

5-1-2004

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### Recommended Citation

Lisa P. Wang, *The Copyrightability of Legal Complaints*, 45 B.C.L. Rev. 705 (2004),  
<http://lawdigitalcommons.bc.edu/bclr/vol45/iss3/5>

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# THE COPYRIGHTABILITY OF LEGAL COMPLAINTS

**Abstract:** In 2002, a renowned U.S. class action law firm began placing copyright notices on its legal complaints. Cease-and-desist letters have been filed against several firms that lifted language off of the copyrighted complaints. Although no litigation has ensued to determine whether legal complaints are copyrightable, this Note asserts that legal complaints are copyrightable subject matter under the Copyright Act of 1976 despite the limitations of the idea-expression dichotomy, merger doctrine, useful article doctrine, and fair use defense. This Note focuses on the originality requirement of the Copyright Act, as interpreted through U.S. case law, and contends that legal complaints exhibit sufficient originality to warrant copyright protection.

*There appear to be no valid grounds why legal forms such as contracts, insurance policies, pleadings and other legal documents should not be protected under the law of copyright.<sup>1</sup>*

## INTRODUCTION

The copyrightability of legal complaints is a new and intriguing issue affecting American copyright jurisprudence.<sup>2</sup> In 2002, the renowned class action law firm of Milberg Weiss Bershad Hynes & Lerach LLP placed copyright notices on its complaints and registered those complaints with the U.S. Copyright Office.<sup>3</sup> The firm is attempting to prevent other law firms from lifting language off of its complaints, and the firm's counsel has already issued cease-and-desist letters to ten firms who have plagiarized Milberg Weiss's complaints.<sup>4</sup> This Note analyzes the copyrightability of a legal complaint and concludes that Milberg Weiss would prevail in enforcing its copyright of its legal complaints.<sup>5</sup>

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<sup>1</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18[E] (2003).

<sup>2</sup> See Stanley F. Birch, *Copyright Protection for Attorney Work Product: Practical and Ethical Considerations*, 10 J. INTELL. PROP. L. 255, 256 (2003); Janet L. Conley, *Milberg Weiss Tries to Nail Class Action Imitators*, <http://www.law.com/jsp/article.jsp?id=1036630458145> (Nov. 20, 2002).

<sup>3</sup> See Conley, *supra* note 2. It is not necessary to register works to obtain copyright protection, nor is it necessary to affix a copyright notice, although taking these actions makes additional remedies available. See Copyright Act of 1976, 17 U.S.C. § 408 (2000).

<sup>4</sup> See Conley, *supra* note 2.

<sup>5</sup> See *infra* notes 214–317 and accompanying text.

The situation, on its face, is not complicated.<sup>6</sup> A law firm, Firm X, spends countless hours researching and compiling facts for a nationwide class action lawsuit.<sup>7</sup> Firm X drafts a complaint, which includes a copyright notice, but along comes a competing firm, Firm Y, that files an identical complaint against the same defendant.<sup>8</sup> Rather than repeat the strenuous work of Firm X, however, Firm Y simply usurps Firm X's complaint by copying and filing the exact same complaint.<sup>9</sup> Firm X, upon learning of Firm Y's copying, files cease-and-desist letters, and eventually files a copyright infringement lawsuit against Firm Y.<sup>10</sup>

Article I of the U.S. Constitution provides copyright protection to authors and inventors by giving them "the exclusive [r]ight to their respective [w]ritings and [d]iscoveries" in order "[t]o promote the [p]rogress of [s]cience and useful [a]rts."<sup>11</sup> With this power, Congress adopted the Copyright Act of 1976, which protects "original works of authorship," including literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.<sup>12</sup>

<sup>6</sup> See *infra* notes 7–10 and accompanying text.

<sup>7</sup> See Birch, *supra* note 2, at 257.

<sup>8</sup> See Birch, *supra* note 2, at 257; Conley, *supra* note 2.

<sup>9</sup> See Birch, *supra* note 2, at 257; Conley, *supra* note 2.

<sup>10</sup> See Conley, *supra* note 2.

<sup>11</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>12</sup> 17 U.S.C. § 102(a) (2000). The Copyright Act sets forth that

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

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;
- (7) sound recordings; and
- (8) architectural works.

(b) 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.

Litigation between Milberg Weiss, Firm X in the hypothetical, and alleged infringing firms, like Firm Y, has yet to materialize.<sup>13</sup> The difficulty courts will have in evaluating this type of copyright infringement claim, however, is apparent due to the requirements of the Copyright Act of 1976.<sup>14</sup> This Note predicts the outcome of a potential copyright infringement suit by Firm X against an allegedly infringing law firm, Firm Y, by examining case law in U.S. copyright jurisprudence.<sup>15</sup> Section I.A of this Note briefly introduces the overall structure of copyright law, including the requirements for copyrightability, as well as the rights that a copyright owner possesses against infringers.<sup>16</sup> Next, section I.B focuses on copyrightable subject matter, which is the first hurdle that Firm X must overcome to enforce its copyright against Firm Y.<sup>17</sup> This section details the originality requirement of copyright law through seminal judicial decisions.<sup>18</sup>

Section I.C sets forth the various limitations on copyrightability, which are applicable even if complaints are copyrightable, including the idea-expression dichotomy, merger doctrine, useful article doctrine, and fair use defense.<sup>19</sup> Thus, section I.C sets forth the potential defenses Firm Y would have against Firm X's copyright infringement suit.<sup>20</sup> Finally, Part II applies each of the various subject matter-related copyright doctrines to the copyrightability of complaints and concludes that Firm X's complaint is copyrightable subject matter, and Firm X likely would prevail in a copyright infringement suit against Firm Y.<sup>21</sup>

## I. ELEMENTS OF COPYRIGHT

### A. Copyright Act of 1976

Under the Copyright Act of 1976, a protectable work must be of copyrightable subject matter.<sup>22</sup> That is, a copyrightable work must exhibit originality and be fixed in a "tangible medium of expression."<sup>23</sup> In

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<sup>13</sup> See Conley, *supra* note 2.

<sup>14</sup> See 17 U.S.C. § 102; Birch, *supra* note 2, at 258; Conley, *supra* note 2.

<sup>15</sup> See *infra* notes 22–317 and accompanying text.

<sup>16</sup> See *infra* notes 22–30 and accompanying text.

<sup>17</sup> See *infra* notes 31–87 and accompanying text.

<sup>18</sup> See *infra* notes 31–87 and accompanying text.

<sup>19</sup> See *infra* notes 88–213 and accompanying text.

<sup>20</sup> See *infra* notes 88–213 and accompanying text.

<sup>21</sup> See *infra* notes 214–317 and accompanying text.

<sup>22</sup> 17 U.S.C. § 102(a) (2000).

<sup>23</sup> *Id.* This Note assumes that a legal complaint satisfies the requirement of being "fixed in any tangible medium of expression" because it "can be perceived, reproduced, or

addition, the Act sets out various notice and registration options for copyright owners.<sup>24</sup> Finally, a copyright lasts for the life of the author plus 70 years or, in the case of entity authors, 95 years from first publication or 120 years from the year of creation, whichever occurs first.<sup>25</sup>

To establish copyright infringement successfully, a copyright owner must prove that there is valid ownership of a copyright and that the defendant copied and improperly appropriated the copyright owner's work.<sup>26</sup> A defendant may also infringe a plaintiff's copyright by other means, such as creating a derivative work without prior permission.<sup>27</sup> In addition, a copyright owner also has reproduction, distribution, performance, and display rights on the original work so that a

otherwise communicated, either directly or with the aid of a machine or device." *See id.*; H.R. REP. NO. 94-1476, at 51-52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5664-65. Civil procedure rules also require parties to file their complaints, pleadings, and papers formally with the clerk of court. *See, e.g.*, FED. R. CIV. P. 5(e); MASS. R. CIV. P. 5(d)-(g); TEX. R. CIV. P. 74.

<sup>24</sup> *See* 17 U.S.C. §§ 401-412. The Copyright Act sets out explicit "Notice of Copyright" requirements for visually perceptible copies, phonorecords of sound recordings, publications incorporating U.S. government works, and contributions to collective works. *Id.* §§ 401-404. Sections 408 through 412 set out the requirements for copyright registration. *Id.* §§ 408-412.

<sup>25</sup> *Id.* § 302.

<sup>26</sup> *See, e.g.*, *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992); *Sid & Marty Krofft Television Prod., Inc v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975). This Note, by assuming that Firm Y copies the entirety of Firm X's complaint, focuses only on the copyrightability of legal complaints and reserves the analyses of copyright infringement and misappropriation for future discourse. *See infra* notes 31-317 and accompanying text.

<sup>27</sup> *See* 17 U.S.C. § 106(2); *Anderson v. Stallone*, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at \*23-24 (C.D. Cal. Apr. 25, 1989); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, 210 (1983). A copyright owner has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

defendant is liable for infringement for reproducing, distributing, performing, or displaying a work without authorization from the owner.<sup>28</sup>

The following Section clarifies one of the principle requirements of copyrightability—the originality requirement—as developed through case law.<sup>29</sup> Subsequent sections address the limitations to copyright, such as the idea-expression dichotomy, merger doctrine, useful article doctrine, and fair use defense.<sup>30</sup>

### B. Copyrightable Subject Matter—Originality

Section 102 of the Copyright Act states that “protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated . . . .”<sup>31</sup> Accordingly, in the hypothetical example of Firm X’s copyrighted complaint, Firm X first will need to persuade a court that its complaint is within the realm of copyrightable subject matter because it is “original.”<sup>32</sup> This requirement does not demand novelty, as is required in patent law, ingenuity, or aesthetic merit.<sup>33</sup> In fact, all that is required of this low originality standard is a showing that an author independently created a work that features a modicum of creativity.<sup>34</sup> Thus, Firm Y may copyright a complaint even if it is identical to a prior, copyrighted work, such as Firm X’s complaint, so long as Firm Y shows that it independently created the work and that it features sufficient creativity.<sup>35</sup> The meaning of independent creation and originality is described in the following subsections.<sup>36</sup>

<sup>28</sup> See 17 U.S.C. § 106.

<sup>29</sup> See *infra* notes 31–87 and accompanying text.

<sup>30</sup> See *infra* notes 88–213 and accompanying text.

<sup>31</sup> See 17 U.S.C. § 102(a).

<sup>32</sup> See *id.*; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 363–64 (1991); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 70–71 (2d Cir. 1999).

<sup>33</sup> See H.R. REP. NO. 94-1476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5664.

<sup>34</sup> See *Feist*, 499 U.S. at 345; Ryan Littrell, *Toward a Stricter Originality Standard for Copyright Law*, 43 B.C. L. REV. 193, 193–94 (2001).

<sup>35</sup> See *Feist*, 499 U.S. at 345; *Bleistein*, 188 U.S. at 250; *Burrow-Giles*, 111 U.S. at 60; *Nihon Keizai*, 166 F.3d at 70–71.

<sup>36</sup> See *infra* notes 37–87 and accompanying text.

