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Articles

The Myth Of The Idea/Expression Dichotomy In Copyright Law†

Richard H. Jones

Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the meta-physics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent. — Justice Joseph Story¹

I. Introduction

Fundamental to traditional copyright doctrine is the claim that copyright only protects an author's particular expression of an idea and never the idea itself.² Courts consider this idea/expression dichotomy to be the central axiom of copyright law to use when determining what is protected in infringement cases.³

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1. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

2. *E.g.*, *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989); *Warner Bros. v. American Broadcasting Cos.*, 654 F.2d 204, 208 (2d Cir. 1981).

3. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1163

In the recent words of Justice Brennan, "[t]his distinction [between protected expressions and unprotected ideas] is at the essence of copyright."⁴ Commentators agree that this fundamental distinction is one of the "most pervasive . . . threads in copyright law."⁵

Numerous commentators have raised problems with the idea/expression dichotomy,⁶ but none have identified the root of the problem — that an idea cannot exist apart from some expression. One may differentiate the form from the substance of a writing, equating the substance with the writing's idea, but any idea must necessarily have an expression. Thus, drawing a distinction between the terms "idea" and "expression" cannot serve as a fundamental determinant for deciding what is protectible under copyright law. Rather, the sole distinction to be made is between those expressions which are protectible and those which are unprotectible.

In short, the thesis of this Article is that the traditional distinction between idea and expression is misguided and irrele-

(9th Cir. 1977) (citing *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954) and *Baker v. Selden*, 101 U.S. 99, 102-03 (1879)). Cf. *Ashton Tate Corp. v. Ross*, 728 F. Supp. 597, 601 (N.D. Cal. 1989) ("The foundation of federal copyright law is that only expressions of ideas, not the ideas themselves, give rise to protected interests.").

4. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting).

5. W. PATRY, *LATMAN'S THE COPYRIGHT LAW* 30 (6th ed. 1986). See also M. NIMMER & D. NIMMER, 1 *NIMMER ON COPYRIGHT* § 2.03[D] (1989) [hereinafter 1 NIMMER]; Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row Publishers, Inc. v. Nation Enterprises*, 1986 B.Y.U. L. REV. 983, 987. The dichotomy of idea and expression is also accepted in English law. See E. SKONE JAMES, J. MUMMERY & J. RAYNER JAMES, *COPINGER AND SKONE JAMES ON COPYRIGHT* 175-76 (12th ed. 1980); Andrews, *Copyright Protection for Ideas: An Appraisal of The Traditional View*, 10 *MONASH U.L. REV.* 175, 176 (1984) (accepting the "fundamental" idea/expression dichotomy but arguing that copyright law protects expressed ideas).

6. See B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967); H. LADDIE, P. PRESCOTT & M. VITORIA, *THE MODERN LAW OF COPYRIGHT* § 2.55 (1980); Collins, *Some Obsolete Doctrines of the Law of Copyright*, 1 *S. CAL. L. REV.* 127, 139 (1928); Knowles & Palmieri, *Dissecting Krofft: An Expression of New Ideas in Copyright?*, 8 *SAN FERN. V.L. REV.* 109, 124-29 (1980); Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 16 *COPYRIGHT L. SYMP. (ASCAP)* 30, 32-35 (1968), revised and reprinted in 14 *UCLA L. REV.* 735, 737-39 (1967); Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 *TENN. L. REV.* 321 (1989); Umbreit, *A Consideration of Copyright*, 87 *U. PA. L. REV.* 932, 950 (1939). One court has noted that the usual criticism is more of the application of the dichotomy than of the dichotomy itself. *Sid & Marty Krofft*, 562 F.2d at 1163 n.6.

vant. No "expressionless idea" exists and, at least in any meaningful writing, it makes no sense to speak of an "idealess expression." Despite the manner in which cases are framed, the scheme of differentiating idea from expression does not aid courts in their task of determining what is the protectible expression and whether this expression has been infringed.

Part II of this Article reviews how the idea/expression dichotomy became ingrained in Anglo-American copyright law. Part III discusses how the terms "idea" and "expression" are currently used in copyright law. Part IV examines the role the idea/expression dichotomy plays in courts' decision-making processes in copyright infringement cases. Part V discusses how the doctrines of copyright protection and infringement can be presented without reference to the dichotomy. Part VI concludes that a contrast of abstract ideas and expressions, and any process of abstracting ideas from expressions, are both irrelevant to copyright doctrine and that the relevant distinction is whether the expression is protectible or unprotectible.

II. History

A. *Early Cases*

"Ideas" as a category became part of legal history long before they were contrasted with "expressions." In the first century of the Judeo-Christian era, the Roman Seneca stated that "the best ideas are common property."⁷ In the eighteenth century in England, Justice Yates expanded this doctrine to include the author's right to control ideas only prior to revealing them to the public: "Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have the right to let fly for, till he thinks proper to emancipate them, they are under his own dominion."⁸

When courts first discussed ideas and expressions together, judges did not contrast them. For instance, in 1769 Lord Justice Mansfield described the protection granted by copyright as "an incorporeal right to print a set of intellectual ideas or modes of

7. SENECA, AD LUCILIUM EPISTULAE MORALES 12.11.

8. *Millar v. Taylor*, 98 Eng. Rep. 201, 242 (K.B. 1769) (Yates, J., dissenting), *overruled by* *Donaldson v. Beckett*, 1 Eng. Rep. 837 (H.L. 1774).

thinking, communicated in a set of words and sentences and modes of expression.”⁹ Thus, the author’s right was in both the ideas and expressions — each was treated as the author’s intellectual creation.

Several early copyright decisions in this country further supported the position that ideas and expressions do not fall into fundamentally different categories. The term “expression” occurred only rarely, and ideas were considered part of one category encompassing all writings. In *Emerson v. Davies*,¹⁰ Justice Story, without suggesting any contrast of categories between idea and expression, used the terminology customary at the time to note that “every author of a book has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance.”¹¹ Later in the century, the court in *Lawrence v. Dana*¹² agreed, stating that “the author of such a book has as much right in his plan, arrangement, and combination of materials collected and presented, as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated.”¹³ Expressions and the ideas they express were not delineated by these courts in terms of what was protected and what was not.

Contrasted with this doctrine is the often quoted Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*,¹⁴ which defined writings as “all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression.”¹⁵ This definition indicates a dichotomy of ideas and expressions as two distinct types of entities, with the term expression meaning any embodiment of an idea. In other words, under the *Burrow-Giles* definition, any visible embodiment of an idea (i.e., any expression) is protectible.

Other nineteenth century court decisions reflect this posi-

9. *Id.* at 251.

10. 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4436).

11. *Id.* at 619.

12. 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136).

13. *Id.* at 58.

14. 111 U.S. 53 (1883).

