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A Case for the Federal Protection of Television Formats: Testing the Limit of “Expression”

FRANK L. FINE*

“En un mot, il aime l’argent plus que rev’putation, qu’honneur, et que vertu . . .”**

La Flev’che, from L’Avare, by Moliev’re (Act II, Scene IV)

I. INTRODUCTION

Reasonable minds will always differ on the issue of whether television broadcasting in the United States actually serves the public interest. In their desire to satisfy the widest cross-section of the American populace,¹ the networks arguably have watered down the potential of television as an artistic, informative, and theatrical medium, and

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** Translation: “In a word, he loves money more than reputation, honor, and virtue . . .”

1. In about 1960, the major television networks radically altered the way in which broadcast advertisers had dominated television programming. No longer were shows created and produced by one “sponsor.” Under the new regime, the networks assumed the reins of production and sold 30 or 60 second spots to the advertisers. This is broadcast financing, and indeed television itself, as we know it today. For an excellent discussion of the economic determinants of modern television programming, see Rice, *Network Television and the Public Interest*, in NETWORK TELEVISION AND THE PUBLIC INTEREST 193-95 (1980). The impact of this repositioning of the sponsor on network programming and profits is vividly depicted by Rice:

Since the rates those advertisers will pay are proportional to the size of the audience, the networks are economically motivated to offer programming that will attract as

have turned television programming into the "medicine show" of post-industrial society.² Conversely, it may be perfectly plausible to contend that what is good for Granny Goose is good for the viewing gander. Nielsen ratings are, if nothing else, an indication of majority tastes,³ even though the literature suggests that consumer satisfaction is closely linked to subliminal identification with carefully manipulated "program elements."⁴ Whether television programming is considered

large an audience as possible. Once advertising revenues surpass the substantial but fixed program-production costs, increases in audience size—and hence in revenues—translate almost directly into profit. Thus a change of only 1 or 2 percent in audience share can mean millions of dollars in network profits Given this economic structure, the programming objectives of the networks are easily understood. Programs are chosen on the basis of their hoped-for ability to draw a large audience share at the expense of competing programs on the other networks. A weak program inflicts both direct and indirect losses on the network that carries it. Its low ratings not only will result in the loss of millions of dollars in potential profits during its own time slot, but also may cut into the ratings of programs in adjacent time periods, perhaps affecting the entire evening on which it is shown.

Id. at 193-94.

2. As explained by one commentator, the present system of network economics has caused a shift in programming orientation from that of arousing viewer interest in the show as a whole to that of discouraging him from flipping the channel:

A typical prime-time network schedule is deliberately designed so as *not* to produce radical shifts in audiences. Networks do not want audiences moving to switch the dial. As one successful television producer put it, "We're a medicine show. We're here to deliver the audience to the next commercial. So the basic network policy is set in motion from the beginning of prime time to the end of prime time, programs to maintain and deliver those audiences to the commercial."

J. GREENFIELD, *TELEVISION: THE FIRST FIFTY YEARS* 56 (1977). It has been noted that prime-time programming is dominated by situation comedies and adventure shows, whereas the fetid daytime diet consists largely of soap operas and game shows. Rice, *supra* note 1, at 194. The new industry philosophy should be contrasted with the benevolent attitude which prevailed before the networks obtained control over their programming, as exemplified by the following comment submitted to Congress: "By making available throughout the country *information, education and the best of culture*, network television brought about a cohesion among the people of the United States which has never before existed . . ." *Network Practices*, Memorandum of Frank Stanton, President, CBS, for the Senate Committee on Interstate and Foreign Commerce 12-13 (June 1956) (emphasis added). With reference to Mr. Stanton's comment on "information," the following note on the modern direction of news broadcasting is an interesting contrast: "[C]ritical commentary programming is now more concerned with audience response than with the subject of the commentary." L. Thompson, *Trends and Issues in Commercial Prime Time Television—an Analysis of Network Programming, 1966-76* 3-4 (1977) (unpublished doctoral dissertation submitted to Michigan State University, available in UCLA Theatre Arts Library).

3. It was observed circa 1830 by a celebrated French political philosopher that the American political system offers few protections for minority views. See A. DE TOQUEVILLE, *ON DEMOCRACY IN AMERICA* 74-82 (ed. Librairie Larousse 1975).

4. The clinical process that determines which programs shall go to series involves the experimental testing of subjects. See Jencks, *How Network Television Program Decisions are Made*, in *NETWORK TELEVISION AND THE PUBLIC INTEREST* 43-44 (1980). It is interesting to note that an entire genre of television psychology has emerged. One media expert suggests, for example,

to be the triumph of banality or of democracy, the networks undeniably will remain in the for-profit mode, while the writers will compete at almost hopeless odds for Hollywood fame and fortune.⁵ The networks will remain locked in a fiercely-drawn battle for the most profitable program ideas.

Central to the development of new television programs, series, and the like, is the "format." Although an absolute definition of "format" has not been agreed upon, a format generally is considered to be a written presentation setting out the framework within which the central characters of a proposed program will operate and includes the setting, theme, and premise or general story line of the program.⁶

that television presents American culture as historically developed and unconsciously ingrained and as offering a means to "convert many of the differential and disconnected segments of our lives . . . and to analyze the ways in which social norms are implicitly or explicitly present . . ." G. GOETHALS, *THE TV RITUAL* 33-35 (1981). A more macrascopic view of television's power is evident in this comment:

[T]elevision is not simply a "medium" but a "mediator"—between fact and fantasy; between our desire to escape and our need to deal with real problems; between our old values and new ideas; between our individual lives and the life of the nation and the world. Seen from this perspective, television becomes much more interesting and much less simple than before.

Adler, *Introduction: A Context for Criticism*, in *TELEVISION AS A CULTURAL FORCE* 13 (1976).

5. A former high-ranking CBS executive estimated several years ago that the total number of "program ideas" and formats "accumulated and reviewed" by CBS during a single season ranges between only 200 and 300. Jencks, *supra*, note 4, at 42. This figure is preposterously low in view of the myriad of sources from which Jencks himself admits the program ideas and other materials are received. These sources include "the public, from writing and producing talent, from literary agents on behalf of published books or stories, from talent agents on behalf of their clients, from production companies that have existing programs on the network, and from producers and writers on the network's own payroll." *Id.* at 41. Supporting the view that Jencks' estimate is unrealistically low is the assessment of a senior NBC attorney who posited in 1958 that NBC reviewed some 30,000 to 40,000 "suggestions" each year, including "everything from letter outlines to pilot films," but seriously studied between 2,000 and 3,000 of the total number of submissions received. Olsson, *Dreams for Sale: Some Observations on the Law of Idea Submissions and Problems Arising Therefrom*, 23 *LAW & CONTEMP. PROBS.* 34, 55 (1958). Olsson also observed that it was not unusual at that time for a motion picture studio to receive 20,000 "stories or ideas" per year. *Id.*

6. As might be expected, no consensus exists as to what a television format consists of. According to Article 1C, Paragraph 19 of the Writers Guild of America 1977 Basic Agreement (Theatrical and Television) [hereinafter cited as the 1977 Basic Agreement], a "format" is in essence a "written presentation." The format of a "serial or episodic series" is quite comprehensive:

[S]uch format sets forth [a] the framework within which the central running characters will operate and which framework is intended to be repeated in each episode, [b] the setting, theme, premise or general story line of the proposed serial or episodic series and [c] the central running characters which are distinct and identifiable including detailed characterizations and the interplay of such characters. It may also include [d] one or more suggested story lines for individual episodes.

Id. Accord, Jencks, *supra* note 5, at 42, in which the author states that the program ideas received by NBC most often come in the form of a "format, describing at length the characters of a series, the era and locale in which they are placed, their interrelationships and the kinds of story involvements which will typify the series."

As the backbone of a potential hit series and the foundation upon which the scripts of each episode are usually conceived, the format figures importantly in the profit-making structure of the networks, a point which has not been overlooked by the Writers Guild in its minimum price schedules.⁷

Taking into account the time and effort that a writer will devote to preparing a format⁸ and the staggering profits that a "hot" new format may generate, the series creator must have rights to assert against those who would rather plagiarize than pay for the author's work. Moreover, these rights should be available under the unified federal copyright scheme. Because state "property right" theories, with few exceptions, have been preempted by federal copyright, it is unrealistic to expect that contractual remedies can begin to address the problem of nationwide or regional programming that consists of pirated formats.

Ironically, neither the federal courts nor the legal commentators have squarely addressed the issue of whether television formats are entitled to federal copyright protection.⁹ However, this paper will demonstrate that Congress and the federal courts, at least in principle, may be coming to terms with the need for federal protection.