## 1. *Burrow-Giles Lithographic Co. v. Sarony*: An Author's Creative Efforts Contribute to a Work's Originality

In 1884, in *Burrow-Giles Lithographic Co. v. Sarony*, the U.S. Supreme Court addressed the originality standard as applied to a photograph of Oscar Wilde and concluded that the photograph was sufficiently original to warrant copyright protection.<sup>37</sup> In *Burrow-Giles*, the plaintiff produced a photograph of Oscar Wilde in which the plaintiff posed and arranged the subject, selected his costume, and adjusted the lighting.<sup>38</sup> Subsequently, the defendant made and sold copies of the photograph, but argued that he could not have infringed on any copyright because photographs were not "writings" as is required by the Constitution.<sup>39</sup> The Court, however, interpreted the Constitution's language to encompass "all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression."<sup>40</sup> In essence, the Court defined "author" to mean "he to whom anything owes its origin; originator; maker," so that copyright focuses on the originality of expression—not the mode of expression, such as a photograph.<sup>41</sup>

In *Burrow-Giles*, the Court recognized that photographs are not copyrightable *per se*, but held that the plaintiff's photograph was protected because it exhibited the requisite originality.<sup>42</sup> The Court examined the plaintiff's creative efforts in making the photograph, which included posing the subject in a particular way, choosing an appropriate costume and accessories, and applying different light and shade.<sup>43</sup> Accordingly, the Court held that the photograph was an original work of authorship because it arose from the plaintiff's own original mental conception and displayed the requisite modicum of creativity.<sup>44</sup>

## 2. *Bleistein v. Donaldson Lithographing Co.*: Originality Does Not Depend on Aesthetic Merit

Moreover, in 1903, in *Bleistein v. Donaldson Lithographing Co.*, the U.S. Supreme Court again addressed the originality requirement in

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<sup>37</sup> 111 U.S. at 54–55, 60.

<sup>38</sup> *Id.* at 55–56.

<sup>39</sup> *Id.* at 56.

<sup>40</sup> *Id.* at 58.

<sup>41</sup> *See id.* at 57–58.

<sup>42</sup> *See* 111 U.S. at 59–60.

<sup>43</sup> *Id.* at 60.

<sup>44</sup> *Id.* at 55, 60.

copyright law and held that originality does not depend on a work's aesthetic merit.<sup>45</sup> In *Bleistein*, the plaintiff's employees created three chromolithographs—pictures printed in colors from a series of lithographic stones or plates—depicting various circus scenes.<sup>46</sup> The defendant was accused of copying the three chromolithographs in violation of the plaintiff's copyright.<sup>47</sup> The posters were designed for sale to a circus owner to use in advertising his circus.<sup>48</sup> The posters depicted different circus scenes—one of an ordinary ballet, another of bicycle performers, and one of men and women costumed to represent statues.<sup>49</sup> As additional proof that the posters were original and were not made for anyone else, each poster also included pictures of the circus owner.<sup>50</sup>

The Court referenced its holding in *Burrow-Giles* in stating that lithographs were not automatically barred from copyright protection due to their mechanical nature.<sup>51</sup> The Court also rejected the notion that originality should be decided by judging the aesthetic merits of a work.<sup>52</sup> Instead, the Court, in holding that the lithographs were original, relied on a personality theory of copyright, which states that a work is original because it encompasses the unique personality of its artist.<sup>53</sup> The lithographs in *Bleistein*, like the photograph of Oscar Wilde in *Burrow-Giles*, were sufficiently original because they contained the artists' personal imprint of creativity and uniqueness.<sup>54</sup> Specifically, the posters were original designs that arose from the artists' ideal of how to appeal to an audience's imagination.<sup>55</sup> Like in *Burrow-Giles*, the artists' creative judgments about the arrangement and selection of pictures were their original creation.<sup>56</sup>

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<sup>45</sup> 188 U.S. at 251–52.

<sup>46</sup> *Id.* at 248.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See Bleistein*, 188 U.S. at 248.

<sup>51</sup> *Id.* at 249.

<sup>52</sup> *Id.* at 251–52.

<sup>53</sup> *Id.* at 250.

<sup>54</sup> *See id.*

<sup>55</sup> *See Bleistein*, 188 U.S. at 251, 252.

<sup>56</sup> *See id.*



### 3. *Feist Publications, Inc. v. Rural Telephone Service, Co.*: Factual Compilations Are Copyrightable If They Exhibit Sufficient Originality

In addition to the artistic works of photographs and posters in *Burrow-Giles* and *Bleistein*, respectively, the originality requirement also applies to literary works, such as telephone directories and news reports.<sup>57</sup> In 1991, in *Feist Publications, Inc. v. Rural Telephone Service, Co.*, the U.S. Supreme Court held that the names and telephone numbers used in the plaintiff's telephone directory were not sufficiently original to warrant copyright protection.<sup>58</sup> In *Feist*, the plaintiff, Rural Telephone Service Company, published a typical telephone directory that listed the names of its subscribers in alphabetical order along with each subscriber's telephone number and town.<sup>59</sup> The defendant, Feist Publications, Inc., also published telephone directories.<sup>60</sup> Unlike the plaintiff's directory, however, the defendant published area-wide directories that spanned larger geographical ranges.<sup>61</sup>

In *Feist*, the defendant wanted to compile a directory that covered eleven different telephone service areas.<sup>62</sup> Accordingly, the defendant approached each of the eleven local telephone companies to obtain subscriber information.<sup>63</sup> The plaintiff was the only service provider that refused to license its listings to the defendant.<sup>64</sup> Nevertheless, the defendant used the plaintiff's directory without consent, and the plaintiff sued for copyright infringement.<sup>65</sup>

In holding for the defendant, the Court reiterated the importance of two well-established propositions in copyright jurisprudence.<sup>66</sup> First, facts are not copyrightable because they do not owe their origin to the author; second, compilations of facts generally are copyrightable.<sup>67</sup> In addition, an important limitation on the copyrightability of compilations is that protection will extend only to the element of the compilation that is, in fact, copyrightable—the creative

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<sup>57</sup> See *Feist*, 499 U.S. at 363–64; *Nihon Keizai*, 166 F.3d at 70.

<sup>58</sup> 499 U.S. at 363–64.

<sup>59</sup> *Id.* at 342.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 343.

<sup>62</sup> *Id.*

<sup>63</sup> *Feist*, 499 U.S. at 343.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 343–44.

<sup>66</sup> *Id.* at 344.

<sup>67</sup> *Id.* at 344, 347; see 17 U.S.C. § 101 (2000).

arrangement.<sup>68</sup> In *Feist*, the plaintiff's telephone directory was composed of uncopyrightable, factual information—names of subscribers and their corresponding towns and telephone numbers.<sup>69</sup> The Court stated that “[t]he *sine qua non* of copyright is originality,” as mandated by the Copyright Act, because a work must be original to the author before it will qualify for protection.<sup>70</sup> The level of creativity demanded by the originality requirement is extremely low, but here, the telephone directory was not even minimally creative.<sup>71</sup> The names and telephone numbers of the subscribers were not created independently by the plaintiff, and therefore, could not be protected under copyright.<sup>72</sup>

The plaintiff, however, argued that its directory was still protected because it was a factual compilation.<sup>73</sup> The Court recognized this exception, noting that a factual compilation may meet the minimum constitutional requirement for copyright protection if it features an original selection or arrangement—in essence, if it possesses a modicum of creativity.<sup>74</sup> In *Feist*, however, the plaintiff did not select, coordinate, or arrange the factual information in an original way.<sup>75</sup> In fact, the plaintiff's selection and arrangement was typical of any telephone directory, and there was nothing remotely creative about organizing the directory alphabetically by surname.<sup>76</sup>

The Court reiterated that the primary objective of copyright law is “[t]o promote the Progress of Science and useful Arts”—not to reward the labor, or “sweat of the brow,” of authors.<sup>77</sup> In conclusion, the Court held that the names, towns, and telephone numbers in the plaintiff's telephone directory, as well as the organization of the information, lacked sufficient originality, and therefore, the defendant did not copy protectable subject matter.<sup>78</sup>

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<sup>68</sup> *Feist*, 499 U.S. at 348.

<sup>69</sup> *Id.* at 342.

<sup>70</sup> *Id.* at 345.

<sup>71</sup> *Id.* at 345, 363.

<sup>72</sup> *Id.*

<sup>73</sup> *Feist*, 499 U.S. at 348.

<sup>74</sup> *See id.*

<sup>75</sup> *Id.* at 362–63.

<sup>76</sup> *Id.*; *see also* *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 999 F.2d 1436, 1444 (11th Cir. 1993) (holding that a yellow pages business directory arrangement was not sufficiently original to warrant copyright protection because the heading titles, such as “Attorneys” and “Banks,” were typical and obvious labels for the categories).

<sup>77</sup> *Feist*, 499 U.S. at 349, 354; *see* U.S. CONST. art. I, § 8, cl. 8.

<sup>78</sup> *Feist*, 499 U.S. at 363–64.

4. *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*: Copyright Protection Extends to an Author's Analysis and Manner of Expression

More recently, in 1998, in *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, the Second Circuit Court of Appeals held that news reports were copyrightable because they contained sufficient originality.<sup>79</sup> In *Nihon Keizai*, the plaintiff, a Japanese corporation that published financial and business news, accused the defendants of copyright infringement for translating portions of twenty-two of the plaintiff's news articles to sell as abstracts to customers.<sup>80</sup> The defendants' abstracts displayed the same structure, organization, and grouping of facts as the plaintiff's news reports.<sup>81</sup> In addition, the defendants' abstracts produced the same conclusions as the plaintiff's reports, often using identical phrases and word choices.<sup>82</sup> Basically, the defendants' abstracts were nearly word-for-word translations of the plaintiff's original reports, with only occasional rearrangements of facts or deviations from the plaintiff's sentence structure.<sup>83</sup>

In addressing the main issue of whether the defendants' work was substantially similar to the plaintiff's work to constitute unlawful copying, the court first acknowledged that the defendants' abstracts reported unprotected factual information.<sup>84</sup> Nevertheless, the court held that the defendant violated the plaintiff's copyright in its news reports, because copyright protects "the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments."<sup>85</sup> Essentially, even though the news is not copyrightable in itself due to its highly factual substance, there may be a copyright in the reporter's or publisher's expression of the facts.<sup>86</sup> The plaintiff's arrangement of facts, word choice, sentence structure, and analysis were all part of the plaintiff's protectable ex-

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<sup>79</sup> See 166 F.3d at 70.

<sup>80</sup> See *id.* at 69, 70.

<sup>81</sup> *Id.* at 70-71.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 71.

<sup>84</sup> *Nihon Keizai*, 166 F.3d at 70.

<sup>85</sup> *Id.* (quoting *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977)).