15. *Id.* at 58.

tion. For example, the court in *Stowe v. Thomas*¹⁶ contrasted “ideas, sentiments, or the creations of the imagination” with “the language, idiom, style, or the outward semblance and exhibition” of such creations.¹⁷ An author’s literary property is limited to only the concrete form and language used to “clothe” the ideas.¹⁸

One state court, in *Carter v. Bailey*,¹⁹ used the doctrine that “ideas are free” to create a separate category for the protectible “language or the outward semblance in which [ideas or sentiments] are conveyed” in a book.²⁰ That the issue of a dichotomy of ideas and expressions was not clearly envisioned at that time is evidenced by the *Carter* court justifying its conclusion with the different rationales represented by *Stowe*²¹ (which relegated ideas and expressions into separate categories), and *Emerson*²² (which did not relegate ideas and expressions into separate categories), without perceiving the fundamental differences between these two rationales.

Two Supreme Court decisions from the late 1800s — *Baker v. Selden*²³ and *Holmes v. Hurst*²⁴ — are often cited as the origin of the idea/expression dichotomy.²⁵ This conclusion, however, is not obvious. Even though the Court in *Baker* referred to unprotected “art” described in a protected work, it failed to articulate distinct and separate “idea” and “expression” categories in discussing the “language employed by the author to convey his ideas”²⁶ Indeed, the dichotomy of ideas and expressions found in *Baker* and *Holmes* is perceived only when viewed from the point of view of later history.

In *Holmes*, the Court stated:

16. 23 F. Cas. 201 (C.C.D. Pa. 1853) (No. 13,514).

17. *Id.* at 206.

18. *Id.*

19. 64 Me. 458 (W.D. Cumberland Co. 1874) (owner of copyright not liable to co-owner absent express agreement).

20. *Id.* at 461.

21. 23 F. Cas. 201. See also *supra* notes 16-18.

22. *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1885) (No. 4,436). See also *supra* notes 10-11.

23. 101 U.S. 99 (1880).

24. 174 U.S. 82 (1899).

25. *E.g.*, Samuels, *supra* note 6, at 326.

26. *Baker*, 101 U.S. at 103.

The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sun light; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas. . . . "The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."²⁷

Although ideas expressed by words were distinguished by the *Holmes* Court from the "order of the words," the Court failed to articulate clearly a dichotomy based upon ideas existing "behind" expressions.

While the nineteenth century American courts had not yet explicitly formulated the dichotomy, at least one English court, in *Hollinrake v. Truswell*,²⁸ developed the terminology in the 1890s that squarely expressed the dichotomy: "Copyright . . . does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed."²⁹ Later in that decade, an English commentator stated the well-entrenched doctrine that "ideas are free" but did not clearly formulate what is protected, other than stating that it is the "material part of a protected work."³⁰

By the 1900s, unprotectible ideas had gradually come to be seen as a separate category from their protectible embodiment. In the legislative hearings for the Copyright Act of 1909,³¹ the

27. *Holmes*, 174 U.S. at 86 (quoting *Jefferys v. Boosey*, 10 Eng. Rep. 681, 702 (H.L. 1854)).

28. 3 Ch. 420 (1894).

29. *Id.* at 427 (Lindley, L.J.) (citing *Baker*, 101 U.S. 99 (1880) as an illustration).

30. A. BIRRELL, *Literary Larceny*, in SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 167, 170 (1899).

31. See, e.g., MEMORANDUM OF NATHAN BURKAN IN ARGUMENTS BEFORE THE COMMITTEES ON PATENTS OF THE SENATE AND HOUSE OF REPRESENTATIVES, CONJOINTLY, ON THE BILLS S. 6330 AND H.R. 19853 215-18 (1906) [hereinafter MEMORANDUM OF NATHAN BURKAN]. The Copyright Act of 1909, 35 Stat. 1075, repealed by Copyright Act of 1976, did not define protectible or unprotectible subject matter.

justification for the idea/expression dichotomy was made clear: "[that] there can be no property in thoughts, conceptions, ideas, sentiments, etc., apart from their association, is clear, for they are then incapable of being identified or owned exclusively."³²

B. *Developments in Twentieth Century Cases*

In *Kalem Co. v. Harper Brothers*,³³ Justice Holmes recounted the state of the idea/expression dichotomy at the turn of the century: copyright does not extend to "the ideas as distinguished from the words in which those ideas are clothed."³⁴ A district court opinion by Judge Learned Hand shows how the distinction was taking form in this country: "[I]t has never been very satisfactorily established, and probably never can be, at what point a plagiarism ceases to copy the expression of an author's ideas and steals only the ideas themselves."³⁵

In the 1920s, the Court of Appeals for the Second Circuit in *Dymow v. Bolton*³⁶ provided an important statement regarding the idea/expression dichotomy: "[I]deas as such are not protected . . . [T]he copyright law protects the means of expressing an idea . . ."³⁷ Later courts have accepted this passage as justification for the view that ideas are not open to protection, while the expressions or illustrations of the ideas are protectible.³⁸

32. MEMORANDUM OF NATHAN BURKAN, *supra* note 31, at 217. The property rationale expressed by Nathan Burkan is still present in modern cases. See, e.g., *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 90 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940) (protectible interest in phonograph recording extends only to copying the recording, and not to the radio broadcast thereof); *Chuck Blore & Don Richman, Inc. v. 20/20 Advertising, Inc.*, 674 F. Supp. 671, 676 (D. Minn. 1987) ("Ideas themselves are non-copyrightable because they can only exist in the mind and thus cannot be the basis of a property interest.").

33. 222 U.S. 55 (1911).

34. *Id.* at 63.

35. *Fitch v. Young*, 230 F. 743, 745-46 (S.D.N.Y. 1916), *aff'd*, 239 F. 1021 (2d Cir. 1917). See also *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947) ("The means of expressing an idea is subject to copyright protection, and where one uses his own method or way of expressing his idea, such adornment constitutes a protectible work.") (emphasis omitted); *Eichel v. Marcin*, 241 F. 404, 408-09 (S.D.N.Y. 1913) ("new arrangement and form of expression" distinguished from "ideas or conceptions").

36. 11 F.2d 690 (2d Cir. 1926).

37. *Id.* at 691. See also *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940) (contrasting a work's "theme" or "ideas" with its "expression").