II. THE 1909 ACT: A TALE OF JUDICIAL SKEPTICISM

Under the prior federal statute, the Copyright Act of 1909 (1909 Act), a curious ambiguity existed as to whether television formats were eligible for federal copyright protection. The statute and interpretive

7. The minimum fee for the "outline" of a television series during the 1980-81 year was \$605 for a 30 minute show and \$1,148 for a 60 minute program. In contrast, the minimum fee for a series "format" during the same period was \$2,515, more than twice the amount paid for the outline of a 60 minute program, irrespective of whether the program was 30 or 60 minutes in duration. The creator of the format may, of course, obtain additional fees for scripts that he may submit for individual episodes. Even though the minimum payment for scripts in 1980-81 varied from \$1,664 to \$2,160 for a 30 minute show and \$3,175 to \$4,186 for a 60 minute program, depending on whether the series was classified as a low-budget or high-budget production, the creator of a purchased format would be in a favorable position to negotiate his own rate of compensation. 1977 Basic Agreement, art. 13, §§7(g), (m)(1).

8. One commentator has observed that formats "are often fifty to a hundred typewritten pages long and contain writing of considerable intellectual effort . . ." Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 759 (1967).

9. See *infra* note 12 and accompanying text. For an excellent discussion of the law governing television formats prior to the enactment of the Copyright Act of 1976 [hereinafter cited as the 1976 Act], see Comment, *Television Formats—The Search for Protection*, 58 CALIF. L. REV. 1169 (1970). There is evidently no other legal literature which focuses directly on format protectibility.

House Report, antedating the invention of television, were understandably silent on the issue of format protectibility.¹⁰

The federal courts¹¹ did nothing to clarify the status of formats. In all of the federal cases involving the protectibility of formats, the plaintiffs conceded the unavailability of federal copyright, and instead, pursued his or her remedies under state law.¹² Interestingly, although this reluctance by authors to test the waters of federal protection prevented a "case or controversy" from arising, the courts in these cases said nothing by way of dicta to indicate that the author could have asserted ownership of a federal copyright.

This uncomfortable stalemate ended in 1959, when the Copyright Office formally announced its position that television formats were not registrable under the 1909 Act.¹³ The impact of non-registrability was catastrophic to the cause of format protection. Under the statute, the claimant was required to sue the Register of Copyrights to compel the issuance of a certificate of registration before an action could

10. Section 4 of the Copyright Act of 1909 [hereinafter cited as the 1909 Act] generally provided that, "[T]he works for which copyright may be secured under this title shall include all the writings of an author." 17 U.S.C. §4 (1909). Section 5 listed the classes of works registrable for copyright as the following:

- (a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.
- (b) Periodicals, including newspapers.
- (c) Lectures, sermons, addresses (prepared for oral delivery).
- (d) Dramatic or dramatico-musical compositions.
- (e) Musical compositions.
- (f) Maps.
- (g) Works of art; models or designs for works of art.
- (h) Reproductions of a work of art.
- (i) Drawings or plastic works of a scientific or technical character.
- (j) Photographs.
- (k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.
- (l) Motion-picture photoplays.
- (m) Motion pictures other than photoplays.
- (n) Sound recordings.

17 U.S.C. §5 (1909).

11. The federal courts have exclusive jurisdiction of cases arising under the federal copyright law. 28 U.S.C. §1338(a). "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to . . . copyrights . . ." *Id.*

12. To this date, not a single federal case has been reported in which the protectibility of a radio or television format has been determined. The decisions under the 1909 Act are: *ABC v. Wahl Co.*, 36 F. Supp. 167 (S.D.N.Y. 1940), *modified*, 121 F.2d 412 (2d Cir. 1941) (complaint generally alleging infringement of copyright was dismissed with leave to amend, but plaintiff failed to amend); *Herwitz v. NBC*, 210 F. Supp. 231 (S.D.N.Y. 1962) (plaintiff claimed infringement of a radio format under common law copyright, rather than federal copyright); *Dugan v. ABC*, 216 F. Supp. 763 (S.D. Cal. 1963) (plaintiff conceded that television "sketch" was not protected by federal copyright). Under the 1976 Act, *see Whitfield v. Lear*, 582 F. Supp. 1186 (E.D.N.Y. 1984) (plaintiff claimed infringement of state rather than federal copyright as to television format). For further discussion of the treatment of formats in the federal courts, *see M. NIMMER, NIMMER ON COPYRIGHT §16.02 (1978)*. [hereinafter cited as *NIMMER*].

13. Pursuant to the Copyright Office Regulations, unpublished television and radio scripts were protected by copyright, provided that they "consist of the actual text of the work to be presented orally." 37 C.F.R. §202.6 (1959). But, according to the Regulations, "formats, outlines, brochures, synopses or general descriptions of radio and television programs are not registrable in unpublished form." *Id.* In 1971, the Copyright Office reaffirmed its position

be brought against the infringer.¹⁴ Since neither Congress nor the courts stepped in to give television formats the status of protected works, the Copyright Office, by administrative fiat, deprived format creators of standing to bring an infringement action under the 1909 Act.

The reluctance of litigants and judges alike to test the copyrightability of formats was indicative of the air of pessimism which prevailed under the former law and confirmed the widespread association of television formats with "ideas," which have never been copyrightable, rather than with the "expression" of ideas.¹⁵ This view is substantiated by the 1971 circulars of the Copyright Office in which formats are included alongside program ideas as non-copyrightable material.¹⁶ The characterization of television formats under the current statute, the Copyright Act of 1976 (1976 Act), is anything but certain. However, the legislative history of the Act and recent judicial developments portend a new optimism.

III. PROTECTION UNDER THE 1976 ACT

A. Congressional Intent

The first step in a search for format protectibility under the 1976 Act would call for a "positive" approach to the issue. Language must be found in the statute or accompanying House Report which may be construed to suggest that formats are within the scope of federal copyright. In the words of section 102(a), copyright shall subsist in "original works of authorship."¹⁷ Enumerated in the section are seven

in several circulars. See Copyright Office Circular 47 (1971). Circular 47 provided, in pertinent part, as follows: "The general idea or title of a radio or television program cannot be copyrighted To be acceptable for copyright registration in unpublished form, a script must be more than an outline or synopsis. It should be ready for presentation or performance, so that a program could actually be produced from the script deposited." *Id.* Circular 47E similarly provided that, "The general idea or outline for a program is not copyrightable. Copyright will protect the literary or dramatic expression of an author's idea, but not the ideas themselves." *Id.* "Publication" may be defined as, "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending," 17 U.S.C. §101 (1976).

14. *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958).

15. For a detailed discussion of the idea/expression dichotomy as applied to formats, see *infra* notes 72-85.

16. See *supra* note 13.

17. Section 102(a) provides, in relevant part, as follows: "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known

categories of protectible works of authorship.¹⁸ Of these seven categories, only two could even remotely accommodate television formats: literary and dramatic works.

“Literary works,” under the 1976 Act, are “works . . . expressed in words, numbers, or other verbal or numerical symbols or indicia . . . such as books, periodicals [and] manuscripts”¹⁹ The House Report does not define the terms “books,” “periodicals,” or “manuscripts,” nor do the Copyright Office Regulations shed any light on their meaning.²⁰ The lack of definition suggests that these terms should be given the significance accorded to them under the 1909 Act.²¹ This approach, however, is not very helpful because under the former statute, television formats were considered to be neither books nor periodicals.²² Furthermore, in 1971, as demonstrated by several circulars of the Copyright Office, formats were reduced to the value of mere program ideas.²³

However, the “such as” language contained in the definition of “literary works” suggests that books, periodicals, and manuscripts are only illustrative of the material that may constitute a literary work. In the words of the statute, a work “expressed in words” is a literary work.²⁴ The view that this category is open-ended is confirmed by a comment in the House Report that the list of protected works is intended to provide “sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.”²⁵ Thus,

or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. §102(a) (1976). *See infra* notes 33-36 and accompanying text (definition of works of authorship).

18. Section 102(a) further provides:

Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.

17 U.S.C. §102(a) (1976).

19. 17 U.S.C. §101 (1976).

20. The Regulations to the 1976 Act state that the term “literary work” shall “have the meaning set forth in section 101 of Title 17.” 37 C.F.R. §202.3(a)(2)(1983).

21. *See NIMMER, supra* note 12, at §2.04.

22. Under section 59(a) of the 1909 Act, “books” included “composite and cyclopedic works, directories, gazetteers, and other compilations.” 17 U.S.C. §5(a)(1909). The Copyright Office added to this list, “poems, catalogs, annual publications, and information in tabular form.” 37 C.F.R. §202.4(a) (1959). “Periodicals,” on the other hand, were narrowly defined to include “newspapers, magazines, reviews, bulletins, and serial publications . . .” 37 C.F.R. §202.5 (1959).

23. *See supra* note 13.

24. 17 U.S.C. §101 (1976)(definition of “literary works”).

