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# A First Amendment Perspective on the Idea/ Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"

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# A FIRST AMENDMENT PERSPECTIVE ON THE IDEA/ EXPRESSION DICHOTOMY AND COPYRIGHT IN A WORK'S "TOTAL CONCEPT AND FEEL"

by  
Alfred C. Yen\*

## I. INTRODUCTION

At first blush, the coexistence of the first amendment and the copyright law<sup>1</sup> poses a puzzling contradiction. The first amendment provides that "Congress shall pass no law abridging the freedom of speech."<sup>2</sup> The Supreme Court has often invoked this passage to prevent the suppression or censorship of written,<sup>3</sup> spoken,<sup>4</sup> symbolic,<sup>5</sup> and artistic expression.<sup>6</sup> By contrast, the copyright law appears to do exactly what the first amendment prohibits by forcing authors not to make unauthorized use of copy-

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<sup>1</sup> 17 U.S.C. §§ 101-810 (1982).

<sup>2</sup> U.S. CONST. amend. I.

<sup>3</sup> See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (press reports concerning a trial receive first amendment protection); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (newspaper publishing "The Pentagon Papers" entitled to first amendment protection); *Near v. Minnesota*, 283 U.S. 697 (1931) (first amendment protects newspaper article charging police with neglect of duty).

<sup>4</sup> See, e.g., *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam) (defendant's shouted statements entitled to first amendment protection); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (defendant's verbal references to shooting the President of the United States entitled to first amendment protection); *Saia v. New York*, 334 U.S. 558 (1948) (restrictions on loudspeakers unconstitutional as an infringement on free speech).

<sup>5</sup> See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam) (taping a peace symbol to an upside down American flag was protected expression); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (wearing black armbands to protest the Vietnam war constituted protected expression); *Stromberg v. California*, 283 U.S. 359 (1931) (flying red flag as a symbol of opposition to the government was protected expression).

<sup>6</sup> See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969) (defendant has right to possess obscene movie); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684 (1959) (first amendment protects distribution of the film *Lady Chatterley's Lover*).

righted material.<sup>7</sup> To the extent that copyright dictates the manner in which an author may express herself, it infringes the author's freedom of expression.<sup>8</sup>

In 1970, separate articles by Professors Melville Nimmer and Paul Goldstein identified this apparent conflict between the first amendment and copyright.<sup>9</sup> However, both scholars believed that the conflict could be resolved. Naturally, they identified the importance of uninhibited expression as guaranteed by the first amendment.<sup>10</sup> However, they also noted that copyright actually encourages speech by granting limited monopolies to authors. Without these incentives, expressive output would presumably decline.<sup>11</sup> Thus, in their view, copyright's promotion of expression<sup>12</sup> was generally consistent with the first amendment.<sup>13</sup>

This belief has profoundly affected the course of copyright jurisprudence. In particular, courts have used the general congruence between copyright and the first amendment to support a practice of ignoring the first amendment when interpreting the copyright law. Consequently, even when first amendment arguments have been placed directly before them, courts have held that no conflict exists between the first amendment and copyright.<sup>14</sup>

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<sup>7</sup> Although copyright is expressly authorized by article I of the Constitution, U.S. CONST. art. I, § 8, cl. 8, the first amendment limits all powers granted in the main body of the Constitution. Thus, to the extent that copyright and the first amendment clash, copyright must give way.

<sup>8</sup> Further evidence of copyright's infringing effect comes from copyright's legal origin in censorship. See B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 2-9 (1967).

<sup>9</sup> Nimmer, *Does Copyright Abridge First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970). See also Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT LAW SYMPOSIUM 43 (1971); Lee v. Runge, 404 U.S. 887, 892-93 (1971) (Douglas, J., dissenting); L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 224-29 (1968).

<sup>10</sup> Goldstein, *supra* note 9, at 988-90; Nimmer, *supra* note 9, at 1186-88.

<sup>11</sup> Goldstein, *supra* note 9, at 991 ("[W]ithdrawal of property rights will presumably be accompanied by a decline in the dissemination of needed expression."); Nimmer, *supra* note 9, at 1186 ("[C]ongressional authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors and that the copyright monopoly is a necessary stimulus to the full realization of such creative activities.").

<sup>12</sup> The Constitution grants Congress its copyright power "[t]o promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8.

<sup>13</sup> Nimmer, *supra* note 9, at 1189-93; Goldstein, *supra* note 9, at 990, 1001.

<sup>14</sup> Schnapper v. Foley, 471 F. Supp. 426, 428 (D.D.C. 1979), *aff'd*, 667 F.2d 102 (D.C. Cir.

The courts have generally supported this position by referring to a copyright doctrine known as the idea/expression dichotomy.<sup>15</sup> This dichotomy, which is presently embodied in Section 102(b) of the copyright code,<sup>16</sup> is perhaps the most important limit on the unwarranted expansion of copyright. It operates by denying protection to the ideas which underlie copyrightable works. Consequently, only the original "expressions" contained in these works can actually receive copyright protection. This makes certain portions (the "ideas") of every work freely available for others to copy.<sup>17</sup> Such permitted borrowing from copyrighted works ostensibly keeps copyright from unduly restricting speech and running afoul of the first amendment.<sup>18</sup>

Theoretically, the idea/expression dichotomy discharges copyright's first amendment duties because the application of copyright protection to expressions, but not to ideas, serves to prohibit only speech that is consti-

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1981), *cert. denied*, 455 U.S. 948 (1982) ("[I]t is well established that there is no conflict between the First Amendment and the copyright laws."); *McGraw-Hill, Inc. v. Worth Publishers, Inc.* 335 F. Supp. 415, 422 (S.D.N.Y. 1971) ("Defendants' First Amendment argument can be dismissed as flying in the face of established law."). *See also* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) ("defendant's [first amendment] claim can be dismissed without a lengthy discussion"); *United States v. Bodin*, 375 F. Supp. 1265, 1267-68 (W.D. Okla. 1974) ("We fail to see any protected first amendment right or privilege to usurp the benefits" of the copyright holder.).

<sup>15</sup> *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) ("[T]he impact, if any, of the first amendment on copyright has not been discussed by the [Supreme] Court. We believe this silence stems not from neglect but from the fact that the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment."); *Fantasy, Inc. v. Fogerty*, 664 F. Supp. 1345, 1351 (N.D. Cal. 1987) ("The 'idea/expression' dichotomy serves to accommodate any 1st Amendment concerns . . .").

<sup>16</sup> 17 U.S.C. § 102(b) (1982).

<sup>17</sup> *See Baker v. Selden*, 101 U.S. 99 (1879) (idea of double entry bookkeeping with all transactions appearing on one page of a ledger not copyrightable). *See infra* notes 41-78 and accompanying text.

<sup>18</sup> In Nimmer's view, the idea/expression dichotomy represented an acceptable "definitional balance" between copyright and the first amendment. Granting copyright protection to an author's expression could be weighed against denying copyright protection to her ideas, thereby leading to a balance between the competing values of copyright and the first amendment. Nimmer, *supra* note 9, at 1190-93. Under "definitional balancing," the balance struck in one case serves as a rule for resolving the conflict between copyright and the first amendment in future cases. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 944-45 (1968).

In Goldstein's view, the idea/expression dichotomy was simply one of several doctrines which discharged copyright's first amendment functions. Goldstein, *supra* note 9, at 1020.

tutionally valueless.<sup>19</sup> In other words, to the extent that copyright silences only those who merely repeat what others have already expressed, it disturbs only expression which adds nothing new to the “marketplace of ideas.”<sup>20</sup> Similarly, to the extent that copyright permits the borrowing of ideas, it leaves ample room to authors whose works do not merely repeat the expression of others, but rather add to the “marketplace of ideas.”<sup>21</sup> Indeed, copyright encourages these authors to contribute by granting them exclusive rights in their work.<sup>22</sup> Under this view, copyright law can be characterized as a facilitator of speech entirely consistent with the first amendment.<sup>23</sup>

Unfortunately, such analysis overlooks the fact that the first amendment guarantees more than just the protection of speech deemed constitutionally valuable. The first amendment also recognizes that laws are sometimes unavoidably vague, thereby making prospective speakers unsure as to whether or not their contemplated expression is prohibited. This uncertainty creates a “chilling effect” which forces individuals to forego exercising their first amendment rights for fear of being prosecuted or sued. In such cases, the first amendment requires clear legal standards which leave breathing room for the exercise of constitutionally valuable speech. This means pulling legal standards back from constitutional limits, so that any speech deterred by vague standards falls on the constitutionally valueless side of the line.<sup>24</sup>

When these requirements are used to examine the position which courts have taken on copyright and the first amendment, it becomes apparent

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<sup>19</sup> The Supreme Court has often pointed to the lack of constitutional value as a justification for otherwise unconstitutional limitations on speech. *See Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (“the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection”); *Roth v. United States*, 354 U.S. 476, 484, *reh’g. denied*, 355 U.S. 852 (1957) (“implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“fighting words” one of several classes of speech which receive no constitutional protection).

<sup>20</sup> *See, e.g.*, Nimmer, *supra* note 9, at 1191-92.

<sup>21</sup> *See, e.g.*, *Sid and Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (“The ‘marketplace of ideas’ is not limited by copyright because copyright is limited to protection of expression.”); M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT*, § 13.03 [A][1], at 13-20.2 — 13-20.3 (1988) [hereinafter *NIMMER TREATISE*].

<sup>22</sup> *See supra* note 11; *Mazer v. Stein*, 347 U.S. 201, 219, *reh’g. denied*, 347 U.S. 949 (1954).

<sup>23</sup> *See* Nimmer, *supra* note 9, at 1191; Goldstein, *supra* note 9, at 1001.

<sup>24</sup> For further discussion of this topic and its application to copyright law, see *infra* Section IV, notes 155-98 and accompanying text.

that reliance on the idea/expression dichotomy to reconcile copyright with the first amendment is unjustified. Even though copyright theoretically aims only at constitutionally valueless speech, judicial interpretation of the idea/expression dichotomy has failed to leave ample room for constitutionally valuable expression. Problems connected with separating idea from expression have caused many copyright decisions to rest upon the courts' ad hoc sense of what is permissible copying rather than upon any tangible principles.<sup>25</sup> Such unprincipled decision making is constitutionally suspect because it leaves courts and citizens uncertain about the contours of constitutionally significant doctrine. This uncertainty ultimately causes copyright's unacceptable chilling effect.

This Article will examine the free speech problems caused by the courts' reliance on the idea/expression dichotomy to keep copyright within its first amendment limits. This examination will consist of three steps. First, the Article will examine the idea/expression dichotomy to see if it provides a principled limit which can be assessed against the first amendment. The Article will find that the methodologies adopted for separating idea from expression leave the courts on a proverbial "slippery slope" on which it is easy to lose sight of first amendment values. Second, the Article will examine cases which slide down the slippery slope by allowing extremely general and abstract similarities between works to serve as the basis for copyright claims. Instead of limiting copyright to the protection of relatively concrete facets of works, these cases protect a work's "total concept and feel."<sup>26</sup> The Article will demonstrate the manner in which these cases destroy the idea/expression dichotomy's ability to check the unlimited expansion of copyright. Third, the Article will assess the impli-

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<sup>25</sup> See, e.g., *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*."); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (citing *Peter Pan Fabrics*). See also Knowles and Palmieri, *Dissecting Krofft: An Expression of New Ideas in Copyright?*, 8 SAN FERN. V.L. REV. 109, 124 (1980) (arguing that there is no distinction between idea and expression).

<sup>26</sup> For present purposes, it is sufficient to note that copyright in a work's "total concept and feel" amounts to copyright in the work's general appearance. Under such a theory, infringement "may appear from the mood evoked by a work." See *v. Durang*, 711 F.2d 141, 144 (9th Cir. 1983). As the reader may surmise, the notion that a work's general concept and appearance may be monopolized through copyright is extremely controversial. For a more complete description of "total concept and feel" copyright suits and the ensuing controversy, see *infra* Section III, notes 80-154 and accompanying text.

cations of this line of cases as regards the first amendment. Specifically, the Article will show that these cases create a constitutionally unacceptable "chilling effect" on protected speech. The Article will conclude with some suggestions for bringing copyright law back to its first amendment limits.

## II. THE INSTINCTIVE NATURE OF THE IDEA/EXPRESSION DICHOTOMY

The United States Constitution specifically authorizes Congress to grant authors copyrights in their works.<sup>27</sup> The theory behind this authority is that Congress can maximize the creative output of authors by granting them limited monopolies over their works.<sup>28</sup> The copyright code currently extends such monopolies to original works of authorship<sup>29</sup> fixed in any tangible medium.<sup>30</sup>

Once a work qualifies for copyright protection, its author gains several exclusive rights: the right to reproduce the work; the right to prepare derivative works; the right to distribute copies of the work; the right to perform the work; and the right to display the work publicly.<sup>31</sup> Consequently, the author may sue those who copy the author's work without authorization for copyright infringement.<sup>32</sup>

The evaluation of the idea/expression dichotomy begins by understanding how the dichotomy regulates the kind and degree of similarity required to support a claim of copyright infringement.<sup>33</sup> To prove an in-

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<sup>27</sup> Congress shall have the power: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

<sup>28</sup> *Mazer v. Stein*, 347 U.S. 201, 219, *reh'g. denied*, 347 U.S. 949 (1954).

