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WARNING ALL AUTHORS! YOUR “STYLE” MAY INFRINGE YOUR OWN WORK: AUTHORS CAN BENEFIT THROUGH LESS COPYRIGHT PROTECTION

Anyone who listens to pop music will have no problem distinguishing an ABBA song from one written by John Fogerty. Although both works may be rock and roll songs, each has its own unique “sound.”

Likewise, Ray Bradbury, Arthur C. Clarke and Kurt Vonnegut, Jr. may all write an identical science fiction tale as far as content is concerned, yet each story will *read* differently. More importantly, any fan familiar with these writers will have no trouble placing each work with its corresponding author. The identifying element is what is known as “style.”

The “idea/expression” test in American copyright law forms a roughly parallel concept to this “content/style” dichotomy. The rule is that while ideas are not protectable under copyright, the expression of ideas is protected.¹

Under this rule, the songwriting style of an artist might be protected as an expression of an idea. But if an artist wrote a song bearing his unique style, assigned the song’s copyright and then wrote another song using the same style, could a court rule that the two songs had the same expression? If so, the court might also rule that the artist infringed on his own previously assigned work. A broad construction of “expression” would limit the amount of work an artist with a unique style can produce before infringing on previously assigned works.² Ironically, authors might actually be better off with *less* copyright protection. A rule with a

1. Sid & Marty Krofft Television v. McDonald’s Corp., 562 F.2d 1157, 1163 (9th Cir. 1977). This dichotomy was established by the United States Supreme Court in Baker v. Selden, 101 U.S. 99 (1879). Selden invented a new system of bookkeeping, which he described in “Selden’s Condensed Ledger, or Book-keeping Simplified,” a book for which he obtained a copyright in 1859. The book contained sample ledger sheets to illustrate the system. *Id.* at 99-100. The Supreme Court held that Selden’s copyright could not bar others from copying the ledger sheets if they were needed to utilize the system; otherwise, Selden would have a monopoly ownership over the system itself. This type of broad protection could only be secured, if at all, through a patent. The only thing protected by Selden’s copyright was his explanation of the system. *Id.* at 102.

2. An artist who repeatedly engages the same style might do so either out of a desire to express his work in a certain way, or because of a limited range of talent. Such situations have been addressed by the courts in Esquire, Inc. v. Varga Enter., 81 F. Supp. 306, 307-08 (N.D. Ill. 1948) (painter); Warner Bros. Pictures v. Columbia Broadcasting Sys., 216 F.2d 945, 950 (9th Cir. 1954) (writer).

narrow scope of copyright protection would allow anyone, including the original artist, to recreate the artist's "style" without danger of infringing on an earlier work, because a greater degree of similarity would be required between the two expressions for an infringement.

THE HYPOS COME TO LIFE IN FANTASY V. FOGERTY

In *Fantasy v. Fogerty*,³ Fantasy, Inc. sued singer-songwriter John Fogerty for infringing the copyright to "Run From The Jungle" ("Jungle"), a song which Fogerty had written.⁴ Fogerty wrote "Jungle" in 1970. He then granted exclusive rights⁵ to the copyright to Fantasy's predecessors, Cicero Music and Galaxy Records.⁶ In 1984, Fogerty wrote the song "The Old Man Down The Road"⁷ ("Old Man"). He registered the song for copyright and authorized Warner Brothers Records, Inc. ("Warner Bros.") to distribute phonorecords of his performance of "Old Man."⁸ Fantasy claimed "Old Man" was the same song as "Jungle," only with new lyrics.⁹ Fantasy brought suit in the United States District Court for the Northern District of California, charging Fogerty and Warner Bros. with copyright infringement.¹⁰

One of Fogerty's defenses was that the first amendment¹¹ protected

3. *Fantasy, Inc. v. Fogerty*, 664 F. Supp. 1345 (N.D. Cal. 1987) ("*Fantasy II*"). This suit is yet another in a long round of disputes between John Fogerty and Fantasy owner Saul Zaentz. In 1985, Zaentz filed a \$142,000,000 suit against Fogerty in Los Angeles Superior Court, alleging that he was libeled by two songs on Fogerty's "Centerfield" album, "Zanz Kant Danz" and "Mr. Greed." That case has not gone to trial. J. Harwood, *Fogerty Demonstration Lends Credence To Claim On Music*, Daily Variety, Nov. 1, 1988, at 10, col. 4-5 [*hereinafter* Daily Variety, Nov. 1, 1988]. Creedence Clearwater Revival, Fogerty's former group, also filed a suit against a Bahama bank, naming Zaentz as a codefendant. Zaentz succeeded in showing he had nothing to do with the bank and sued Fogerty for malicious prosecution. His suit was dismissed from Los Angeles Superior Court but an appeal is now pending. *Id.* at 10, col. 5.

4. *Fantasy II*, 664 F. Supp. at 1347.

5. "Exclusive rights" in a copyrighted work include the right to: reproduce it in copies or phonorecords; to make derivative works based upon it; to distribute copies of it; to perform it in public; to display it in public; and to authorize anyone else to exercise any of these rights. 17 U.S.C. § 106 (1982). A "phonorecord" is any material object, now known or later developed, in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed and from which they can be perceived, reproduced or communicated, either directly or through the use of a machine. 17 U.S.C. § 101 (1982).

6. *Fantasy II*, 664 F. Supp. at 1347.

7. "Old Man Down The Road" was included on the "Centerfield" album. Daily Variety, Nov. 1, 1988, *supra* note 3, at 3, col. 2.

8. *Fantasy II*, 664 F. Supp. at 1347.

9. *Id.*

10. *Id.*

11. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or

his songwriting "style" and that a finding of infringement would impair his ability to earn a livelihood.¹² Fogerty claimed that "Old Man" was written in his general style¹³ and that many of his songs were musically alike.¹⁴

Fogerty sought summary judgment on the issues of the first amendment protection of songwriting style and of fair use.¹⁵ The court held that the "idea/expression" dichotomy of the substantial similarity test adequately served the competing interests of copyright and the first amendment and that disputed issues of material fact existed concerning the fair use defense.¹⁶ The court denied Fogerty summary judgment on both counts.¹⁷

Warner Bros. responded with a motion for summary judgment.¹⁸ Warner Bros. claimed that because the legal co-owners of a copyright cannot bring an infringement suit against each other, a legal owner and a beneficial owner of a copyright cannot bring a suit against each other.¹⁹ Since Fogerty was the beneficial owner of the copyright to "Jungle," he could not be sued by Fantasy, the legal owner. The court dismissed this argument, stating that a beneficial owner had an economic interest in the copyright, but no right to use or license the use of the copyright.²⁰ Therefore, Fogerty could infringe upon "Jungle" in the same manner as anyone else, and Fantasy had standing to sue him.²¹

of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

12. *Fantasy II*, 664 F. Supp. at 1351.