25. H.R. REP. NO. 1476, 94TH CONG., 2D SESS. 53 (1976) [hereinafter cited as HOUSE REPORT].

some basis does exist for arguing that a television format, which is in most cases expressed in words, may qualify for protection as a literary work. However, as will be discussed later in this analysis, a television format must be recognized as a work of authorship before the format may be placed in any of the seven categories.²⁶

Assuming for the moment a television format qualifies as a work of authorship, could the format be characterized as a dramatic work? According to the House Report to the 1976 Act, the meaning of "dramatic work"²⁷ is "fairly settled" under the old law and requires no further elaboration.²⁸ This retention of the guidelines of the 1909 Act does not bode well for television formats, however, because the Copyright Office Regulations protected only the "acting version of plays for. . . television. . . ."²⁹ In other words, the script for an episode of a television series was and continues to be a dramatic work,³⁰ whereas the format of the series as a whole has never fit within this category of protected works.

Television formats also may be protectible outside of the seven established categories of section 102(a). As the House Report makes clear, "the listing is 'illustrative and not limitative'. . . . [T]he seven categories do not necessarily exhaust the scope of 'original works of authorship' Rather, the list sets out the general area of copyrightable subject matter"³¹ The ultimate determination of whether television formats are copyrightable as literary works or as works completely outside of the seven established categories therefore depends on whether they constitute "works of authorship." This is

26. See *infra* notes 32-36 and accompanying text.

27. See *infra* note 30 (discussion of dramatic works).

28. *Id.*

29. 37. C.F.R. §202.7 (1959).

30. Circular 47 of the Copyright Office, construing the 1909 Act, provided that, "The unpublished script for a radio or television program, or a group of related scripts forming a series, may ordinarily be registered for copyright." Copyright Office Circular 47 (1971). The copyrightability of scripts under the 1976 Act is implicitly based on the old law. See NIMMER, *supra* note 12, at §7.06[A]. Moreover, as Nimmer accurately points out, "The fact that the actors are not in the physical presence of the audience but are rather viewed (or heard) through mechanical or electronic means does not derogate from the quality of drama. Thus a work remains dramatic regardless of whether it is to be performed on the legitimate stage, radio, television, or in any other medium." *Id.* at §206[A]. Nimmer's construction of the term "dramatic work" is supported by the Copyright Office Regulations to the 1976 Act, which state that included under the class of "Works of the Performing arts," are "works prepared for the purpose of being performed directly before an audience or indirectly by means of a device or process." 37 C.F.R. §202.3(b)(1)(ii) (1983).

31. See *supra* note 25, at 53. The statute itself demonstrates this intent with the language that, "Works of authorship include the following categories." 17 U.S.C. §102(a)(1976) (emphasis added).

the threshold federal standard for all copyrightable works.³² But as will be seen, this is no easy task.

The term “works of authorship” was “purposely left undefined” by Congress.³³ The House Report notes that the meaning of the phrase is not so broad as to encompass all “writings” capable of copyright under the Constitution because Congress did not wish to abdicate its power to legislate the limits of copyrightable subject matter.³⁴ In fact, the new standard, “works of authorship,” replaces the “all the writings of an author” phraseology of the 1909 Act³⁵ for the very reason that the old standard was “substantially the same” as the empowering constitutional language.³⁶

What then are the tools of analysis to be employed by Congress and the federal courts in determining the works which are or shall be protected outside of the seven categories of section 102(a) or that may come into one of these enumerated categories?³⁷ In this area, Congress opted for flexibility, intending neither “to freeze the scope of copyrightable technology [n]or to allow unlimited expansion into areas *completely outside the present congressional intent.*”³⁸

32. See *supra* note 17 and accompanying text.

33. HOUSE REPORT, *supra* note 25, at 51.

34. The Copyright Clause empowers Congress “[t]o promote the progress of science and usable arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. CONST. art. I, §8, cl. 8.

35. 17 U.S.C. §4 (1909). See *supra* note 10 and accompanying text.

36. HOUSE REPORT 1476, *supra* note 25, at 51.

37. It may appear at first blush that the courts would be engaged in legislative activity in determining the scope of section 102. However, as Nimmer points out, the concept of “works of authorship” was “intentionally left vague The courts are thereby permitted but not required, to recognize as protectible, types of works not expressly included in the seven category enumeration.” NIMMER, *supra* note 13, at §2.03[A].

38. HOUSE REPORT 1476, *supra* note 25, at 51 (emphasis added). One commentator has noted that specific guidelines are already in effect:

In considering whether the federal Copyright Act can serve as a basis for protecting specific materials or items of information, one therefore should make three fundamental inquiries:

1. Is the material or information sought to be protected original?
2. Is the material or information sought to be protected fixed in a tangible medium of expression?
3. *Is the item sought to be protected the actual form of expression, or does the real value reside not in the expression but in the underlying idea?*

M.A. EPSTEIN, MODERN INTELLECTUAL PROPERTY 99 (1984) (emphasis added). The first two elements of this test, “originality” and “fixation,” are mandated by section 102(a) of the 1976 Act, which provides that “copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. §102(a) (1976). The originality requirement is not an onerous one. As Judge Frank stated for a unanimous court, “All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951). See also HOUSE REPORT 1476,

A second means of determining whether formats qualify for protection under an enumerated or residuary class of works of authorship appears to require a "negative" analysis of whether formats fall "completely outside the present congressional intent."³⁹

Nothing in the statutory language itself expressly precludes the protectibility of formats. However, section 102(b) arguably forecloses the copyrightability of formats in providing, in pertinent part, that, "In no case does copyright protection . . . extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied . . ."⁴⁰ Whether this language is intended to perpetuate under the new law the relegation of a format to the status of a mere idea depends, in large part, on the interpretation of the legislative history of section 102.

The prior versions of section 102 did not contain subsection (b).⁴¹ Instead, the House Committee Reports to the earlier bills listed those items which were not protected under the Act. Both the 1966 and 1967 House Reports specifically provided in a footnote that protectible works of authorship do not include, among other things, "ideas, plans, methods, systems . . . formats and synopses of television series and the like . . ."⁴² Protection for these items, said the Committee of the Judiciary in the 1967 House Report, could be achieved only when "combined with copyrightable subject matter."⁴³

In a curious move, Congress completely eliminated the exclusionary footnote from the final version of the House Report and grafted the non-copyrightability provision of the 1976 Act into the text of the

supra note 25, at 51 (providing that the standard of originality "does not include requirements of novelty, ingenuity, or esthetic merit . . .") The concern of this paper is with the third element suggested by Epstein, the conflict between idea and expression. See *infra* notes 54-83 and accompanying text.

39. HOUSE REPORT 1476, *supra* note 25, at 51.

40. 17 U.S.C. §102(b)(1976). See also *supra* note 38.

41. NIMMER, *supra* note 12, at §2.03[A] n.7.

42. H.R. REP. NO. 83, 90th Cong., 1st Sess. 15 n. 1 (1967). Footnote 1 to this House Report cited the following as examples of subject matter not intended to come within the scope of the bill: "typography; unfixed performances or broadcast emissions; blank forms and calculating devices; titles, slogans, and similar short expressions; certain three-dimensional industrial designs; interior decoration; ideas, plans, methods, systems, mathematical principles; formats and synopses of television series and the like; color schemes; news and factual information considered apart from its compilation or expression." *Id.* This language was carried over virtually unchanged from the 1966 House Report. See H.R. REP. NO. 2237, 89th Cong., 2d Sess. 44 n.1 (1966), which listed as unprotectible: "Typography; unfixed performances or broadcast emissions; blank forms and calculating devices; titles, slogans, and similar short expressions; certain three dimensional industrial designs; interior decoration; ideas, plans and methods; systems mathematical principles; formats and synopses of television series and the like; color schemes; news and factual information considered apart from its compilation or expression . . ." *Id.*

43. H.R. REP. NO. 83, 90th Cong., 1st Sess 15 n. 1 (1967).

statute (section 102(b)). However, section 102(b) is clearly not as comprehensive as the former Committee footnotes, omitting television formats from the list of unprotected subject matter, as well as other items which had been listed as non-copyrightable in the preceding House Reports.⁴⁴ This restructuring of the exclusionary language may portend a favorable congressional attitude toward television formats.

The final version of the House Report cautions that, "Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present [1909 Act] law. Its purpose is to restate. . .that *the basic dichotomy between expression and idea remain unchanged.*"⁴⁵ This language could be construed to mean that Congress, in lieu of passing into law a finite list of non-copyrightable subject matter, decided to shift to the courts the problem of determining the copyrightability of all works not specifically excluded by Congress.⁴⁶ Under this line of reasoning, however, television formats would not have any status at all because the federal courts have not addressed the issue of their protectibility.

Melville Nimmer, in his treatise on copyright, goes further, raising the possibility that Congress may have in fact adopted the notion of format protectibility. Observing that many of the items from the exclusionary footnote are not contained in section 102(b), Nimmer posits whether this raises a "negative implication" that one or more of the items formerly within the exclusionary footnote, but not incorporated into subsection (b), are now copyrightable works.⁴⁷

The evidence suggests that Nimmer's hypothesis applies particularly to television formats. In the House Report to the 1976 Act, Congress has clarified that unfixed broadcast emissions and certain industrial designs, both of which were listed in the exclusionary footnote, shall remain non-copyrightable.⁴⁸ With respect to other footnoted items, Congress appears to have contemplated that the non-copyrightable status accorded to them by the courts in their interpretation of the 1909 Act should remain in effect under the 1976 Act. These items

44. Section 102(b) provides as follows: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. §102(b) (1976).

45. HOUSE REPORT 1476, *supra* note 25, at 57 (emphasis added).

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

47. Section 102(b) renders the footnote "unnecessary as to some, but not all of the . . . items." NIMMER, *supra* note 12, at §203.[A] n. 10.