<sup>29</sup> 17 U.S.C. § 102(a) (1982). Instead of defining the term "original," the 1976 Copyright Code incorporates the concept of originality that courts had previously developed under the old code. NIMMER TREATISE, *supra* note 21, § 2.01, at 2-6. Courts do not require original works to be novel or innovative. *Id.*, § 2.01[A], at 2-7 — 2-8. Rather, "[o]riginality means only that the work owes its origin to the author, *i.e.*, is independently created, and not copied from other works." *Id.*, § 2.01[A] at 2-8.

<sup>30</sup> 17 U.S.C. § 102(a) (1982). A work is fixed in a tangible medium if either a person or a machine can read the work. NIMMER TREATISE, *supra* note 21, § 2.03[B][1], at 2-28.

<sup>31</sup> 17 U.S.C. § 106 (1982).

<sup>32</sup> The available remedies include damages, injunctive relief, and attorney's fees. 17 U.S.C. §§ 503-05 (1982). See NIMMER TREATISE, *supra* note 21, § 14.01 — 14.11, at 14-3 — 14-86.

<sup>33</sup> Not surprisingly, copyright prohibits both literal and non-literal copying. Learned Hand once

fringement claim, a copyright plaintiff must establish: 1) that she owns a copyright in the allegedly copied work and 2) that the defendant copied the plaintiff's work.<sup>34</sup> As a practical matter, the first element presents no problem of proof. Given the federal system of copyright registration, plaintiffs can easily demonstrate ownership of their own works.<sup>35</sup> By contrast, the second element of copying offers two avenues of proof.<sup>36</sup>

Following the first method, the plaintiff can produce direct evidence of copying.<sup>37</sup> Under this scenario, the plaintiff proves copying by identifying certain similarities between her work and the defendant's work and offering eyewitness or other direct evidence which shows that the defendant borrowed those similarities from the plaintiff.<sup>38</sup>

Alternatively, if no such evidence is available, the plaintiff may also prove copying via circumstantial evidence. To accomplish this, the plaintiff establishes that the defendant had access to the plaintiff's work and that the defendant's work is substantially similar to the plaintiff's.<sup>39</sup> The courts presume that the defendant copied from the plaintiff's work when the defendant's work is so similar that the likely cause of the identified similarity is copying.<sup>40</sup>

The foregoing analysis demonstrates that all copyright claims depend upon identified similarities between the works of the plaintiff and defend-

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stated that illicit copying need not be word for word "else a plagiarist would escape by immaterial variations." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). Thus, a movie that closely duplicates the plot, characters, and structure of a previous movie can infringe a copyright in the earlier work. *See, e.g., Universal City Studios v. Film Ventures Int'l, Inc.*, 543 F. Supp. 1134 (C.D. Cal. 1982) (movie *Great White* so similar to movie *Jaws* in plot, setting, and characters that infringement occurred).

<sup>34</sup> *Hustler Magazine v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985); NIMMER TREATISE, *supra* note 21, § 13.01, at 13-3 — 13-4.

<sup>35</sup> 17 U.S.C. § 411(a) (1982).

<sup>36</sup> NIMMER TREATISE, *supra* note 21, § 13.01[B], at 13-6 — 13-9.

<sup>37</sup> *Id.*, § 13.01[B], at 13-6.

<sup>38</sup> *Id. See, e.g., M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 445-46 (4th Cir. 1986) (defendant's modification of reproduction in order to avoid copyright liability may be taken as evidence of unlawful copying); *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127, 1135 (N.D. Cal. 1986) (defendant's order that employees copy display screens of plaintiff's computer program provided direct evidence of infringement).

<sup>39</sup> NIMMER TREATISE, *supra* note 21, § 13.01[B], at 13-7.

<sup>40</sup> *Id.*, § 13.01[B], at 13-7 — 13-8.



ant.<sup>41</sup> However, the fact that the defendant's copying caused these similarities does not necessarily mean that the plaintiff wins. If the defendant's borrowing is restricted to the ideas behind the plaintiff's work, then the idea/expression dichotomy excuses the copying.<sup>42</sup> To put it another way, even if the plaintiff proves that certain similarities between two works arose from the defendant's copying, the plaintiff loses if those similarities are only similarities of idea, and not similarities of expression.<sup>43</sup>

Brief reflection on this state of affairs reveals the important role played by the idea/expression dichotomy in regulating the scope of copyright. On the one hand, if courts adopt a narrow view of idea and a broad view of expression, more and more similarities will be similarities of expression and will therefore support claims of infringement. In turn, this implies a broad scope of copyright. Conversely, if courts adopt a broad view of idea and a narrow view of expression, few similarities will qualify as similarities of expression. This will result in a relatively limited scope of copyright.

The seminal case of *Baker v. Selden*<sup>44</sup> was one of the first to employ the idea/expression dichotomy to deny a claim of copyright.<sup>45</sup> In *Baker*, the plaintiff held a valid copyright in the book "Selden's Condensed Ledger, or Bookkeeping Simplified." The book set forth a system of accounting, and contained a number of forms which could be used to implement the system.<sup>46</sup> The defendant authored a series of books which described essentially the same system of accounting as the plaintiff's work. The defendant's work contained forms which implemented the system, but which also had their columns arranged differently from those on the plaintiff's forms.<sup>47</sup> The issue before the Court was whether or not the

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<sup>41</sup> These similarities need not be literal similarities. See *infra* Section III, notes 80-154 and accompanying text for discussion of several cases in which non-literal similarity supported a claim of infringement.

<sup>42</sup> NIMMER TREATISE, *supra* note 21, § 2.03[D], at 2-34 — 2-34.1.

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

<sup>44</sup> 101 U.S. 99 (1879).

<sup>45</sup> When the present copyright code was enacted in 1976, Congress made clear its intention to codify the idea/expression dichotomy first set forth in *Baker*. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5670 ("[Section 102(b)'s] purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.").

<sup>46</sup> *Baker*, 101 U.S. at 100.

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

defendant's work, particularly his forms, infringed the plaintiff's work.<sup>48</sup>

In ruling for the defendant, the Court stated that copyright protected only the plaintiff's description of the accounting system.<sup>49</sup> Contrary to the plaintiff's assertion, copyright did not and could not extend to the system itself, which was the "idea" behind the plaintiff's work.<sup>50</sup> The plaintiff's description of the underlying system was entitled to copyright, but the copyright could not be used to prevent others from using or describing the system themselves.<sup>51</sup> If the copyright claim were allowed, the plaintiff would be able to stop others from using or describing the system. This was unacceptable.<sup>52</sup>

*Baker* implied that the idea/expression dichotomy could be implemented by a two step analysis. First, the court identifies the idea underlying the work in which copyright is claimed. Second, the court determines if enforcing the plaintiff's copyright claim creates an unacceptable risk of monopolizing that underlying idea. If so, the court enters judgment for the defendant.<sup>53</sup>

The typical method for assessing the risk of monopolizing a given idea involves counting the number of ways the idea can be expressed.<sup>54</sup> If the idea can be expressed in many different ways, the danger of monopolizing the idea via a single copyright is minimal. Granting the plaintiff a monopoly over her chosen expression of the idea and reasonably similar expressions leaves plenty of alternate expressions for future authors. In this context, the courts can safely grant broad copyright protection to works, requiring future authors to use very dissimilar expressions of the same idea. Only a moderate degree of similarity need be required to support a

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<sup>48</sup> *Id.* at 101.

<sup>49</sup> *Id.* at 102-04.

<sup>50</sup> *Id.* at 104-05.

<sup>51</sup> *Id.* at 104.

<sup>52</sup> *Id.* at 103-04.

<sup>53</sup> See NIMMER TREATISE, *supra* note 21, § 13.03[A], at 13-20 — 13-20.1.

<sup>54</sup> See, e.g., *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) (since factual works have a narrow range of expression, plaintiff must establish verbatim copying to support a claim of infringement); *Atari, Inc. v. North American Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) ("scope of copyright protection increases with the extent expression differs from the idea" (quoting *Sid and Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977))). This method of analysis is sometimes called the "plurality of expressions test."

claim of infringement.<sup>55</sup>

On the other hand, if the range of available expressions is small, similarly broad copyright protection raises a high risk of allowing a single copyright to monopolize an entire idea. Since relatively few ways to express the idea exist, an author could tie up all of the available expressions by means of a single copyright. This would be unacceptable. In this context, courts must construe the copyright law very narrowly, and should deem only similarity which is close to literal as sufficient to support a claim of infringement.<sup>56</sup>

The case of *Landsberg v. Scrabble Crossword Game Players, Inc.*<sup>57</sup> provides a good example of this reasoning. In *Landsberg*, the Ninth Circuit considered a copyright claim involving two books which described strategies to be used in playing the game Scrabble.<sup>58</sup> The plaintiff, who had been negotiating with the defendant over the defendant's prospective purchase of the plaintiff's book, sued when the defendant refused to purchase the book, and instead turned out its own book which was based on the plaintiff's book.<sup>59</sup> Even though the defendant paraphrased "a significant part" of the plaintiff's work, the court refused to find infringement.<sup>60</sup> The court recognized that while the similarities between the two works might prove infringement in many cases, the limited range of expressions inherent in the ideas behind a book about how to play Scrabble required more literal copying to prove infringement.<sup>61</sup>

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<sup>55</sup> See, e.g., *Atari*, 672 F.2d at 617-18 (similarity between maze games *Pac-Man* and *K.C. Munchkin* held sufficient to support plaintiff's claim of infringement despite differences between the mazes, characters and scoring targets of the two games); *Sheldon v. Metro-Goldwyn-Mayer Pictures Corp.*, 81 F.2d 49, 49-56 (2d Cir. 1936) (parallel plot development between movie and play held sufficient to support claim of infringement despite absence of literal copying).

<sup>56</sup> *McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F. Supp. 415, 420-21 (S.D.N.Y. 1971) (Nature of economics dictates similarities between two economics textbooks. Therefore, similarities of form between plaintiff's and defendant's books not sufficient to support claim of infringement.); *Dorsey v. Old Surety Life Ins. Co.*, 98 F.2d 872, 874 (10th Cir. 1938) (Court found that insurance forms could be expressed in a limited number of ways. "To constitute infringement in such cases a showing of appropriation in the exact form or substantially so of the copyrighted material should be required.").

<sup>57</sup> 736 F.2d 485 (9th Cir.), cert. denied, 469 U.S. 1037 (1984).

<sup>58</sup> *Id.* at 486-87.

<sup>59</sup> *Id.* at 487. In fact, the defendant conducted negotiations with the plaintiff for the express purpose of delaying plaintiff's publication. *Id.*

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

<sup>61</sup> *Id.* at 488-89.

The court bolstered its reasoning by comparing the works at hand to ordinary works of fiction. On the one hand, the ideas underlying ordinary fictional works are capable of many expressions. For example, the idea of "girl meets boy" has been cast and recast in thousands of different forms. Thus, relatively broad copyright protection for these works raises few risks of allowing a copyright in a single work to degenerate into a monopoly over an entire genre of human expression.<sup>62</sup>

By contrast, the ideas behind factual works are not expressible in as many ways.<sup>63</sup> In the case at hand, the similarities between the two works were dictated by the fact that both works described how to play Scrabble. Broad copyright protection would therefore raise unacceptable risks of creating a monopoly over the ideas behind the works, namely the methods described. Thus the plaintiff, while entitled to hold a copyright in his work, could not succeed in this action absent more literal infringement by the defendant.<sup>64</sup>

The above-described analysis is attractive because it indicates how applying the idea/expression dichotomy can prevent overbroad copyright claims. However, the analysis is deficient in that it provides no definition of what constitutes an idea. To ensure that copyright claims do not result in the monopolization of ideas, courts must necessarily develop concepts and terms which enable them to identify ideas. Otherwise courts would simply have to guess as to whether or not a copyright claim risked the monopolization of ideas, or only expression.<sup>65</sup> The idea/expression dichotomy could become so amorphous that courts would have no principled

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

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 489. In some cases, courts have found that the range of expressions is so narrow that copyright in the relevant works must be completely denied. In these situations, idea and expression are said to have "merged." See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971) (since idea of a bee shaped pin encrusted with jewels is indistinguishable from its expression, defendant would be allowed to copy plaintiff's expression); *Morrisey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967) (contest rules capable of being expressed in such a limited number of ways that copyright in those rules must be denied); *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir.), *cert. denied*, 358 U.S. 816 (1958) (copyright in plaintiff's insurance forms would lead to monopolization of underlying ideas, so plaintiff enjoined from asserting any claim that his forms were copyrighted).