38. E.g., *MacDonald v. Du Maurier*, 144 F.2d 696, 700 (2d Cir. 1944); *Marx v.*

These courts separate ideas and expressions into either/or categories as other courts have separated a "subject" and the "treatment of a subject" in an either/or contrast.³⁹

Although the idea/expression dichotomy arose in cases of verbatim copying, it gained its importance in cases of non-verbatim copying. In 1930, Judge Learned Hand added a major development to the doctrine. In *Nichols v. Universal Pictures Corp.*,⁴⁰ he formulated a procedure to distinguish an idea from an expression based on the notion of "abstraction." In a case involving similar plots and character types in a play and a screenplay, he spoke of abstracting levels of increasing generality in a work:

Upon any work, and especially upon a play, a great number of patterns of increasing generality 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 of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.⁴¹

The development of characters, plots, themes, and settings can then be analyzed to determine the protected expression. If such a procedure in fact worked, it would give substance to the idea/

United States, 96 F.2d 204, 207 (9th Cir. 1938); *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131, 137-38 (8th Cir.), *cert. denied*, 287 U.S. 666 (1932). The idea/expression dichotomy was not solidified in common law until 1954. *See infra* notes 43-44 and accompanying text. Prior to 1954, courts often contrasted unprotectible and protectible elements of a work without articulating the idea/expression dichotomy. *See, e.g.*, *London v. Biograph Co.*, 231 F. 696, 698 (2d Cir. 1916) (a copyright on a short story did not protect an old and familiar plot — deemed to be common property — but protected only the narrative and embellishments); *Dam v. Kirk La Shelle Co.*, 175 F. 902, 905-08 (2d Cir. 1910), *overruled by* *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940); *Daly v. Webster*, 56 F. 483, 486-87 (2d Cir. 1892), *appeal dismissed*, 163 U.S. 155 (1896) (various incidents in a play, though in themselves common literary property, may create a protectible composition if they are grouped together to form a novel story).

39. *E.g.*, *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162, 164 (1st Cir. 1951), *aff'd*, 344 U.S. 228 (1952) (copyright on a work of art only protects the treatment of a subject, not the subject itself).

40. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

41. *Id.* at 121 (citations omitted).

expression dichotomy.⁴²

The common law view of the idea/expression dichotomy was solidified in the 1950s when the Supreme Court in *Mazer v. Stein*⁴³ stated: "Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea — not the idea itself."⁴⁴ After *Mazer v. Stein*, courts routinely differentiated between unprotectible "ideas, abstract conceptions and similar matters" and the protectible elements in a copyrighted work of the "treatment, expression, . . . incidents and details" by which abstractions are worked out and developed.⁴⁵ Subsequently, most infringement cases involving non-verbatim copying became framed in terms of the idea/expression dichotomy.

C. *The Copyright Act of 1976*

As discussed above,⁴⁶ the common law prior to 1976 viewed ideas and expressions in copyright law as two distinct entities belonging to mutually exclusive categories. The Copyright Act of 1976 codified the idea/expression dichotomy.⁴⁷ Section 102 provides:

(a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.⁴⁸

Subsection (b) depicts ideas as a separate category "described, explained, illustrated, or embodied"⁴⁹ in expressions. This subsection uses the term "form" rather than "expression," but the

42. *But see infra* notes 166-86, 224-26 and accompanying text.

43. 347 U.S. 201 (1954).

44. *Id.* at 217.

45. *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 172 (S.D. Cal. 1955), *aff'd*, 239 F.2d 532 (9th Cir. 1956), *aff'd*, 356 U.S. 43 (1958).

46. *See supra* notes 23-45 and accompanying text.

47. The Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (1989)).

48. 17 U.S.C. § 102 (1989).

49. *Id.* at § 102(b).

legislative history of this section makes clear that "expression" was meant, and that subsection (b) was not considered an innovation.⁵⁰

Subsection (b) in no way enlarges or contracts the scope of copyright protection under the present law. Its 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.⁵¹

The regulations promulgated by the Copyright Office pursuant to the 1976 Act include ideas along with other works not subject to copyright: words and short phrases, blank forms, and works consisting entirely of information that is common property containing no original authorship.⁵²

The 1976 Act also clarifies one element of the idea/expression dichotomy. When expression was contrasted with idea in earlier case law, the term expression usually denoted any embodiment of ideas, not merely those expressions protectible under copyright law. Both subsections of section 102 make it clear, however, that only "original works of authorship" are protectible. Thus expression, in contrast with idea, becomes a term of art in copyright law for protectible original works of authorship.

50. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 87th Cong., 1st Sess., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3 (87th Comm. Print 1961), which states:

Copyright does not preclude others from using the *ideas or information* revealed by the author's work. It pertains to the literary, musical, graphic or artistic *form* in which the author expresses intellectual concepts. It enables him to prevent others from reproducing his individual expression without his consent. But anyone is free to create his own expression of the same concepts, or to make practical use of them, as long as he does not copy the author's *form of expression*.

Id. (emphasis added).

"Form of expression" is a particularly inappropriate phrase for the idea/expression dichotomy for two reasons. First, "expression" as applicable in copyright doctrine is broader than one particular form. See *infra* text accompanying notes 75-78 and 94-107. Second, the phrase, if accepted literally, would introduce a third layer to the situation, i.e., "the form of the expression of the idea."

51. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, 57 (1976) [hereinafter H.R. REP. NO. 1476]; S. REP. NO. 473, 94th Cong., 1st Sess. 115, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5670.

52. 37 C.F.R. § 202.1 (1989).

D. *Justification for the Idea/Expression Dichotomy*

The justification for protecting expressions but not ideas rests in balancing the interests of society in the free flow of information against the property interests of authors. More particularly, the justification comes from balancing first amendment freedom of speech rights against the property interest protected by the copyright clause of the Constitution.⁵³ As the Supreme Court stated in *Harper & Row Publishers, Inc. v. Nation Enterprises*,⁵⁴ "copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still

53. U.S. CONST., art. I, § 8, cl. 8. See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 580 (1985) (Brennan, J., dissenting); *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977) (dictum); *New Era Publications Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir.), *reh'g denied*, 884 F.2d 659 (2d Cir. 1989); *United Video, Inc. v. F.C.C.*, 890 F.2d 1173, 1191 (D.C. Cir. 1989); *Roy Export Co. Establishment of Vaduz v. Columbia Broadcasting Sys.*, 672 F.2d 1095, 1099-1100 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982). See also *Cary v. Longman*, 102 Eng. Rep. 139, 140 n.(b) (K.B. 1785). The *Longman* court quoted Lord Mansfield, C. J., in *Sayre v. Moore*:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

Id.

On the position that the idea/expression dichotomy serves to accommodate the competing interests of copyright law and the first amendment, see Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Goldwag, *Copyright Infringement and the First Amendment*, 29 COPYRIGHT L. SYMP. (ASCAP) 1 (1983); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Shipley, *supra* note 5 at 987-91; Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971); Swanson, *Copyright Versus the First Amendment: Forecasting an End to the Storm*, 7 LOY. ENT. L.J. 263 (1987); Comment, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135 (1984).

For the suggestion that current copyright doctrine which protects expressions but not ideas does not promote creativity and free flow of information, see *Harper & Row*, 471 U.S. at 579 (Brennan, J., dissenting); Hopkins, *Ideas, Their Time Has Come: An Argument and a Proposal for Copyrighting Ideas*, 46 ALB. L. REV. 443 (1982), reprinted in 14 INTELL. PROP. L. REV. 385 (1982); Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393 (1989) (arguing that courts' current use of the idea/expression dichotomy does not balance copyright and first amendment interests).