48. HOUSE REPORT, 1476, *supra* note 25, at 52-53.

include news events independent of their form of expression,⁴⁹ titles,⁵⁰ and color schemes⁵¹ — uniformly denied protection under each Act.

Television formats, on the other hand, had not been judicially characterized under the 1909 Act. Congress must have had notice of this fact when formats were removed from its list of non-copyrightable works. In addition, Congress must have realized that the withdrawal of formats from the list of prohibited subject matter left them in better position than they would have been in had the exclusionary footnote been enacted. Lending further support to the view that formats are now protected by “negative implication” is the fact that the Copyright Office Regulations no longer exclude television formats from copyright, as they had been under the 1909 Act.⁵²

In summary, the finalization of the 1976 House Report arguably may have resulted in the copyrightability of television formats as works *not* “outside the present congressional intent.” Recent federal cases

49. See, e.g., *Wainwright Securities, Inc. v. Wall Street Journal Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (expression under the 1909 Act); *Suid v. Newsweek Magazine*, 503 F. Supp. 146, 147 (D.D.C. 1980), *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554 (D.D.C. 1981) (“expression” under the 1976 Act).

50. See, e.g., *Warner Brothers Pictures Inc. v. Majestic Pictures Corp.*, 70 F.2d 310 (2d Cir. 1934) (“Title” under the 1909 Act); *Paramore v. Mack Sennett, Inc.*, 9 F.2d 66 (D.C. Cal. 1925) (“Title” under the 1909 Act); *Brandon v. Regents of University of California*, 441 F. Supp. 1086 (D. Mass. 1977) (“Title” under the 1976 Act).

51. Color schemes have never been copyrightable per se. Protection has been limited under the 1909 and 1976 statutes to designs embroidered or printed onto fabrics, which is distinguishable from the copyrightability of “color combinations” alone. “Color” under the 1909 Act, see, e.g., *Primcot Fabrics v. Kleinfab Corp.*, 368 F. Supp. 482, 484 (S.D.N.Y. 1974) (protection for arrangement of designs in a pleasing pattern); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) (ornamental designs on cloth protectible). “Color” under the 1976 Act, see, e.g., *Novelty Textile Mills v. John Fabrics Corp.*, 558 F.2d 1090, 1096 (2d Cir. 1977) (issue was whether color scheme was part of protected subject matter in the design, but remanded to district court for determination) (“[W]e have never ruled as a matter of law on the issue [of color scheme protectibility]”) (Mansfield, J., concurring and dissenting); *Greeff Fabrics, Inc. v. Spectrum Fabrics Corp.*, 217 U.S.P.Q. 498 (S.D.N.Y. 1981) (design protectible). Cf. also *Pantone, Inc. v. A.I. Friedman, Inc.*, 294 F. Supp. 545, 548 (S.D.N.Y. 1968) (a 72 page booklet containing a “color matching system” was protected, but “the mere portrayal of a series of gradations of color shades, *standing alone*, would present a doubtful case for copyright protection”) (emphasis added). Nimmer observes that color schemes “should” be regarded as copyrightable, acknowledging that as of this time, they are not. NIMMER, *supra* note 12, at §2.14.

52. For the exclusion of television formats under the 1909 Copyright Office Regulations, see *supra* note 13. Under the 1976 Act, the Copyright Office Regulations have listed the following subject matter as “not subject to copyright and for [which] registration cannot be entertained:

- (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;
- (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;
- (c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which

corroborate this view.⁵³ It is now well-settled that “video game formats,” which are comparable in a number of ways to television formats, have gained the status of “works of authorship.”

B. *The Liberalization of Judicial Attitudes*

The video game craze burst on the American scene after Congress had put the finishing touches on the 1976 Act. Therefore, the fact that no reference is made to the copyrightability of video games throughout the legislative history of the Act or in the statute itself is not surprising. In the early 1980's, however, a number of federal courts stepped into this void and created a body of case law governing video game protectibility. To fully appreciate the import of these decisions within the context of the present analysis, an understanding of the basic functioning of a video game is necessary.

An electronic video game is a post-industrial cross-product of home computer and penny arcade technologies. All of the components of the game fit, essentially, into a cabinet or box which contains a cathode ray tube, electronic circuitry, a loud speaker, and hand controls for the player. Memory devices in the circuitry store computer program instructions which determine all of the appearances, movements, and sounds which take place during the course of a play, including all of the variations which may flow from the action of the player.⁵⁴

are designed for recording information and do not in themselves convey information;

(d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.

37 C.F.R. §202.1 (1982). Section 202.1 closely follows the language of the exclusionary footnotes. *See supra* note 42. It should be noted that there is no reference to formats in section 202.1(b) following the words “[i]deas, plans, methods, systems . . .” as there had been after this identical language in the exclusionary footnotes. It should also be noted that if the Copyright Office amends the Regulations or issues a circular to exclude television formats from copyright protection, the copyright claimant would not be powerless to bring a federal infringement action, as he was under the old law. *See supra* note 14 and accompanying text. Under the 1976 Act, the copyright claimant may respond to the refusal of the Copyright Office to register a work by simply serving notice of the infringement action on the Copyright Office. *See* 17 U.S.C. §411(a)(1976) and HOUSE REPORT 1476, *supra* note 25, at 157. “Under section 411, a rejected claimant who has properly applied for registration may maintain an infringement suit if notice of it is served on the Register of Copyrights. The Register is authorized, though not required, to enter the suit within 60 days; the Register would be a party *on the issue of registrability only*, and a failure by the Register to join the action would ‘not deprive the court of jurisdiction to determine that issue.’” *Id.* (emphasis added).

53. *See infra* notes 56-70 and accompanying text.

54. For a more complete description of a video game's components, *see* Williams Electronics, Inc. v. Artic International, Inc., 685 F.2d 870, 871-72 (3d Cir. 1982).

The protectibility of the computer program component of the game has never been in doubt. In the House Report to the 1976 Act, Congress indicated that computer programs qualify as a form of "literary work."⁵⁵ As the result of this protection, the copying of a video game computer program without the permission of its "author" would constitute an infringement of the program.⁵⁶ The ownership of the program, however, did not prevent others from obtaining the program indirectly by duplicating the sights and sounds of the game and later incorporating them into a separate "non-infringing" computer program.⁵⁷

This gap in protection was swiftly filled in by the courts. The aspect of the game which may be visually and aurally perceived, usually referred to as the "audiovisual display,"⁵⁸ is now copyrightable as an "audiovisual work"⁵⁹ and as a "motion picture,"⁶⁰ which is a subclass of audiovisual works.⁶¹ In effect, two versions of the video game, as embodied in the computer program and as displayed from the cathode ray tube, are now copyrightable works of authorship.⁶²

55. HOUSE REPORT 1476, *supra* note 25, at 54. "The term 'literary works' . . . includes . . . computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves." *Id.*

56. *Artic International*, 685 F.2d at 876-77. See also *Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741 (N.D. Ill. 1983).

57. *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 855 (2d Cir. 1982). "Such replication is possible because many different computer programs can produce the same 'results,' whether those results are an analysis of financial records or a sequence of images and sounds . . . to take an elementary example, the result of displaying '4' can be achieved by an instruction to add 2 and 2, subtract 3 from 7, or in a variety of other ways. Obviously, writing a new program to replicate the game of 'Scramble' requires a sophisticated effort, but it is a manageable task." *Id.*

58. The audiovisual display may be divided into two parts. *Artic International*, 685 F.2d at 872 n. 2. The "attract mode" consists of the pre-game audiovisual effects, such as the repetitive display of the name of the game, the previous high score, and so on. *Id.* The "play mode" refers to the audiovisual effects displayed during actual play. *Id.* at n. 3.

59. *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 617 (7th Cir. 1982). "The audio component and the concrete details of the visual presentation constitute the copyrightable expression . . ." *Id.* *Accord*, *Williams Electronics, Inc. v. Bally Manufacturing Corp.*, 568 F. Supp. 1274, 1278 (N.D. Ill. 1983). The 1976 Act defines "audiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with any accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." 17 U.S.C. §101 (1976).

60. *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 226 (D. Md. 1981).

61. "Motion pictures" are defined as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with any accompanying sounds, if any." 17 U.S.C. §101 (1976).

62. One federal court has suggested that a video game is also copyrightable as a literary and musical work. See *Nintendo of America, Inc. v. Elcon Industries, Inc.*, 564 F. Supp. 937, 943 (E.D. Mich. 1982).