<sup>65</sup> Indeed, the notion that ideas can be identified separately from expression may be incorrect. See *Knowles and Palmieri*, *supra* note 25, at 124.

manner in which to apply the doctrine.<sup>66</sup>

Fortunately, some progress has been made in this area. In the case of *Nichols v. Universal Pictures Corp.*,<sup>67</sup> Judge Learned Hand authored the most widely quoted distinction between idea and expression:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.<sup>68</sup>

Hand first applied this analysis to the plays *Abie's Irish Rose* and *The Cohens and The Kellys*.<sup>69</sup> Certain similarities between the two were plain. Both involved the marriage of Jewish and Irish children, the tensions between the two families, the birth of grandchildren, and the resolution of the turmoil by fortuitous circumstance which leaves all concerned to live happily ever after.<sup>70</sup> Hand acknowledged these similarities, but noted the differences between the two plays as well. In one, religious zealotry played a larger role in causing the tension between the families. In the other, sudden wealth created the trouble. In one, the grandchildren played a large role in effecting the reconciliation between the families. In the other, the grandchildren played no role at all.<sup>71</sup> After all this, Hand concluded that even though copyright does not require literal infringement,<sup>72</sup> the material that had been borrowed from the plaintiff was "too generalized an abstraction of what she wrote. It was only a part of her 'ideas.'"<sup>73</sup> Therefore, the plaintiff's claim for copyright infringement was denied.

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<sup>66</sup> For a discussion of how this ambiguity leads to constitutional problems, see *infra* Section IV, notes 155-98 and accompanying text.

<sup>67</sup> 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

<sup>68</sup> *Id.* at 121.

<sup>69</sup> Hand described *The Cohens and The Kellys* as a "motion picture play." *Id.* at 120.

<sup>70</sup> *Id.* at 120-21.

<sup>71</sup> *Id.* at 121-22.

<sup>72</sup> *Id.* at 121.

<sup>73</sup> *Id.* at 122.

Initially, it appears that Hand's description of ideas as more abstract than expressions has solved the difficult problem of identifying ideas. However, closer analysis reveals that the quest for separation of idea and expression in *Nichols* is still based primarily on instinct, and not upon some principled distinction between the two categories.<sup>74</sup>

In particular, the *Nichols* opinion never stated any principle which tells the court where to draw the line between idea and expression. Instead, Hand simply compared the two works, analyzed their similarities, and instinctively decided whether or not the similarity was literal enough to warrant a finding of infringement. Hand's reliance on instinct was further shown by the dissatisfaction he expressed with the trial court's use of expert witnesses. Hand complained that experts drew the court's attention toward the "intricacies of dramatic craftsmanship" and away from the court's "firmer, if more naive, ground of its considered impressions."<sup>75</sup>

Presently, the consensus view is that Hand's attempt to solve the idea/expression dichotomy is the best effort to date.<sup>76</sup> Therefore, since Hand himself admitted that his solution rested ultimately upon instinct, the idea/expression dichotomy does not provide a clear, principled separation between the first amendment and copyright law. Instead, the best that can be said is that the idea/expression dichotomy provides a slippery slope on which to slide in our efforts to properly limit copyright law. The interpretation of the idea/expression dichotomy found at the top of this slope requires literal similarity to support a claim of infringement. This leads to a narrow scope of copyright. By contrast, the interpretation found at the bottom of the slope permits almost any abstract similarity between works

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<sup>74</sup> Indeed, Hand himself knew that he had only defined the parameters of the debate, and that the boundary between idea and expression could not be fixed. In reference to the division between idea and expression, Hand wrote, "Nobody has ever been able to fix that boundary, and nobody ever can." *Id.* at 121.

<sup>75</sup> *Id.* at 123. See also *Couleur Int'l Ltd. v. Opulent Fabrics, Inc.*, 330 F. Supp. 152, 153 (S.D.N.Y. 1971) ("Good eyes and common sense may be as useful as deep study of reported and unreported cases, which themselves are tied to highly particularized facts.").

<sup>76</sup> See, e.g., *Krofft*, 562 F.2d at 1163 ("No court or commentator . . . has been able to improve upon Judge Learned Hand's famous 'abstractions test' articulated in *Nichols* . . ."). Numerous cases dealing with the idea/expression dichotomy cite Hand's test for separating idea from expression. See, e.g., *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 49 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 624 (2d Cir. 1982).

to support a claim of infringement. This leads to a broad scope of copyright.

Brief reflection proves the necessity of this proposition. Literal, concrete descriptions of a work will fit very few other works. Thus, requiring plaintiffs to use literal similarities in support of copyright claims keeps plaintiffs from suing the authors of vaguely similar works. This narrows the scope of a given copyright's preclusive power. By contrast, abstract, general descriptions of any work will fit not only the work in question, but many other works as well. Allowing such similarities to support a copyright claim lets plaintiffs sue the authors of works which only vaguely resemble the plaintiffs' works. This broadens copyright's scope.

For example, if Mickey Mouse is described literally as "a cartoon character in the shape of a mouse as created by Walt Disney," the description would extend to few, if any, other characters. Indeed, any characters which also fit this description would probably look just like Mickey Mouse. Not surprisingly, a narrow claim of copyright based upon such a description of Disney's work would probably be enforced.<sup>77</sup>

By contrast, if Mickey were described more abstractly as "a cartoon character in the shape of a mouse," the description would fit a wider range of figures. Copyrights based on such a description would probably include such figures as Mighty Mouse, and might not be enforced.

Finally, if Mickey were even more abstractly described as "a cartoon character," the description would fit a very broad range of figures such as Bugs Bunny, Fred Flintstone, and Yogi Bear. If such a general claim of copyright in Mickey Mouse were in fact enforced, the creator of Mickey Mouse could sue the creators of Fred Flintstone, Bugs Bunny, and Yogi Bear. The scope of such a claim would be broad and unwarranted. One suspects that a court confronted by such a claim of copyright would dismiss the plaintiff's claim under the idea/expression dichotomy.<sup>78</sup>

From a first amendment point of view, the unmasking of the idea/ex-

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<sup>77</sup> See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (plaintiff's copyright in Mickey Mouse enforced against defendants, who published magazines depicting Disney cartoon characters engaged in promiscuous behavior).

<sup>78</sup> Cf. *Warner Bros. v. American Broadcasting Co.*, 720 F.2d 231 (2d Cir. 1983) (similarities between defendant's show, *The Greatest American Hero*, and plaintiff's character, Superman, were insufficient to support claim of infringement).

pression dichotomy as a primarily instinctive limit on copyright raises the likelihood that there are constitutionally suspect lines of copyright cases. First of all, the slippery slope nature of the idea/expression dichotomy means that there is no clear limiting principle which assures compliance with the first amendment. Furthermore, since courts generally see no need to even consider the first amendment when interpreting the idea/expression dichotomy,<sup>79</sup> there is simply no reason to believe that those slippery slope decisions have fortuitously conformed to first amendment requirements. Instead, it is highly likely that in their haste to do equity between the parties, courts have forgotten first amendment principles when applying the copyright law. The next section of this Article will examine a line of cases in which these oversights occurred.

### III. COPYRIGHT PROTECTION FOR A WORK'S "TOTAL CONCEPT AND FEEL"

The fact that Hand's analysis ultimately rested on instinct did not vitiate its usefulness. The value of Judge Hand's analysis lay in his realization that abstract, non-literal claims of copyright were likely to improperly stretch the scope of copyright law, and that abstract facets of works should therefore be considered ideas. This suggests that our constitutional assessment of copyright's limits would do well to look for cases which adopt or suggest the enforcement of vague and general claims of copyright. Such a line of cases exists, beginning with two Ninth Circuit opinions, *Roth Greeting Cards v. United Card Co.*<sup>80</sup> and *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*<sup>81</sup>

In *Roth*, both parties made and sold greeting cards. The plaintiff, Roth, contended that United had infringed copyrights that Roth held in seven studio greeting cards.<sup>82</sup> Roth's cards were simple. They involved original artwork combined with phrases such as "i wuv you" and "I miss you already . . . and You Haven't even Left . . ."<sup>83</sup> Although United's cards were similar to Roth's, United claimed that Roth should lose for two reasons. First, United had not infringed Roth's original artwork. Second, the

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<sup>79</sup> See *supra* note 14 and accompanying text.

<sup>80</sup> 429 F.2d 1106 (9th Cir. 1970).

<sup>81</sup> 562 F.2d 1157 (9th Cir. 1977).

<sup>82</sup> 429 F.2d at 1107.

<sup>83</sup> *Id.* at 1110.



phrases used by Roth belonged in the public domain and were therefore uncopyrightable.<sup>84</sup>

The Ninth Circuit disagreed. It held that even though United's contentions were true, Roth's combination of uncopyrightable words and original artwork was in fact copyrightable expression.<sup>85</sup> In this case, United's cards were substantially similar to Roth's because they shared the same "total concept and feel." United's cards infringed Roth's not because the artwork or phrases were identical, but because "the characters depicted in the art work, *the mood they portrayed*, the combination of art work *conveying a particular mood with a particular message*, and the arrangement of the words on the greeting card are substantially the same. . . ."<sup>86</sup>

In *Krofft*, the Ninth Circuit considered a claim that McDonald's *McDonaldland* advertisements infringed the plaintiffs' copyright in the popular *H. R. Pufnstuf* series.<sup>87</sup> The *Pufnstuf* series was a full length Saturday morning children's television program. It involved "several fanciful costumed characters" and a boy named Jimmy who lived in a fantasyland called Living Island. Living Island was inhabited by talking books and moving trees.<sup>88</sup>

In 1970, an advertising agency contacted the producers of the *Pufnstuf* series to inquire about basing a McDonald's advertising campaign upon the *Pufnstuf* series. No agreement for such a campaign was ever reached.<sup>89</sup> However, in 1971, McDonald's began its *McDonaldland* advertising campaign,<sup>90</sup> which contained various general similarities to the *Pufnstuf* series.<sup>91</sup>

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<sup>84</sup> *Id.* at 1109-10.

<sup>85</sup> The court accepted Roth's contention that "[I]t is the arrangement of the words, their combination and plan, together with the appropriate art work. . . ' which is original, the creation of Roth, and entitled to copyright protection." *Id.* at 1109 (brackets in the original).

<sup>86</sup> *Id.* at 1110 (emphasis added).

<sup>87</sup> 562 F.2d at 1160.

<sup>88</sup> *Id.* at 1161.

<sup>89</sup> Apparently, the advertising agency misled the plaintiffs about the status of the proposed campaign. *Id.*

<sup>90</sup> *Id.* at 1161-62.

<sup>91</sup> *Id.* at 1166-67. The court wrote that both contained:

imaginary worlds inhabited by anthropomorphic [sic] plants and animals and other fanciful creatures. The dominant topographical features of the locales are the same: trees, caves, a pond, a road, and a castle. Both works feature a forest with talking trees that have human faces and characteristics.

In its defense, McDonald's admitted that it had borrowed the "idea" of *H. R. Pufnstuf* — namely the idea of a "fantasyland filled with diverse and fanciful characters in action."<sup>92</sup> However, McDonald's contended that its expression of that idea was substantially dissimilar from the plaintiffs', and that infringement therefore did not exist. McDonald's came to this conclusion by identifying various components of the two expressions and pointing out the dissimilarities.<sup>93</sup>

The Ninth Circuit rejected this argument, stating that the analysis ignored the idea/expression dichotomy.<sup>94</sup> Instead, the court applied a two-step test purportedly based upon the idea/expression dichotomy to determine whether substantial similarity exists between two works.<sup>95</sup> The first step of this test was designed to decide whether the two works shared the same ideas. This step, called the "extrinsic test," involved the listing and analysis of specific characteristics of the works. Since this test required detailed analysis, the court held that dissection and expert testimony were appropriate at this point.<sup>96</sup>

The second step of the test was designed to determine whether the similarities of ideas identified in the previous step were enough to constitute substantial similarity of expression.<sup>97</sup> Drawing on Judge Hand's observation that the line between appropriation of ideas and appropriation of expression must be ad hoc, the court left this determination to the "response of the ordinary reasonable person."<sup>98</sup> Since this step, labelled the "intrinsic test," depended on the response of ordinary individuals, no dissection or expert analysis would be allowed.<sup>99</sup>

Since McDonald's had already admitted borrowing the idea from the

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The characters are also similar. Both lands are governed by mayors who have disproportionately large round heads dominated by long wide mouths. They are assisted by "Keystone cop" characters. Both lands feature strikingly similar crazy scientists and a multi-armed evil creature.

*Id.* at 1167 n.9.

<sup>92</sup> *Id.* at 1165.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at n.7.