13. *Legal Briefs*, The Hollywood Reporter, Oct. 28, 1988, at 16, col. 3.

14. J. Harwood, *Fogerty Up Against Himself In Trial*, Daily Variety, Oct. 27, 1988, at 16, col. 3. John Fogerty has written many tunes in what he calls his "swamp rock" repertoire. An expert witness for Fogerty, Harold Barlow, testified that "Mr. Fogerty has made this structure commonplace," and that the riffs found in both "Jungle" and "Old Man" repeatedly show up in Fogerty tunes going back to "Bootleg" in 1968 (written before either of the songs at issue). *Id.* at 16, col. 4-5.

15. *Fantasy II*, 664 F. Supp. at 1347. Fair use is a common law doctrine which grants a limited privilege to those other than the copyright owner to use the copyrighted material in a reasonable manner without the owner's consent. *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986). Congress codified the doctrine in the Copyright Act of 1976, 17 U.S.C. § 107 (1982), but the codification was only a listing of some nonexclusive factors for courts to consider. Congress's express intent was to leave the courts free to adapt the doctrine to new situations as they arose. *Fisher*, 794 F.2d at 435.

16. *Fantasy II*, 664 F. Supp. at 1350-51.

17. *Id.*

18. *Fantasy, Inc. v. Fogerty*, 654 F. Supp. 1129 (N.D. Cal. 1987) ("*Fantasy I*").

19. *Id.* at 1131. A "beneficial owner" of a copyright is an author who has parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.

20. *Id.*

21. *Id.* After this setback, Warner Bros. moved for reconsideration, arguing that Fantasy was not the legal owner of the "Jungle" copyright because of a broken link in Fantasy's chain

Fantasy sought summary judgment on the issue of copyright infringement.²² The court denied the motion,²³ and the case proceeded to trial, where the jury found that "Old Man" did not infringe the copyright to "Jungle."²⁴ Judge Samuel Conti did not write an opinion for the case. Juror Ed Wilson said that the general feeling on the panel was that while "superficial similarities" existed between the two songs, they lacked the "substantial similarities" which the law required for infringement.²⁵ Thus, Fogerty won on the basis of traditional copyright law.

However, Wilson went on to say that "even if the similarities between the songs were substantial, he and the other jurors did not think Fogerty could copy from himself."²⁶ Unfortunately, the remarks of jurors do not establish new rules of law. The following material demonstrates that courts are more prepared to find an artist liable for infringement when that artist produces a second work "substantially similar" to his or her own previous work.

COPYRIGHT LAW AND THE POLICY OF LIMITED PROTECTION

The Copyright Act of 1976 protects "original works of authorship."²⁷ In the context of copyright law, "original" means that the work

of title. *Fantasy II*, 664 F. Supp. at 1355. However, the court ruled that Fantasy had established its chain of title to the copyright and could proceed with its infringement claim. *Id.* at 1349.

22. *Fantasy II*, 664 F. Supp. at 1353. To establish a successful copyright infringement claim, a plaintiff must prove (1) ownership of the copyright, and (2) copying of protectable expression by the defendant. *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 346 (1987). But because direct evidence of copying is rarely available, a plaintiff may establish copying by the circumstantial evidence of (1) the defendant's access to the copyrighted work, and (2) a substantial similarity in both the general ideas and the expression of the two works. *Baxter*, 812 F.2d at 423. Fantasy had to prove Fogerty's access to "Jungle" and the existence of a substantial similarity in both the ideas and the expression of the two songs. No bright line rule exists as to what constitutes substantial similarity. Nimmer has stated that determining the extent of similarity needed to constitute a substantial similarity is one of the most difficult questions in copyright law and the one least given to helpful generalizations. Somewhere between the opposite extremes of no similarity and complete similarity lies the boundary line of substantial similarity. 3 M. NIMMER ON COPYRIGHT § 13.03[A], at 13-20 (1988). Judge Learned Hand has pointed out that the line delineating substantial similarity will seem arbitrary wherever it is drawn. *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 122 (2d Cir. 1930). John Fogerty had access to "Jungle" since he had written it. The court found, however, that reasonable minds could differ as to whether a substantial similarity between "Jungle" and "Old Man" existed. *Fantasy II*, 664 F. Supp. at 1350.

23. *Fantasy II*, 664 F. Supp. at 1350.

24. *Fantasy v. Fogerty*, No. C85-4929 (N.D. Cal. Nov. 7, 1988) ("*Fantasy III*").

25. J. Harwood, *Jury Clears Fogerty Of Plagiarism Charge*, Daily Variety, Nov. 8, 1988, at 18, col. 2 [hereinafter Daily Variety, Nov. 8, 1988].

26. *Id.*

27. 17 U.S.C. § 102(a) (1982).

“owes its origin” to the author,²⁸ and “means little more than a prohibition of actual copying.”²⁹ The Copyright Act does not require novelty to secure copyright protection for a work.³⁰ For example, two independent creators of identical maps may each obtain exclusive rights to make a copy of his own map, and neither will infringe the other’s copyright. Originality, rather than the higher standard of novelty, is all that is required.

Accordingly, in *Gross v. Seligman*,³¹ the court found that if two artists choose to photograph the same model and, by chance, the same pose, background, light and shade make it difficult to distinguish the second photograph from the first photograph, the second photograph will not infringe the first because it is not a *copy* of the first.³²

Limitations on the scope of copyright protection are founded upon the policy voiced by Lord Mansfield.³³ We want to secure to “men of ability, who have employed their time for the service of the community . . . their just merits, and the reward of their ingenuity and labour . . . [balanced against the consideration that] . . . the world may not be deprived of improvements, nor the progress of the arts be retarded.”³⁴

These two goals, rewarding the author and making their works available to the public, are not mutually exclusive. The Constitution specifies that “[t]o Promote the Progress of Science and useful Arts,” Congress shall have the power to secure “for *limited* Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁵ The Supreme Court has ruled that the “economic philosophy” behind this clause is that the best way to advance the public welfare through the talents of authors and inventors is to encourage their individual efforts through the financial reward that comes to them from copyright and patent protection.³⁶ However, rewarding owners is a *sec-*

28. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951).

29. *Id.* at 103.

30. *Mazer v. Stein*, 347 U.S. 201, 218 (1954).

31. *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914).