<sup>86</sup> See *id.*

pression, and therefore, the defendants violated the plaintiff's copyright in the reports by copying the original and protectable elements.<sup>87</sup>

### C. Limitations and Defenses Against Copyright Protection

Various doctrines emanate from the rules set out in the Copyright Act that limit the extent of copyright protection of a work, including the idea-expression dichotomy, merger doctrine, useful article doctrine, and fair use defense.<sup>88</sup> The idea-expression dichotomy stands for the proposition that only expression—as opposed to ideas—is protectable under copyright law.<sup>89</sup> The difficulty in applying this rule, as illustrated in the cases discussed below, is in distinguishing between ideas and expression.<sup>90</sup> As a branch of the idea-expression dichotomy, the merger doctrine states that when there are only a limited number of ways to express an idea, the scarce expressions are “merged,” and are considered inseparable from the idea it-

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<sup>87</sup> See *id.* The court offered two exceptions to its holding, which are inconsequential to this Note because the exceptions relate to copyright infringement and misappropriation when only portions of a work are copied—as opposed to Firm Y, which copies the entirety of Firm X's complaint. See *id.* at 71. In the first exception, one of the defendants' abstracts did not copy the plaintiff's protectable expression, because the only similarity between it and the plaintiff's corresponding report was the use of the same facts. *Id.* The defendant reported the facts in a different arrangement using different sentence structure and word choice. *Id.* Because the abstract only repeated uncopyrightable facts, as opposed to repeating the plaintiff's protected expression, there was no copyright infringement regarding this particular abstract. *Id.*

The second exception resulted from the defendants' copying of only one paragraph of the plaintiff's six-paragraph article. *Id.* As opposed to the other infringing abstracts, which copied well over fifty percent of the plaintiff's respective reports, this particular abstract only copied twenty percent of the plaintiff's original report. *Id.* The court was careful not to establish a quantitative bright-line rule that twenty percent copying is never substantially similar for infringement purposes. *Id.*; see also *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 564–65 (1985) (holding that copying of an insubstantial portion of a book still qualified as copyright infringement when the defendant essentially copied the “heart of the book”). The court made it clear that infringement would depend on both a quantitative—how much was copied—and qualitative—what was copied—analysis. See *Nihon Keizai*, 166 F.3d at 71. Where, as in the case at hand, the copyrighted work contained both uncopyrightable facts and copyrightable expression, a higher quantity of copying was required to support an infringement claim. *Id.* In contrast, if the work were wholly original, a lower quantity of copying would justify a finding of infringement. *Id.*

<sup>88</sup> See *Harper & Row*, 471 U.S. at 560, 569; *Baker v. Selden*, 101 U.S. 99, 104–05 (1879); *Nihon Keizai*, 166 F.3d at 72–73; *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1143 (2d Cir. 1987); *Gay Toys, Inc. v. Buddy L Corp.*, 703 F.2d 970, 973 (6th Cir. 1983); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>89</sup> See *Baker*, 101 U.S. at 104–05; *Nichols*, 45 F.2d at 121.

<sup>90</sup> See *Baker*, 101 U.S. at 104–05; *Nichols*, 45 F.2d at 121; *infra* notes 96–117 and accompanying text.

self, thereby making the expression of the idea unprotectable under copyright law.<sup>91</sup> Next, the useful article doctrine holds that a work is uncopyrightable if it is used for solely utilitarian purposes.<sup>92</sup> The difficulty here, similar to the idea-expression dichotomy, is determining when a work is primarily functional instead of aesthetically motivated.<sup>93</sup> Finally, the fair use defense utilizes a four-factor balancing test to determine when to allow unauthorized copying of a copyrighted work.<sup>94</sup> The following subsections describe these various limitations and defenses and how they affect the copyrightability of subject matter ordinarily viewed as protectable under the Copyright Act.<sup>95</sup>

## 1. Idea-Expression Dichotomy

The Copyright Act expressly sets forth that copyright protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery."<sup>96</sup> This rule, the idea-expression dichotomy, means that ideas, as opposed to expression, are not copyrightable.<sup>97</sup> In terms of the hypothetical example in the Introduction to this Note, Firm X is unable to copyright its complaint if it encompasses an idea rather than a form of expression.<sup>98</sup> The difficulty in this inquiry, however, is in determining the line between idea and expression.<sup>99</sup>

### a. *Baker v. Selden: Copyright Protection Extends to the Explanation of an Art, But Not to the Art Itself*

In 1879, in *Baker v. Selden*, the U.S. Supreme Court set forth the critical idea-expression dichotomy by denying copyright protection to a system of bookkeeping.<sup>100</sup> In *Baker*, the plaintiff, Charles Selden, ob-

<sup>91</sup> See *Morrissey*, 379 F.2d at 678-79; *infra* notes 118-130 and accompanying text.

<sup>92</sup> See *Brandir*, 834 F.2d at 1147; *Gay Toys*, 703 F.2d at 973; *infra* notes 131-171 and accompanying text.

<sup>93</sup> See *Brandir*, 834 F.2d at 1147; *Gay Toys*, 703 F.2d at 973; *infra* notes 131-171 and accompanying text.

<sup>94</sup> See *Harper & Row*, 471 U.S. at 560-61; *Nihon Keizai*, 166 F.3d at 72; *infra* notes 172-213 and accompanying text.

<sup>95</sup> See *infra* notes 96-213 and accompanying text.

<sup>96</sup> 17 U.S.C. § 102(b) (2000).

<sup>97</sup> See *id.*; *Baker*, 101 U.S. at 104-05; *Nichols*, 45 F.2d at 121.

<sup>98</sup> See *Baker*, 101 U.S. at 104-05; *Nichols*, 45 F.2d at 121.

<sup>99</sup> See *Baker*, 101 U.S. at 104-05; *Nichols*, 45 F.2d at 121.

<sup>100</sup> See *Baker*, 101 U.S. at 107. Although the U.S. Supreme Court did not explicitly use the term "idea-expression dichotomy" in *Baker*, it formally set forth the doctrine in its 1954 decision in *Mazer v. Stein*. See *Mazer v. Stein*, 347 U.S. 201, 217 (1954). In *Mazer*, the Court

tained a copyright for a book entitled "Selden's Condensed Ledger, or Book-keeping Simplified" in which he explained a particular book-keeping system and illustrated his method with blank forms containing ruled lines, blank columns, and headings.<sup>101</sup> The defendant, the alleged infringer, also wished to explain a bookkeeping system by using illustrative forms, but he used a different arrangement of columns and headings.<sup>102</sup> The plaintiff filed suit against the defendant for allegedly infringing the plaintiff's copyright by copying his bookkeeping forms.<sup>103</sup>

The U.S. Supreme Court held that the explanatory nature of the plaintiff's book was copyrightable, because the author explained bookkeeping in his own, particular way.<sup>104</sup> Nevertheless, the Court held for the defendant because he did not copy the plaintiff's explanation of the bookkeeping system.<sup>105</sup> Instead, the copyright infringement claim rested solely on the defendant's copying of the blank forms used to illustrate the bookkeeping practice.<sup>106</sup>

The Court, in holding that there was no valid copyright on the forms in the book, emphasized the distinction between an author's expression and the idea that is the subject of the author's expression.<sup>107</sup> The Court stated that the use of an art is "totally different . . . from a publication of the book explaining" the art.<sup>108</sup> The plaintiff's explanation of bookkeeping was protectable as expression, but the forms he used corresponded with the art of bookkeeping, which was

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reiterated the importance of the idea-expression dichotomy by stating that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Id.* at 219. Essentially, the Court in *Mazer* looked to preserve the balance between competition and protection to determine how best to encourage the individual efforts of artists. *See id.* *Mazer* involved table lamps made in the shapes of male and female dancing figures. *Id.* at 202. The Court held that the lamps were copyrightable subject matter despite the fact that the lamps' bases—the male and female figures—were put to practical use. *Id.* at 217, 218. The Court noted that copyright protection is "given only to the expression of the idea—not the idea itself" and expressly acknowledged the idea-expression dichotomy from *Baker*. *Id.* at 217; *see also* *CDN Inc. v. Kapes*, 197 F.3d 1256, 1262 (9th Cir. 1999) (holding that copyright protection for the plaintiff's price guides served as an incentive to create such price guides and fostered competition for others to create their own price guides).

<sup>101</sup> *Baker*, 101 U.S. at 99–100.

<sup>102</sup> *Id.* at 100.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 101–02, 105.

<sup>105</sup> *Id.* at 101, 104.

<sup>106</sup> *Baker*, 101 U.S. at 100.

<sup>107</sup> *Id.* at 102, 104–05.

<sup>108</sup> *Id.* at 104.

not protectable under copyright.<sup>109</sup> Implicitly, the forms lacked the requisite modicum of originality to support copyrightability, and therefore, the plaintiff did not have an exclusive right to make and to use the blank account forms in his book.<sup>110</sup>

b. *Nichols v. Universal Pictures Corp.: Using the Abstractions Test to Distinguish Ideas from Expression*

Although courts often have found it difficult to distinguish ideas from expression, Judge Learned Hand, in his oft-cited 1930 opinion of the Second Circuit Court of Appeals in *Nichols v. Universal Pictures Corp.*, offered a solution commonly referred to as the "abstractions test."<sup>111</sup> The defendant in *Nichols* was accused of copying the plaintiff's play, "Abie's Irish Rose."<sup>112</sup> The plots of both the plaintiff's and defendant's plays involved lovers, torn by their families' animosities towards one another, who married, bore children, and helped reconcile their families' differences.<sup>113</sup>

In deciding whether the defendant had copied the plaintiff's play, Judge Hand noted that "[u]pon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out."<sup>114</sup> For instance, the most general statement of the play may have stated simply what the play was about.<sup>115</sup> There is a point in this series of abstractions, however, where the pattern is no longer protected because doing so would protect general ideas instead of an author's expression.<sup>116</sup> In essence, the plays in *Nichols* were copyrightable, but the underlying theme common to both plays—lovers who reconcile their families' differences—was too general to be copyrightable.<sup>117</sup>

<sup>109</sup> *Id.* at 104, 107.

<sup>110</sup> *See id.* at 107.

<sup>111</sup> *See* 45 F.2d 119, 121 (2d Cir. 1930).

<sup>112</sup> *Id.* at 120.

<sup>113</sup> *Id.* at 122. As Judge Hand noted, "The only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation." *Id.*

<sup>114</sup> *Id.* at 121.

<sup>115</sup> *Id.*

<sup>116</sup> *See Nichols*, 45 F.2d at 121.

<sup>117</sup> *See id.* at 122. Judge Hand stated that the plaintiff's general idea of "conflicts between Irish and Jews, into which the marriage of their children enters" was no more copyrightable than the "outline of Romeo and Juliet." *Id.*

## 2. Merger Doctrine

The merger doctrine is an extension of the basic rationale of the idea-expression dichotomy, because it limits the copyrightability of expression when there is only one or a few, limited ways to express an idea.<sup>118</sup> In such instances, the idea of the work and the expression behind the work merge together, that is, become inseparable, and as a merged component, become unprotectable under copyright law.<sup>119</sup> With respect to the hypothetical example in this Note, Firm X would be unable to copyright its complaint if there were only a limited number of ways to express the complaint's content.<sup>120</sup> Copyright protection would be denied because it would essentially allow Firm X to constrain the public, that is, other law firms, from future use of the complaint's substance.<sup>121</sup> If there were numerous ways to express the complaint's content, however, then Firm X could attain copyright protection in its complaint because, with other ways to express the content, Firm Y would not have to rely on Firm X's expression.<sup>122</sup> The following case illustrates the application of the merger doctrine.<sup>123</sup>

### a. *Morrissey v. Procter & Gamble Co.: Merger Applies When There Are Only a Limited Number of Ways to Express an Idea*

In 1967, in *Morrissey v. Procter & Gamble Co.*, the First Circuit Court of Appeals held that the plaintiff's "Rule 1" set forth in a sales contest was not copyrightable because there were only a limited number of ways to express the rule.<sup>124</sup> The plaintiff was the copyright

<sup>118</sup> See *Morrissey*, 379 F.2d at 678-79.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See *infra* notes 124-130 and accompanying text.