<sup>96</sup> *Id.* at 1164.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

plaintiffs' work, the court applied only the intrinsic test.<sup>100</sup> Because no dissection was appropriate, the court compared the subjective qualities of the two works.<sup>101</sup> Following *Roth*, the court held that McDonald's had improperly copied the "total concept and feel" of the *Pufnstuf* show, and held for the plaintiffs.<sup>102</sup>

Although neither case purported to do so, *Roth* and *Krofft* implied a potentially massive restructuring of the distinction between idea and expression that Judge Hand defined. Hand analyzed the issue of substantial similarity by comparing relatively concrete facets of works, such as plot and characters.<sup>103</sup> Under this analysis, Hand characterized abstract and vague features of works as ideas, and not expressions. Consequently, abstract similarities between works would not be enough to support a copyright infringement claim.<sup>104</sup>

By contrast, the *Roth* and *Krofft* courts saw no need to restrict the scope of protected expression to concrete facets of works. Indeed, the *Roth* court ignored the fact that the defendant had borrowed no concrete copyrightable expression, and based its finding of infringement upon similarities of mood conveyed. Similarly, *Krofft's* application of its intrinsic test for substantial similarity expressly rejected the defendants' attempts to compare concrete aspects of the two works to demonstrate dissimilarity.<sup>105</sup> More importantly, by treating the "total concept and feel" of a work as part of its protectable expression, *Roth* and *Krofft* established that very abstract similarities between two works could support a claim of copyright infringement.

The full implication of "total concept and feel" copyright protection becomes apparent when one considers just how abstract and subjective the

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<sup>100</sup> *Id.* at 1165.

<sup>101</sup> *Id.* at 1167, 1169.

<sup>102</sup> *Id.* at 1167. The court's opinion demonstrates the abstract and broad nature of the plaintiffs' successful copyright claim. See *supra* notes 76-78 and accompanying text. The court's holding that these similarities constitute appropriation of copyrightable expression is highly questionable. If these facets, alone or in combination, were copyrightable, then the plaintiffs presumably infringed the works of numerous authors. For example, the court's reliance on the use of "disproportionately large round heads dominated by long wide mouths," 562 F.2d at 1167 n.9, would seem to characterize the popular Peanuts cartoon strip. See Kulzick and Hogue, *Chilled Bird: Freedom of Expression in the Eighties*, 14 LOY. L.A.L. REV. 57, 77 (1980).

<sup>103</sup> *Nichols*, 45 F.2d at 121-23.

<sup>104</sup> *Id.* at 121.

<sup>105</sup> *Krofft*, 562 F.2d at 1165-67.

“total concept and feel” of a work can be. As the above analysis made clear, *Roth* and *Krofft* strongly suggest that the very mood a work creates constitutes its protectable expression.<sup>106</sup> If copyright claims can in fact be maintained at such a high level of abstraction, practically any similarity could conceivably support a finding of infringement.

Despite their broad implications, *Roth* and *Krofft* alone did not dismantle the doctrinal limits on copyright. Although *Roth* and *Krofft* adopted a very liberal view of protectable expression, they did not explicitly adopt a hopelessly narrow view of unprotectable idea. Thus, *Roth* and *Krofft* dismantled only half of the idea/expression dichotomy, and left future courts the opportunity to employ a vigorous conception of idea in order to keep copyright from sliding down its slippery slope.<sup>107</sup>

Not surprisingly, many courts have in fact used a strong vision of idea to prevent plaintiffs from realizing the full potential of *Roth* and *Krofft*.<sup>108</sup> For example, in *Aliotti v. R. Dakin & Co.*,<sup>109</sup> the court rejected the plaintiff Aliotti's claim that defendant Dakin's Prehistoric Pet line of stuffed dinosaurs infringed her Ding-A-Saur line of stuffed dinosaurs. In many ways, Aliotti's case was analogous to *Krofft*. In 1978 and 1979, two Dakin executives were shown the Ding-A-Saur dolls as part of a proposal that Dakin buy the company which manufactured them.<sup>110</sup> Dakin did not make the purchase, though Aliotti was told she could call the executives if she wanted to be considered for a job.<sup>111</sup> Three months later, Dakin devel-

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<sup>106</sup> The Ninth Circuit has written that “substantial similarity in the expression of an idea may appear from the mood evoked by a work.” See *v. Durang*, 711 F.2d 141, 144 (9th Cir. 1983) (citing *Krofft* and *Roth*).

<sup>107</sup> In terms of Nimmer's definitional balance, *Roth* and *Krofft* implied a change in the balance between idea and expression by expanding the scope of copyrightable expression. However, the balance could be retained if the courts used a vigorous conception of idea to offset the implications of *Roth* and *Krofft*. See *supra* note 18 for discussion of Nimmer's definitional balance.

<sup>108</sup> See, e.g., *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117 (8th Cir. 1987) (Hallmark's *Rainbow Brite* characters and products not sufficiently similar to plaintiff's graphics and script, entitled *The Adventures of Rainbow Island*, to support claim of infringement); *Berkic v. Crichton*, 761 F.2d 1289 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985) (movie *Coma* not sufficiently similar to the screenplay *Reincarnation, Inc.* to support a claim of infringement); *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) (movie *E.T. — The Extra Terrestrial* not sufficiently similar to the musical play *Lokey from Maldemar* to support a claim of infringement).

<sup>109</sup> 831 F.2d 898 (9th Cir. 1987).

<sup>110</sup> *Id.* at 899.

<sup>111</sup> *Id.*

oped and began selling its Prehistoric Pet line of stuffed dinosaurs.<sup>112</sup> Dakin's line included the same species of dinosaurs represented by the Ding-a-Saur line.<sup>113</sup> Furthermore, the animals shared similar postures and body designs.<sup>114</sup>

In light of *Roth* and *Krofft*, Aliotti seemingly had a winning case against Dakin. However, the Ninth Circuit held that the idea/expression dichotomy prohibited the plaintiff from basing her copyright claim on the general similarities between the two lines of toys. The court wrote:

No copyright protection may be afforded to the idea of producing stuffed dinosaur toys or to elements of expression that necessarily follow from the idea of such dolls. Appellants therefore may place no reliance upon any similarity in expression resulting from either the physiognomy of dinosaurs or from the nature of stuffed animals.<sup>115</sup>

Having thus disposed of the major similarities between the two lines of toys, the court went on to find that Dakin had not infringed Aliotti's line.<sup>116</sup>

Unfortunately, other courts have failed to perceive the need to limit *Roth* and *Krofft*, and have adopted a dangerously weak view of idea. Most prominently, the Third Circuit case of *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*<sup>117</sup> completed what *Roth* and *Krofft* started when it created an explicit rule for identifying the idea behind a computer program.

In *Whelan*, the court considered a claim that the defendant's software for the operation of a dental laboratory infringed a similar program written by the plaintiff.<sup>118</sup> The plaintiff built its case around similarities in three areas of the two programs: file structures, subroutines, and screen outputs.<sup>119</sup> The defendant countered with the assertion that such similarities reflected only the ideas behind the plaintiff's program, and not the

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<sup>112</sup> *Id.* at 900.

<sup>113</sup> *Id.* at 902 n.2.

<sup>114</sup> *Id.* at 901.

<sup>115</sup> *Id.* at 901 (citation omitted).

<sup>116</sup> *Id.* at 901-02.

<sup>117</sup> 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

<sup>118</sup> *Id.* at 1224-27.

<sup>119</sup> *Id.* at 1228.

expression.<sup>120</sup>

In finding for the plaintiff, the Third Circuit interpreted *Baker v. Selden* to create a rule for identifying the idea behind a computer program:

*[T]he purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of the idea. . . . Where there are various means of achieving the desired purpose, then the particular means chosen is not necessary to the purpose; hence, there is expression, not idea.*<sup>121</sup>

Applying this rule to the programs at hand, the court found that the purpose of the programs was to aid in the business operations of a dental laboratory.<sup>122</sup> The court then noted the existence of other programs with different structures which also assisted the business operations of a dental laboratory. In the court's analysis, this demonstrated that the similarities between the plaintiff's and defendant's programs were not necessary to the underlying idea. Consequently, the danger of monopolizing an idea did not exist, and the court found that the defendant had copied expression, and not idea.<sup>123</sup>

For purposes of this Article, *Whelan's* importance lies in its extremely limited view of what constitutes a work's uncopyrightable idea.<sup>124</sup> By restricting the idea of a program to its purpose or function, *Whelan* reduced the notion of idea to only the most general and abstract facets of a work. *Whelan's* view of the idea/expression dichotomy implied that a program or other work embodies only one idea.<sup>125</sup> This made practically everything

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<sup>120</sup> *Id.* at 1235.

<sup>121</sup> *Id.* at 1236 (emphasis in original). The reader will recognize the test here as a version of the plurality of expressions test. *See supra* note 54.

<sup>122</sup> 797 F.2d at 1238.

<sup>123</sup> *Id.* at 1238-39.

<sup>124</sup> *Whelan* may also be important because the court did not extensively discuss the so-called useful article doctrine, which often implies weaker copyright protection for useful articles. Although the useful article doctrine serves, along with the idea/expression dichotomy, to limit the scope of copyright, courts have not used it to resolve the tension between copyright and the first amendment. Thus, the useful article doctrine is beyond the scope of this Article. For a discussion of the useful article doctrine, see NIMMER TREATISE, *supra* note 21, § 2.08[B][3], at 2-88 — 2-96.7.

<sup>125</sup> The danger of implying that any work embodies only one idea is immediately apparent. Any great literary work certainly embodies more than one idea. For an analysis of *Whelan* pointing out that computer programs embody more than one idea, see Brinson, *Copyrighted Software: Separating*

found in a work part of its copyrightable expression.<sup>126</sup> In other words, *Whelan* adopted a definition of idea which was so weak that it left no meaningful limit on the scope of copyrightable expression.<sup>127</sup> This dismantled the half of the idea/expression dichotomy left standing by *Roth* and *Krofft*, namely the broad definition of idea which served to limit the tendency to protect abstraction which is inherent in the "total concept and feel" doctrine.

Despite the reservations of many commentators,<sup>128</sup> *Whelan* soon became the leading case for determining the scope of copyright protection in computer programs.<sup>129</sup> As a result, it was not long before cases combined

*the Protected Expression from Unprotected Ideas, A Starting Point*, 29 B.C.L. REV. 803 (1988).

<sup>126</sup> According to *Whelan*, a computer program's expression includes the structure of the program, as well as the "manner in which the program operates, controls and regulates the computer in receiving, assembling, calculating, retaining, correlating, and producing useful information either on a screen, print-out or by audio communication." *Whelan*, 797 F.2d at 1239 (quoting trial court, 609 F. Supp. 1307, 1320 (E.D. Pa. 1985)). Although this Article is concerned primarily with *Whelan*'s implications for the conflict between copyright and the first amendment, it is worth pointing out that *Whelan* misconstrues section 102(b) of the copyright code, which codified the idea/expression dichotomy. A computer program written to aid in the operations of a dental laboratory might, for example, take a number from a user, store the number in the computer's memory, perform a computation with the number, and display the result on the computer's screen. Under *Whelan*'s view of the idea/expression dichotomy, the idea behind the program would be "aiding in the operations of a dental laboratory." Therefore, the above-described procedure would be part of the manner in which the program operates the computer, and would thus be copyrightable expression. However, the notion that a person could somehow prevent others from operating a computer in the same fashion directly contradicts section 102(b) of the copyright code. Section 102(b) provides that "In no case does copyright protection . . . extend to any idea, procedure, process, system, [or] method of operation . . ." 17 U.S.C. § 102(b) (1982) (emphasis added).

<sup>127</sup> "[*Whelan*'s rule] completes the destruction of the idea/expression [sic] as an effective limitation on the protection of copyrighted expression." Note, *Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software*, 35 UCLA L. REV. 723, 747 (1988).

<sup>128</sup> "[*Whelan*'s rule] is dangerously wrong, and flies in the face of every copyright case involving the 'idea/expression dichotomy' since 1880." G. Davis, *Computer Software — The Final Frontier: Clones, Compatibility and Copyright*, COMPUTER LAW., June 1985, at 2.

"The *Whelan* court's rule for dividing idea and expression teeters precariously on the brink between the arbitrary and the ad hoc . . . There is simply no principled stopping point at which to fix 'function' on the continuum between idea and expression. In this way, the *Whelan* rule is an unwarranted extension of copyright precedent." Note, *supra* note 127, at 748.

"The functions that *Whelan* was disposed to characterize as protectable expression are more accurately characterized as unprotectable ideas." Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1126 (1986).

<sup>129</sup> *Digital Communications Assocs., Inc. v. Softklone Distrib. Corp.*, 659 F. Supp. 449, 455 (N.D. Ga. 1987) ("The leading case addressing the extent of [non-literal protection for computer programs] is *Whelan* . . ."). *But see* *Plains Cotton Coop. Ass'n v. Goodpasture Computer Serv., Inc.*,

*Whelan's* extremely restricted view of idea with *Krofft's* expansive view of expression.