32. *Id.* at 931.

33. Lord William Murray Mansfield, Lord Chief Justice of England during the latter half of the 18th century, is possibly best remembered for his statement to the effect that “Possession is very strong; rather more than nine points of the law.” *Corporation of Kingston-upon-Hull v. Horner*, 98 Eng. Rep. 807, 815 (1774) (*reprinted in J. DUKEMINIER & J. KRIER, PROPERTY* 3 (1st ed. 1981)).

34. *Franklin Mint Corp. v. National Wildlife Art Exch.*, 575 F.2d 62, 63 (3d Cir. 1978), citing *Cary v. Longman*, 102 Eng. Rep. 138, 140 (K.B. 1801), *quoting* Lord Mansfield in *Sayre v. Moore* (Hil. 1785).

35. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

36. *Mazer*, 347 U.S. at 219.

ondary consideration.³⁷ The scope of copyright protection must not expand to the extent that it strangles rather than encourages future artistic efforts. To do so would be a flagrant violation of the constitutional mandate behind copyright protection.

For instance, a more expansive copyright protection than the court allowed in *Gross* might mean that a second photographer would not be able to take a photograph of the original model, or one resembling the original model, or even a photograph of any model whatsoever, depending on how broadly the definition of protectable expression was construed.

METHODS OF LIMITING COPYRIGHT PROTECTION

Merger Doctrine

To avoid restrictions on future works of authorship, and the resulting constraints on free speech, the courts have established the "idea/expression" dichotomy as an important policy limitation on the scope of copyright protection.³⁸

However, as Judge Hand observed, no clear demarcation exists "as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression.'" ³⁹ In some cases, an idea merges with its expression when the idea is so narrow that only a few ways exist to express the idea,⁴⁰ or even no other way of expressing it.⁴¹ Although the expression contains original authorship, to protect the expression under copyright would prevent others from expressing the same idea. Under the Merger Doctrine, when such merger takes place, copyright protection is denied.⁴²

The Merger Doctrine was applied in *Morrissey v. Procter & Gamble Co.*⁴³ The court denied copyright protection to a set of contest rules. Though the rules were an expression rather than an idea, the court determined that only a limited number of ways existed to state the simple

37. *Id.* In an earlier Supreme Court decision regarding the copyright monopoly granted by Congress to authors, Chief Justice Hughes stated: "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

38. *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977). The "idea/expression" dichotomy explained *supra* note 1.

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

40. Such as a simple set of contest rules. See *infra* note 44.

41. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

42. *Id.*

43. 379 F.2d 675 (1st Cir. 1967).

rules.⁴⁴ Copyright protection would bar anyone else from holding a similar contest because no one would be able to express the rules to the contestants. The policy behind the Merger Doctrine forbids monopolization of subject matter by the copyrighting of its expression.⁴⁵

Scenes a Faire

*Schwarz v. Universal Pictures*⁴⁶ introduced the doctrine of *scenes a faire* as a further limitation on the scope of copyright protection.⁴⁷ A *scene a faire* is a scene which is inherent in a story's subject matter and, therefore, cannot be avoided by any author who chooses to write about that subject.⁴⁸ A second author cannot infringe even if he recreates exactly the first author's expression if that expression is composed of stock scenes that flow inevitably from common unprotectable ideas. To hold otherwise would give the first author a monopoly on commonplace ideas.⁴⁹ The policy behind *scenes a faire* and the Merger Doctrine is the same.⁵⁰ Both doctrines deny protection to expression if it would mean granting a monopoly over an idea.

WHEN AN AUTHOR INFRINGES HIS OWN WORK

Copyright protection is limited by the policy not to restrict the creation of future works of authorship. Paradoxically, some authors benefit when the scope of copyright protection is narrowed. Such limitations allow authors the freedom to explore ideas already expressed in works by previous authors, or in their own previous works in which they have as-

44. *Id.* at 678.

45. *Id.* at 678-79.

46. 85 F. Supp. 270 (S.D. Cal. 1945).

47. 3 M. NIMMER ON COPYRIGHT § 13.03[A], at 13-32 (1988), *citing Schwarz*, 85 F. Supp. 270 (S.D. Cal. 1945).

48. *Schwarz*, 85 F. Supp. at 275-76. There may only be about three dozen basic dramatic situations "which form the stuff of drama." *Id.* at 275. Such "fundamental plot[s]" are common property and cannot be protected under copyright. *Id.* Compulsory truth-telling by means of a bet is one such fundamental idea. *Id.*

49. *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir. 1984).

50. In a story about American slavery, *scenes a faire* would include "[a]ttempted escapes, flights through the woods pursued by baying dogs, the sorrowful or happy singing of slaves." *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978). Also "sex between male slave owners and female slaves and the resentment of the female slave owners . . . the sale of a slave child away from her family and the attendant agonies . . . the horror of punitive mutilation . . . slave owners complaining about the high price of slaves." *Id.* at 45 n.7. A story about the destruction of the Hindenburg dirigible would include such *scenes a faire* as "the airship's crew engag[ing] in revelry [in a German beer hall] prior to the voyage . . . common German greetings of the period, such as 'Heil Hitler,' or songs, such as the German National anthem." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980).

signed the copyrights. A narrower scope of copyright protection allows them to come closer to previous expressions without infringing them.

Courts apply the "idea/expression" dichotomy rule identically to an author accused of infringing another's work as to an author accused of infringing his or her own (assigned) work.⁵¹ While the test is the same, the burden of proof seems to be heavier on the "self-infringer" because of the increased difficulty in proving that a work is original if the author has already created a previous work very much like the work in question.

For instance, in *Gross*, the court held that if a second artist created a photograph nearly indistinguishable from a photograph made by the first artist, the second photograph would not constitute infringement so long as it came from the second artist's own conception.⁵² The first artist risked competition from a second-comer by choosing to create a picture of an already existing model.⁵³ The facts in *Gross* concerned only one artist, who had taken a photograph of a model whom he had pose in a certain way.⁵⁴ He assigned the copyright to the photograph. Two years later, the same artist took another photograph of the same model, posed in an identical way, but with some small variations. The court found that the second photograph infringed the copyright of the first.⁵⁵ Significantly, "the identity of the artist" was one of the factors which the court weighed heavily in reaching its decision.⁵⁶ The court thought it was likely that the artist had copied the first photograph because he himself had taken it.⁵⁷

If another artist creates a photograph nearly indistinguishable from the original, the courts assume that the work came from his or her own conception. But the original artist who creates the original work, and assigns the copyright to it, must not repeat himself. Other artists may echo the original work to a degree denied to its original creator.