54. 471 U.S. 539 (1985).

protecting an author's expression.' ”⁵⁵

Justice Brandeis set forth the classic statement of the public interest in the free flow of information: “The general rule of law is, that the noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use.”⁵⁶ In the words of Professor Nimmer:

To grant property status to a mere idea would permit withdrawing the idea from the stock of materials which would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation. This, it is reasoned, would hinder rather than promote the professed purpose of the copyright laws, *i.e.*, “the progress of science and useful arts.” Indeed, it has been said that copyright protection is granted for the very reason that it may persuade authors to make their ideas freely accessible to the public so that they may be used for the intellectual advancement of mankind.⁵⁷

The interest of authors in controlling and exploiting their writings is grounded in the copyright clause of the Constitution which gives Congress the power “[t]o promote the Progress of Science . . . by securing . . . to Authors . . . the exclusive Right to their respective Writings”⁵⁸ The interest embodied in this

55. *Harper & Row*, 471 U.S. at 556 (quoting *Harper & Row Publishers v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985)). See also *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977); *Fantasy, Inc. v. Fogerty*, 664 F. Supp. 1345, 1351 (N.D. Cal. 1987).

56. *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). In a later case, Justice Douglas made a similar point:

The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained. We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect.

Lee v. Runge, 404 U.S. 887, 893 (1971) (Douglas, J., dissenting from denial of certiorari); see also *Harper & Row*, 471 U.S. at 581-82 (Brennan, J., dissenting); *Eichel v. Marcin*, 241 F. 404, 408 (S.D.N.Y. 1913); *Desny v. Wilder*, 46 Cal. 2d 715, 731, 299 P.2d 257, 265 (1956) (ideas are not property but are “as free as the air”); *Fendler v. Morosco*, 253 N.Y. 281, 287, 171 N.E. 56, 58 (1930) (ideas are “free as air”).

57. M. NIMMER & D. NIMMER, 3 NIMMER ON COPYRIGHT § 13.03[A] (1989) (footnotes omitted) [hereinafter 3 NIMMER].

58. U.S. CONST. art. I, § 8, cl. 8. In this clause, “[s]cience” is used in the sense of general knowledge rather than the modern sense of physical or biological science.” *Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. (BNA) 670, 683 (Ct. Cl. 1972), *rev'd on other grounds*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420

clause is ultimately justified by "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors" ⁵⁹ Thereby, the interests of both authors and society are advanced by protecting writings. Ideas, on the other hand, remain unowned and therefore available to all. Thus, the interests of society are ultimately advanced both by copyright protection for expressions and no copyright protection for ideas.

The justification for the idea/expression dichotomy was recently summarized by the District Court for the Southern District of New York:

The idea/expression distinction, although an imprecise tool, has not been abandoned because we have as yet discovered no better way to reconcile the two competing societal interests that provide the rationale for the granting of and restrictions on copyright protection, namely, both rewarding individual ingenuity, and nevertheless allowing progress and improvements based on the same subject matter by others than the original author. ⁶⁰

With this rationale, and with the apparent common sense of the idea/expression dichotomy, it is not surprising that the dichotomy has today attained the status of the central axiom within copyright doctrine of protectibility. ⁶¹ The dichotomy is now routinely applied to all areas of protection, including such recent developments as computer programs. ⁶²

U.S. 376 (1975) (per curiam); *In re Bergy*, 596 F.2d 952, 958 (C.C.P.A. 1979), *aff'd sub nom.* *Diamond v. Chakrabarty*, 447 U.S. 303 (1980). See also Statute of Anne, 8 Anne, c. 19 (1710) ("An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.").

59. *Mazer v. Stein*, 347 U.S. 201, 219 (1954). See also *Harper & Row*, 471 U.S. at 558; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

60. *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987) (citations omitted). See also *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1357 (N.D. Ill. 1989); *Ekern v. Sew/Fit Co.*, 622 F. Supp. 367, 370 (N.D. Ill. 1985); *Pendleton v. Acuff-Rose Publications*, 605 F. Supp. 477, 484 (M.D. Tenn. 1984).

61. See *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 n.5 (2d Cir. 1988); *Whelan Assocs. v. Jaslow Dental Laboratories*, 797 F.2d 1222, 1234 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90-91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 418 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

62. E.g., *Whelan*, 797 F.2d at 1236. "[T]he purpose or function of a utilitarian work

III. The Current Use of "Ideas" and "Expressions" in Copyright Cases

A. "Ideas" and "Expressions"

In the history of Western philosophy, the nature of ideas is an important and recurring topic of discussion. Generally, ideas are discussed as human mental conceptions or representations.⁶³ Ideas are not usually considered to be eternal Platonic forms existing apart from human conceptions and waiting to be thought. A contrast between ideas (concepts and propositions) and expressions has never been an issue. Instead, thinking is viewed as concept manipulation, i.e., a process necessarily involving representations (expressions). The notion of an expressionless idea in such circumstances is totally alien.

Ideas inform writings, and in this sense any meaningful writing is at once both expressions and ideas. Form and substance can be conceptually distinguished to a degree as different aspects of a writing. However, as a component of any writing, substance (idea) shapes the form (expression) and vice versa — neither component can be varied indefinitely without varying the other. The form does not add something to an idea already existing independently of all expression. In addition, a writing's ideas cannot exist apart from some form: from their inception, ideas are themselves *expressions*, and even in their simplest form they will always be expressions. This follows simply and immediately from the fact that all ideas are human conceptions — they cannot exist apart from the only way of conceptualizing, i.e., by expression. Ideas, as well as potentially

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." *Id.* (emphasis omitted); see also *NEC Corp. v. Intel Corp.*, 10 U.S.P.Q.2d (BNA) 1177, 1179 (N.D. Cal. 1989); *Broderbund Software v. Unison World*, 648 F. Supp. 1127, 1132 (N.D. Cal. 1986).

The appropriateness of the application of the idea/expression dichotomy to computer law has been open to discussion. See Halvey, *A Rose by Any Other Name: Computer Programs and the Idea-Expression Distinction*, 34 EMORY L.J. 741, 744 (1985); Stern, *The Centre Will Not Hold—Recent US Developments in Protecting "Idea" Aspects of Computer Software*, 9 EUR. INTELL. PROP. REV. 125 (1987); Note, *The Scope of Copyright Protection for Computer Programs: Exploring the Idea/Expression Dichotomy*, 43 WASH. & LEE L. REV. 1373 (1986).

63. See, e.g., Urmson, *Ideas*, 4 ENCYCLOPEDIA OF PHILOSOPHY 118 (P. Edwards, ed., 1967).

protectible expressions, may be disembodied, but there are no unexpressed ideas.