The most prominent of these cases is *Broderbund Software, Inc. v. Unison World, Inc.*<sup>130</sup> In *Broderbund*, the plaintiff held a valid copyright in "The Print Shop," a menu driven program which enabled its user to design greeting cards on a computer.<sup>131</sup> The defendant had originally contracted with the plaintiff to create an IBM compatible version of "The Print Shop." When this arrangement fell through, the defendant continued the project on its own. The result of the defendant's work was "Printmaster," another menu driven program whose screens were based upon the screens of "The Print Shop."<sup>132</sup> The plaintiff claimed that the "Printmaster" screens violated its copyright in the "Print Shop" program.<sup>133</sup> In response, the defendant asserted that the ideas behind the plaintiff's screens could not be expressed in any substantially different way. Therefore, the plaintiff's claim should not be enforced because it would monopolize ideas, and not expression.<sup>134</sup>

In rejecting the defendant's claim, the court first turned to the limited view of idea espoused in *Whelan*,<sup>135</sup> and identified the idea (i.e. purpose) behind the two works as "the creation of greeting cards, banners, posters and signs that contain infinitely variable combinations of text, graphics, and borders."<sup>136</sup> The court also noted that other programs with dissimilar screens had expressed the same idea.<sup>137</sup> Therefore, enforcing the plaintiff's copyright against the defendant would raise no danger of monopolizing ideas, and the idea/expression dichotomy need not be applied.<sup>138</sup>

Having identified the idea behind the two programs, the court went on to find that the two programs contained substantially similar expressions

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807 F.2d 1256 (5th Cir.), *reh'g denied en banc*, 813 F.2d 407, *cert. denied*, 108 S. Ct. 80 (1987) (declining to adopt *Whelan*).

<sup>130</sup> 648 F. Supp. 1127 (N.D. Cal. 1986).

<sup>131</sup> *Id.* at 1130. "Menu driven" means that the user operates the program by making selections from a list of available commands presented on the computer screen.

<sup>132</sup> *Id.* at 1130-31.

<sup>133</sup> *Id.* at 1130.

<sup>134</sup> *Id.* at 1132.

<sup>135</sup> *Id.* at 1133.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1132.

<sup>138</sup> *Id.* at 1134.



of that idea. In doing this, the *Broderbund* court could easily have pointed out the extremely detailed and concrete similarities between the two programs.<sup>139</sup> Drawing from Hand's observations about the danger of monopolizing ideas by finding abstract similarities between works,<sup>140</sup> such an analysis would have demonstrated copying of expression, thereby avoiding the error of protecting the ideas behind the plaintiff's program. However, the court explicitly chose not to follow this course.<sup>141</sup> Instead, the court followed the approach taken in *Krofft*, stating that the issue of similarity ultimately hinged not upon a comparison of concrete facets of the two programs, but upon whether the defendant's work captured the "total concept and feel" of the plaintiff's work.<sup>142</sup>

*Broderbund's* approach to the idea/expression dichotomy is explosive stuff. Although *Broderbund* may well have been decided correctly on its facts, its combination of *Roth* and *Krofft's* broad view of expression with *Whelan's* weak view of idea completely removed copyright's most important limiting doctrine.<sup>143</sup> By placing practically all facets of a work in the realm of expression and not idea, *Broderbund's* reasoning gives a clear doctrinal signal that practically any copyright claim is possible. Other recent copyright cases vividly illustrate the point.

For example, in *Chuck Blore & Don Richman, Inc. v. 20/20 Advertising, Inc.*,<sup>144</sup> the court considered a claim that television commercials made by the defendants infringed commercials made by the plaintiff. One of the plaintiff's commercials featured a celebrity actress<sup>145</sup> extolling the

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<sup>139</sup> Apparently the similarities were so great that the "Printmaster" screens contained instructions which were not appropriate for the IBM computers on which it was designed to run. For example, both the "Print Shop" and "Printmaster" programs instructed their users to press "Return" several times during the program. This command made sense on the Apple computers for which "Print Shop" was designed. However, instead of the "Return" key found on Apple computers, IBM computers contained an "Enter" key. *Id.* at 1135. The court noted other detailed similarities throughout the opinion. *Id.* at 1135-37.

<sup>140</sup> See *supra* notes 67-75 and accompanying text.

<sup>141</sup> 648 F. Supp. at 1136.

<sup>142</sup> *Id.* at 1137. For another recent case which adopts *Whelan's* reasoning to protect the "total concept and feel" of a computer program, see *Digital Communications Assocs., Inc. v. Softklone Distrib. Corp.*, 659 F. Supp. 449 (N.D. Ga. 1987).

<sup>143</sup> In terms of the definitional balance adopted by *Nimmer*, *Broderbund* put all of its weight behind expression without putting a countervailing weight behind idea.

<sup>144</sup> 674 F. Supp. 671 (D. Minn. 1987).

<sup>145</sup> The actress was Deborah Shelton, best known for her role in the television series *Dallas*. *Id.* at 673.

virtues of a newspaper and a radio station. The opening shot was a close-up of the actress with her name in the lower left of the screen. The rest of the commercial involved a series of twenty rapidly displayed photographs of the actress. A different line of spoken dialogue accompanied each photograph.<sup>146</sup> The defendants' commercials were inspired by the plaintiff's commercials. One of the defendants' commercials also involved an opening close-up of the same actress with her name in the lower right of the screen. The rest of that commercial involved fourteen rapidly displayed photographs of the actress. Again, a separate line of dialogue accompanied each photograph.<sup>147</sup>

Both parties agreed that the two commercials involved completely dif-

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<sup>146</sup> *Id.* at 674. The dialogue was as follows:

What do the Daily News and a hot bubble bath have in common?

Me.

I just love them both.

Everybody knows about the Daily News' commitment to the Valley

And its commitment to excellence.

There is another paper that says it covers the Valley

But everybody knows

They're over the hill.

Can you imagine living in the Valley and not reading the Daily News?

That's like wearing all new underwear and not getting hit by a bus.

What a waste.

Daily

News.

Daily

And Sundays.

You

Ought to look into that.

*Id.*

<sup>147</sup> The dialogue was as follows:

ferent text and subject matter.<sup>148</sup> Additionally, the defendants apparently used their own photographs of the actress. Thus, the primary similarities between the commercials were their use of the actress and of the "rapid-edit style." Despite these facts, the court denied the defendants' motion for summary judgment. In so deciding, the court held that the idea behind the two commercials was either the use of a celebrity spokesperson in an advertisement or the idea that the actress was beautiful. For this reason, both the close-up photographs and the "rapid-edit style" of the plaintiff's commercials were protectable expression, and the two commercials were substantially similar in "total concept and feel."<sup>149</sup>

Brief reflection reveals how *Blore's* use of the *Roth-Broderbund* approach led to its unusual result. Like *Whelan* and *Broderbund*, *Blore* adopted a very limited view of idea. Indeed, the characterization of the commercials' idea as the actress's beauty seems especially bizarre. When the "total concept and feel" approach of *Roth* and *Krofft* was added to this limited view, a correspondingly broad range of copyrightable expression resulted. This allowed the court to find the two commercials substantially similar despite their complete differences in script and subject matter.<sup>150</sup>

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There are some things in life that should  
take more than an hour.  
But making your glasses isn't one of them.  
Duling Optical Super Store  
Has thousands of designer frames  
And contact lenses to choose from.  
I can have my eyes examined  
And have my new glasses and  
Contact lenses in about an hour.  
And they're guaranteed to be  
Prescription perfect.  
The Duling Optical Super Store  
The one-stop shopping  
That allows me more time for  
Other things.

*Id.* at 675.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 678.

<sup>150</sup> Another example of limited idea and expanded expression can be found in *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316 (9th Cir. 1987), in which the Ninth Circuit considered a claim that the defendants had infringed the plaintiff's copyrighted plate, which bore the phrase "You Are Special Today" along with a floral design. *Id.* at 318. The defendants, who also manufactured a plate bearing the same phrase along with a floral design, countered with the argument that their borrowing

The results of cases like *Roth*, *Krofft*, and *Blore* raised some disturbing questions.<sup>151</sup> For example, if a work's "total concept and feel" is protected, do the creators of Batman and other caped heroes owe royalties to Superman's creators? On a more serious level, can the authors of the first encyclopedia claim that later authors of encyclopedias stole their "total concept and feel"? If copyright prevents others from borrowing the style of the Blore commercials, do composers who emulate the style of Stravinsky owe royalties to his heirs?<sup>152</sup>

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was limited to the idea behind the plaintiff's work. *Id.* at 319.

The court rejected the defendant's claims. In finding for the plaintiff, the court held that the idea was "to honor somebody at dinner if they had done something." *Id.* at 320. Since this extremely weak view of idea could be expressed in many ways (*e.g.* by giving the special person a plaque, gold watch, or jeweled pin), enforcing the plaintiff's claim would pose no undue risk of monopolizing the idea. *Id.* Next, the court followed *Roth's* "total concept and feel" approach to infringement. *Id.* at 319, 321. Not surprisingly, the two plates were held to be substantially similar, and the plaintiff won. *Id.* at 319.

See also *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987) (defendant's poster advertising the film *Moscow on the Hudson* infringed plaintiff's well-known illustration which appeared on the March 29, 1976 front cover of *The New Yorker*); *Atari, Inc. v. North American Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) (similarity between maze games *Pac-Man* and *K.C. Munchkin* supports plaintiff's claim of infringement despite differences between the mazes, characters and scoring targets of the two games). For a critical analysis of *Atari*, see Hemnes, *The Adaptation of Copyright Law to Video Games*, 131 U. PA. L. REV. 171, 196-205 (1982).

<sup>151</sup> For an embittered but humorous view, see Manes, *Who'll Think of Suing What Next?*, PC MAGAZINE, May 26, 1987, at 180-82. Among other things, Manes suggests that recent case law supports a hypothetical suit by the estate of Marilyn Monroe against the pop star Madonna. Apparently, Monroe's estate would allege that Madonna has appropriated Monroe's distinctive "total concept and feel." Manes quotes the fictitious spokeswoman for Monroe's estate as saying "As the little copycat admits, we are living in a material world." *Id.* at 180.

<sup>152</sup> As the reader may be aware, *Roth*, *Krofft*, *Whelan*, and *Broderbund* have fueled a number of controversial "look and feel" copyright claims in computer programs.

Briefly stated, the "look and feel" of a computer program consists of the design and presentation of the software's user interface. When a program is run, information passes between the user and the computer via the computer screen and, to a lesser extent, the computer keyboard. Information is given to the user via the screen. Information is sent back to the computer via the keyboard. The visual and tactile "aura" created by the particular layout of displays and input formats used in the interface constitute a program's "look and feel." For example, the particular pattern of screen displays associated with a common word processing program (such as *WordPerfect*), along with the commands used to operate the program, comprise its "look and feel." See Russo and Derwin, *Copyright in the "Look and Feel" of Computer Software*, COMPUTER LAW., Feb. 1985, at 1.

The widespread press coverage given to computer "look and feel" litigation illustrates the tremendous commercial and legal interest in the potential expansion of copyright law. In the most prominent of these lawsuits, Apple Computer alleged that Microsoft and Hewlett-Packard infringed Apple's copyright in the visual displays associated with its distinctive Macintosh personal computers. *Apple Computer, Inc. v. Microsoft Corp. and Hewlett-Packard Co.* (N.D. Cal. No. C-88-20149). The inter-

From a conventional view of copyright, the answer to these questions would surely be "no." If the idea/expression dichotomy is to have any value, it must label the hypothesized similarities as mere similarities of idea. Without such a result, copyright would enable the monopolization of entire genres of works. The ensuing limits on expression would raise serious first amendment problems.

This Article's analysis has shown that, unfortunately, the idea/expression dichotomy operates solely on instinct. Even worse, in applying this instinct the courts have failed to leave us any firm doctrinal guidance as to when the idea/expression dichotomy should be used to limit copyright claims. Indeed, the doctrine left behind in cases like *Roth*, *Krofft*, *Whelan*, and *Broderbund*<sup>153</sup> indicates that no meaningful limits exist. Cases such as *Blore* and *McCulloch* appear to confirm these suspicions.

Of course, the lack of any meaningful limit between copyright and the first amendment does not necessarily mean that copyright has overstepped its constitutional bounds. Perhaps the expression stifled in cases like *Roth*, *Krofft*, and *Blore* falls outside the first amendment.<sup>154</sup> However, as the next section will show, *Roth-Broderbund*'s protection of a work's "total concept and feel" has a chilling effect on protected speech which is troubling.