<sup>124</sup> *Morrissey*, 379 F.2d at 678-79. Plaintiff's "Rule 1" stated,

1. Entrants should print name, address and social security number on a box-top, or a plain paper. Entries must be accompanied by . . . boxtop or by plain paper on which the name . . . is copied from any source. Official rules are explained on . . . packages of leaflets obtained from dealer. If you do not have a social security number you may use the name and number of any member of your immediate family living with you. Only the person named on the entry will be deemed an entrant and may qualify for prize.

Use the correct social security number belonging to the person named on entry . . . wrong number will be disqualified.

*Id.* at 678. Defendant's Rule 1 stated:



owner of a set of rules for a traditional sweepstakes-type contest.<sup>125</sup> The plaintiff sued the defendant, who was also engaged in a similar-type contest, for copying nearly all of "Rule 1," which included instructions for entering the contest.<sup>126</sup> Although there was proof that there was more than one way of stating the rule, the court ruled in favor of the defendant because the subject matter was too narrow to qualify for copyright protection.<sup>127</sup>

Essentially, when there are only a limited number of ways to express a certain subject matter, copyrighting the "mere handful" of expressions could constrain the public by exhausting all possibilities for future use.<sup>128</sup> "Rule 1" could only be expressed in a limited number of ways because it was so straightforward and simple.<sup>129</sup> In such circumstances, the expression merges with the underlying idea, and copyright does not extend to the subject matter at all.<sup>130</sup>

### 3. Useful Article Doctrine

In addition to the idea-expression dichotomy and merger doctrine, the useful article doctrine provides another limitation on copyright protection.<sup>131</sup> The Copyright Act of 1976 extends protection to

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1. Entrants should print name, address and Social Security number on a Tide boxtop, or on [a] plain paper. Entries must be accompanied by Tide boxtop (any size) or by plain paper on which the name "Tide" is copied from any source. Official rules are available on Tide Sweepstakes packages, or on leaflets at Tide dealers, or you can send a stamped, self-addressed envelope to: Tide "Shopping Fling" Sweepstakes, P.O. Box 4459, Chicago 77, Illinois.

If you do not have a Social Security number, you may use the name and number of any member of your immediate family living with you. Only the person named on the entry will be deemed an entrant and may qualify for a prize.

Use the correct Social Security number, belonging to the person named on the entry—wrong numbers will be disqualified.

*Id.*

<sup>125</sup> *Id.* at 676.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 678.

<sup>128</sup> *Id.* at 678-79.

<sup>129</sup> See *Morrissey*, 379 F.2d at 678-79.

<sup>130</sup> See *id.*; *BellSouth*, 999 F.2d at 1442 (holding that because there were only a few ways to construct a useful business directory, the arrangement of the directory—the expression of the information—"merged" with the idea of a business directory and was uncopyrightable); cf. *Kregos v. Associated Press*, 3 F.3d 656, 660 (2d Cir. 1993) (holding that the plaintiff's pitching forms, used to predict winners in upcoming baseball games by comparing pitchers' statistics, did not evince a merger of idea and expression because there were numerous ways to express the idea of rating pitchers' performances).

<sup>131</sup> See 17 U.S.C. § 101 (2000); *Brandir*, 834 F.2d at 1143; *Gay Toys*, 703 F.2d at 973.

"pictorial, graphic, and sculptural works."<sup>132</sup> Protection for such works, however, is limited by the useful article doctrine, which prohibits protection of works that serve a utilitarian function.<sup>133</sup> The Copyright Act defines a "useful article" as an "article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."<sup>134</sup> In adopting the useful article doctrine, Congress's intent was "to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design" to avoid monopolization of functional works.<sup>135</sup> Relating back to the hypothetical introduced in this Note, Firm X's complaint might not be copyright protected due to its utilitarian function in the judicial process.<sup>136</sup> As discussed in the cases below, if one is unable to separate the artistic elements of Firm X's complaint from its functional aspects, then the complaint itself is solely utilitarian and unprotectable under copyright law.<sup>137</sup>

Indeed, even before the Copyright Act of 1976 was passed, the U.S. Supreme Court recognized the uncopyrightability of useful articles.<sup>138</sup> For instance, in 1879, in *Baker*,<sup>139</sup> the U.S. Supreme Court set forth the idea-expression dichotomy, but the Court, in denying copyright protection for the plaintiff's bookkeeping forms, also relied on the inherent usefulness of the forms.<sup>140</sup> The plaintiff's explanation of his bookkeeping system was protected, but the forms in his book were not, because they conveyed no information and were merely used to practice the art of bookkeeping.<sup>141</sup> Although *Baker* is most often cited for the idea-expression dichotomy, its holding also serves to limit copyright by denying protection to utilitarian articles, such as blank forms.<sup>142</sup>

Moreover, the House Report for the 1976 Copyright Act cites *Mazer v. Stein*,<sup>143</sup> among other cases, as holding that a useful article is something that has an intrinsic utilitarian function apart from conveying information or portraying an appearance.<sup>144</sup> Basically, copyright

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<sup>132</sup> 17 U.S.C. § 102(a)(5).

<sup>133</sup> *Id.* § 101.

<sup>134</sup> *Id.*

<sup>135</sup> H.R. REP. No. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5668.

<sup>136</sup> See *Brandir*, 834 F.2d at 1148-49; *Gay Toys*, 703 F.2d at 973.

<sup>137</sup> See *Brandir*, 834 F.2d at 1145, 1147; *Gay Toys*, 703 F.2d at 973.

<sup>138</sup> See *Bleistein*, 188 U.S. at 249; *Baker*, 101 U.S. at 105.

<sup>139</sup> See *supra* notes 100-110 and accompany text.

<sup>140</sup> See 101 U.S. at 104-05.

<sup>141</sup> *Id.*

<sup>142</sup> See *id.* at 107.

<sup>143</sup> See *supra* note 100.

<sup>144</sup> See H.R. REP. No. 94-1476, at 54-55 (1976), reprinted in 1976 U.S.C.C.A.N. 5667-68.

protection does not stem from an article's apparent artistic worth—instead, one must determine whether the article is intrinsically functional.<sup>145</sup> Unfortunately, the House Report does not specify which uses are intrinsically functional.<sup>146</sup> Accordingly, the judicial system has worked to define this standard over the years.<sup>147</sup>

a. *Gay Toys, Inc. v. Buddy L Corp.: A Useful Article Possesses an Intrinsic Function Other Than the Portrayal of the Art or Item Itself*

In 1981, in *Gay Toys, Inc. v. Buddy L Corp.*, the Sixth Circuit Court of Appeals helped define the meaning of "intrinsic" function in holding that toy airplanes, though useful in a general sense, were still copyright protected.<sup>148</sup> In *Gay Toys*, the manufacturer of the "Air Coupe" toy airplane, Buddy L Corporation, sought to enforce its copyright on its toy airplanes against another toy manufacturer, Gay Toys, Inc.<sup>149</sup> Gay Toys conceded that its product design team examined and referred to Buddy L Corporation's "Air Coupe" in designing its "Flying Eagle I."<sup>150</sup> Subsequently, Buddy L notified Gay Toys that it was violating Buddy L's copyright in its toy airplane.<sup>151</sup> Gay Toys sought a declaratory judgment to invalidate Buddy L's copyright, and Buddy L counterclaimed for copyright infringement.<sup>152</sup>

The district court invalidated Buddy L's copyright in the "Air Coupe," but the Sixth Circuit Court of Appeals reversed.<sup>153</sup> In reversing the district court's decision, the Sixth Circuit noted that the statutory requirement of a useful article is that it has an "intrinsic utilitarian function that is not merely to portray the appearance of the article."<sup>154</sup> The Sixth Circuit held that a toy airplane has no intrinsic utilitarian function other than to portray a real airplane.<sup>155</sup>

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<sup>145</sup> *See id.*

<sup>146</sup> *See id.*

<sup>147</sup> *See Brandir*, 834 F.2d at 1147; *Gay Toys*, 703 F.2d at 973.

<sup>148</sup> 703 F.2d at 973-74.

<sup>149</sup> *Id.* at 971.

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

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 971-72.

<sup>153</sup> *Gay Toys*, 703 F.2d at 974. The district court found that toy airplanes were useful because "children need toys for growing up." *Id.* at 973. In addition, the district court held that toy airplanes have the utilitarian function of permitting a "child to dream and to let his or her imagination soar." *Id.* (quoting *Gay Toys, Inc. v. Buddy L Corp.*, 522 F. Supp. 622, 625 (E.D. Mich. 1981)).

<sup>154</sup> *Id.* at 973.

<sup>155</sup> *Id.*

The court cited legislative history to illustrate that Congress intended to deny copyright protection to industrial products, such as televisions and automobiles.<sup>156</sup> The court held that a toy airplane's function is closer to that of a work of art—a painting of an airplane that is looked at and enjoyed—than the intrinsic utilitarian functions of industrial products.<sup>157</sup> Essentially, toys do not have “an intrinsic function other than the portrayal of the real item,” and therefore, they are protected by copyright because they are not useful articles.<sup>158</sup>

b. *Brandir International, Inc. v. Cascade Pacific Lumber Co.: Conceptual Separability—When the Aesthetic and Functional Elements of a Work Are Separable*

In contrast, in 1987, in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, the Second Circuit Court of Appeals applied the useful article doctrine to the plaintiff's bicycle rack, the “RIBBON Rack,” and held it uncopyrightable because it was designed to serve a purely utilitarian function—to hold bicycles in place.<sup>159</sup> The plaintiff, the original designer, sued the defendant after discovering that it was selling a product similar to the RIBBON Rack.<sup>160</sup> The Court of Appeals held that the defendant did not violate any protectable expression by copying the RIBBON Rack, because the plaintiff designed the rack for purely utilitarian purposes.<sup>161</sup> The plaintiff did not simply adopt the original wire sculpture that gave rise to the bicycle rack idea.<sup>162</sup> Instead, the design of the RIBBON Rack was essentially a product of in-

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Gay Toys*, 703 F.2d at 974.