But what precisely does the “expression” of the audiovisual display consist of? Is the “expression” limited to the features which are fixed and non-variable, or does the expression encompass the “combination of elements” which make up the game as a whole, including those which are subject to the control of the player? If the expression of the display embraces the latter, isn’t the format of the game actually being protected? As we will see, a television format contains the structural spine of the entire series, as opposed to the “play” of each episode. Similarly, the author of the video game format creates the contingency for a second person, the player, to write the “script” for that player’s game, which would not exist but for the author of the format.⁶³

In essence, the courts have indicated that the format of a video game, as embodied in the audiovisual display, is the form of “expression” subject to copyright. This conclusion is evidenced by the language and analysis employed by the courts. In variously worded opinions, the courts have stated that the combination of elements which comprise the video game, rather than its fixed sequences, constitutes the protected form of “expression.” In one case which tested the copyrightability of the video game “Donkey Kong,” the form of “expression” was said to include “the characters, obstacles and background as well as the sequence of play of the game.”⁶⁴ Another court stated more generally that plaintiff’s copyrights in several games cover the “audiovisual expression of various game ideas [including] the distinctive color and design of the space ships and other players, as well as the sound accompanying the playing of the games.”⁶⁵ Put another way, the courts in these cases are protecting the pattern of elements which make up the game as a whole, that is, the “theme” of the game,⁶⁶ the in-

63. See Rubenstein, *Copyright Protection for “Elaborated Ideas,”* 224 Law Times 296, et seq. (1957).

64. *Nintendo of America, Inc.*, 564 F. Supp. at 943. But cf. *Stern Electronics, Inc.*, 669 F.2d at 857. “Assessing the entire effect of the game as it appears and sounds, we conclude that its repetitive sequences of images is copyrightable as an audiovisual display.” *Id.*

65. *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 480 (D. Neb. 1981). As stated in *Bally Manufacturing Corp.*, 568 F. Supp. at 1277-78: “What is protected is a *particular form of a game*, and the protection increases as the work in question moves away from a generalized form [of ‘game idea’] toward a particularized expression.” (emphasis added). The foregoing is essentially a rephrasing of Judge Learned Hand’s “abstractions test.” See *infra* note 74 and accompanying text.

66. *Amusement World, Inc.*, 547 F. Supp. at 229. “This Court has held that plaintiff is entitled to a copyright on ‘Asteroids,’ because the idea of a video game in which the player shoots his way through a barrage is an idea that is sufficiently general so as to permit more than one form of expression.” *Id.* Accord, *North American Philips Consumer Electronics Corp.*, 672 F.2d at 617. “PAC-MAN is a maze-chase game in which the player scores points by

teraction of characters or obstacles,⁶⁷ the development of the "game story,"⁶⁸ and even the setting (e.g., mazes, outer space).

The federal courts find no currency in the argument that the copyrightability of video game formats tends to deprive competing authors and the general public of works embodying the video game ideas. To the contrary, the protection of video game formats as a "class" of works, has the effect of stimulating creative activity by rewarding those authors who reduce their ideas into forms of "expression," while at the same time, ensuring that game ideas remain in the public domain.⁶⁹ If a certain video game format does not contain a level of sophistication sufficient to amount to particularized "expression," the courts may freely conclude that the maker of the format cannot prevent others from borrowing the various

guiding a central figure through various passageways of a maze and at the same time avoiding collision with certain opponents or pursuit figures which move independently about the maze." *Id.*

"The elements of the Galaxian video game appear on a background star pattern consisting of twinkling colored lights that roll from the top of the screen to the bottom. The game involves a missile-firing rocket ship operated by the player, plus a formation of enemy aliens. The aliens are arranged in a convoy of five horizontal rows. There are four denominations or ranks of aliens, with the highest ranking nearest the player's ship. Each rank has a distinguished color. The highest ranking alien is shaped like a rocket ship, but the other ranks have flapping wings. Individual aliens unpredictably invest and swoop down to bomb the player's ship."

Dirkschneider, 543 F. Supp. at 473-74.

67. In *North American Philips Consumer Electronics Corp.*, *supra* note 59, the court accorded copyright protection to specific characters in the video game at issue . . . : "the ghost monster and gobbler, as well as the distinctive gobbling action and the manner in which of space rocks the gobbler disappeared upon being captured." *Bally Manufacturing Corp.*, 568 F. Supp. at 1278.

68. *North American Philips Consumer Electronics Corp.*, 672 F.2d at 617 ("Under certain conditions, the central figure may temporarily become empowered to chase and overtake the opponents . . ."); *Dirkschneider*, 543 F. Supp. at 474 ("Sometimes the alien attack consists of misinformations involving the alien flagship or chief, as well as flying alien escorts").

69. In the leading case of *North American Philips Consumer Electronics Corp.*, *supra* note 59, the precise issue before the Seventh Circuit was "the scope of copyright protection to be afforded audiovisual games such as PAC-MAN." *North American Philips Consumer Electronics Corp.*, 672 F.2d at 615. The court stated the following: "Plaintiff's audiovisual work is primarily an unprotectible game, but . . . to at least a limited extent the particular form in which it is expressed (shapes, sizes, colors, sequences, arrangements, and sounds) provides something 'new or additional over the idea.'" *Id.* at 617 (emphasis added). Thus, plaintiff did not prevent defendant from creating a "maze-chase" game typified by PAC-MAN, nor the "standard game devices," such as mazes, tunnels, and dots, which are common features of video games. *Id.* In *Amusement World, Inc.*, *supra* note 60, defendants argued that plaintiffs were attempting "to monopolize the use of the idea of a video game ['Asteroids'] in which the player fights his way through asteroids and spaceships." *Amusement World*, 547 F. Supp. at 227. However, as in the Seventh Circuit PAC-MAN case, the court took a position which frustrates copying but stimulates creativity:

The critical difference in this case is that the idea of a video game involving asteroids is a much more general idea than the rather specific concept of a jewelled pin in the shape of a bee, and the former is capable of many forms of expression. Thus,

characters, sequences, and other features comprising the game.⁷⁰

It will be shown in Part IV that the "expression" of a television format can be far more elaborate than that of a video game's audiovisual display.⁷¹ For this reason, the protection afforded to video game formats logically and necessarily should extend to television formats.

IV. THE "EXPRESSION" OF TELEVISION FORMATS: AN ANALYTICAL FRAMEWORK

As in the example of video game formats, the availability of federal copyright to television formats as "works of authorship"⁷² can promote and facilitate the interest of authors in obtaining a reward for their creativity, and at the same time, prevent the monopolization

when plaintiff copyrighted his particular expression of the game, he did not prevent others from using the idea of a game with asteroids. He prevented only the copying of the arbitrary design features that makes plaintiff's expression of this idea unique. These design features consist of the symbols that appear on the display screen, the ways in which those symbols move around the screen, and the sounds emanating from the game cabinet. *Defendants are entitled to use the idea of a video game involving asteroids, so long as they adopt a different expression of the idea—i.e., a version of such a game that uses symbols, movements, and sounds that are different from those used in plaintiff's game.*

547 F. Supp. at 227 (emphasis added) (held, no infringement due to absence of substantial similarity). See also *infra* note 73.

70. *Bally Manufacturing Corp.*, 568 F. Supp. at 1281-82 ("Once the noncopyrightable elements of *Hyperball* are put to one side, relatively little remains. The color and shape of the playing field is primarily all that is left In viewing the two games solely with reference to their copyrightable features, one is struck by the almost complete absence of substantial similarities The similarities are almost wholly the product of the games' reliance on similar but noncopyrightable game concepts. The specific artwork and exterior configuration in which Williams claims a copyright is not substantially similar except in that both games portray an adversary—though the adversaries hardly appear or act the same and the concept of an adversary is hardly copyrightable.").

71. The fact that a video game format may be conveyed sensorially through a cathode ray tube and speakers whereas a television format is usually communicated in written form is of no import. With great effort the format of a video game can be described verbally, as is shown in the cases cited by this article. Conversely, a television format may subsist entirely in a video-tape, without a written embodiment of the series. See, e.g., *Goodson-Todman Enterprises, Inc. v. Kellogg Co.*, *infra* note 88. Whether a work is fixed in a tangible medium of expression is the critical issue, not the particular medium in which the work is fixed. H.R. REP. NO. 1476, *supra* note 25, at 52-53. See also *Dirkschneider*, 543 F. Supp. at 480 ("The Act contains no restrictions on the type of material objects suitable for fixation"). In the case of video games, the "fixation" requirement is satisfied, not by the transient imagery emitted by the cathode ray tube, but by the fact that "[t]he printed circuit boards are tangible objects from which the audiovisual works may be perceived for a period of time more than transitory." *Id. Accord, Artic International*, 685 F.2d at 874 (citing cases). Under the 1976 Act, "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. §101 (1976).