The idea/expression dichotomy introduces a metaphysics of abstractions and essences behind expressions. Under the 1976 Copyright Act, an idea is not an expression not as yet "fixed in a tangible medium of expression" ⁶⁴ If it were, the idea/expression dichotomy would be redundant and hence superfluous. Rather, both prior to this Act and subsequently, numerous cases speak of ideas apart from expressions, ⁶⁵ or underlying ideas, ⁶⁶ or ideas behind expressions, ⁶⁷ or the embodiment of ideas. ⁶⁸ Contrasting general ideas with particular expressions is also common. ⁶⁹ One court has contrasted protectible expressions with possible ineffable creations, ⁷⁰ as if creations could be conceived without representations.

A central difficulty with the dichotomy is that courts and commentators, while relating ideas to expressions, never define or clarify what exactly they mean by the terms "idea" and "expression." With regard to ideas, sometimes they refer to general concepts ⁷¹ or abstract ideas. ⁷² Professor Nimmer referred to an

64. 17 U.S.C. § 102(a) (1989).

65. See *Ring v. Estee Lauder, Inc.*, 874 F.2d 109, 110 (2d Cir. 1989); *Christianson v. West Publishing Co.*, 149 F.2d 202, 203-04 (9th Cir. 1945); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Richards v. Columbia Broadcasting Sys.*, 161 F. Supp. 516, 518 (D.D.C. 1958).

66. See *Broderbund Software*, 648 F. Supp. at 1132; *Atari, Inc. v. Amusement World*, 547 F. Supp. 222, 228 (D. Md. 1981); *Gentieu v. John Muller & Co.*, 712 F. Supp. 740, 742 (W.D. Mo.), *appeal dismissed*, 881 F.2d 1082 (8th Cir. 1989).

67. See *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986); *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291, 304 (S.D.N.Y. 1977). Cf. *Continental Casualty Co. v. Beardsley*, 253 F.2d 702, 706 (2d Cir.), *cert. denied*; 358 U.S. 816 (1958) (proper standard of infringement allows free use of "the thought beneath the [copyrighted] language").

68. See *Welles v. Columbia Broadcasting Sys.*, 308 F.2d 810, 814 (9th Cir. 1962); *Gero v. Seven-Up Co.*, 535 F. Supp. 212, 216 (E.D.N.Y.), *aff'd*, 714 F.2d 113 (2d Cir. 1982); *Curtis v. Time, Inc.*, 147 F. Supp. 505, 506 (D.D.C. 1957), *aff'd*, 251 F.2d 389 (D.C. Cir. 1958).

69. See *Mattel, Inc. v. Azrak-Hamway Int'l*, 724 F.2d 357, 360 (2d Cir. 1983); *Gund, Inc. v. Smile Int'l*, 691 F. Supp. 642, 644 (E.D.N.Y. 1988), *aff'd*, 872 F.2d 1021 (2d Cir. 1989); *Bowen v. Yankee Network*, 46 F. Supp. 62, 63-64 (D. Mass. 1942).

70. *Columbia Broadcasting Sys. v. DeCosta*, 377 F.2d 315, 320 (1st Cir.), *cert. denied*, 389 U.S. 1007 (1967) (protectible expressions defined as "any concrete, describable manifestation of intellectual creation").

71. *E.g.*, *Mihalek Corp. v. State of Michigan*, 814 F.2d 290, 294 (6th Cir. 1987); *Johnson v. Donaldson*, 3 F. 22, 24 (C.C.S.D.N.Y. 1880). "A copyright secures the proprie-

abstract idea as "an idea unaccompanied by a representation or expression thereof . . .,"⁷³ although he failed to explain how such an entity is possible. Only commitment to the idea/expression dichotomy would lead someone to hypothesize such an entity.

Treating the idea of a work as an abstraction behind or apart from the idea's expression presents certain problems. In particular, many different ideas can be abstracted from a writing depending upon the focus of attention of the person doing the abstracting.⁷⁴ Thus, a work has many different levels of intellectual content — from the outline of the work as a whole down to individual statements or other creations. When a modern court uses the idea/expression dichotomy to determine which of these abstracted statements is protected by copyright it must necessarily impose its own value judgments.

Furthermore, courts are no more helpful in their use of the term "expression." This "troublesome concept"⁷⁵ eludes definition. Dictionaries, reflecting common usage, state that an expression is "an act, process, or instance of representing in a medium."⁷⁶ Instead of following common sense, courts and commentators do not consistently treat expression in copyright doctrine as merely the embodiment of an idea in a tangible medium. Rather, courts and commentators usually distinguish expression from idea by examining the degree of detail, arrangement and development in the writing.⁷⁷ Such features of a writing as its style become protected elements of the writing, in contrast with the writing's idea.⁷⁸

tor against the copying, by others, of the original work, but does not confer upon him a monopoly in the intellectual conceptions which it expresses." *Id.*

72. *E.g.*, *Merritt Forbes & Co. v. Newman Inv. Sec.*, 604 F. Supp. 943, 949 (S.D.N.Y. 1985); *Grove Press v. Greenleaf Publishing Co.*, 247 F. Supp. 518, 525 (E.D.N.Y. 1965); *Uneeda Doll Co. v. P & M Doll Co.*, 241 F. Supp. 675, 677 (S.D.N.Y.), *aff'd*, 353 F.2d 788 (2d Cir. 1965).

73. *Nimmer, The Law of Ideas*, 27 S. CAL. L. REV. 119, 119 (1954).

74. *See infra* notes 167-79 and accompanying text.

75. *Harper & Row Publishers v. Nation Enters.*, 723 F.2d 195, 204 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

76. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 439 (1986).

77. *E.g.*, *Harper & Row*, 723 F.2d at 203; *Gordon v. Weir*, 111 F. Supp. 117, 122 (E.D. Mich. 1953), *aff'd*, 216 F.2d 508 (6th Cir. 1954).

78. *E.g.*, *Chuck Blore & Don Richman, Inc. v. 20/20 Advertising, Inc.*, 674 F. Supp. 671, 677-78 (D. Minn. 1987); *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706,

Courts state that the particular expression⁷⁹ or "arrangement of words the author uses to express" ideas is protectible⁸⁰ but the idea is not.⁸¹ However, not every embodiment of an idea is protected — only certain expressions are protectible.⁸² Thus, when courts refer to the term "expression" in this context, they are actually referring only to those expressions protectible by copyright law.⁸³ Courts thereby produce an ambiguity when they use the term "expression," or relate ideas to expressions, without making clear that not all expressions are protectible.

Overall, courts are not consistent in their use of either idea or expression.⁸⁴ Some courts appear to use the term "idea" to refer to unprotectible "abstractions."⁸⁵ Other courts have used the term "idea" to mean any unprotected expressions in a protected writing.⁸⁶ "Expression" is sometimes used by courts to mean any concrete embodiment of an idea (whether protectible or not).⁸⁷ In another case the term appears to denote only the protectible elements in a writing (i.e., certain developments or treatments of the writing's subject matter).⁸⁸

712 (S.D.N.Y. 1987); *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941).