<sup>159</sup> 834 F.2d at 1147. The plaintiff's chief owner, the original designer of the RIBBON Rack, testified that he had created several wire sculptures as part of his personal expression—one of a bicycle and another self-standing sculpture. *Id.* at 1146. He stated that he did not give any thought to the utilitarian aspect of the latter wire sculpture until he accidentally juxtaposed the wire bicycle with it. *Id.* Even so, he did not seriously consider pursuing the utilitarian application of his wire sculpture until his friend, a bicycle enthusiast, informed him that the sculpture would make an excellent bicycle rack. *Id.* Thereafter, he worked with his friend to perfect the design of the bicycle rack, and in September 1979, the Brandir RIBBON Rack was advertised and promoted for sale nationally. *Id.* This rack, ubiquitous today, essentially consists of an undulating, wave-shaped steel tubing for holding bicycles. *See id.* at 1147, 1149–50 app.

<sup>160</sup> *Id.* at 1146.

<sup>161</sup> *Id.* at 1147. Utilitarian articles, though uncopyrightable, could be protected under U.S. patent laws so long as the requirements for patentability are met. *See* 35 U.S.C. §§ 101–103, 112 (2000). *See generally* *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 12–15 (1966).

<sup>162</sup> *Brandir*, 834 F.2d at 1147.

dustrial design.<sup>163</sup> The altered design features were in furtherance of a "safe, secure, and maintenance-free system of parking bicycles" instead of a work of art.<sup>164</sup>

In deciding this case, the court looked to determine whether the function of the bicycle rack could be separated from its aesthetic value—what is referred to as conceptual separability.<sup>165</sup> On the one hand, the court renewed Judge Jon O. Newman's dissent in *Carol Barnhart Inc. v. Economy Cover Corp.* and proposed that functional and aesthetic features are conceptually separable if "the article . . . stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function."<sup>166</sup> On the other hand, the court discussed a leading scholar on useful articles, Robert Denicola, who views conceptual separability as the relationship between the design process and the actual work-product.<sup>167</sup> Under Denicola's test, a work is not copyrightable if its design elements reflect a merger of aesthetic and functional considerations.<sup>168</sup> Conversely, conceptual separability does exist if and when a designer exercises artistic judgment to include certain artistic aspects that are unrelated to the functional elements of the work.<sup>169</sup>

The court followed Professor Denicola's test of conceptual separability in holding that the artistic aspects of the RIBBON Rack were not conceptually separable from its utilitarian aspects.<sup>170</sup> The RIBBON Rack possessed no artistic elements that could be identified as separate and "capable of existing independently, of, the utilitarian aspects of the article," and accordingly, the court denied plaintiff's copyright infringement claim.<sup>171</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1147.

<sup>165</sup> *Id.* at 1143-45.

<sup>166</sup> *Id.* at 1144 (quoting *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985)).

<sup>167</sup> *Brandir*, 834 F.2d at 1145; see Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 741 (1983).

<sup>168</sup> *Brandir*, 834 F.2d at 1145.

<sup>169</sup> See *id.*

<sup>170</sup> *Id.* at 1145, 1147; see Denicola, *supra* note 167, at 741 (stating that copyrightability "ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations").

<sup>171</sup> *Brandir*, 834 F.2d at 1147-48.

#### 4. Fair Use Defense

Assuming that a work is copyrightable despite the limitations of the idea-expression dichotomy, or the merger and useful article doctrines, a defendant may still be allowed to copy a copyrighted work by utilizing the fair use defense.<sup>172</sup> Fair use was codified in the Copyright Act to reflect the common-law doctrine that others are entitled to use copyrighted material in a reasonable manner without an author's consent.<sup>173</sup> Although fair use is one of the most difficult doctrines to apply in copyright law, it remains a strong and valid defense for a defendant who, under ordinary circumstances, has copied, and thus, has infringed, another's copyrighted work.<sup>174</sup> In determining whether a work qualifies as fair use of a copyrighted work, a court examines the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.<sup>175</sup> Thus, in the hypothetical presented in this Note, even if Firm X's complaint qualifies as copyrightable subject matter, Firm Y may have a fair use defense for copying if Firm Y can show that it used Firm X's complaint in a reasonable manner in accordance with the four fair use factors.<sup>176</sup>

##### a. *Harper & Row, Publishers, Inc. v. Nation Enterprises: The Four Elements of Fair Use*

In 1985, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the U.S. Supreme Court held that the defendant's use of the plaintiff's work was too extreme to qualify as a fair use.<sup>177</sup> In *Harper & Row*, the

<sup>172</sup> See 17 U.S.C. § 107 (2000); *Harper & Row*, 471 U.S. at 560–69; *Nihon Keizai*, 166 F.3d at 72–73.

<sup>173</sup> See 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”); *Harper & Row*, 471 U.S. at 560; *Nihon Keizai*, 166 F.3d at 72; 4 NIMMER & NIMMER, *supra* note 1, § 13.05.

<sup>174</sup> See *Harper & Row*, 471 U.S. at 560–69; *Nihon Keizai*, 166 F.3d at 72–73; see also *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (describing the fair use doctrine as “the most troublesome in the whole law of copyright”).

<sup>175</sup> See 17 U.S.C. § 107; *Harper & Row*, 471 U.S. at 560–61; *Nihon Keizai*, 166 F.3d at 72; 4 NIMMER & NIMMER, *supra* note 1, § 13.05[A].

<sup>176</sup> See *infra* notes 284–317 and accompanying text.

<sup>177</sup> 471 U.S. at 569.

plaintiff agreed to publish Gerald Ford's memoirs in *A Time to Heal: The Autobiography of Gerald R. Ford*.<sup>178</sup> *Time Magazine* agreed to purchase from the plaintiffs the exclusive right to print prepublication excerpts in its magazine one week prior to shipment of the full-length book version to bookstores.<sup>179</sup> Before *Time Magazine* was able to print the excerpts, however, the defendant received a copy of the unpublished manuscript of *A Time to Heal* and published excerpts in its own magazine—attempting to “scoop” *Time Magazine's* article on the same subject.<sup>180</sup> As a result of the defendant's actions, *Time Magazine* canceled its piece and refused to pay the plaintiff.<sup>181</sup>

The plaintiff claimed that the defendant infringed its copyright, and the defendant raised the fair use defense.<sup>182</sup> The Court examined the four elements of fair use and concluded that the defendant's exploitation of the unpublished book did not qualify as a fair use of the plaintiff's copyrighted material.<sup>183</sup> First, the Court found that the purpose and character of the use was not only for commercial profit; it also exploited the copyrighted material without paying the customary price.<sup>184</sup> The defendant's intended purpose was to trump the copyright holder's commercially valuable right of first publication, which nullifies any claim of good faith or fair dealing.<sup>185</sup> Second, although the Court noted that the nature of the copyrighted work was factual and acknowledged the need to disseminate facts, the defendant did not merely copy factual information.<sup>186</sup> The defendant also excerpted subjective descriptions and portraits, and such copying of the plaintiff's individualized expression exceeded the necessity to disseminate facts, which helped persuade the Court to reject the fair use claim.<sup>187</sup>

Third, the Court examined the amount and substantiality of the portion used from the plaintiff's work.<sup>188</sup> The defendant only copied an insubstantial portion of the book.<sup>189</sup> Nevertheless, the Court agreed with the district court's finding that the excerpts copied were

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<sup>178</sup> *Id.* at 542.

<sup>179</sup> *Id.* at 542-43.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 542.

<sup>182</sup> *Harper & Row*, 471 U.S. at 544.

<sup>183</sup> *See id.* at 560-69.

<sup>184</sup> *Id.* at 561-62.

<sup>185</sup> *Id.* at 562.

<sup>186</sup> *Id.* at 563-64.

<sup>187</sup> *See Harper & Row*, 471 U.S. at 563-64.

<sup>188</sup> *Id.* at 564-65.

<sup>189</sup> *Id.* at 564.

“essentially the heart of the book” because they were “the most interesting and moving parts” of the entire work.<sup>190</sup>

Finally, the fourth factor the Court considered was the effect of the defendant’s copying on the market.<sup>191</sup> As the single most important element of fair use, the Court held that *Time Magazine’s* cancellation of the project and its refusal to pay the remaining balance were caused directly by the defendant’s infringement.<sup>192</sup> The defendant was directly competing for a share of the market when it copied excerpts from the book, and allowing such a broad allowance of fair use would pose substantial damage to the marketability of first publication rights in general.<sup>193</sup> Thus, the Court concluded that the defendant’s actions did not constitute a fair use of the plaintiff’s book because the copyrighted material was not used in a reasonable manner.<sup>194</sup>

b. *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.: Infringing Works Must Be Sufficiently Transformative to Qualify as Fair Use*

Similarly, in 1999, in *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, the Second Circuit Court of Appeals decided that copying news reports to construct abstracts did not qualify as fair use because the new work was not sufficiently transformative.<sup>195</sup> The court first addressed the copyrightability of the news reports and found that there was original expression in the plaintiff’s reports apart from the uncopyrightable facts that it was reporting.<sup>196</sup> The court then addressed whether the defendants’ abstracts qualified as a fair use of the plaintiff’s articles by examining the four fair use factors.<sup>197</sup>

First, the court held that the purpose and character test requires that the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.”<sup>198</sup> This inquiry requires that the copying be substantially transformative.<sup>199</sup> In *Nihon Keizai*, however, the defendants’ abstracts were “not in the least ‘transformative’” because the defendants did

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<sup>190</sup> *Id.* at 565.

<sup>191</sup> *Id.* at 566–67.

<sup>192</sup> *Harper & Row*, 471 U.S. at 567.

<sup>193</sup> *Id.* at 568–69.

<sup>194</sup> *See id.* at 569.

<sup>195</sup> 166 F.3d at 72–73.

<sup>196</sup> *Id.* at 70–71; *see supra* notes 79–87 and accompanying text.

<sup>197</sup> *Nihon Keizai*, 166 F.3d at 72.

<sup>198</sup> *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>199</sup> *Id.*



not add anything new in their works—they simply copied and translated the plaintiff's reports without adding anything original.<sup>200</sup> Therefore, the purpose and character of the use weighed against a finding of fair use.<sup>201</sup>

Second, in determining the nature of the plaintiff's copyrighted news reports, the court agreed with the district court's finding that the plaintiff's articles were creative and original.<sup>202</sup> The court recognized, however, that some copyrighted works are "closer to the core of intended copyright protection than others."<sup>203</sup> For instance, factual news articles, like the plaintiff's reports, are further from "the core" than more artistic, fictional works of art.<sup>204</sup> The court also held that the expressive elements in the plaintiff's news reports, as opposed to the factual elements, were not the dominant features of the works.<sup>205</sup> Overall, the court found that this factor was mostly neutral on the question of fair use.<sup>206</sup>

Third, in examining the amount and substantiality of the portions used in relation to the plaintiff's copyrighted works, the court held that the defendants' abstracts copied "the crucial facts and ideas" from the plaintiff's reports.<sup>207</sup> The defendants' case for fair use, however, would have been stronger if they merely copied the factual content from the plaintiff's reports.<sup>208</sup> Instead, the defendants also copied the plaintiff's copyrighted expression in structure, word choice, and factual arrangement.<sup>209</sup> Accordingly, the amount of copying of protectable expression also weighed against a finding of fair use.<sup>210</sup>

Finally, in determining the effect of the use upon the potential market for the copyrighted work, the court considered not only the harm caused by the defendants, but also whether similar widespread conduct would have a substantial impact on the market for the original.<sup>211</sup> This factor also worked against a finding of fair use because as

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<sup>200</sup> *Id.* (quoting *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, No. 98 Civ. 641 DLC, 1998 U.S. Dist. LEXIS 6806, at \*39 (S.D.N.Y. Apr. 14, 1998)).