72. See *supra* note 17, and accompanying text.

of abstract "program ideas."⁷³ These private and public interests may be accommodated by characterizing television formats as a "genre" of protectible "works of authorship," and by leaving to the courts the case-by-case determination of whether the "idea" or the "expression" of the format has been taken.

Unfortunately, few guidelines have been established or even suggested for the making of this idea/expression determination. Many federal courts have cited the famous "abstractions test" of Judge Learned Hand as the appropriate benchmark:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more

73. It is axiomatic under the federal copyright law that the "expression" of a work, not its "idea," is protected by copyright. *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Baker v. Selden*, 101 U.S. 99, 102-03 (1879). As the court explained in the frequently quoted case of *Eichel v. Marcin*:

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

241 F. 404, 408 (S.D.N.Y. 1913).

The language contained in the Copyright Clause "[t]o promote the progress of science and usable arts" has been interpreted by the United States Supreme Court to mean that the interest of the author is subordinated to that of the greater public good." *See, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("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 labor of authors"); *Mazer, supra* note 67, 347 U.S. at 219 (1954) ("The economic philosophy behind the clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare. . ."); *Sony Corp. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 783 (1984) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."). This balancing of the interests of the author and the public is manifested in the legislative history of the 1909 Act. The House Report stated that, "In enacting a copyright law, Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and [s]econd, how much will the monopoly granted be detrimental to the public." H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909). The public interest aim of the copyright law suggests an interplay between the Copyright Clause and the First Amendment, as the Court appeared to imply in stating that "society's competing interest [is] in the free flow of ideas, information, and commerce . . ." *Sony Corp.*, 104 S. Ct. at 782. *See generally, De Acosta v. Brown*, 146 F.2d 408 (2d Cir. 1944); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970); Nimmer, *Copyright and the First Amendment*, 17 BULL. CR. SOC'Y 255 (1970). For a specific treatment of this conflict between the constitutional provisions, as applied to record retailers, see Fine, *Record Piracy and Modern Problems of Innocent Infringement: A Comparative Analysis of United States and British Copyright Laws*, 1 LOY. L.A. ENTERTAINMENT L.J. 113 (1981), reprinted in 21 SANTA CLARA L. REV. 357 (1981) and 6 COLUM. J. ART & L. 69 (1983).

than the most general statement of what the play is about, and at times might consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.⁷⁴

A more practical analytical tool was articulated by Professor Zechariah Chafee in his well-known "pattern" test:

No doubt the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the *protection covers the "pattern" of the work . . . the sequence of events, and the development of the interplay of characters.*⁷⁵

A hybrid of the "abstractions test" and the "pattern test" would appear to present the most accurate yardstick of "expression." Such an approach, which we will call a test of "comprehensiveness," demands an analysis of both the depth and breadth of the work. A hybrid approach appears to have been used by several federal courts in determining the "expression" of a verbal work such as a play or script. The proposition that actionable copying "extends beyond exact reproduction of words . . ." is well settled.⁷⁶ As one court has observed, "[I]t has been emphasized repeatedly that the essence of infringement lies in taking not a general theme but . . . [the work's] particular *expression* through similarities of *treatment, details, scenes, events and characterizations.*"⁷⁷

Since the "expression" of a play or script consists of the "pattern" of those elements which have attained a state of "concreteness,"⁷⁸ logic would appear to dictate that the "expression" of a television format consists of this same "pattern" of concrete elements. This leaves us with the task of determining the elements of a television format. A meaningful distinction may be drawn between formats for "fictional" programs (e.g., situation comedies, soap operas, and detec-

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

75. Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513-14 (1945) (emphasis added).

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

77. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976) (emphasis added). Often-cited for this proposition is *Gethers v. Blatty*, 283 F. Supp. 303, 305 (C.D. Cal. 1968), in which the court stated that copyright protection extends to "the development, treatment, and expression of such elements as theme, locale, settings, situations, ideas, bare basic plots and ordinarily characters." *Id.*

78. The term "concreteness" has also been used to describe that which is taken, i.e., whether another "descends so far into what is concrete as to invade [its] expression." *National Comics*

tive shows) and “non-fictional” shows, such as news-magazines, talk-shows, commentaries, and travelogues.

A. Fictional Television Series

A format for a “fictional” television series appears to be fully capable of satisfying the test of “comprehensiveness.”⁷⁹ The author of such a series format will usually describe in detail the ongoing “framework” of the series—or those elements of theme, situation, and characterization which recur in virtually every episode and which

Publications v. Fawcett Publications, 191 F.2d 594, 600 (2d Cir. 1951). “Concreteness” is not to be confused with the requirement of the 1976 Act that a work of authorship must be in a “tangible medium of expression” in order to qualify for copyright. As Professor Nimmer has stated:

[T]he expression of an idea to which copyright may attach requires concreteness only in the sense that concrete is the polar opposite of abstract. In this sense, an expression may be most concrete (i.e., specific and detailed rather than general and abstract) and nevertheless not be embodied in tangible form Thus an author may write in tangible form the following: “A man becomes entrapped in a cave. The newspaper accounts of the unsuccessful rescue attempts catapult the victim to nationwide fame. The man becomes a victim not only for commercial exploitation.” The foregoing would probably be regarded as merely an abstract idea, not the concrete expression of an idea, and hence not copyrightable. This notwithstanding the fact that the idea was in written form and therefore concrete in the alternative sense mentioned above.

NIMMER, *supra* note 12, at §2.02.

79. At least two state courts have so held. In *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal. App. 3d 996, 88 Cal. Rptr. 679 (1970), plaintiff alleged that his written format for a television series tentatively entitled, “The Coward,” had been pirated by defendants in their production of the series, “Branded.” In Fink’s conceived series, the hero is a World War II Army lieutenant, Dundee, who is court-martialed for failing to obey orders under extenuating battle conditions. Following the war, Dundee becomes a valiant police officer in Greenwich Village, admired by his junior colleagues, but haunted by his wartime memories. Although the holding of the Court of Appeal was limited to the reversal of a demurrer, the language of Justice Reppy’s opinion is insightful as to how a television format may achieve sufficient elaboration to constitute a form of “expression” under state copyright law. Justice Reppy found that Fink’s plan for “The Coward” might be termed “a partial (but substantial) development toward a completely expressed television series, well calculated to give a clear insight to what the finished article would be like.” 9 Cal. App. 3d at 1006. Addressing the specific issue of what the protectible elements of “The Coward” format consisted of, the Court of Appeal concluded that protection would not be afforded to the abstract ideas contained in the format, or in the words of the court, to “an eternal verity or super objective, such as . . . eternal youth is no panacea [citation] [or] inanimate objects can give solace to humans” *Id.* at 1013. Rather, the protectible subject matter consisted of “the development [and] treatment. . . of such elements as theme, . . . situations, . . . bar basic plots and characters.” *Id.* at 1014 [quoting *Gethers v. Blatty*, *supra* note 70] (emphasis in text). Applying these guidelines to “The Coward” format, the court determined that the protectible elements included “the plan for an entire series, the full back story, the molding of an important part of the hero’s character and personality, the method of presenting and capturing the back story in the consequential episodes, and various portrayal techniques” *Id.* The court added in conclusion that, “It is not likely that defendants would have produced their end product if plaintiff had not offered and supplied his *elaborate idea*.” *Id.* (emphasis added). This concept of an “elaborated idea” relied upon in *Fink* appears to have originated with Rubenstein, who described it as follows:

[I]f an author has a novel and original idea and decides to clothe it in a costume

give the series its style and flavor.⁸⁰ The author may also include in the format “treatments” of the central and peripheral characters, including their biographical and psychological profiles and the dynamics of their interaction on the program. The author may establish the very “means” of presenting the story, such as the “texture” of the film (i.e., whether it will appear lavish or stark, pleasant or foreboding, natural or mysterious),⁸¹ whether classical or popular music should be used for the sound track, and whether the story should be presented in linear fashion or through flashbacks. The series creator may even describe “evolutionary” developments in the series, such as the onset of new characters and the withdrawal of old ones, or the gradual strengthening or decay of existing relationships.⁸²

Assuming a series creator were to generate a format elaborately describing such a broad pattern of elements, could it be disputed that the unauthorized copying of the format by another “descend into” the “expression” of the work? The proof of “expression” seems to be apparent in the narrow scope of the monopoly and the complete absence of penetration into publicly owned ideas. Obviously, to the extent that each of these series elements approaches generality, the likelihood that ideas rather than “expression” would be taken, increases. However, this problem is not particular to formats, but is inherent in the taking of any verbal work.

of his own fashioning (the fabric, the needle and thread, the thimble lie on his study table with a sketch showing what the rehabilitated idea will look like), surely only he should be allowed to elaborate the sketch and finish off the costume—a costume which, but for the author, would never have existed.