79. *E.g.*, *Eden Toys v. Marshall Field & Co.*, 675 F.2d 498, 500 (2d Cir. 1982); *Past Pluto Prods. Corp. v. Dana*, 627 F. Supp. 1435, 1441 (S.D.N.Y. 1986).

80. *Holmes v. Hurst*, 174 U.S. 82, 86 (1899) (the right is to that arrangement of words which the author has selected to express his ideas); *Feder v. Videotrip Corp.*, 697 F. Supp. 1165, 1169 (D. Colo. 1988).

81. *E.g.*, *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Uneeda Doll Co., v. P & M Doll Co.*, 353 F.2d 788, 789 (2d Cir. 1965) (per curiam); *Raffoler, Ltd. v. Peabody & Wright, Ltd.*, 671 F. Supp. 947, 951 (E.D.N.Y. 1987).

82. *See, e.g., infra* notes 97-100, 118-20, 125-31 and accompanying text.

83. *See infra* notes 95, 98-100, 125-28 and accompanying text for examples of unprotectible expressions.

84. A term is occasionally used in two different senses in the law, but the different uses are usually made clear. For example, consider the use of "publication" under the 1909 Act. *See Roy Export Co. Establishment of Vaduz v. Columbia Broadcasting Sys.*, 672 F.2d 1095, 1101-02 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982); 1 NIMMER, *supra* note 5, at § 4.12[A]. However, the different uses can cause confusion. *See Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1357-58 (N.D. Ill. 1989) (on copying and substantial similarity).

85. *E.g.*, *Atari, Inc. v. Amusement World*, 547 F. Supp. 222, 228 (D. Md. 1981); *See also Broderbund Software v. Unison World*, 648 F. Supp. 1127 (N.D. Cal. 1986).

86. *E.g.*, *Midway Mfg. Co. v. Bandai-America*, 546 F. Supp. 125, 148 (D.N.J. 1982), *aff'd*, 775 F.2d 70 (3d Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

87. *E.g.*, *Dollcraft Indus., Ltd. v. Well-Made Toy Mfg. Co.*, 479 F. Supp. 1105, 1113 (E.D.N.Y. 1978).

88. *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1110 (E.D.N.Y.), *aff'd*,

Because both “idea” and “expression” are used in these two different senses, the idea/expression dichotomy may have any of four different meanings: (1) It may mean the important distinction between the subject matter of a work and protectible expressions in the work;⁸⁹ (2) It may mean the distinction between unprotectible and protectible expressions;⁹⁰ (3) It may mean a distinction between the subject matter of a work and unprotected expressions;⁹¹ or (4) It may mean a distinction from earlier times between disembodied ideas and any embodiment of them.⁹²

The idea/expression dichotomy conflates these possible distinctions — two of which are important to copyright law and two of which are irrelevant — under the guise of an insupportable distinction between ideas and expressions. As discussed earlier, there are no such things as unexpressed ideas or idealess expressions.⁹³ At a minimum, having as an axiom a dichotomy that uses each key term in two different senses strongly suggests that there is room for clarification in copyright doctrine. Even if used consistently, the terms “ideas” and “expressions” become inartful terms of art. They become terms whose ordinary denotations can easily become confused with various specialized meanings used in the context of copyright law.

B. *Illustrations of the Problem of Applying the Idea/Expression Dichotomy*

The courts’ lack of clarity concerning the terms “idea” and “expression” immediately presents problems in applying the supposed dichotomy. For instance, all of the items listed as unprotectible in section 102(b) of the 1976 Copyright

788 F.2d 2 (2d Cir. 1985); *Suid v. Newsweek Magazine*, 503 F. Supp. 146, 147 (D.D.C. 1980).

89. This distinction does not require abstraction or the notion of unexpressed ideas. See *infra* notes 217-42 and accompanying text.

90. This distinction is crucial for infringement cases, but it also does not require abstraction or any notion of expressions behind those actually present in the works at issue. See *infra* notes 243-67 and accompanying text.

91. Such a distinction is irrelevant to copyright law, since only identifying protectible expression is relevant.

92. This distinction is also irrelevant to copyright law, since once again only protectible expressions are relevant.

93. See *supra* notes 63-64 and accompanying text.

Act⁹⁴ — “idea, procedure, process, system, method of operation, concept, principle, or discovery”⁹⁵ — have one thing in common: each of the items involves a mental conception that is inextricably tied to some vehicle of expression.⁹⁶ Since none of them can exist apart from an expression, each is an expression. For example, “process” may include natural processes which, of course, are neither expressions nor ideas; they exist independent of our mental conceptions. However, any person’s attempt to conceive or articulate such a process — as with any technical process devised by researchers, systems, principles, and “methods of operation” — necessarily involves human categories of expression and thus is necessarily an expression.

Although courts have not consistently defined the basic terms “idea” or “expression,” they apply the idea/expression dichotomy to all areas of works in determining what is protectible. Ordinary phrases such as titles, names, slogans, mottos, brief labels, catch phrases, and short advertising expressions are ordinarily held to be unprotectible.⁹⁷ These phrases are, however, also expressions in the ordinary sense of the word. Often a great amount of creativity is invested in finding an appropriate title. Conversely, a novel as a whole consists no less of ideas than does its title. But only short phrases are considered unprotectible ideas. In order to use the idea/expression dichotomy in this hypothetical, therefore, some expressions (such as the title) must be termed “ideas,” and the term “idea” becomes a term of art.

In the realm of entertainment, labelling expressions as unprotectible ideas occurs constantly. The general theme and plot of literary works are considered unprotectible.⁹⁸ The rules and

94. 17 U.S.C. § 102(b) (1989).

95. *Id.*

96. See *supra* notes 63-64 and accompanying text.

97. *E.g.*, *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989); *Salinger v. Random House*, 811 F.2d 90, 98 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); *Warner Bros. Pictures v. Majestic Pictures Corp.*, 70 F.2d 310, 311-13 (2d Cir. 1934); *Sebastian Int'l v. Consumer Contact (PTY) Ltd.*, 664 F. Supp. 909, 913 (D.N.J. 1987); *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978); *Gray v. Eskimo Pie Corp.*, 244 F. Supp. 785, 788 (D. Del. 1965). In the words of the Copyright Office Circular 34 (1986): “Even if a name, title, or short phrase is novel, distinctive, or lends itself to a play on words, it cannot be protected by copyright.” See also 37 C.F.R. § 202.1(a) (1989); *supra* notes 40-42 and accompanying text.

98. *E.g.*, *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); *Hearn v. Meyer*, 664 F. Supp. 832, 851 (S.D.N.Y. 1987); *Rokeach v. Avco*

ideas for games are also unprotectible.⁹⁹ Similarly, *scènes à faire* (i.e., incidents, characters and settings which as a practical matter are indispensable or standard in the treatment of a given topic) are unprotectible.¹⁰⁰ Yet each of these unprotectible items clearly must involve some form of expression — there can be no theme, plot, incident or rule existing apart from an expression.