<sup>201</sup> *Id.*

<sup>202</sup> *Nihon Keizai*, 166 F.3d at 72-73.

<sup>203</sup> *Id.* at 72 (quoting *Campbell*, 510 U.S. at 586).

<sup>204</sup> *Id.*; see also *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (holding that "fair use is more likely to be found in factual works than in fictional works").

<sup>205</sup> *Nihon Keizai*, 166 F.3d at 72.

<sup>206</sup> *Id.* at 73.

<sup>207</sup> *Id.*

<sup>208</sup> See *id.*

<sup>209</sup> *Id.* at 71, 73.

<sup>210</sup> *Nihon Keizai*, 166 F.3d at 73.

<sup>211</sup> *Id.*

copies of the plaintiff's work, the defendants' abstracts competed with and superseded the plaintiff's articles.<sup>212</sup> In conclusion, the court denied the defendants' fair use claim because the copyrighted material was not used in a reasonable manner—the defendants' abstracts were insufficiently transformative, copied too much of the plaintiff's expression, and unfairly competed with the plaintiff's reports.<sup>213</sup>

## II. COPYRIGHTABILITY OF COMPLAINTS

### A. Firm X's Complaint

Returning to the hypothetical in the Introduction of this Note, the threshold issue is whether Firm X's complaint is an original work of authorship.<sup>214</sup> Before venturing into the analysis, however, several basic facts about Firm X's class action complaint must be assumed.<sup>215</sup> A legal complaint must state the nature of the action, such as a federal securities class action suit.<sup>216</sup> Next, the complaint must set forth the respective parties and the basis for the court's jurisdiction and venue.<sup>217</sup> With respect to Firm X's complaint, the main focus is on the allegations—often included in a "facts" section—which, ideally, help suggest to opposing counsel that the plaintiff's case is strong.<sup>218</sup> In the statement of facts, attorneys for Firm X presumably set forth their cause of action in the light most favorable to their clients, emphasizing favorable facts and minimizing the importance of other, less favorable facts—all in hopes that the facts are sufficient to constitute a cause or causes of action.<sup>219</sup> With these assumptions in place, the inquiry shifts to whether Firm X's complaint is copyrightable subject matter—specifically, whether Firm X's complaint depicts the requisite "originality" under the Copyright Act so that Firm Y is precluded from copying the complaint.<sup>220</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *See id.*

<sup>214</sup> *See* 17 U.S.C. § 102(a) (2000); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 362–64 (1991); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250–51 (1903); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 70–71 (2d Cir. 1999).

<sup>215</sup> *See* FRANK E. COOPER, *WRITING IN LAW PRACTICE* 185 (rev. ed. 1963).

<sup>216</sup> *Id.*

<sup>217</sup> *See id.* at 183–84.

<sup>218</sup> *See id.* at 185.

<sup>219</sup> *See id.*

<sup>220</sup> *See* 17 U.S.C. § 102(a) (2000); *Feist*, 499 U.S. at 362–64; *Bleistein*, 188 U.S. at 250–51; *Burrow-Giles*, 111 U.S. at 59–60; *Nihon Keizai*, 166 F.3d at 70–71. To avoid confusion over the

### B. Complaints Are Original

Firm X's copyright in its class action complaint is copyrightable because it is an "original work[] of authorship fixed in a[] tangible medium of expression" that can be "perceived, reproduced, or otherwise communicated."<sup>221</sup> First, the complaint is "fixed in a[] tangible medium of expression" because it is in written form.<sup>222</sup> In *Burrow-Giles Lithographic Co. v. Sarony*<sup>223</sup> and *Bleistein v. Donaldson Lithographing Co.*<sup>224</sup> the U.S. Supreme Court addressed the issue of whether photographs and chromolithographs, respectively, were encompassed in the "writings" that the Constitution was meant to protect.<sup>225</sup> The Court in both cases held that the Constitution's language encompassed "all forms of writing," including printing, engravings, and other means by which authors' ideas are given "visible expression."<sup>226</sup> By having the complaint in written and printed forms, Firm X's attorneys have expressed their case in a visible format, thus satisfying the requirement of being "fixed in a[] tangible medium of expression."<sup>227</sup>

Aside from requiring works to meet the fixation requirement, the Copyright Act also requires that copyright protection only extend to "original works of authorship."<sup>228</sup> Firm X's complaint satisfies the originality standard because the complaint features at least a modicum of creativity.<sup>229</sup> For instance, Firm X's complaint, like the photograph of Oscar Wilde in *Burrow-Giles*, exhibits the author's creative efforts in choosing sentence structure, factual interpretation, and word choice.<sup>230</sup> The attorney who writes a complaint, like the photographer in *Burrow-Giles* who exhibited his creativity by posing Oscar

copying and misappropriation requirements in the Copyright Act, the hypothetical in this Note assumes that Firm Y copies Firm X's complaint in its totality. See 17 U.S.C. § 501. This Note focuses primarily on whether a legal complaint is copyrightable—not on what constitutes copyright infringement. See *infra* notes 221–317 and accompanying text.

<sup>221</sup> See 17 U.S.C. § 102(a); *Feist*, 499 U.S. at 362–64; *Bleistein*, 188 U.S. at 250–51; *Burrow-Giles*, 111 U.S. at 59–60; *Nihon Keizai*, 166 F.3d at 70–71.

<sup>222</sup> See 17 U.S.C. § 102(a); *Bleistein*, 188 U.S. at 250; *Burrow-Giles*, 111 U.S. at 56–58; *supra* note 23 and accompanying text.

<sup>223</sup> See *Burrow-Giles*, 111 U.S. at 56–57; *supra* notes 37–44 and accompanying text.

<sup>224</sup> See *Bleistein*, 188 U.S. at 249; *supra* notes 45–56 and accompanying text.

<sup>225</sup> See U.S. CONST. art. I, § 8, cl. 8; *supra* notes 37–56.

<sup>226</sup> See *Bleistein*, 188 U.S. at 250; *Burrow-Giles*, 111 U.S. at 58.

<sup>227</sup> See 17 U.S.C. § 102(a); *Bleistein*, 188 U.S. at 250; *Burrow-Giles*, 111 U.S. at 58.

<sup>228</sup> See 17 U.S.C. § 102(a); *Feist*, 499 U.S. at 362–64; *Bleistein*, 188 U.S. at 250; *Burrow-Giles*, 111 U.S. at 59–60; *Nihon Keizai*, 166 F.3d at 70–71.

<sup>229</sup> See *Feist*, 499 U.S. at 362; *Bleistein*, 188 U.S. at 250; *Burrow-Giles*, 111 U.S. at 60; *Nihon Keizai*, 166 F.3d at 70–71.

<sup>230</sup> See *Burrow-Giles*, 111 U.S. at 60.

Wilde, choosing an appropriate costume, and applying different light and shade, utilizes at least a minimal degree of creativity in selecting which facts to emphasize and even which words to use to emphasize the respective facts.<sup>231</sup>

Similarly, in *Bleistein*, the plaintiff's circus posters were also original because they depicted the unique personality of the artist, regardless of whether the Court believed in their aesthetic merit.<sup>232</sup> Moreover, the attorney drafting Firm X's complaint need not be as artistic as the circus poster designer in *Bleistein*, because originality is not determined by aesthetic merit.<sup>233</sup> Additionally, Firm X's complaint also depicts the author's unique personality because it encompasses the author's creative choice of words and sentence structure.<sup>234</sup> Therefore, under the *Bleistein* and *Burrow-Giles* standards, Firm X's complaint is copyrightable subject matter because it is sufficiently original.<sup>235</sup>

Additionally, Firm X's complaint is also copyrightable subject matter under the *Feist Publications v. Rural Telephone Service, Co.*<sup>236</sup> and *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*<sup>237</sup> standards.<sup>238</sup> Facts, such those enumerated in a legal complaint, are generally uncopyrightable, but a compilation of facts is copyrightable so long as there is some modicum of creativity, such as an original selection or arrangement of facts.<sup>239</sup> Unlike the telephone directory in *Feist*, which displayed an entirely typical selection and arrangement of telephone numbers, an attorney drafting Firm X's complaint likely considers the facts necessary to prove the client's claim, and accordingly, arranges and chooses the facts to express the claim in a light most favorable to the client.<sup>240</sup> Thus, as suggested by the Court in *Feist*, the attorney's creativity in selecting and arranging the facts in the complaint should be found sufficiently original to warrant copyright protection.<sup>241</sup>

Moreover, Firm X's complaint is similar to the plaintiff's news report in *Nihon Keizai* because both works express factual information in

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<sup>231</sup> See *id.*

<sup>232</sup> See *Bleistein*, 188 U.S. at 251-52.

<sup>233</sup> See *id.*

<sup>234</sup> See *id.* at 250.

<sup>235</sup> See *Bleistein*, 188 U.S. at 250-51; *Burrow-Giles*, 111 U.S. at 60.

<sup>236</sup> See 499 U.S. at 363-64; *supra* notes 57-78 and accompanying text.

<sup>237</sup> See 166 F.3d at 70-71; *supra* notes 79-87 and accompanying text.

<sup>238</sup> See *supra* notes 57-87 and accompanying text.

<sup>239</sup> See *Feist*, 499 U.S. at 348, 361-63; *Nihon Keizai*, 166 F.3d at 70; Conley, *supra* note 2.

<sup>240</sup> See *Feist*, 499 U.S. at 348, 362-64.

<sup>241</sup> See *id.* at 362-64.

a creatively expressive manner.<sup>242</sup> Like the news reports in *Nihon Keizai*, an attorney's arrangement of facts, word choice, sentence structure, and analysis are all forms of protectable expression.<sup>243</sup> Firm Y would be infringing on Firm X's copyright by copying Firm X's complaint, because Firm Y would be copying someone else's interpretation of events, choice of words, and factual emphasis.<sup>244</sup> Despite the rule that facts are not copyrightable, Firm X's complaint is copyrightable because it encompasses protected expression in the form of word choice and arrangement, sentence structure, and claim analysis.<sup>245</sup> Essentially, Firm X does not have a copyright over the factual events that occurred in its client's case—that is, Firm Y may freely copy facts—but Firm X does have a copyright in its expression and interpretation of those facts.<sup>246</sup>

### C. *Idea-Expression Dichotomy: Complaints Do Not Express an Idea*

The idea-expression dichotomy also does not limit Firm X's copyright in its complaint because the complaint does not express an "idea."<sup>247</sup> Unlike the plaintiff's attempt to copyright the art of bookkeeping in *Baker v. Selden*,<sup>248</sup> Firm X does not want to copyright the art or method of drafting complaints.<sup>249</sup> Indeed, Firm X merely wants to protect its creation of a specific complaint, drafted for a specific client, for a specific cause of action.<sup>250</sup> Moreover, Firm X is not copyrighting its specific cause of action.<sup>251</sup> Consistent with Judge Hand's decision in *Nichols v. Universal Pictures Corp.*,<sup>252</sup> Firm X is not copyrighting a "general idea" in complaints—instead, it is copyrighting the specific aspects of its complaint, such as the factual interpretation of how its client will prevail at trial.<sup>253</sup> Copyrighting Firm X's complaint does not preclude all others from practicing the art of drafting complaints—importantly,

<sup>242</sup> See *Nihon Keizai*, 166 F.3d at 70–71; Conley, *supra* note 2.