[S]urely the test will be: *could the interpreter have produced the finished article, the end product, if the author had not produced the elaborated idea?*

Rubenstein, *supra* note 63 at 296. See also *Hamilton National Bank v. Belt*, 210 F.2d 706, 709 (D.C. Cir. 1953) (judgment for plaintiff based on appropriation of radio format) (“‘It is the means of expressing these ideas rather than the ideas themselves which warrant protection.’ [citation] ‘Such a right can only exist in the arrangement and combination of the ideas, i.e., in the form, sequence, and manner in which the composition expresses the ideas, not the ideas themselves’ [I]n the field of radio broadcasting concreteness may lie between the boundaries of mere generality on the one hand and, on the other, a full script containing the words to be uttered and delineating the action to be portrayed . . .”).

80. In the popular situation comedy, “All in the Family,” for example, there was hardly an episode in which Archie Bunker did not call his son-in-law, “Meathead,” or assume a regal posture in his lazy-boy reclining chair. Twenty years earlier, the Ralph Kramden character of “The Honeymooners” displayed similar but totally distinct mannerisms in bellowing to his wife, “Alice!” and in waiting imperiously and impatiently at the table for his dinner.

81. It was no accident that the 1970’s situation comedy, “Barney Miller,” had a crusty, simplistic look, similar to that of 1950’s comedy series such as “The Honeymooners” and “I Love Lucy.”

82. In the modern detective series, “Remington Steele,” for example, the male and female protagonists began the series as platonic partners, but later romanticized their relationship. Such a gradual development could have been part of the series format.

B. Non-Fictional Television Programs

Can the format of a "non-fictional" reality-based program be protectible? These shows do not provide "characters." Instead, the home viewer is presented with either a host or the disembodied voice of a narrator. Moreover, these shows do not offer any "evolutionary" developments, but rather, a continuous repetition of the same "theme," whether the program presents provocative news features, guest interviews, or visits strange and exotic places. Since the elements of such a program consist simply of its repetitive theme and technical means of presentation (e.g., hosts/narration, staging devices and effects), a format describing these elements would probably constitute nothing more than a collection of non-protectible ideas.⁸³ The format would not appear to achieve any "comprehensiveness" whatsoever. Copyright protection for such "compounded" ideas could result in a monopoly over a "type" of show,⁸⁴ rather than in the specific show apart from others in the genre. Furthermore, due to the "factual content" of

83. On the non-protectability of "themes," "plots," and program "ideas," see *Nichols v. Universal Pictures Corp.*, *supra* note 67, in which the author of a play entitled "Abie's Irish Rose" alleged that her play had been infringed by defendant's motion picture, "The Cohens and the Kellys." The court found, however, that the only similarity between the two works consisted of the theme of a "quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation." See also *Dugan v. ABC*, 216 F. Supp. 763 (S.D. Cal. 1963) (plaintiff conceded that his television "sketch" was not protected by federal copyright). As amended in 1947, Section 980(a) of the California Civil Code provided that: "The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof . . ." CAL. CIV. CODE §980(a) (emphasis added). Under this statute, see *Mann v. Columbia Pictures, Inc.*, 128 Cal. App.3d 628, 633, 180 Cal. Rptr. 522 (1982) (Plaintiff's 29 page motion picture outline consisted only of a "brief description" of six principal characters and a "short narration for a number of scenes," which in its totality, was "no more than a collection of ideas . . ."). *Ware v. CBS, Inc.*, 253 Cal. App.2d 489, 491, 61 Cal. Rptr. 590 (1967). Defendant only borrowed from plaintiff's script, "[t]he theme or idea of a man who finds happiness with an inanimate object, whom he treats as a real person." *Id.* On the non-protectibility of theatrical devices and techniques, see *Taylor v. Metro-Goldwyn-Mayer Studios*, 115 F. Supp. 156 (C.D. Cal. 1953) (Plaintiff failed to obtain a common law copyright in a "particular arrangement of cameras and lights . . ."); *Serrana v. Jefferson*, 33 F. 347 (S.D.N.Y. 1888) (use of a stage gimmick such as a water tank on stage is not protected by copyright); *Barnes v. Minor*, 122 F. 480 (S.D.N.Y. 1903) (copyright does not protect settings, drop curtains, staging, lights, or kinoscopes).

84. See, e.g., *Midas Productions, Inc. v. Baer*, 437 F. Supp. 1388, 1389 (C.D. Cal. 1977) (The similarities between plaintiff's screenplay, "Rednek Amerika—Love it or . . ." and defendant's motion picture, "Macon County Line," were "all . . . woven around a familiar matrix of ideas which . . . are common to all pictures which show young people 'on the move.'"); *Bevan v. CBS, Inc.*, 329 F. Supp. 601, 606-07 (S.D.N.Y. 1971) (The similarities between "Stalag 17" and "Hogan's Heroes" were "virtually necessitated by the use of the historical setting, clearly in the public domain"); *Miller v. CBS, Inc.*, 209 U.S.P.Q. 502, 506 (C.D. Cal. 1980) ("Many of the similarities [between the two works] naturally arise from the idea of a convict studying law in prison.").

these programs, a copyright could represent a significant threat to the dissemination of information.⁸⁵

Those who oppose copyright protection for television formats usually make the argument that a television script embodying the final evolved work *must* be a subject of federal copyright. They also assert that the protection of any work occupying the “middle ground” between the abstract idea and the shooting script would endanger an already difficult balance in the competing interests of the author and the public. Although this is a valid concern, the premium on a format is far greater than that accorded to a script. Therefore, a means to protect the series creator without intruding into publicly owned ideas should exist. The balance of interests may be maintained by simply defining the elements of a copyrightable format. The earlier discussion of formats for “fictional” television series suggests a workable starting point. In short, a protectible television format should contain: (1) the ongoing “framework” of the series, (2) “treatments” of the central and peripheral characters, (3) the “means” of presenting the story, and (4) any “evolutionary” developments. The description or content of each of these program elements should satisfy fixed criterion, such as those suggested in the previous discussion.

Despite the favorable evidence in support of the protectibility of television formats, however, neither Congress nor the federal courts have expressly determined their status. We must therefore consider other means of protection.

V. PRACTICAL CONSIDERATIONS

This article will now propose some useful suggestions for the author of a television format who has (1) just finished preparing the final draft of a format and is in doubt as to how to prevent a network “rip-off;” or (2) just learned that the recipient network or some other

85. As Judge Yankwich eloquently stated in *Echevarria v. Warner Brothers, Inc.*, 12 F. Supp. 632, 638 (S.D. Cal. 1935):

One cannot build a story around a historical incident and then claim exclusive right to the use of the incident. If originality can be claimed in opposing Aguinardo to Funston . . . then all the novels, short stories, and dramas written about the Civil War, opposing Grant to Lee, might never have been written after the first one because the author of the first one could have claimed exclusive right to the product. See, e.g., *Norman v. CBS, Inc.*, 333 F. Supp. 788 (S.D.N.Y. 1971) (The 148 alleged similarities between plaintiff's biography of poet Ezra Pound and defendant's television program about the poet consisted of non-protectible descriptions of the poet's lifestyle, habits, and events); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981) (Plaintiff could not monopolize the true event of a girl who had been buried alive for five days).

entity is broadcasting a program that embodies a format created by that author.

A. Preventative Action

Upon completion of a format, the author should proceed immediately to prepare a pilot script of the projected series, then register with the Copyright Office⁸⁶ a copy of both the format and the script. Great care should be taken to place all the elements of the format into the script.⁸⁷ In this way, if the Copyright Office refuses to register the format, the format is nevertheless protected by virtue of "incorporation" into the script. The writer may even attach as an "addendum" to the script an outline of future episodes, being sure to identify the addendum as part of the script.⁸⁸ The Copyright Office registration of the unpublished script will have three important effects:

(1) The certificate of registration will provide the author with "prima facie evidence of the validity of the copyright and of the facts stated in the certificate."⁸⁹

(2) Such registration tends to discourage piracy by the network by serving notice of the prima facie effect of the registration. This deterrent effect may be achieved by submitting to the network the script "of the series" along with a separate written format, under a cover letter stating that the format was deliberately and painstakingly embodied in the registered script. A writer should also attach as an enclosure a copy of the certificate of registration.

(3) In the event that the network subsequently receiving the author's materials pirates the format, the author can claim the infringement of the script, the format, or both.⁹⁰

86. It is suggested that the author simultaneously register his script with the Writers Guild. This Guild registration may, in litigation, provide valuable evidence of first authorship, thereby establishing the possibility of "access," a key element in the proof of infringement.

87. For the element of "formats" see *supra* note 6 and accompanying text.

88. Similar methods have been successfully employed in the past. See e.g., *Giangrasso v. CBS*, 534 F. Supp. 472 (E.D.N.Y. 1982) (plaintiff obtained a federal copyright in a radio play script and "promotional presentation"); *Goodson-Todman Enterprises, Inc. v. Kellogg, Inc.*, 513 F.2d 913 (9th Cir. 1975) (plaintiff embodied format of quiz-show "To Tell the Truth" in videotape and registered the tape as an audiovisual work).