51. See generally *Franklin Mint*, 575 F.2d at 64-67. An artist assigned the copyright to his painting of a cardinal. Afterwards he created a similar painting of a cardinal. In the copyright infringement suit which followed, the sole determining issue was whether the artist had copied his first painting in creating his second. His previous access to his first work, and the similarity between the two paintings, was circumstantial evidence of copying, but was not conclusive. *Id.* at 66. "[A]n artist is free to consult the same source for another original painting." *Id.* at 65.

52. *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914).

53. *Id.*

54. *Id.*

55. *Id.* at 932.

56. *Id.* at 931. "The identity of the artist . . . indicate[s] very strongly that the first picture was used to produce the second." *Id.*

57. *Gross*, 212 F. at 931. "The one thing, viz., the *exercise of artistic talent*, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original." *Id.* (emphasis added).

A rationale for this state of affairs may lie in the rule that to infringe a copyright, the infringer must copy a protectable expression owned by someone else.⁵⁸ Because direct evidence of actual copying is rarely available, copying can be inferred by access to the copyrighted work and the substantial similarity between the two works.⁵⁹ Access can be inferred by circumstantial evidence.⁶⁰ But where proof of access is clear and convincing, rather than merely shown by the preponderance of the evidence, "the required degree of similarity may be somewhat less than would be necessary in the absence of such proof."⁶¹ The stronger the proof of access, the less similarity needed to find infringement.⁶²

"Copying done from memory is as objectionable as that done by tracing or direct view"⁶³ and the original author is in the best position to remember his own previous work. Thus, one of the best proofs of access to an original work is when the accused infringer is the original author. This strong showing of access places the original author under a heavier burden of proof than that placed on a second author, to show that there is no substantial similarity between his new work and his original (assigned) work.

Nevertheless, some cases have reached more favorable results for original artists. In *Franklin Mint v. National Wildlife Art Exchange*⁶⁴ the court faced an artist who painted a picture of two cardinals. He sold the work and then painted another picture of two cardinals. As in *Gross*, the artist in *Franklin Mint* used some of the same source material (sketches, photographs, slides, etc.), as well as some new source material, for his second painting as for the first.⁶⁵ The court found that the artist's second work had not infringed upon the copyright of the first.⁶⁶

The outcome in *Franklin Mint* differed from that of *Gross* in that the *Franklin Mint* court recognized the need not to restrict the progress of the arts by broadening the scope of copyright protection for past works.⁶⁷ The opinion favors giving artists ample room to express themselves in new works and leaves them free to consult the same source for another

58. *Baxter*, 812 F.2d at 423.

59. *Fantasy II*, 664 F. Supp. at 1348.

60. *Krofft*, 562 F.2d at 1162.

61. *Id.* at 1172.

62. *Id.*

63. *Franklin Mint Corp. v. National Wildlife Art Exch.*, 575 F.2d 62, 63-64 (3d Cir. 1978), *cert. denied*, 439 U.S. 880 (1978).

64. *Id.* at 62.

65. *Id.* at 64.

66. *Id.* at 67.

67. *Id.* at 66. The court agreed with the defendant's argument that "freedom . . . must be extended to artists to utilize basic subject matter more than once." *Id.*

painting, just as others are free to copy the original subject matter.⁶⁸ An element of *scenes a faire* was also factored into the decision. Expert testimony stated that conventions in ornithological art tended to limit novelty in the depiction of birds.⁶⁹

More importantly, the court recognized that some painters repeatedly return to the same basic themes.⁷⁰ Furthermore, an artist's copying of his own work might not be enough to constitute infringement. The degree of substantial similarity needed to prove infringement is greater than the degree needed to show mere copying. If an ordinary lay person would be able to distinguish between the two works, there would be no infringement even if there had been some copying.⁷¹

The court noted that the difficulty inherent in marking the boundary between idea and expression was compounded by applying the same general principles to claims involving plays, novels, sculptures, maps, informational directories, musical compositions and artistic paintings.⁷² However, "[i]solating the idea from the expression and determining the extent of copying required . . . [to constitute unlawful appropriation depended] . . . to some degree on whether the subject matter is words or symbols written on paper, or paint brushed onto canvas."⁷³

DIFFERENT STANDARDS FOR DIFFERENT MEDIA

Factual Expressions

A stricter standard of similarity is required where the subject matter of the copyrighted work is factual rather than purely artistic. In *Ricker v. General Electric*,⁷⁴ an author wrote a book on radio communications in

68. *Id.* at 65.

69. *Franklin Mint*, 575 F.2d at 66. "For example, minute attention to detail of plumage and other physical characteristics is required and the stance of the birds must be anatomically correct." *Id.*

70. *Id.* at 66. Judge Weis equated themes with ideas rather than expressions, and hence themes were not copyrightable. *Id.*

71. *Id.* at 65-66.

72. *Franklin Mint*, 575 F.2d at 65. In *Mazer*, Supreme Court Justice Douglas noted in a separate opinion that items which have been copyrighted include

statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles and ash trays. Perhaps these are all "writings" in the constitutional sense. But to me, at least, they are not obviously so . . . I would accordingly put the case down for reargument.

Mazer, 347 U.S. at 221.

73. *Id.* (emphasis added). Although nothing in the opinion clarifies what Judge Weis had in mind when contrasting "words" with "symbols," it is possible that musical notes may qualify here.

74. 162 F.2d 141 (2d Cir. 1947).

simple language comprehensible to lay readers.⁷⁵ The author submitted her work to General Electric for publication. General Electric refused her offer and published its own radio communications book targeted to the nontechnical employees of the radio industry.⁷⁶ The author sued, alleging "plagiarism of scientific materials simply prepared for the lay reader."⁷⁷

The court found that although General Electric did have access to the plaintiff's book, the evidence showed no proof of copying and that General Electric had based most of its own book on its own pre-existing material.⁷⁸

However, the court went further in stating that the plaintiff had no monopoly on the scientific information contained in her book, and did not have a monopoly on "the idea of expounding such information in simple language comprehensible to lay readers."⁷⁹ In other words, the court classified the style of her writing as an unprotectable idea rather than as a protectable expression.

The court also held that the nature of the work must be considered when determining whether or not a work has been plagiarized.⁸⁰ Where access is proven, similarities between the copyrighted work and the alleged piracy may create an inference of plagiarism. But such an inference is notably diminished when the similarities relate "to the expression of scientific principles which must necessarily be stated in more or less stereotyped language."⁸¹ The policy is similar to that of *Merger*, in that copyright protection is not extended to the expression of certain scientific facts because the facts involved can only be expressed in a limited fashion.