<sup>243</sup> See *Nihon Keizai*, 166 F.3d at 70–71; Conley, *supra* note 2.

<sup>244</sup> See *Nihon Keizai*, 166 F.3d at 70–71.

<sup>245</sup> See *id.*; *Feist*, 499 U.S. at 362–64.

<sup>246</sup> See *Nihon Keizai*, 166 F.3d at 70–71.

<sup>247</sup> See 17 U.S.C. § 102(b) (2000); *Baker v. Selden*, 101 U.S. 99, 102 (1879); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>248</sup> See *Baker*, 101 U.S. at 107; *supra* notes 100–110 and accompanying text.

<sup>249</sup> See *supra* notes 100–110 and accompanying text.

<sup>250</sup> See COOPER, *supra* note 215, at 185.

<sup>251</sup> See *supra* notes 214–220 and accompanying text.

<sup>252</sup> See *Nichols*, 45 F.2d at 121–22; *supra* notes 111–117 and accompanying text.

<sup>253</sup> See *supra* notes 111–117 and accompanying text.

another firm, such as Firm Y, is still free to draft a complaint for the same case so long as its complaint is sufficiently original.<sup>254</sup>

If anything, Firm X's complaint embodies the idea that its client should prevail in a cause of action, and Firm X's complaint is merely an expression of this idea.<sup>255</sup> Other firms are free to express the idea in their own creative and original manner, because Firm X is claiming rights to the complaint's expressive content only, not its idea or its facts.<sup>256</sup>

#### D. *Merger: There Are More Than a Limited Number of Ways to Write a Complaint*

In addition, Firm X's complaint is not precluded from copyright protection under the merger doctrine because there are more than a limited number of ways to express the content and idea of the complaint.<sup>257</sup> Unlike "Rule 1" in *Morrissey v. Procter & Gamble Co.*,<sup>258</sup> which could be expressed only in a limited number of ways, a complaint drafted for a specific cause of action can be organized and expressed in more than a "mere handful" of ways.<sup>259</sup> The subject matter embodied in a complaint is not as straightforward and simple as a sweepstakes contest rule that instructs entrants on how to enter a contest.<sup>260</sup>

In drafting a complaint, an attorney must organize and present the facts of a case in an understandable and brief fashion.<sup>261</sup> An attorney chooses specific words—emotive or neutral—to present the case in the most favorable way possible.<sup>262</sup> This thought-provoking and time-consuming process likely does not produce only a handful of ways to draft a complaint.<sup>263</sup> Although it is likely that skilled attorneys will focus on similar facts, they likely will not express them in the exact same manner, with the exact same adjectives, or in the exact same order.<sup>264</sup> Moreover, though brevity and precision are basic tenets of complaint writing, adherence to these rules need not deprive a com-

<sup>254</sup> See *Feist*, 499 U.S. at 362–64; *Bleistein*, 188 U.S. at 250; *Burrow-Giles*, 111 U.S. at 60; *Baker*, 101 U.S. at 105; *Nihon Keizai*, 166 F.3d at 70–71.

<sup>255</sup> See *Baker*, 101 U.S. at 105.

<sup>256</sup> See *id.*; *Nichols*, 45 F.2d at 121.

<sup>257</sup> See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967).

<sup>258</sup> See *id.* at 678; *supra* notes 124–130 and accompanying text.

<sup>259</sup> See *supra* notes 124–130 and accompanying text.

<sup>260</sup> See *id.* at 678–79.

<sup>261</sup> See COOPER, *supra* note 215, at 185–86.

<sup>262</sup> See *id.* at 185.

<sup>263</sup> See *id.* at 185–86.

<sup>264</sup> See *id.* at 185–86, 187–88.

plaint of vigor or uniqueness—it may very well add to the complaint's presentation and dramatic impact.<sup>265</sup> Indeed, part of the drafting attorney's task is to predict opposing counsel's reaction to the complaint, and in doing so, make crucial "artistic" decisions regarding the presentation of the complaint.<sup>266</sup> Accordingly, Firm X's complaint is not similar to "Rule 1" in *Morrissey*, because the idea of the complaint—that the client deserves relief—can be expressed in numerous ways depending on the attorney interpreting the case, the relief sought, and the claims alleged.<sup>267</sup> Firm X's complaint does not foreclose other methods of expressing the same idea of seeking relief for the client, and accordingly, the merger doctrine does not limit Firm X's copyright in its complaint.<sup>268</sup>

#### E. *Useful Article Doctrine: Legal Complaints Are Not Useful Articles*

In addition, the useful article doctrine does not limit copyright protection for Firm X's complaint because it is unlikely that a legal complaint serves "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."<sup>269</sup> Therefore, in determining whether complaints are useful articles, the question is whether legal complaints have an intrinsic utilitarian function apart from conveying information.<sup>270</sup>

The toy airplanes in *Gay Toys, Inc. v. Buddy L Corp.*,<sup>271</sup> though useful for upbringing children, were not viewed as possessing an intrinsic utilitarian function because their main purpose was to portray the appearance of an article—namely, an airplane.<sup>272</sup> The toy airplanes in dispute in *Gay Toys* did not have a utilitarian function other than portraying airplanes, and accordingly, the useful article doctrine was not applicable.<sup>273</sup> In contrast, a legal complaint is used to convey information about the parties to a lawsuit, the claims alleged, and the factual circumstances of the allegations.<sup>274</sup> This function, in itself, is useful, but the test is

<sup>265</sup> See *id.* at 187.

<sup>266</sup> See COOPER, *supra* note 215, at 188.

<sup>267</sup> See *Morrissey*, 379 F.2d at 678–79; COOPER, *supra* note 215, at 187.

<sup>268</sup> See *Morrissey*, 379 F.2d at 678–79.

<sup>269</sup> See 17 U.S.C. § 101 (2000); *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147–48 (2d Cir. 1987); *Gay Toys, Inc. v. Buddy L Corp.*, 703 F.2d 970, 973 (6th Cir. 1983).

<sup>270</sup> See *Brandir*, 834 F.2d at 1147–48; *Gay Toys*, 703 F.2d at 973.

<sup>271</sup> See *Gay Toys*, 703 F.2d at 973; *supra* notes 148–158 and accompanying text.

<sup>272</sup> See *supra* notes 148–158 and accompanying text.

<sup>273</sup> *Gay Toys*, 703 F.2d at 974.

<sup>274</sup> See COOPER, *supra* note 215, at 185–86.

whether the complaint serves an intrinsic function *other than* conveying the lawsuit's information.<sup>275</sup> A legal complaint, like the toy airplane, does not serve any purpose other than to convey information.<sup>276</sup>

Moreover, Firm X's complaint, unlike the RIBBON Rack in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*,<sup>277</sup> is not a useful article because the functional and aesthetic elements of a legal complaint, unlike those of a bike rack, are conceptually separable.<sup>278</sup> In *Brandir*, the designer of the bicycle rack did not include any artistic elements independent of the function of the bicycle rack, and therefore, there was no conceptual separability and the useful article doctrine applied.<sup>279</sup> Firm X's attorney does not draft a complaint for the sole purpose of reporting facts—indeed, attorneys write to express and to persuade that their claims should prevail.<sup>280</sup> Additionally, the artistic elements of a legal complaint—the author's expression, sentence structure, and factual analysis—are distinguishable from the functional, informative aspects of a complaint.<sup>281</sup> In other words, the artistic elements of persuasion in an attorney's word choice, sentence structure, and analysis in a complaint are capable of existing independently from the utilitarian aspects of the article, which consist mostly of facts.<sup>282</sup> Therefore, an article's ability to convey factual information does not automatically make it a "useful article" with limited copyright protection.<sup>283</sup>

<sup>275</sup> See *Brandir*, 834 F.2d at 1147–48; *Gay Toys*, 703 F.2d at 973.

<sup>276</sup> See *Brandir*, 834 F.2d at 1147–48; *Gay Toys*, 703 F.2d at 974.

<sup>277</sup> See *Brandir*, 834 F.2d at 1147–48; *supra* notes 159–171 and accompanying text.

<sup>278</sup> See *supra* notes 159–171 and accompanying text.

<sup>279</sup> *Brandir*, 834 F.2d at 1147–48.

<sup>280</sup> See COOPER, *supra* note 215, at 185–86.

<sup>281</sup> See *id.* at 187; Conley, *supra* note 2.

<sup>282</sup> See *Brandir*, 834 F.2d at 1147–48.

<sup>283</sup> See *Nihon Keizai*, 166 F.3d at 70; *Gay Toys*, 703 F.2d at 973. Usefulness, in itself, does not invalidate copyright protection automatically. See *Nihon Keizai*, 166 F.3d at 70; *Brandir* 834 F.2d at 1147. One must determine whether there are artistic qualities about the work that are worthy of copyright protection, because disallowing copyright protection on a work merely because it is useful in a general sense would effectively invalidate copyrights on many articles that convey factual information—such as news reports, newspapers, and other non-fictional works. See *Nihon Keizai*, 166 F.3d at 70; *Brandir* 834 F.2d at 1147. Moreover, denying copyright protection to news reports and other non-fictional works would have the detrimental effect of reducing authors' and artists' incentives to create such works. See *CDN Inc. v. Kapes*, 197 F.3d 1256, 1262 (9th Cir. 1999) (holding that extending copyright protection to a publisher of price guides furthered competition by allowing the publisher's competitors to create their own price guides, and simultaneously, provided an incentive to the publisher to create such guides).



F. *Fair Use: Verbatim Copying of Another Complaint Is Not Fair Use*

Firm Y will be unable to plead the fair use defense effectively regarding its copying of Firm X's complaint because it is not using Firm X's copyrighted material in a reasonable manner; in other words, none of the four elements of fair use works in Firm Y's favor.<sup>284</sup> First, like the copying in both *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>285</sup> and *Nihon Keizai*,<sup>286</sup> the purpose and character of Firm Y's use of Firm X's complaint is not fair use because it is for commercial profit and is not substantially transformative.<sup>287</sup> In 1985, in *Harper & Row*, the U.S. Supreme Court held that the defendant's actions—copying material excerpts out of a book—were not fair use because its intended purpose was to trump the copyright holder's right of first publication.<sup>288</sup> Technically, Firm Y is unable to “trump” Firm X's complaint because Firm X's complaint is already available and in existence.<sup>289</sup> Firm Y can, however, entice and lure other class action clients to utilize its services by, for instance, charging lower legal fees due to an already-existing complaint.<sup>290</sup> The complaint, however, is solely Firm X's work product, and Firm Y's copying would compete unfairly with Firm X.<sup>291</sup> Denying Firm X copyright protection for its complaint would hinder competition, because no law firm would have an incentive to be the “first” to write a complaint knowing other law firms may subsequently copy its complaint for use in the same case.<sup>292</sup> Therefore, extending copyright to the complaint and denying Firm Y's fair use claim would provide an incentive for law firms to accept cases actively, and to draft complaints with the confidence that competing firms will not usurp their efforts.<sup>293</sup>

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<sup>284</sup> See 17 U.S.C. § 107 (2000); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560–69 (1985); *Nihon Keizai*, 166 F.3d at 72–73.