Cartoon or graphic characters are protectible independent of the works in which they appear if they exhibit sufficiently original delineation.¹⁰¹ However, protection of literary fictional characters is more problematic than protection of characters which are expressed by visual images.¹⁰² The rationale is that “it

Embassy Pictures Corp., 197 U.S.P.Q. (BNA) 155, 160 (S.D.N.Y. 1978); Caruthers v. R.K.O. Radio Pictures, 20 F. Supp. 906, 907-08 (S.D.N.Y. 1937); Wiren v. Shubert Theatre Corp., 5 F. Supp. 358, 363 (S.D.N.Y. 1933), *aff'd*, 70 F.2d 1023 (2d Cir.), *cert. denied*, 293 U.S. 591 (1934); Weitzenkorn v. Lesser, 40 Cal. 2d 778, 789, 256 P.2d 947, 956 (1953); Golding v. R.K.O. Pictures, 35 Cal. 2d 690, 697, 221 P.2d 95, 99 (1950); Klekas v. EMI Films, Inc., 150 Cal. App. 3d 1102, 1111 n.5, 198 Cal. Rptr. 296, 301 n.5 (1984).

99. Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 617 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); William Elecs., Inc. v. Bally Mfg. Corp., 568 F. Supp. 1274, 1278 (N.D. Ill. 1983); Russell v. Northeastern Publishing Co., 7 F. Supp. 571, 572 (D. Mass. 1934); Whist Club v. Foster, 42 F.2d 782 (S.D.N.Y. 1929).

100. On the relation of this doctrine to the idea/expression dichotomy, see *Landsberg v. Scrabble Crossword Game Players*, 736 F.2d 485, 489 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984), *aff'd and modified after remand*, 802 F.2d 1193 (9th Cir. 1986); See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983); Walker v. Time Life Films, 615 F. Supp. 430, 436 (S.D.N.Y. 1985), *aff'd*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Haley*, 460 F. Supp. at 45.

Courts differ on whether *scènes à faire* are unprotectible, see *Hoehling v. Universal City Studios*, 618 F.2d 972, 979-80 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *Klekas*, 150 Cal. App. 3d at 1113-14, 198 Cal. Rptr. at 303, or are copyrightable but protected only against identical copying, see *Atari Games Corp. v. Oman*, 888 F.2d 878, 886 (D.C. Cir. 1989).

101. *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1521 n.5 (S.D.N.Y. 1988); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610 (2d Cir. 1982) (issue expressly left open); *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60, 62-66 (S.D.N.Y.), *aff'd in part and rev'd in part*, 668 F.2d 91 (2d Cir. 1981).

102. *Silverman v. Columbia Broadcasting Sys.*, 632 F. Supp. 1344, 1355 (S.D.N.Y. 1986), *aff'd in part and vacated in part*, 870 F.2d 40 (2d Cir. 1989). The Second Circuit grants more protection to literary characters than does the Ninth. See *Anderson v. Stal-lone*, 1989 Copyright L. Dec. (CCH), ¶ 26,427 at 22,670 (1989); *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 240-41 (2d Cir. 1983) (discussing Ninth Circuit cases); *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Group*, 443 F. Supp. 291, 301 n.8 (S.D.N.Y. 1977) (refusing to apply Ninth Circuit precedent). Compare *Columbia Broadcasting Sys. v. DeCosta*, 377 F.2d 315, 320-21 (1st Cir.), *cert. denied*, 389 U.S. 1007, (1967). On the issue of whether literary characters should be copyrightable, see, e.g.,

is difficult to delineate distinctively a literary character," while this difficulty is reduced with use of visual images.¹⁰³ All characters, visual or literary, require expressions, and it is therefore not clear why some characters should be treated as ideas rather than expressions¹⁰⁴ merely because they are expressed in words rather than visual images. Likewise, highly distinctive (and hence protectible) characters fall into broad descriptive categories and hence are no less ideas than stock characterizations.

The idea/expression dichotomy is also problematic in the areas of visual and non-verbal audio copyrightable material. What is the idea behind a piece of protectible music? What intellectual content is expressed? Music may be written on a theme, and, as with other works of art, may be symbolic. But no separate idea is expressed.¹⁰⁵ Nor can there be a piece of music apart from an expression. Similarly, what idea is there behind a photograph, painting or sculpture?¹⁰⁶ Art may be produced upon a theme and may elicit emotions, but no ideas in the usual sense of the term are "expressed." Rather, there exists only the subject portrayed from a particular point of view. Stating that a portrait of Mona Lisa is the "idea" behind Leonardo da Vinci's portrait of her is unilluminating at best. Even if themes expressed in art could be viewed under the artificial approach of the idea/expression dichotomy, such a framework would not aid the decision-making process.¹⁰⁷

Brylawski, *Protection of Characters — Sam Spade Revisited*, 22 BULL. COPY. SOC'Y 77 (1974); Kellerman, *The Legal Protection of Fictional Characters*, 25 BROOKLYN L. REV. 3 (1959); Marks, *The Legal Rights of Fictional Characters*, 25 COPYRIGHT L. SYMP. (ASCAP) 35 (1980).

103. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979). See also Simensky, *Protection of Character Rights*, 3 ENT. & SPORTS LAW. 4, 9, 13 (1985).

104. See *Warner Bros.*, 720 F.2d at 243; *Air Pirates*, 581 F.2d at 755; *Novak v. National Broadcasting Co.*, 716 F. Supp. 745, 753 (S.D.N.Y. 1989).

105. See Comment, *An Improved Framework for Music Plagiarism*, 76 CALIF. L. REV. 421, 443 (1988). See also *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 n.5 (2d Cir. 1988).

106. See *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1181-82 (5th Cir. 1980) (Brown, J., concurring); 1 NIMMER, *supra* note 5, at § 1.10[C][2]; Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPPERDINE L. REV. 571, 590-91 (1987).

107. See *infra* notes 243-47 and accompanying text.

C. *Facts and Factual Works*

Facts, like ideas, are not copyrightable,¹⁰⁸ but expression of these facts is protected.¹⁰⁹ Facts are considered to be discovered, not created, and therefore are not original works of authorship.¹¹⁰ Factual works are of two types: compilations of facts (e.g., directories)¹¹¹ and narrative works (e.g., news reports or historical or biographical reports). For directories, only the compilation itself is protectible if: (1) an author's selection and arrangement of the items is original¹¹² or (2) the author expended

108. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); *Business Trends Analysts v. Freedonia Group*, 887 F.2d 399, 403 (2d Cir. 1989) ("factual information"); *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989); *Financial Information, Inc. v. Moody's Investors*, 751 F.2d 501, 504-05 (2d Cir. 1984), *cert. denied*, 484 U.S. 820 (1987); *Miller v. Universal City Studios*, 650 F.2d 1365, 1368 (5th Cir. 1981); *Hoehling v. Universal Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Houts v. Universal City Studios*, 603 F. Supp. 26, 28 (C.D. Cal. 1984); *Triangle Publications, Inc. v. Sports Eye, Inc.*, 415 F. Supp. 682, 685 n.9 (E.D. Pa. 1976) ("For the purposes of copyright infringement, data and ideas are treated as equivalents."); *Norman v. Columbia Broadcasting Sys.*, 333 F. Supp. 788, 797 (S.D.N.Y. 1971); *Greenbie v. Noble*, 151 F. Supp. 45, 65-66 (S.D.N.Y. 1957). "[C]opyright does not preclude others from using the ideas or information revealed by the author's work." H.R. REP. NO. 1476, *supra* note 51, at 56-57. See generally Gorman, *Fact or Fancy? The Implications for Copyright: The Twelfth Annual Donald C. Brace Memorial Lecture*, 29 J. COPYRIGHT SOC'Y 560, 560 (1982).