The rule of limiting the copyright protection afforded to the style used in the expression of factual material was reaffirmed more recently in *McMahon v. Prentice-Hall*.⁸² In *McMahon*, the plaintiff professor wrote three editions of a college level introductory psychology textbook as well as one edition for another textbook, which were published by Prentice-Hall. Later Prentice-Hall also published three editions of a college level introductory psychology textbook written by Professor Morris. Professor McMahon claimed that both Prentice-Hall and Professor Morris had

75. *Id.* at 142. The plaintiff author titled her book "Radio Primer."

76. *Id.* at 142-43. General Electric's book was called "The ABC's of Radio."

77. *Id.* at 142.

78. *Id.* at 143.

79. *Ricker*, 162 F.2d at 142.

80. *Id.*

81. *Id.*

82. 486 F. Supp. 1296 (E.D. Mo. 1980).

infringed the copyrights to his respective works.⁸³

The court found it unclear which elements of Morris' books the plaintiff claimed had infringed his copyrights.⁸⁴ In holding for the defendants, the court found the similarity of the works' subject matter insufficient for a finding of infringement.⁸⁵ Second, the court analyzed the style in which the books were written and decided that Morris had followed McMahon's style to a large extent, in spite of some differences.⁸⁶ Presented as a question of fact, a jury might conclude that Morris had adopted the writing style McMahon had used first.⁸⁷

However, this question of fact alone could not preclude the court from granting defendant summary judgment because such a finding would not amount to copyright infringement.⁸⁸ The court went on to construe *Ricker* as holding that "[a] writer may not claim a monopoly on a particular writing style by virtue of a copyright."⁸⁹

The court also held that an author cannot obtain a copyright on ideas, concepts or theories.⁹⁰ McMahon argued that he was "the first author to treat certain subjects in a particular way or to analyze concepts to reach the results contained in his books."⁹¹ The court, however, could not distinguish his "treatment" or "analysis" from his "theories, ideas, concepts, or style of writing."⁹² Regarding the style used to express factual material, the court held that style belonged in the category of unprotected items.⁹³

Artistic Expressions

The same analysis used to determine whether the copyright to a factual work is infringed is also applied to artistic works. The court in *Franklin Mint* held that "the ease with which a copyright may be deline-

83. *Id.* at 1298.

84. *Id.* at 1302.

85. *Id.*

86. *Id.*

87. *McMahon*, 486 F. Supp. at 1302. McMahon's textbook was written in the first person "in a light and easily readable style." He used colloquialisms and examples which the young people to whom his book was directed could easily relate to. Morris followed this style to a large extent, though he wrote in the third person. Morris, like McMahon, designed his books to hold the reader's interest and attention, rather than offering a mere recital of dry facts. *Id.*

88. *Id.* at 1302. The court reached this conclusion in spite of the fact that it accepted McMahon's "assertion that he was the first author of such textbooks to depart from the dry and serious tone previously employed." *Id.*

89. *Id.*

90. *Id.* at 1303.

91. *Id.*

92. *McMahon*, 486 F. Supp. at 1303.

93. *Id.* at 1302.

ated may depend on the artist's style."⁹⁴ An artist who creates an impressionist painting will have a broader scope of protection than one who creates paintings with a photograph-like clarity. Such a copyright "may be termed 'weak' " because of the difficulty in proving, in the case of a realist painting, that a second artist who paints a similar work has copied the first painting rather than the actual subject matter.⁹⁵ Thus, how accurately a painting attempts to mirror reality is a factor in deciding whether an artist has infringed a previous work.⁹⁶

SELF-INFRINGEMENT OF NON-FACTUAL WORKS

The above cases show the increased difficulty of infringing on a work depicting facts as opposed to a work of pure fiction or abstraction, regardless of whether the medium of expression is literary⁹⁷ or visual.⁹⁸ The burden of proving that a new work is not a copy of a previous work is heavier if the author of both works is the same,⁹⁹ but the rule is the same. Infringement is found only if the court believes that the second work was a copy of the first, because authors remain free to create new works based on the original subject matter.¹⁰⁰

Because of the limited ways of expressing facts, different works expressing the same fact must necessarily be similar to each other. The courts recognize this and have accordingly granted a narrower scope of copyright to factual works than to purely artistic works.¹⁰¹ Thus, an author of a factual work can more easily claim that his work was based on the subject matter itself rather than on a previous factual work.

Conversely, the greater number of ways in which fictional or abstract¹⁰² works can be expressed results in increased difficulty for the artist of such a work to prove that the new work originated with her rather than having been copied.

94. *Franklin Mint*, 575 F.2d at 65.

95. *Id.*

96. *Id.* "A scientific drawing of a bird must necessarily be more similar to another of the same nature than it would be to an abstract version of the creature in flight." *Id.*

97. *Ricker*, 162 F.2d 141; *McMahon*, 486 F. Supp. 1296.

98. *Franklin Mint*, 575 F.2d 62.

99. *See generally Gross*, 212 F. at 931.

100. *Franklin Mint*, 575 F.2d at 65.

101. *Franklin Mint*, 575 F.2d at 65; *Ricker*, 162 F.2d at 142.

102. For purposes of this casenote, the term "abstract" is used broadly to mean a work that does not depict reality in an accurate manner, such as an impressionist painting as opposed to a realist painting, or a photograph.

Visual Style

When an artist repeatedly engages in a particular style of expression, either because of a desire to express his work in a certain way, or because of a limited range of talent, he will produce works of inevitable similarity to each other. Such artists need a narrow scope of copyright protection, otherwise, once they assign a work, the assignee could very well claim that any of the artists' subsequent works are infringements of the assigned work. Fortunately, some authority in this area is favorable to artists.

In *Esquire v. Varga Enterprises*,¹⁰³ Esquire Magazine hired Alberto Vargas to create paintings for use in its magazine and in its annual calendar.¹⁰⁴ Esquire became the owner of the copyrights to all of the paintings which Vargas produced under his contract with the magazine. The contract expired in 1943, but a new one was signed in 1944. In 1946, Vargas repudiated his contract with Esquire and published calendars featuring his new paintings.¹⁰⁵

Esquire sued Vargas, alleging that four of the paintings in his calendar were copied from paintings that Vargas had previously submitted to Esquire and to which Esquire owned the copyright.¹⁰⁶

The court held for Vargas on the issue of copyright infringement.¹⁰⁷ It based part of its decision not on the lack of similarity among the paintings, but rather on the consistent similarities which existed throughout all of Vargas' paintings.¹⁰⁸ The court stated:

Any attempt to point out the distinguishing elements of the various paintings should be prefaced by the observation that the over one hundred paintings by defendant in evidence reveal that defendant's artistic talent is limited to the portrayal of the female figure in varying degrees of undress. His success in this line of endeavor can undoubtedly be attributed to the remarka-

103. 81 F. Supp. 306 (N.D. Ill. 1948).