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est in this case is so intense that it has achieved cover story status in lawyers' magazines and detailed coverage in newspapers of general circulation. See Thompson, *Is Apple Out on a Limb?*, CALIF. LAW., Aug. 1988, at 41 (cover story); Schlender, Miller, and Carroll, *Apple's Copyright Lawsuit Is Seen As Effort to Lock In Technical Lead*, Wall St. J., Mar. 21, 1988, § 2, at 1, col. 4; Waldman, *Software — Copyright Laws Are in State of Confusion*, Wall St. J., Mar. 21, 1988, § 2, at 1, col. 4; O'Reilly and Sing, *Apple Files Copyright Suit Against HP and Microsoft*, L.A. Times, Mar. 21, 1988, § 4, at 2; *Apple Sues Microsoft, HP Over MacInterface*, E.E. Times, Mar. 21, 1988.

Other widely publicized computer "look and feel" lawsuits include Lotus Development's suit against competitors for infringing the famous 1-2-3 spreadsheet and Ashton-Tate's similar suit for infringement of its dBASE database programs. See *Ashton-Tate Sues Two Firms, Charging Violation of dBASE Program Copyrights*, Wall St. J., Nov. 21, 1988, at B4, col. 4; PC MAGAZINE, May 26, 1987, at 186-97.

<sup>153</sup> *Roth*, *Krofft*, *Whelan*, and *Broderbund* will be collectively referred to as "*Roth-Broderbund*."

<sup>154</sup> For example, one could argue (albeit weakly) that the *Blore* television commercials were beyond the protection of the first amendment because they were advertisements. Cf. *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (allowing the prohibition of advertisements for gambling even though gambling was legal in Puerto Rico).

#### IV. A FIRST AMENDMENT ANALYSIS OF THE IDEA/EXPRESSION DICHOTOMY

The idea/expression dichotomy theoretically limits copyright so that it prohibits only copying that is constitutionally valueless.<sup>155</sup> This limitation, however, does not necessarily keep copyright law from running afoul of the first amendment, which requires that laws do more than theoretically avoid suppressing speech that would contribute to the marketplace of ideas. The first amendment further mandates that laws which ostensibly suppress only constitutionally valueless speech must not also accidentally chill constitutionally valuable speech.<sup>156</sup>

The Supreme Court's analysis of libel law provides the best known example of this first amendment principle.<sup>157</sup> In a line of famous cases beginning with *New York Times v. Sullivan*<sup>158</sup> the Court applied the first amendment to limit the scope of libel actions.<sup>159</sup> Prior to *New York Times*, ordinary state libel law held a defendant strictly liable for all false and defamatory<sup>160</sup> statements.<sup>161</sup> State law also awarded presumed damages to

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<sup>155</sup> See *supra* note 19 and accompanying text.

<sup>156</sup> This requirement has been applied to limit many laws which infringe various types of speech, including obscenity, libel, picketing, intentional infliction of emotional distress, and advocacy of lawless conduct. See *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988) (invalidating a District of Columbia ordinance, which prohibited certain types of picketing within 500 feet of an embassy, the Court emphasized the necessity of providing adequate "breathing space" for free speech); *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988) (applying breathing space analysis to tort action for the intentional infliction of emotional distress); *Virginia v. American Booksellers Ass'n*, 108 S. Ct. 636, 645, *vacated and remanded*, 109 S. Ct. 254 (1988) (Court discussed "First Amendment chilling effect" in relation to the delay caused by seeking a narrowing construction of a statute from a state supreme court). See also Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685 (1978).

<sup>157</sup> The analogy between libel and copyright is quite appropriate. Both causes involve civil actions brought by private individuals against others who have expressed themselves in some way.

<sup>158</sup> 376 U.S. 254 (1964). In *New York Times*, Sullivan had successfully sued the Times over inaccuracies which appeared in a paid newspaper advertisement. *Id.* at 256. The advertisement, which supported the civil rights movement, charged that police had, among other things, assaulted and arrested Dr. Martin Luther King, Jr. seven times. In fact, Dr. King had been arrested only four times. *Id.* at 257-59. Sullivan, who was the police commissioner of Montgomery, Alabama, prevailed in the Alabama courts on his claim that the advertisement libelled him. *Id.* at 258. The Supreme Court reversed. *Id.* at 264.

<sup>159</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

<sup>160</sup> A statement is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS, § 559 (1977).

the successful plaintiff.<sup>162</sup> This meant that plaintiffs could sometimes recover huge monetary awards without showing any pecuniary harm.<sup>163</sup> The New York Times (like other libel defendants) contended that these state libel laws unduly suppressed its right of free expression.<sup>164</sup>

The Supreme Court agreed, and stated that the application of strict liability and presumed damages created an unacceptable fear of damage awards among certain potential libel defendants.<sup>165</sup> To reduce this chill, the Court raised the standards required to support a libel claim. Specifically, the Court held that so-called "public figures" could not recover libel judgments unless they proved, by clear and convincing evidence, that the defendants had published the libelous statements with "actual malice."<sup>166</sup> The Court later held that "private figure" plaintiffs could not recover unless they proved that the defendants were "at fault" in publishing the defamatory falsehood.<sup>167</sup>

For purposes of this Article, the salient feature of the Supreme Court's libel analysis is that the Court applied the first amendment to libel laws even though those laws were aimed only at speech which was false, and therefore constitutionally valueless.<sup>168</sup> This reflected a constitutional judgment that the harm created by the risk of unwarranted libel awards and the attendant chilling effect was greater than the harm created by allowing some libel to go unpunished.<sup>169</sup> By raising the substantive standards required to support libel claims, the Court created a buffer zone protecting constitutionally valuable speech from the uncertain and chilling prohibition of the libel laws. Thus, the Court managed to restrict libel's

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<sup>161</sup> R. SMOLLA, *THE LAW OF DEFAMATION*, § 1.03 (1988).

<sup>162</sup> Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 748 (1984).

<sup>163</sup> R. SMOLLA, *supra* note 161, § 9.05. In *New York Times*, the plaintiff recovered \$500,000. 376 U.S. at 277-78.

<sup>164</sup> *New York Times*, 376 U.S. at 262-64. See also *Gertz*, 418 U.S. at 327.

<sup>165</sup> 376 U.S. at 279.

<sup>166</sup> *Id.* at 279-80. See also *Butts*, 388 U.S. at 155. Actual malice meant that the defendant published the statement with actual knowledge of, or reckless disregard for, the statement's falsity. *Id.*

<sup>167</sup> *Gertz*, 418 U.S. at 347.

<sup>168</sup> The Supreme Court has held that "there is no constitutional value in false statements of fact." *Id.* at 340.

<sup>169</sup> "[E]rroneous statement[s] . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *New York Times*, 376 U.S. at 271-72; Schauer, *supra* note 156, at 709-10.

chilling effect to constitutionally valueless speech.<sup>170</sup>

The following charts, adapted from Professor Schauer's analysis of libel's chilling effect, best illustrate the point:

true factual  
statement

intentionally  
false statement

Speech at the left side of this continuum is considered constitutionally valuable, and therefore should be free from libel's chill. Speech on the right-hand side is constitutionally valueless because it is false, and therefore may be prohibited. At some point between these two extremes, a line may be drawn separating constitutionally protected speech from constitutionally unprotected speech. This line, which separates true and false statements, represents libel's theoretical constitutional limit:

true factual  
statement

false  
statements

intentionally  
false statement

theoretical  
constitutional limit

Ideally, courts would be able to fashion a legal rule which accurately embodied this theoretical limit. However, the uncertainty inherent in libel caused the traditional prohibition of false statements to actually deter a number of true statements as well. This was libel's chilling effect.<sup>171</sup> To reduce the chill, the Supreme Court set libel's actual constitutional limit to the right of its theoretical constitutional limit:

true factual  
statement

buffer zone  
some false  
statements

intentionally  
false statement

theoretical  
constitutional  
limit

actual  
constitutional  
limit

<sup>170</sup> See Schauer, *supra* note 156, at 705-10.

<sup>171</sup> See *infra* notes 173-98 and accompanying text for the method by which copyright chills speech.



The buffer zone created between libel's actual and theoretical constitutional limits serves to ensure that statements to the left of the theoretical limit will not be accidentally deterred or punished. To be sure, the buffer zone also allows some false libelous statements to go unpunished, but this result merely reflects our constitutional judgment that some evil must be tolerated to make sure that all good survives.<sup>172</sup>

The analysis of *New York Times* and the other libel cases points out the flaw in the prevailing judicial approach to the conflict between the first amendment and copyright. Instead of merely satisfying themselves that copyright aims only at constitutionally valueless speech, the courts should make sure that the copyright law does not create an unacceptable chilling effect. Indeed, the courts' failure to undertake such analysis has allowed copyright to create a chilling effect which is fully comparable to that created by libel law. This realization springs from a chilling effect analysis of the *Roth-Broderbund* line of cases.

This analysis starts with two basic legal propositions. The first proposition is that the chilling effect results from the inherent uncertainty of the legal system.<sup>173</sup> Legal rules are often unclear. Furthermore, the court system does not always apply legal rules in a consistent fashion. This uncertainty creates three identifiable fears among individuals. First, they may not know if their conduct is illegal. Second, even if they correctly believe that their conduct is legal, the system may mistakenly punish them anyway. Third, even if individuals know that they will vindicate themselves, the mere cost of litigation alone creates a fear of what it might cost to protect constitutional rights.<sup>174</sup> These fears deter individuals from acting.

The second basic legal proposition underlying this analysis is that while uncertainty alone is a constitutional vice,<sup>175</sup> that uncertainty which chills

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<sup>172</sup> See Schauer, *supra* note 156, at 705-10. The same type of buffer zone can be seen in the Supreme Court's treatment of obscenity and subversive speech. *Id.* at 715-30.

<sup>173</sup> *Id.* at 688-89.

<sup>174</sup> See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971). See also *Anderson, Libel and Press Self-Censorship*, 53 *TEX. L. REV.* 422, 424-25 (1975).

<sup>175</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (vague statute unconstitutional "based upon the potential for arbitrarily suppressing First Amendment liberties" (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965))); *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (unconstitutionally vague statute "fails to draw reasonable clear lines" between prohibited conduct and permitted conduct); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (Statute prohibiting annoying conduct was void for vagueness. "[T]he ordinance is vague . . . in the sense that no standard of conduct

first amendment rights is particularly offensive.<sup>176</sup> The first amendment requires us to err on the side of protecting free speech. There is a constitutional preference for minimizing interference with free speech, even when such minimization might disserve other legitimate government goals.<sup>177</sup>

When these principles are applied to the *Roth-Broderbund* line of cases, serious first amendment problems appear. In particular, the “total concept and feel” protection adopted by this line of cases creates a first amendment chilling effect which has not been addressed by copyright doctrine. A comparison of the first amendment implications of libel law and “total concept and feel” copyright protection reveals this chill.

The Supreme Court’s libel analysis focused on two sources of the chilling effect. First, there was the defendant’s concern that a jury might reject her interpretation of the truth, no matter how careful she had been.<sup>178</sup> Second, the sheer cost of litigating a defamation suit could chill expression, even if the defendant were certain she would ultimately prevail.<sup>179</sup>

Under the *Roth-Broderbund* line of cases, two analogous sources of chill exist. First, there is the uncertainty that a jury might perceive the “total concept and feel” of the plaintiff’s work differently than the defendant does. Thus, even if the defendant genuinely believed that she had not copied the plaintiff’s protectable “concept and feel,” the defendant would still have to worry about the perceptions of the jury. Second, the cost of litigating a copyright suit could be overly burdensome, as was the cost of litigating a defamation suit. Further examination reveals that the size of copyright’s chill is completely comparable to, if not greater than, libel’s chill.

To make the easy comparison first, the cost of modern litigation is con-

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is specified at all.”).

<sup>176</sup> *NAACP v. Button*, 371 U.S. 415, 432-33 (1963) (vagueness a particular vice “in the area of First Amendment freedoms”).

<sup>177</sup> Of course, this preference does not afford absolute protection for all speech interests. If it did there would be no libel or copyright laws. Instead, the preference reflects a “tipping of the scales” in favor of speakers. See Schauer, *supra* note 156, at 701-05, 709-10 (“[A]cknowledgement of the inevitability of error and the priority of one type of error mandates that any such balancing process be heavily weighted in favor of the constitutional interest.”).

<sup>178</sup> *New York Times*, 376 U.S. at 279; *Rosenbloom*, 403 U.S. at 50.

<sup>179</sup> See *Rosenbloom*, 403 U.S. at 52-53. See also Anderson, *supra* note 174, at 424-25.

siderable, no matter what the subject matter of the suit.<sup>180</sup> Thus, the chilling effect which arises from the cost of defending one's rights is equal in both contexts. More importantly, the risk of disagreement between the perceptions of jury and defendant seems greater in the case of "total concept and feel" than it does in the case of libel. Thus, the uncertainty faced by prospective copyright defendants is even worse than that faced by prospective libel defendants.