<sup>285</sup> See *Harper & Row*, 471 U.S. at 561–69; *supra* notes 177–194 and accompanying text.

<sup>286</sup> See *Nihon Keizai*, 166 F.3d at 72–73; *supra* notes 195–213 and accompanying text.

<sup>287</sup> See *supra* notes 177–213 and accompanying text.

<sup>288</sup> *Harper & Row*, 471 U.S. at 562–63.

<sup>289</sup> See *id.*

<sup>290</sup> See *id.*; Birch, *supra* note 2, at 257; Conley, *supra* note 2.

<sup>291</sup> See *Harper & Row*, 471 U.S. at 562–63, 566–69; Birch, *supra* note 2, at 257; Conley, *supra* note 2.

<sup>292</sup> See *Harper & Row*, 471 U.S. at 566–69; *Nihon Keizai*, 166 F.3d at 73; see also *CDN*, 197 F.3d at 1262 (holding that extending copyright protection to a publisher of price guides furthered competition by allowing the publisher's competitors to create their own price guides, and simultaneously, provided an incentive to the publisher to create such a guide).

<sup>293</sup> See *Harper & Row*, 471 U.S. at 566–69; *Nihon Keizai*, 166 F.3d at 73; Birch, *supra* note 2, at 257.

Additionally, the purpose and character of Firm Y's use of Firm X's complaint is not at all "transformative" as is required in *Nihon Keizai*.<sup>294</sup> The defendants in *Nihon Keizai* copied the plaintiff's news reports to sell the reports as abstracts.<sup>295</sup> The defendants did not add anything new or original in their abstracts to "transform" sufficiently the plaintiff's work.<sup>296</sup> Accordingly, Firm Y's verbatim copying of Firm X's complaint does not meet the sufficiently "transformative" threshold because Firm Y did not add anything to the complaint—except, perhaps, its signature and address on the certification page, as well as the plaintiff's information.<sup>297</sup> Therefore, the character and purpose of Firm Y's copying of Firm X's complaint—verbatim copying that lacks originality and transformative quality—weighs against a finding of fair use.<sup>298</sup>

The second element of fair use—the nature of the copyrighted work—also warrants a finding against fair use because Firm X's complaint is original and creative by virtue of the author's choice of words, sentence structure, and overall organization.<sup>299</sup> Firm Y may argue that a complaint is fact-based, and therefore, uncopyrightable because facts are uncopyrightable subject matter.<sup>300</sup> The copyrighted works in *Harper & Row* and *Nihon Keizai*, however, were also factual works—an autobiography of Gerald Ford and news reports, respectively—but fair use was denied in both cases.<sup>301</sup> Although fact-based works may not be as close to the core of intended copyrightable works, they may still receive protection if expressed with sufficient originality.<sup>302</sup> Essentially, the facts, themselves, may be copied, but the author's expression is copyright protected.<sup>303</sup> Therefore, Firm Y would better off copying only the uncopyrightable facts in Firm X's complaint; verbatim copying of the entire complaint, however—facts and copyrightable expression—does not support a finding of fair use.<sup>304</sup>

The third element of fair use, the amount and substantiality copied, is not difficult to evaluate in Firm Y's case because it is assumed

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<sup>294</sup> See 166 F.3d at 72.

<sup>295</sup> *Id.* at 69.

<sup>296</sup> *Id.* at 72.

<sup>297</sup> See *id.*; COOPER, *supra* note 215, at 183–85.

<sup>298</sup> See *Harper & Row*, 471 U.S. at 561–63; *Nihon Keizai*, 166 F.3d at 72.

<sup>299</sup> See *Harper & Row*, 471 U.S. at 563–64; *Nihon Keizai*, 166 F.3d at 72–73.

<sup>300</sup> See *Harper & Row*, 471 U.S. at 563–64; *Nihon Keizai*, 166 F.3d at 72–73.

<sup>301</sup> See *Harper & Row*, 471 U.S. at 542, 569; *Nihon Keizai*, 166 F.3d at 69, 73.

<sup>302</sup> See *Harper & Row*, 471 U.S. at 563–64; *Nihon Keizai*, 166 F.3d at 72–73.

<sup>303</sup> See *Harper & Row*, 471 U.S. at 563–64; *Nihon Keizai*, 166 F.3d at 72–73.

<sup>304</sup> See *Harper & Row*, 471 U.S. at 563–64; *Nihon Keizai*, 166 F.3d at 72–73.

that Firm Y made a virtually verbatim copy of Firm X's complaint.<sup>305</sup> Accordingly, Firm Y also copied Firm X's word choice, factual arrangement, and other protected expression, which operates against a finding of fair use.<sup>306</sup>

Finally, the most important factor in determining fair use—the market effect of Firm Y's copying Firm X's complaint—also works against a finding of fair use.<sup>307</sup> Like the defendant in *Harper & Row* who copied excerpts of a book in order to “scoop” *Time Magazine's* article on the same topic, Firm Y is using Firm X's complaint to avoid repeating Firm X's hard work and to lure clients through lower complaint-drafting costs.<sup>308</sup> Firm Y is thus competing for a share of the market with an unfair advantage—essentially, Firm X has already completed the work and Firm Y is free-riding off the completed complaint.<sup>309</sup>

Moreover, the court in *Nihon Keizai* not only considered the impact on the market, but also questioned whether widespread conduct would have a substantial impact on the market for the original work.<sup>310</sup> The “market” for legal complaints resides in the overall market for legal services, which undoubtedly would be affected if law firms could copy each other's complaints freely.<sup>311</sup> In the hypothetical class action lawsuit, no law firm would have the incentive or motivation to be the first firm to draft a complaint because other law firms could immediately reproduce the complaint for other clients in the class.<sup>312</sup> This lack of incentive may cause unnecessary delays in filing lawsuits, and additionally, clients may also sit and wait until a “copyable” complaint is produced so that they can seek out a law firm that can copy the complaint.<sup>313</sup> By doing so, the clients will not have to pay the corresponding attorney's fees for time spent drafting a complaint

<sup>305</sup> See *Harper & Row*, 471 U.S. at 564–66; *Nihon Keizai*, 166 F.3d at 73. Copying less would require a more in-depth evaluation, like the inquiry in *Harper & Row*, of whether Firm Y copied “the heart” of the complaint. See 471 U.S. at 565. This issue, however, would stray from this Note's focus on the copyrightability of complaints and would enter into the realm of copyright infringement and misappropriation issues. See *supra* note 26 and accompanying text.

<sup>306</sup> See *Harper & Row*, 471 U.S. at 563–66; *Nihon Keizai*, 166 F.3d at 71, 73.

<sup>307</sup> See *Harper & Row*, 471 U.S. at 566–69; *Nihon Keizai*, 166 F.3d at 73.

<sup>308</sup> See *Harper & Row*, 471 U.S. at 542, 566–69; Birch, *supra* note 2, at 256–57; Conley, *supra* note 2.

<sup>309</sup> See *Harper & Row*, 471 U.S. at 566–69; Birch, *supra* note 2, at 257; Conley, *supra* note 2.

<sup>310</sup> *Nihon Keizai*, 166 F.3d at 73.

<sup>311</sup> See *id.*; Birch, *supra* note 2, at 257; Conley, *supra* note 2.

<sup>312</sup> See *Nihon Keizai*, 166 F.3d at 73; Birch, *supra* note 2, at 257; Conley, *supra* note 2.

<sup>313</sup> See *Nihon Keizai*, 166 F.3d at 73; Birch, *supra* note 2, at 257; Conley, *supra* note 2.

because a suitable complaint has already been drafted.<sup>314</sup> Extending copyright protection to Firm X's complaint ensures competition among firms, and allows clients to seek legal counsel freely without wondering whether they should wait for another plaintiff in the class to act first.<sup>315</sup> Due to the detrimental market effects that follow from copying Firm X's complaint, a court likely would deny Firm Y's fair use defense.<sup>316</sup> Overall, the purpose and character of Firm Y's copying, the nature of Firm X's complaint, the amount and substantiality copied, and the effect of the use upon the potential market support a finding against fair use.<sup>317</sup>

### CONCLUSION

Firm X's legal complaint easily meets the Copyright Act's originality requirement because it reflects a modicum of creativity through the author's selection and arrangement of facts, expression, and analysis. Based on copyright case law, firms like Firm X should hold a valid copyright in their legal complaints, and accordingly, law firms like Firm Y would be liable for copyright infringement were they to file virtually identical complaints.

Despite the various limitations to copyrightability, Firm Y would be unable to succeed in defending its actions against Firm X by raising the typical arguments against copyrightability. For instance, legal complaints do not express ideas so the idea-expression dichotomy as set forth in *Baker v. Selden* would not invalidate Firm X's copyright. In addition, the merger doctrine also would not limit Firm X's copyright in its complaint because, unlike the contest rule in *Morrissey v. Procter & Gamble Co.*, there are likely more than a limited number of ways to express the ideas within a legal complaint. Moreover, unlike the bicycle rack in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, the useful article doctrine also would not apply against Firm X because a legal complaint does not serve a utilitarian function other than conveying information.

Finally, Firm Y could not successfully plead the fair use defense for its copying because the type of verbatim copying of another firm's

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<sup>314</sup> See *Nihon Keizai*, 166 F.3d at 73; *Birch*, *supra* note 2, at 257; *Conley*, *supra* note 2.

<sup>315</sup> See *Nihon Keizai*, 166 F.3d at 73; *Birch*, *supra* note 2, at 257; *Conley*, *supra* note 2.

<sup>316</sup> See *Harper & Row*, 471 U.S. at 566-69; *Nihon Keizai*, 166 F.3d at 73.

<sup>317</sup> See *Harper & Row*, 471 U.S. at 560-69; *Nihon Keizai*, 166 F.3d at 72-73. Perhaps it would be fair use for Firm Y to make a copy of Firm X's complaint purely for its files so that it has documentation on the approaches that other plaintiffs are taking. See *supra* note 173 and accompanying text.

complaint discussed herein is not fair use based on the four factors enunciated in *Harper & Row, Publishers, Inc. v. Nation Enterprises* and *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*: the purpose and character of the infringing use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. Thus, Firm X possesses a valid copyright in its legal complaint such that other firms, like Firm Y, are precluded from copying.

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