89. 17 U.S.C. §410(c)(1976). As noted in the House Report:

[E]ndowing a copyright claimant who has obtained a certificate with a rebuttable presumption of the validity of the copyright . . . orders the burden of proof. The plaintiff should not ordinarily be forced in the first instance to prove all of the multitude of facts that underline the validity of the copyright unless the defendant, by effectively challenging them, shifts the burden of doing so to the plaintiff.

HOUSE REPORT 1476, *supra* note 25, at 157 (emphasis added).

90. In light of section 410(c), it appears that the defendant would bear the burden of

After registration with the Copyright Office, the author should obtain physical proof that his format was in fact submitted to the network for payment. This establishes the network's "access" to the format, a key element in an infringement action⁹¹ and is helpful in the proof of a duty to pay in a contract action.⁹² Such tangible evidence can be obtained in several ways: (a) by personally delivering the format to an executive at the network while simultaneously procuring his signature to an acknowledgment of receipt;⁹³ or (b) by mailing the format to the network by certified mail, return receipt requested.

B. Redress of the Wrong

If an author must litigate the copyrightability of his television format, the preferable forum would be a federal court for several reasons:

(1) The unsuccessful effort of the author to register the format does not prevent an assertion of a federal copyright claim, because the attempt to register will confer standing to sue.⁹⁴

(2) The author can assert in federal court not only a federal infringement claim, but also, under the doctrine of pendent jurisdiction, all of the claims available under state law⁹⁵ that are not subject to federal preemption.⁹⁶ Moreover, if the state claims are dismissed for lack of jurisdiction in the event that the federal claim

proving that the plaintiff's work does not satisfy the requirements of a "work of authorship." However, if the defendant is not successful in rebutting the validity of the copyright, plaintiff would still have the burden of proving the infringement.

91. Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977) (explaining the elements of a copyright infringement action).

92. See discussion of pendent jurisdiction *infra* at note 95. See Desny v. Wilder, 46 Cal.2d 715, 749 ("[A] factual issue rather than one of law, is presented as to whether defendants used plaintiff's synopsis or developed their production independently thereof") (emphasis added); Whitfield v. Lear, 582 F. Supp. at 1191 ("Defendants are correct in urging that the plaintiff must ultimately demonstrate that defendant used his ideas in order to recover [under California law of implied-in-fact contract]").

93. Assuming that the price of the format has not been determined by the parties, the receipt should contain a provision that the network agrees to pay the reasonable value of the format if the network uses it without the author's permission. In an action for breach of implied-in-fact contract based on such unauthorized use, "reasonable value" may consist of the value of the format to the network. Donahue v. United Artists Corp., 2 Cal. App.3d 794, 802, 808 Cal. Rptr. 131 (1969).

94. See *supra* note 47.

95. The test is whether plaintiff's federal and state claims "derive from a common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *Gibbs* seems to require dismissal of the state claims, however, if the federal claim, though substantial enough to confer jurisdiction, is dismissed before trial. *Id.* at 726.

96. 17 U.S.C. §301(b) lists three alternative ways in which a state right of action may survive preemption. These are "with respect to—(1) subject matter that does not come within

is dismissed before trial, the author could re-assert these local claims in state court because there has been no determination on the merits.

the subject matter of copyright . . . including works of authorship not fixed in any tangible medium of expression; or (2) any cause of action arising from an undertaking commenced before January 1, 1978; or (3) activities violating legal or equitable rights that are *not equivalent* to any of the exclusive rights within the general scope of copyright as specified by section 106" 17 U.S.C. §301(b)(1976) (emphasis added). The disjunctive "or" phrasing of section 301(b)(1)-(3) permits the states to provide relief if any of the three above conditions are satisfied. Under section 301(b)(1), for example, the ultimate test is whether the "subject matter" is "outside the scope of . . . copyright . . ." HOUSE REPORT 1476, *supra* note 25, at 131. This can be determined in two ways. Clearly, "unfixed works are not included in the specified 'subject matter of copyright.'" *Id.* Additionally, subject matter not qualifying as "works of authorship" under the federal standard are properly left to the states, whether these works are fixed or unfixed. NIMMER, *supra* note 12, at §202.

Assuming arguendo that a television format is created *after* January 1, 1978 and that it does *not* qualify as a "work of authorship," state remedies conferring "equivalent" and non-equivalent rights will survive federal preemption. This means, essentially, that if the state right of action offers redress for unauthorized reproduction or distribution of the format or ideas contained therein, two of the exclusive rights provided by section 106, such a state remedy is not affected by preemption.

Conversely, if the television format *does* in fact qualify as a "work of authorship," state legal theories conferring "equivalent rights" will be preempted. The issue of whether a state legal theory grants such an equivalent right depends, for the most part, on whether the theory is based on "contract" or "property." A state action for breach of contract plainly survives preemption because of the added element in a contract claim that the defendant breach a promise to pay. NIMMER, *supra* note 12, at §16.04[C]. The various state "implied-in-fact" contract decisions therefore remained untouched by preemption. *See generally: Desny, supra* note 92 (Held, an implied-in-fact contract may have been formed where plaintiff orally conveyed his story idea to the producer's secretary on the telephone with the express understanding of payment, if the secretary expressly or implicitly promised to pay plaintiff in exchange for the disclosure). Several California courts have focused on the conditions attending disclosure as creating a duty to pay. *See Chandler v. Roach*, 156 Cal. App. 2d 435, 441, 319 P.2d 776 (1957) ("[T]he assent of the producer [to the contract] is manifested by his acceptance of the idea or material submitted under the circumstances, a part of which is that *it is reasonably understood that a professional author expects payment of the reasonable value of the idea or material*, if used, so that the conduct of the producer in accepting it implies a promise to fulfill those reasonable expectation.") (emphasis added). *Accord, Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App.2d 593, 606, 54 Cal. Rptr. 130 (1966) ("[T]he first contact . . . set up by an agent . . . must have indicated [to the producer] that the persons whom the agent brought together with him were not social callers"); *Minnear v. Tors*, 266 Cal. App. 2d 495, 504, 72 Cal. Rptr. 287 (1968). Other legal theories are less likely to survive, due to their strong "property" characteristics. Unjust enrichment, for example, is an "equivalent right" because this theory of recovery depends on whether defendant "has used for its benefit any property of [plaintiff]. . . ." *Weitzenkorn v. Lessor*, 40 Cal. 2d 778, 794. *Accord, NIMMER supra* note 13, at §1.01[B]. In California, breach of confidence based on the unauthorized disclosure of an idea communicated in confidence at arms-length is regarded as a form of quasi contract, and is also preempted. *See Whitfield, supra* note 92 at 1190 n. 3 (citing *Davies v. Krasna*, 14 Cal. 3d 502, 509-12, 121 Cal. Rptr. 705 (1975)); NIMMER, *supra* note 13, at §16.06. When unfair competition is based on unauthorized copying, rather than passing-off, this theory is preempted. *Giangrasso, supra* note 88, at 478. Similarly, "the mere act of reproduction does not constitute conversion since reproduction constitutes an interference with the intangible literary or artistic property right, not with the tangible property right in the chattel which is being reproduced." NIMMER, *supra* note 13, at §101[B] n. 51; *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 201 (2d Cir. 1983) ("Conversion . . . is a tort involving acts—possession and control of chattels—which are qualitatively different from those prescribed by copyright law . . .").

(3) In the event that defendant's profits are difficult to establish, the plaintiff may, under the 1976 Act, elect statutory damages which include a special measure in cases of wilful infringement.⁹⁷

VI. CONCLUSION

The purpose of this article has been to show that a television format may, through the application of labor, rise to the status of a form of expression. This fact, together with the premium placed on formats in the marketplace, dictates that such works be protected as a class, rather than denigrated as the result of individual instances of banality. Ideas may be "free as the air,"⁹⁸ but there is no sound logic in allowing what is "[F]orge[d] out of . . . ideas with skill, industry, and imagination into concrete forms . . ."⁹⁹ to be subjects of common ownership.

It has been urged herein that the federal protection of television formats would not result in the "disappearance" of police shows, westerns, soap operas, and the other types of programming. For decades, threadbare plays and scripts with less sophistication than many of today's formats have received the benefits of federal copyright without endangering the genre to which the play or script belongs. The courts have successfully maintained the public ownership of ideas contained in plays and scripts by faithfully adhering to the standards which they themselves developed for distinguishing between "idea" and "expression." Similarly, there is every reason to believe that a rigorous set of guidelines applicable to television formats would, as in the case of other verbal works, prevent unwarranted intrusions into the public domain.

97. The statutory maximum may, in the court's discretion, be raised from \$10,000 to \$50,000. 17 U.S.C. §504(c) (1976). The statutory measure may be elected in lieu of actual damages and profits. *Id.* at §504(a) and (b) (1976).

98. *Fendler v. Morosco*, 253 N.Y. 281, 287, 171 N.E. 56 (1930).

99. *Stanley v. CBS*, 35 Cal.2d 653, 672-73, 221 P.2d 73 (1950) (Traynor, J., dissenting).