In libel, the jury considers the issue of truth. Although the question of what constitutes truth is a hotly debated philosophical topic, "truth" is a concept which has an everyday meaning. Average jurors (and defendants) regularly deal with the concept of truth. Human experience furnishes a common basis for deciding whether a defamatory statement is true or false. Thus, even though uncertainty over the truth of a statement still exists, a prospective libel defendant at least understands the nature of the determination a libel jury will make.

By contrast, jurors and litigants involved in a "total concept and feel" copyright case will never have confronted this notion before. Thus, the defendant will have no idea whether what she perceives as being the "total concept and feel" of the plaintiff's work will also be what the jury perceives is the "total concept and feel." The courts' failure to even define "total concept and feel" aggravates this problem. Even the court itself may not know the fundamental issue on which the case turns. Since there is no

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<sup>180</sup> Apple Computer's first "look and feel" copyright lawsuit, which was settled in Apple's favor, provides a good example of the chill caused by legal expenses. In 1984, a company called Digital Research, Inc. authored a program which incorporated many of the user-friendly features popularized by Apple's Macintosh computers. Apple sued, claiming that Digital Research had appropriated Apple's "look and feel." Reportedly, Digital Research settled on terms favorable to Apple largely because it could not afford the millions of dollars necessary to litigate the case. Thompson, *supra* note 152, at 47.

The willingness of aggressive litigants to use the cost of litigation as a weapon against innocent defendants is further illustrated in *Universal City Studios, Inc. v. Nintendo Co.*, 615 F. Supp. 838 (S.D.N.Y. 1985). In that case, Universal attempted to enjoin Nintendo from selling its popular *Donkey Kong* video game. *Id.* at 840. Prior to filing suit, Universal had attempted to extract royalties from Nintendo on the ground that the *Donkey Kong* game (which involved an ape holding a woman captive) violated Universal's rights in *King Kong*. *Id.* at 840, 854-55. Among other things, Universal threatened Nintendo by asserting that its litigation department was a profit center for the company, and that Nintendo should start saving its money for legal fees. *Id.* at 841. Universal lost on summary judgment, and the court ultimately held that Universal had brought its suit in bad faith. *Id.* at 842, 863. For a brief analysis of the chill created by the cost of litigating copyright claims, see Kulzick and Hogue, *supra* note 102, at 71.

common basis for deciding what the “total concept and feel” of a work is, let alone what it means for two works to have substantially the same “total concept and feel,” a prospective copyright defendant in a case like *Krofft* will have absolutely no idea whether she will win or lose an infringement case.<sup>181</sup>

In the context of widely disseminated works like *H. R. Pufnstuf*, this creates a powerful chill. *H. R. Pufnstuf* was the most popular children’s show on Saturday morning television.<sup>182</sup> It seems fair to assume that practically anyone in the television business would have seen the show at one time or another. If one of these hypothetical viewers ever decided to create a series based upon a fantasyland inhabited by fanciful characters, the authors of *Pufnstuf* would probably be able to state a plausible copyright claim against the new show, based upon the decision in *Krofft*. Indeed, *Blore*’s extension of stylistic protection makes it impossible for the second author to avoid liability if sued.<sup>183</sup> In light of such a threat, it would not be surprising if a number of future authors never proceeded with their projects.<sup>184</sup>

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<sup>181</sup> Even those suggesting the propriety of “look and feel” protection for computer programs admit the subjectivity inherent in “look and feel.” Russo and Derwin, *supra* note 152, at 11 n.4 (“We recognize that, even as amplified by the foregoing, the term ‘look and feel’ remains somewhat imprecise and subjective.”).

<sup>182</sup> *Krofft*, 562 F.2d at 1166.

<sup>183</sup> Imagine our hypothetical author going to his lawyer to get an opinion of noninfringement for purposes of preparing a prospectus for investors in the show! Even worse, many copyright holders are well aware of the preclusive power of the mere threat of a copyright suit, and are ready and willing to aggressively use copyright to gain competitive advantages over commercial rivals:

American industry in general, and high-technology companies in particular, are increasingly resorting to patent and copyright litigation as a source of new revenue and as a competitive weapon. Companies are viewing such intellectual property rights as key corporate assets to be exploited to the fullest in an increasingly competitive environment. . . . “You’re seeing the aggressive use of intellectual property rights as a sword,” said [a leading practitioner]. [Another stated], “If you have good patents, litigation is a better way of making money than selling products.”

Pollack, *The New High-Tech Battleground*, N.Y. Times, July 3, 1988, § 3, at 1.

In reference to Apple Computer’s aggressive use of copyright litigation to maintain its competitive edge over rivals, one article quoted the publisher of a computer industry newsletter as saying, “Aggressiveness is extraordinarily necessary in this industry . . . Apple executives would be extremely derelict in their duty to their shareholders if they didn’t try to use every means available to protect what is theirs.” Thompson, *supra* note 152, at 43.

<sup>184</sup> Schauer’s general description of how vagueness deters speech illustrates the chilling effect of “total concept and feel” copyright protection:

If the terms of a statute or the concepts underlying a common-law principle are so amor-

*Krofft's* first amendment problems are matched by those created by *Roth*. Like *H. R. Pufnstuf*, popular greeting cards are widely known among the public. No experienced card artist can plausibly claim not to have seen popular lines of greeting cards such as those designed by Boynton or Schultz. This means that a designer who intends to create cards to compete with these industry giants could not defeat a copyright suit by claiming that she had never seen the original. More importantly, a designer could go crazy trying to decide if her cards avoided the same moods captured in other cards.

The foregoing analysis clearly demonstrates that *Roth* and *Krofft's* "total concept and feel" protection creates at least as much uncertainty among potential defendants as did unfettered common law libel. Under the reasoning of *New York Times* and other chilling effect cases, this uncertainty creates an unconstitutional chill against speech unless a clear buffer zone exists between protected speech and prohibited copying. To put it another way, "total concept and feel" protection is unconstitutional unless copyright doctrine contains a meaningful limit on how far such protection can go. This limit would prevent copyright from deterring the very speech it was meant to encourage.

Again, an adaptation of Schauer's charts best demonstrates the point. Works which borrow only ideas (i.e. are only superficially similar to other

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phous as to create no crystalized view of what precise conduct is being regulated, an individual may be quite unsure whether his intended behavior is proscribed until after he has acted. Indeed, some legal concepts and language may be so incapable of precise definition and application that any real degree of certainty is unattainable. Therefore, when a vague regulatory rule is added to factors previously mentioned, the amount of overall uncertainty is increased, with a corresponding increase in fear; the ultimate result is a heightened probability of deterrence.

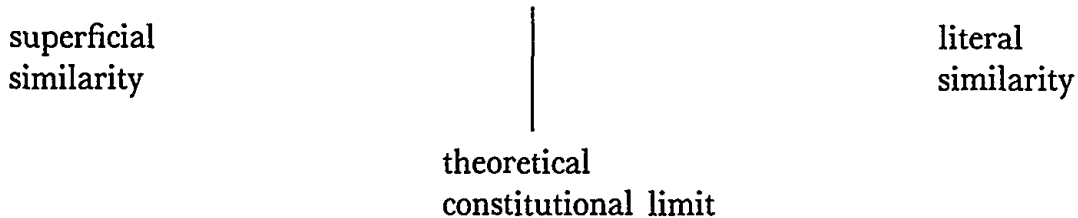
Schauer, *supra* note 156, at 698-99. See also J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW, § 16.9, at 846 (3d ed. 1986):

To the extent that the law is vague and relates to fundamental constitutional rights, it might have an 'in terrorem' effect and deter persons from engaging in activities, such as constitutionally protected speech, that are of particular constitutional importance. In other words, an unclear law regulating speech might deter or chill persons from engaging in speech or activity with special protection under the Constitution.

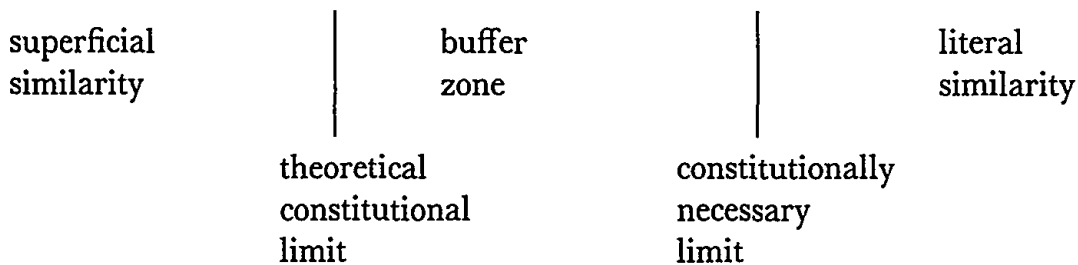
See also *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("Those . . . sensitive to the perils posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.").

In light of the well documented vagueness inherent in the idea/expression dichotomy and "total concept and feel" protection, it is hard to imagine better descriptions of how copyright can deter expression.

works) are constitutionally protected and occupy the left side of the chart. By contrast, works which borrow expression (i.e. are literally similar to other works) are constitutionally valueless and occupy the right side of the chart. Copyright's theoretical constitutional limit exists in the middle:



Like libel, copyright in a work's "total concept and feel" poses a chilling effect problem by deterring the creation of new works which bear even superficial similarity to prior copyrighted works.<sup>185</sup> This creates an unconstitutional infringement of speech unless some limit exists to the right of copyright's theoretical limit.<sup>186</sup>



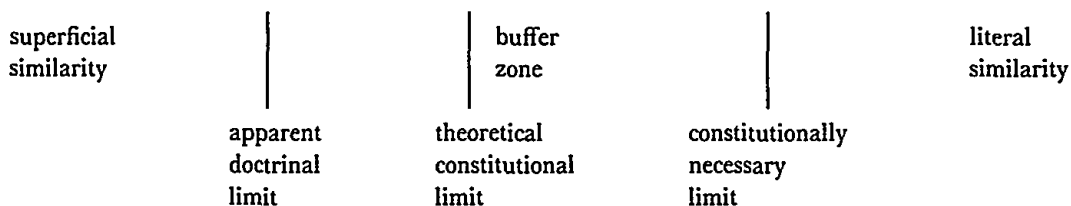
This Article's prior analysis of *Roth* and *Krofft* showed how such a limit could have been provided by a strong vision of idea.<sup>187</sup> However, cases like *Whelan* and *Broderbund* failed to provide the required vision. Instead, those cases adopted such a weak view of idea that no meaningful limit on copyright's scope could be found.<sup>188</sup> The bizarre result reached in

<sup>185</sup> See *supra* note 106 and accompanying text.

<sup>186</sup> See *supra* note 177 and accompanying text.

<sup>187</sup> See *supra* notes 108-16 and accompanying text.

<sup>188</sup> See *supra* notes 117-53 and accompanying text. In terms of Schauer's charts, this result is expressed by placing copyright's apparent doctrinal limit well to the left of the theoretical constitutional limit:



*Blore* further demonstrated the courts' general inability to appreciate the first amendment implications of "total concept and feel" copyright protection. Together, these cases signal the absence of the constitutionally required buffer zone.<sup>189</sup>

The stifling effect of this absence is illustrated by the tremendous problems facing the modern software industry.<sup>190</sup> Presently, computer

<sup>189</sup> The same result also flows from consideration of Nimmer's assertion that the idea/expression dichotomy provides an acceptable definitional balance of first amendment and copyright goals. Under a proper definitional balance, the limiting concept of idea would have enough weight to give future authors an opportunity to write without fear of copyright suits. *Roth-Broderbund* destroyed this balance. *Whelan and Broderbund's* adoption of a very weak conception of idea allows *Roth* and *Krofft's* expanded view of expression to decisively tilt Nimmer's hypothetical balance to the side of copyright. Future authors have little or no room in which to write without fear of copyright suits. See *supra* notes 18 and 107.

<sup>190</sup> Although it may not be immediately apparent, computer programming is speech protected by the first amendment. Courts have consistently held that the first amendment guarantees freedom of expression. See *supra* note 5. Since copyright itself protects only original "expression," the first amendment logically applies to all works within copyright's reach. Computer programming's first amendment implications become even clearer when one examines its communicative and expressive aspects.

First of all, computer programs communicate information to other programmers. As the Office of Technology Assessment noted, "Like other copyrightable works, programs symbolize information to human beings, and can be read and understood by programmers. The CONTU report stressed that programs, like other copyrightable works, communicate to those who can read them." OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 80 (1986). Since the first amendment protects an individual's right to communicate with others, it must protect a computer programmer's right to communicate with others in her special language. Cf. *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (first amendment rights "not confined to verbal expression. They embrace appropriate types of action . . .").