Originally, the pictures furnished bore defendant's name or signature, 'Vargas', and were reproduced and published with his name thereon. Later by agreement of the parties, the name 'Vargas' was changed to 'Varga'. Thereafter, the pictures created by defendant and published by plaintiff were called 'Varga Girls', and the name of the defendant appearing thereon was 'A. Varga' with a small 'Esq.' inserted in the large lower loop of the letter 'g' of the name.

Id. at 307. This explains the discrepancy between the spelling used in the defendant's name, and the spelling used in the case name.

104. *Id.* at 307.

105. *Id.*

106. *Id.*

107. *Esquire*, 81 F. Supp. at 309.

108. *Id.* at 307-08.

ble physical characteristics of his finished product, e.g., the exaggerated torso and the subtly curved but unduly long legs. It is apparent from the testimony that *this is all he has ever drawn and seems to be all he ever will draw*. It follows, therefore, that all his future drawings will bear some similarity to his previous work, whether or not his past creations are before him at the time he is painting. *He has a certain type of art in mind and, consequently, that is all he is able to express on the drawing board*. It can be seen, therefore, that if the *first* painting submitted by him to the plaintiff could properly be considered a work of *creative art*, his *subsequent* paintings should probably be accorded a similar status.¹⁰⁹

The consistent similarities in Vargas's paintings convinced the court that each painting was independently created, rather than copied. But the court added that, in any event, it was

possible to detect a sufficient number of elements of distinction between the original and the accused drawings to remove the latter from the category of copied work. Although it is certainly not decisive, it should be noted for the record that the articles of "clothing" (this term is used euphemistically, for said articles are about as concealing as the ordinary window pane) vary from picture to picture.¹¹⁰

Literary Style

Factual works are narrowly protected under copyright because only a limited number of ways exist to express a fact.¹¹¹ The style of expression falls outside of protectability.

109. *Id.* at 307-08 (emphasis added).

110. *Id.* at 308. Judge Campbell went on to compare the distinctions between each of the four sets of paintings in question. For example, between one set of paintings his examination found that

(a) Hair—Accused's hair is long and gathered at the base of the neck; Original's is combed upward to the top of the head in the well-known "upsweep" coiffure; (b) Face—Original faces almost directly away from the observer; Accused's head is turned more to the right, thereby revealing a greater portion of the cheek, eyebrow and eyelash; (c) Left hand—Original's ring and little fingers are curled under the palm; Accused's hand is spread out in a virtually flat position; (d) Right leg—Original's is held out straight from the body; Accused's is bent approximately 45 degrees at the knee; (e) Left leg—Original's is invisible; Accused's left foot is visible; (f) Body position—Accused appears to be in a more upright position which accordingly raises the left shoulder considerably above the right, whereas Original's shoulders are in almost a perfectly horizontal plane.

Id.

111. *Franklin Mint*, 575 F.2d at 65.

The *Esquire* court applied this principle to the style of expression used in purely artistic visual works. The court reasoned that the limited avenues of expression available to Vargas created a presumption that the artist had originated the works in question, rather than copied them from his previous works.

This reasoning has also been applied to fictitious literary works. In *Warner Brothers Pictures v. Columbia Broadcasting System*,¹¹² Warner accused Dashiell Hammett of infringing the copyright to "*The Maltese Falcon*."¹¹³ Hammett had written "*The Maltese Falcon*" and had sold the exclusive motion picture, television and radio rights to Warner Bros. in 1930.¹¹⁴ In 1946, Hammett granted to third parties the motion picture, television and radio rights to use his characters from "*The Maltese Falcon*" in all future (non-"*Maltese Falcon*") adventures.¹¹⁵

Though the court held for Hammett on a contract theory,¹¹⁶ it also held that Congress did not intend to protect characters with their names under the copyright statute.¹¹⁷ The court equated characters with such unprotectables as style, idea, theme or theory. Even if Hammett had assigned his complete rights in the copyright to "*The Maltese Falcon*," the characters were merely "vehicles for the story told, and vehicles did not go with the sale of the story."¹¹⁸ Since characters were not protectable under copyright,¹¹⁹ either Hammett or another author could write stories using the same characters without infringing anyone's copyright.

An Economic Argument

Warner Bros. also offered an economic argument for refusing to extend the scope of copyright protection to characters.

Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well. The characters of an au-

112. 216 F.2d 945 (9th Cir. 1954).

113. *Id.* at 948.

114. *Id.* at 946-48.

115. *Id.* at 948.

116. *Id.* at 949-50. Hammett won under the doctrine of *ejusdem generis*. Under this theory of construction, where general language follows specific language, the general language is construed as only referring to the specific which came before it. Hammett's contract with Warner Bros. specifically granted to Warner Bros. the title of "*The Maltese Falcon*" but did not specifically grant characters. "The clearest language is necessary to divest the author of the fruits of his labor. Such language is lacking here." *Warner Bros.*, 216 F.2d at 949.

117. *Id.* at 950.

118. *Id.*

119. Though characters are not protectable under copyright in the Ninth Circuit, they may still be protected under trademark theories. *Id.* at 951.

thor's imagination and the art of his descriptive talent, like a painter's or like a person with his penmanship, are always limited and always fall into limited patterns. The restriction argued for [by Warner Bros.] is unreasonable, and would effect the very opposite of the statute's purpose which is to encourage the production of the arts.¹²⁰

The court recognized that the economic policy behind copyright law would be defeated by broadening the scope of protection. Too broad a scope would result in denying authors an economic livelihood and denying the world the benefits of their endeavors.¹²¹

Musical Style

The same principles used to separate idea from expression are applied to significantly different media in attempting to determine the extent of copying needed for unlawful appropriation. However, the court in *Franklin Mint* held that whether a painting's style was realist or abstract had to be considered in infringement cases because of the unequal restrictions imposed in each case.¹²²

The same general principles used to determine the issue of infringement in visual and literary works also apply to musical compositions.¹²³ While lyrics can tell a factually true story, all musical notes are abstract. Thus it would seem that musical compositions should be afforded a broad scope of protection, as with fictional literature, rather than the narrower scope of protection afforded factual texts.

