision of authorship on which it is based — portraying authorship as ineffable creation from nothing — is both flawed and misleading, disserving the authors it seeks to extol. If we took that vision seriously, we could not grant authors copyright rights without first dissecting their creative process to pare elements adapted from the works of others from the later authors' recasting of them. That dissection would be both impossible and unwelcome. If we eschewed that vision but nonetheless adhered unswervingly to the concept of originality, we would oblige each author to solicit the permission of her predecessors. In such a world, most works of authorship would find themselves enjoined by the owners of other copyrights.

The public domain rescues us from this dilemma. It permits us to continue to exalt originality without acknowledging that our claims to take originality seriously are mostly pretense. It furnishes a crucial device to an otherwise unworkable system by reserving the raw material of authorship to the commons, thus leaving that raw material available for other authors to use. The public domain thus permits the law of copyright to avoid a confrontation with the poverty of some of the assumptions on which it is based.