This communication function can be illustrated via a program which makes a computer add the numbers 3 and 4 and then display the result on the screen. Such a program would look something like this:

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x = 3 + 4
print ("The sum of 3 + 4 = ", x)
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When read by a human who understands the computer language in which it is written, the program communicates a method by which the sum of 3 + 4 may be computed and displayed by a computer. Just as a mathematics text or written music communicates to a specially trained group of readers, a computer program communicates to its own group of readers. When seen in this light, the first amendment implications of computer programs are no different from those of many other copyrightable texts.

Second, when a program is run by the computer, the resulting displays are themselves works of authorship which convey information to users. For example, the display generated by the simple program above would be "The sum of 3 + 4 = 7." Furthermore, many computer screen displays contain further instructions about how to operate the program being run. See *Broderbund*, 648 F. Supp. at 1134. Both components of screen displays are certainly protected by the first amendment.

Finally, courts have consistently held that the visual displays generated by computer programs are

programmers who want to avoid duplicating the "total concept and feel" of other programs face tremendous uncertainty in figuring out just what it is they should try to avoid copying. Under present copyright doctrine, these programmers are permitted to identify a work's ideas, and restrict their copying to those ideas. However, when these prospective defendants read *Whelan* and *Broderbund*, they find a conception of idea so weak as to be nearly meaningless. The weak notion of idea would be further reinforced if our prospective defendant ran across the *McCulloch* or *Blore* opinions' strange characterizations of idea.<sup>191</sup>

In particular, the *Whelan* rule forces authors to logically conclude that they can borrow only a program's purpose. Nothing else can be borrowed, no matter how vague or general. This interpretation has stifled innovation, as programmers decide not to create new programs for fear of being sued.<sup>192</sup> From a first amendment point of view, the decreased flow of new programs shows that copyright has in fact chilled the very speech that it was meant to encourage.

Additional examination of *Krofft* and *Whelan* further illustrates the causal connection between the courts' lack of constitutional vigilance and

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copyrightable because they contain significant creative expression. *Broderbund*, 648 F. Supp. at 1134 ("The menu screens in 'Print Shop' contain much more than just instructions on how to operate the program. Their artwork is aesthetically pleasing. Their layout and sequence, viewed as part of a total user interface, provides a significant element of entertainment for the user."); *Softklone*, 659 F. Supp. at 463 ("The specific placement, arrangement and design of the parameter/command terms on the status screen is neither arbitrary nor predetermined but, rather, is the result of extensive original human authorship."). Artistic expression and entertainment have both long been protected by the first amendment. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (first amendment held to protect nude dancing); *Abood v. Detroit Board of Education*, 431 U.S. 209, 231, *reh'g denied*, 433 U.S. 915 (1977) ("But our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection."); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684 (1959) (first amendment protects distribution of the film *Lady Chatterley's Lover*).

<sup>191</sup> See *supra* notes 144-50 and accompanying text.

<sup>192</sup> Statements of industry leaders and observers document the chill created by aggressive copyright claims:

"Look-and-feel lawsuits are already impacting product development. And because hardware and software development takes so long, *the uncertainty brought on . . . will affect the products we see for up to 3 years*. Some of this effect will be irreversible." PC MAGAZINE, May 26, 1987, at 169 (emphasis added) (quoting Dan Bricklin, developer of the VisiCalc spreadsheet program). Bricklin's real life observations correspond closely to Schauer's description of how uncertainty creates a constitutionally objectionable chill. See *supra* note 184.

"After a while, Apple's lawyers didn't have to bother to sue. Rumors of suits were sufficient to scare off would-be competitors." Thompson, *supra* note 152, at 47.



the above-demonstrated problems of copyright law. In *Krofft* the court rejected the defendants' argument that the first amendment limited the scope of protection for the plaintiffs' work.<sup>193</sup> In so deciding, the court remained true to the prevailing view that copyright raises no first amendment problems.<sup>194</sup> Similarly, in *Whelan* the court failed to heed the defendant's warning that adoption of the court's rule for separating idea from expression would render copyright law improperly vague.<sup>195</sup> These decisions wrongly removed constitutional values from the application of the idea/expression dichotomy.

In *Krofft* the court adopted a dangerously vague view of copyrightable expression without even considering the effect this decision would have on future authors. Such considerations would have been at the heart of any analysis truly cognizant of first amendment values.<sup>196</sup> In *Whelan* the court used economic policy to justify its decision.<sup>197</sup> By doing this, the court overlooked the fact that first amendment principles guaranteeing civil rights are superior to the economic policies that it perceived as underlying the copyright law.<sup>198</sup> Even if *Roth-Broderbund's* amorphous and expansive brand of copyright is good economic policy, the Constitution places limits on the chilling effect that can accompany such policy.

The above analysis demonstrates that the courts' failure to heed first amendment values has allowed copyright to unduly chill basic rights of expression. In light of the first amendment's supremacy over copyright,

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<sup>193</sup> *Krofft*, 562 F.2d at 1169-71.

<sup>194</sup> The court wrote: "[T]he idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment." *Id.* at 1170.

<sup>195</sup> *Whelan*, 797 F.2d at 1237-38. It should be noted that this argument was not raised in a constitutional context. Nevertheless, the court should have been cognizant of the first amendment implications behind any vagueness argument involving copyright.

<sup>196</sup> The analysis of copyright's chilling effect relies on assessing the impact of the law on prospective defendants. *See supra* notes 173-74 and accompanying text.

<sup>197</sup> 797 F.2d at 1237-38 ("[I]t is surely true that limiting copyright protection . . . would yield more definite answers than does our answer here. Ease of application is not, however, a sufficient counterweight to the [economic] considerations we have adduced on behalf of our position."). Another example of willingness to overlook vagueness in order to accomplish economic goals is provided by Russo and Derwin, *supra* note 152, at 11 n.4: "We recognize that, even as amplified by the foregoing, the term 'look and feel' remains somewhat imprecise and subjective. That may be necessary if protection is to be extended beyond actual programming to the specific manner in which software communicates with users."

<sup>198</sup> See Nimmer, *supra* note 9, at 1180-82 for a discussion of the first amendment's superiority over copyright law.

the courts must begin limiting the *Roth-Broderbund* trend before it irreversibly pushes copyright beyond its first amendment limits. The conclusion of this Article will suggest some ways in which this might be accomplished.

## V. CONCLUSION

This Article set out to test the validity of the courts' assumption that mere application of the idea/expression dichotomy keeps the copyright law within its first amendment limitations. To accomplish this, the Article first examined the nature of the principal conceptual limit on the expansion of copyright, the idea/expression dichotomy. The examination revealed that the idea/expression dichotomy is at best a very amorphous distinction, one which plausibly may be construed to imply either an extremely broad scope of copyright protection or a very narrow one.

Next, the Article noted that a recent line of cases signalled a dismantling of the idea/expression dichotomy's ability to limit the unwarranted expansion of copyright law. Cases like *Roth* and *Krofft* started this trend by treating vague and general features of works as copyrightable expression. By defining features like "total concept and feel" to be expression and not idea, these cases made it easier for plaintiffs to state broader and broader claims of copyright. Fortunately, for a time courts used a common sense application of the idea/expression dichotomy to prevent a total expansion of copyright to its broadest conceivable limits.

Unfortunately, when courts tried to apply *Roth* and *Krofft* in the unfamiliar context of computer programs, the instinctive process of applying the idea/expression dichotomy broke down. Cases like *Whelan* and *Broderbund* adopted the most limited conception of idea imaginable. By restricting a computer program's unprotected idea to its "purpose or function," the courts implied that practically any similarities between two works could furnish the basis for a copyright infringement claim. Even worse, cases such as *Blore* proved that the combination of "total concept and feel" protection and an extremely limited notion of unprotected idea could quickly lead to bizarre results.

Working from the hypothesis that *Roth-Broderbund* might have pushed copyright beyond its constitutional limits, the Article next evaluated that line of cases in light of its first amendment chilling effect. The

Article found that the uncertainty which surrounds "total concept and feel" protection created a chilling effect which was greater than the chill created by common law libel, and that the toothless notion of idea adopted by the *Whelan* and *Broderbund* courts failed to create the constitutionally necessary buffer zone between copyright and protected speech.

These observations led to the conclusion that the courts were in fact mistaken in ignoring the first amendment implications of copyright law. Indeed, this mistake made the chilling effect of *Roth-Broderbund* possible. To correct this error, the courts must now abandon their belief that the idea/expression dichotomy alone can keep copyright from running afoul of the first amendment. This change should eliminate the chilling effect which was created by *Roth-Broderbund*.

This reversal might be accomplished in part by reinvigorating the idea/expression dichotomy, thereby expanding the scope of a work's ideas and limiting the scope of its expressions. In particular, the chill created by the amorphous notion of a work's "total concept and feel" suggests that courts should either eliminate "total concept and feel" copyright claims or require fairly extensive literal similarity before considering such claims. At the very least, the courts must find some way to concretely define what "total concept and feel" is. Such developments would undoubtedly do much to bring copyright law back within its first amendment limits.

However, while a reinvigorated idea/expression dichotomy certainly will play an important role in the reform of copyright, that concept is one whose unprincipled nature has caused problems in the past. Specifically, that concept failed not only because the courts did not enforce it diligently, but also because the very process of separating idea from expression proved elusive and unsatisfying. For this reason, the reinvigorated use of the idea/expression dichotomy alone may never produce an acceptable limit on copyright law. Indeed, if courts continue their instinctive method of trying to separate idea from expression, they risk recreating the old constitutionally suspect lines of cases like *Roth-Broderbund*.

In light of this, the courts should also look to other areas of copyright doctrine in their struggle to keep copyright within its constitutional limits. For example, raising the burden of proof required in copyright cases might have the effect of reducing the chill cast by overly aggressive copy-

right plaintiffs.<sup>199</sup> Similarly, a quick consideration of copyright's requirement of originality suggests that increased attention to this topic might effectively limit copyright in a more principled manner than does the idea/expression dichotomy.<sup>200</sup> Lastly, Congress should look into the possibility of legislative reform. Modifications of the copyright statute might go far in reducing the uncertain nature of many copyright concepts.

In the final analysis, it is not clear whether the doctrine that ultimately will reconcile copyright law with the first amendment is the idea/expression dichotomy, originality, or some other concept. However, the one thing that is certain is that copyright law has clearly begun to exceed its constitutional boundaries. If this trend is not decisively checked by the courts, then the conflict between copyright and its first amendment limits may become as problematic as the analogous conflict between libel and the first amendment. The controversy which surrounds modern libel law, particularly the many constitutional requirements laid on top of libel doctrine, ought to convince the courts that copyright law should be repaired before complicated constitutional defenses to copyright actions become neces-

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<sup>199</sup> Indeed, the Supreme Court reduced libel's chilling effect by raising the burden of proof to be carried by libel plaintiffs. *See Schauer, supra* note 156, at 708-09.

<sup>200</sup> The suggested quick consideration might run something like this: The section 102(a) requirement of originality means that authors cannot maintain copyright in facets of their work which were copied from prior works or the public domain. NIMMER TREATISE, *supra* note 21, § 2.01, at 2-8. Since all authors owe heavy creative debts to those who have worked before them, it seems that a vigorous application of originality would limit the scope of many broad copyright claims. *Cf. Goldstein, supra* note 9, at 1020-22.

Although the originality requirement is not a substitute for the idea/expression dichotomy, its process of comparison with other works offers distinct advantages over the idea/expression dichotomy from a first amendment point of view. On the one hand, the idea/expression dichotomy relies heavily on an elusive ad hoc distinction between a work's idea and its expression. *See supra* notes 65-66 and accompanying text. The previously demonstrated uncertainty in predicting the outcome of this ad hoc process contributes greatly to the idea/expression dichotomy's constitutionally objectionable chilling effect. *See supra* notes 178-81 and accompanying text.

On the other hand, the originality doctrine avoids this problem to a large extent by not operating in the vacuum created by ad hoc appraisals of works. Instead of guessing whether intended borrowing involves idea or expression, prospective authors can decide whether or not they are entitled to borrow a facet of a prior work by comparing that prior work with even earlier works. If the particular facet to be borrowed appears in a number of earlier works, then the prospective author gains comfort that her contemplated action will not take the intellectual property of another, but instead will borrow from material already in the public domain. This type of analysis yields results that are much more concrete than those produced by the abstract struggle to separate idea from expression. Therefore, prospective authors confront less uncertainty under an originality regime than under an idea/expression regime, and consequently there is less of a constitutionally problematic chilling effect.

sary.<sup>201</sup> For this reason, courts and commentators alike must immediately begin reinterpreting the copyright law so that it will stay within its first amendment boundaries. Without such an effort, we all risk the unwarranted suppression of precious rights of expression.

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<sup>201</sup> For a recent summary of some of the controversy surrounding modern libel law, see Yen, *It's Not That Simple: An Unnecessary Elimination of Strict Liability and Presumed Damages in Libel Law*, 23 HARV. C.R.-C.L. L. REV. 593 (1988).