Nevertheless, though neither fictional literature nor musical compositions are restricted in their expression by having to "stick to the facts,"

120. *Id.* at 950.

He must be a poor creature that does not often repeat himself. Imagine the author of the excellent piece of advice, 'Know thyself', never alluding to that sentiment again during the course of a protracted existence! Why, the truths a man carries about with him are his tools; and do you think a carpenter is bound to use the same plane but once to smooth a knotty board with, or to hang up his hammer after it has driven its first nail? I shall never repeat a conversation, but an idea, often. I shall use the same types when I like, but not commonly the same stereotypes. A thought is often original, though you have uttered it a hundred times. It has come to you over a new route, by a new and express train of associations.

Warner Bros., 216 F.2d at 950 n.5, citing O. W. HOLMES, THE AUTOCRAT OF THE BREAKFAST TABLE 9.

121. *Warner Bros.*, 216 F.2d at 950. In *Esquire*, Vargas would have lost his entire livelihood had he been denied the right to create paintings featuring women of exaggerated torso and unduly long legs; certainly in *Gross*, the entire world was denied the artistic benefits of "Cherry Ripe," the second photograph featuring the same nude model. *Gross*, 212 F. at 930.

122. *Franklin Mint*, 575 F.2d at 65.

123. *Id.*

musical compositions are hampered by a restraint unknown to literary works. Far fewer notes exist on the scale than do words in the English language. Of these notes, only a small percentage of the available combinations will produce anything which can justifiably be termed "music." In *Darrell v. Joe Morris Music Co.*,¹²⁴ the court recognized that "while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear."¹²⁵

Distinguishing between music that is "pleasing" and music "pleasing to the popular ear" has validity. All composers have a more restricted range of expression available to them than do fiction writers. But the available range of musical expression is even narrower in the field of popular, as opposed to classical, music.

In *Selle v. Gibb*,¹²⁶ Dr. Arrand Parsons, a professor of classical music at Northwestern University, testified as an expert witness for Ronald Selle.¹²⁷ Selle alleged that the hit tune by the Bee Gees, "How Deep Is Your Love," had infringed the copyright to his own song, "Let It End."¹²⁸ The court indicated that it would have given Dr. Parsons' testimony more weight if he had been experienced in popular music.¹²⁹ Testimony was required to analyze the complexity of the two popular compositions so as to determine the standard of similarity needed to find infringement¹³⁰ and the court recognized that popular songs are less complex than classical compositions.¹³¹

124. 113 F.2d 80 (2d Cir. 1940).

125. *Id.* at 80.

126. 741 F.2d 896 (7th Cir. 1984).

127. *Id.* at 899.

128. *Id.* at 898.

129. *Id.* at 904.

The plaintiff relies almost entirely on the testimony of his expert witness, Dr. Arrand Parsons. The defendants did not introduce any expert testimony, apparently because they did not think Parsons' testimony needed to be refuted. Defendants are perhaps to some degree correct in asserting that Parsons, although eminently qualified in the field of classical music theory, was not equally qualified to analyze popular music tunes.

Id.

130. *Id.* at 905. "To bolster the expert's conclusion that independent creation was not possible, there should be some testimony or other evidence of the relative complexity or uniqueness of the two compositions. Dr. Parsons' testimony did not refer to this aspect of the compositions." *Id.*

131. *Id.* "In a field such as that of popular music in which all songs are relatively short and tend to build on or repeat a basic theme, such testimony would seem to be particularly necessary." *Id.*

FOGERTY'S VICTORY

Selle acknowledged that the range of expression available to popular composers is more restricted than to their classical colleagues. Because of this it is both logically correct, and beneficial to popular composers, for the courts to expressly recognize a narrowing of copyright protection in popular music infringement cases, which would be similar to the narrowed protection accorded factual/realist works as opposed to fictional/abstract works. Otherwise, popular artists will eventually be foreclosed from servicing the "infantile demands of the popular ear."¹³²

Fortunately, John Fogerty succeeded in his defense against Fantasy's infringement suit. The policy behind copyright law is to encourage artists to use their talents for the benefit of the general public and to reward them for their work. A contrary verdict in *Fantasy* would have defeated this policy. The public would be denied the benefits of "Old Man" and of possible future works from Fogerty. Instead, the public can expect more songs in Fogerty's "swamp rock" style, just as Vargas' victory in *Esquire* resulted in the creation of additional "Varga Girls."

Ideas are outside the protection of copyright¹³³ and so Fogerty was always free to write about any subject matter he chose. But "Jungle's" music constituted protectable expression. Fantasy accused Fogerty of copying "Jungle's" music in "Old Man." Lacking direct evidence of copying, the jury could infer copying if Fogerty had access to "Jungle" and found substantial similarity between the two songs.

Ostensibly, the broader the scope of copyright protection, the greater the benefit to authors. Yet, too broad a scope creates a situation in which the first author to express an idea in a particular style would gain a monopoly over that style.¹³⁴ And even the first author would be prevented from reworking his old ideas in that style once the copyright to the original work had been assigned. Had "Jungle" given Fogerty a copyright monopoly over his "swamp rock" style, the style would have been assigned away with "Jungle" if the jury had construed copyright protection too broadly, just as the photographer in *Gross* assigned away his right ever to create another photograph resembling his first.

No copyright protection is granted when, as in *Morrissey*, an idea can only be expressed in a limited number of ways, nor, as in *Schwarz*, when an expression necessarily flows from an unprotected idea. The pol-

132. *Darrell*, 113 F.2d at 80.

133. 17 U.S.C. § 102(b) (1982).

134. Just as the plaintiff in *Ricker* unsuccessfully attempted to gain a monopoly over the idea of expressing radio technology in simple language. *Ricker*, 162 F.2d at 142.

icy is to narrow the scope of protection along with the available means of expression. The narrower the scope of protection, the greater the degree of similarity that is allowed to exist between "Jungle" and "Old Man" without a finding of substantial similarity.

Limited available means of expression in factual works results in narrowing the scope of protection accorded to the style used in such works.¹³⁵ *Darrell* and *Selle* recognize that popular music is an area of limited available means of expression. Thus, the songwriting style of "Jungle" was properly accorded the same narrow scope of protection as the style used in factual works. Fogerty is free to write songs as similar to "Jungle" as the second painting of the cardinal was to its predecessor in *Franklin Mint*.

But if popular songs are more analogous to abstract rather than to factual works, *Esquire* shows that abstract works (i.e. women with exaggerated torsos and unduly long legs) can still be accorded a narrow scope of protection if they nevertheless reflect a limited available means of expression. In *Esquire*, the narrow scope of protection granted by the court to the assigned paintings was due to Vargas' own limited style rather than to any limitations inherent in his medium of choice (abstract art). If rock music is construed as "abstract" by a court, Fogerty's own "swamp rock" style might indicate that only a limited means of expression are available to him, and "Jungle's" copyright should be narrowly construed so as not to deprive Fogerty of a livelihood and the world of "Old Man."

The jury's feeling in *Fantasy*, that it is not possible for an author to copy from himself,¹³⁶ suggests a new rule for the courts to consider. This new rule need not permit an author to make outright duplicates of previously assigned works. It would only require the courts to consider, as a valid factor during summary proceedings, that any author's work will inevitably resemble his previous works because every author has his own style. This additional factor might have decided *Fantasy* in Fogerty's favor at the summary stage, avoiding an expensive and unnecessary lawsuit,¹³⁷ while at the same time upholding the economic policy behind

135. *Ricker*, 162 F.2d 141; *McMahon*, 486 F. Supp. 1296; *Franklin Mint*, 575 F.2d 62.

136. *Daily Variety*, Nov. 8, 1988, *supra* note 25, at 18, col. 2. Whether two works are similar is determined by asking whether they "carry the impression to . . . an average person who reads a scenario and sees a play, that they are the same. This is the criterion which the courts have adopted." *Schwarz*, 85 F. Supp. at 274; "[I]t must be shown that copying went so far as to constitute improper appropriation, the test being the response of the ordinary lay person." *Franklin Mint*, 575 F.2d at 65. Thus, it would not be improper for the courts to consider the "general feeling" of the jury in *Fantasy III*.

137. John Fogerty's victory cost over \$400,000 in legal fees. In his contract with Warner Bros., Fogerty guaranteed that "Old Man" had not infringed anyone else's work and that he

copyright protection.

CONCLUSION

The new rule would be especially valuable to authors in the context of today's entertainment industry, where the author and the eventual owner of the copyright are usually two separate entities. The great number of writers and composers attempting to break into the industry has resulted in a "buyer's market," where producers use their unequal bargaining power to set the terms of the sale, expecting the desperate artist to be grateful that the producer has chosen to produce his work.

The problem for screenwriters began when they first came to Hollywood to write for talking pictures. Film producers established the precedent that, unlike the theater where playwrights grant mere licenses, screenwriters would have to assign full copyright ownership of their scripts to the studios.¹³⁸ The situation is, if anything, worse for composers. Although the entertainment industry as a whole has a bad reputation for its financial practices, the music industry is particularly infamous for its "creative accounting."¹³⁹ Once the copyright is assigned, the author is at the mercy of such accounting. Equity calls for a new rule shielding authors from the deceitful practices prevalent in today's industry.¹⁴⁰ Allowing authors greater freedom to rework their old ideas would permit them to create new works, free from the grip of old contracts.

would defend any infringement suits at his own expense. *Daily Variety*, Nov. 8, 1988, *supra* note 25, at 18, col. 1.

138. A. Gansberg, *Writers Guild Of America: Writing History With 40 Years of Awards & 55 Years of Artistic Excellence*, *The Hollywood Reporter*, Mar. 18, 1988, at S-2, col. 1.

139. D. Kagan, *A Contractual Cacophony in Music*, *INSIGHT*, July 4, 1988, at 50-52, (*INSIGHT* is published by the Washington Times). Traditional industry practices by which record companies avoid paying any royalty to artists include: (1) "Free goods," in which recording companies give away records, tapes and compact discs for promotional purposes. Some of these goods go to radio stations for free airtime and some go to retailers in the hope that free records will generate added display space. However, sometimes record companies will give away free copies of artist X's work in order to generate display space for artist Y. Artist X gets neither royalties nor promotion for these giveaways of his or her work. *Id.* at 51, col. 2; (2) Recording companies have been accused of falsely claiming to have melted down unsold records while secretly selling them for profit. *Id.* at 50, col. 1; (3) A "packaging deduction" is taken when a recording company deducts 10% from the retail price for packaging, and thus reducing the artist's royalty base by that amount. *Id.* at 52, col. 1; (4) A "studio advance" is when a recording company "advances" an artist money for the cost of studio time to record the master tape, and then deducts it from the artist's royalties. William Krasilovsky, a music industry lawyer, terms this a "phony advance" because the artist never sees the money, and the recording company withholds royalties from the artist long after the company has started profiting from each unit sold. The practice is especially harmful to new artists who sign on for very low royalty amounts. *Id.* at 52, col. 1.

140. *See supra* note 139.

Congress was aware of the fact that many authors assigned their copyrights for less than full value.¹⁴¹ Legislative history shows that Congress saw the problem as lying in "the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."¹⁴² To help assure authors adequate compensation, and thus support the policy of encouraging them to create for the public good, Congress included a nonwaivable termination clause in the Copyright Act of 1976.¹⁴³ Any assignment of a copyright made after January 1, 1978, can be terminated by the original author, notwithstanding any agreement to the contrary. This clause reaffirms the policy that authors deserve fair compensation for their works.¹⁴⁴

The scope of copyright protection is already narrow enough to allow any author to re-explore an old idea or theme. Courts must recognize that since there are a limited number of ways to express ideas, some authors, either by choice or lack of ability, limit themselves to a certain style of expression. Such judicial recognition would hold the doors of creativity open to authors who have assigned a lucrative copyright, so that they might re-enter old rooms to express different, albeit similar, works.

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141. For instance, although Wes Craven is the creator of the original "Nightmare on Elm Street" film, he only receives "minimal percentage points" from the series. He is currently working on a competitor for Freddy ("Nightmare's" horrific star) which he hopes will result in his first creation being "forced into retirement." A. King, *Horror maven Wes Craven broadens film, TV portfolio*, *The Hollywood Reporter*, Aug. 26, 1988, at 6, col. 1.

142. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 124, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5740.

143. 17 U.S.C. § 203(a)(5) (1982). However, the author must wait thirty-five years from the transfer of copyright before he or she can exercise this right. 17 U.S.C. § 203(a)(3) (1982). Sensibly, Congress determined that the author's widow, widower and the surviving children and grandchildren of the author, should also have some interest in the termination of transfer. 17 U.S.C. § 203(2) (1982).

144. Another change that would benefit composers and musicians would be recognition that recording companies have a fiduciary relationship to artists, which would place a special obligation of trust on them, as opposed to their relationship being a mere arms length business agreement. Los Angeles attorney Don Engel has stated that he would "take the case for free, just to go all the way to court and set the precedent." *INSIGHT*, *supra* note 139, at 52, col. 3.