109. *Business Trends Analysts*, 700 F. Supp. 1213, 1230 (S.D.N.Y. 1988); *New Era Publications Int'l, ApS v. Henry Holt and Co.*, 695 F. Supp. 1493, 1504 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989), *reh'g denied*, 884 F.2d 659 (1989); *cert. denied*, 110 S. Ct. 1168 (1990).

110. *Houts*, 603 F. Supp. at 28; 1 NIMMER, *supra* note 5, at § 2.11[A].

111. On compilations, see 17 U.S.C. §§ 101, 103 (1989). On directories, see *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922). See Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981), reprinted in 6 ARTS & L. 96 (1981); Ginsburg, *Fact Works Revisited*, 192 N.Y.L.J., July 19, 1984, at 1, col. 1.

112. On the "selection and arrangement" rationale, see *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 438 (4th Cir. 1986); *Eckes v. Card Price Updates*, 736 F.2d 859, 862 (2d Cir. 1984); *Financial Information*, 751 F.2d at 504-05; *Leon*, 91 F.2d at 485; *Jeweler's Circular Publishing Co.*, 281 F. at 84-86; *National Business Lists v. Dun & Bradstreet*, 552 F. Supp. 89, 94 (N.D. Ill. 1982). See Latman & Ginsburg, *Copyright Law: Facts, Phone Books*, 191 N.Y.L.J., May 18, 1984, at 1, col. 1.

Historical (chronological) order is unprotectible even if embedded in a protectible narrative. In the words of Judge Hand, "[T]here cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection, although into that selection may go the highest genius of authorship, for indeed, history depends

labor in either gathering the items one by one, or in arranging them into mechanical (and hence unprotectible) categories (i.e., alphabetical, numerical or chronological order).¹¹³ Hence, compilations are considered protectible writings even if the labor expended — the “sweat of the brow” — is the only original contribution of the author. These factual works may require unique treatment in copyright law, but one may rightly inquire: if the dichotomy is indeed applicable to any copyrightable work, can labor be equated with expression?

Narrative works involve the protectible expression of unprotectible facts and theories.¹¹⁴ What is protectible in narrative works is the manner of an author's interpretation or analysis of events, or the manner in which the author structures material and marshals the facts. Thus, in narrative works, copyright equates an author's choice of words and emphasis in particular developments with expression, and protects such developments.¹¹⁵

The distinction between facts and expression in factual works is no better grounded than drawing a distinction between

wholly upon a selection from the undifferentiated mass of recorded facts.” *Norman*, 333 F. Supp. at 796-97 (quoting *Myers v. Mail & Express Co.*, 36 C.O. Bull. 478, 479 (S.D.N.Y. Sept. 23, 1919)).

113. On the “sweat of the brow” rationale, see *Schroeder*, 566 F.2d at 5; *Leon*, 91 F.2d at 486; *Rand McNally & Co. v. Fleet Management Sys.*, 591 F. Supp. 726, 733-34 (N.D. Ill. 1983), *reh'g denied*; 634 F. Supp. 604 (N.D. Ill. 1986); *Southwestern Bell Tel. Co. v. Nationwide Indep. Directory Serv.*, 371 F. Supp. 900, 906 (W.D. Ark. 1974); *Triangle Publications v. New England Newspaper Publishing Co.*, 46 F. Supp. 198, 201 (D. Mass. 1942).

114. On narrative factual works in general, see Hill, *Copyright Protection for Historical Research: A Defense of the Minority View*, 31 COPYRIGHT L. SYMP. (ASCAP) 45 (1984); Shipley & Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C.L. REV. 125 (1984); Taylor, *The Uncopyrightability of Historical Matters: Protecting Form Over Substance and Fiction Over Fact*, 30 COPYRIGHT L. SYMP. (ASCAP) 33 (1983).

115. *Wainwright Sec. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). See also *Werlin v. Reader's Digest Ass'n*, 528 F. Supp. 451, 461-63 (S.D.N.Y. 1981); *McMahon v. Prentice-Hall*, 486 F. Supp. 1296, 1303 (E.D. Mo. 1980); *McGraw-Hill v. Worth Publishers*, 335 F. Supp. 415, 420-21 (S.D.N.Y. 1971). The Northern District of Illinois has recently presented the only exception to this position. That court held in *Nash v. CBS*, 691 F. Supp. 140, 143 (N.D. Ill. 1988) that “interpretative theories based on historical facts are copyrightable,” not merely the expressions of such theories. See also *Nash v. CBS*, 704 F. Supp. 823, 828 (N.D. Ill. 1989), *aff'd*, 899 F.2d 1537 (2d Cir. 1990) (court found interpretative “story” copyrightable but dismissed copyright claims on other grounds).

idea and expression. Facts require some conceptualization.¹¹⁶ While material objects and events exist apart from our expressions, facts are merely our conceptualizations of these objects and events. That is, a pen exists apart from our expressions, but that "the pen is on the table" or "the pen is red" is a fact, and each fact requires some conceptual element. Because facts cannot exist without conceptualization, there can be no unexpressed facts. The same is true of events and our histories of these events — the events themselves do not supply our descriptive and explanatory categories used to create our historical accounts. Thus, facts are inherently expressions. However, facts are not physical objects or events but statements regarding physical objects and events; in this respect they are in the same category as those expressions traditionally labelled ideas under the idea/expression dichotomy.

Simple factual expressions are statements describing objects or events using comparatively simple descriptive categories. Under such circumstances, there is no separate information apart from the expression — the information is the data itself. Such factual data do not express any unprotected information "behind" themselves. It is thus impossible to use the factual information without using the expression the facts are embodied in¹¹⁷ or claiming that the protection of a fact extends only to its expression and not its content.

Similarly, the expression of factual research is the facts themselves. This was recognized in a case involving historical research by the Court of Appeals for the Fifth Circuit in *Miller v. Universal City Studios, Inc.*¹¹⁸ when it held that facts, the expression of facts, and the research used to discover the facts are all uncopyrightable.¹¹⁹ The court reasoned that "[t]o hold that research is copyrightable is no more or no less than to hold that the facts discovered as a result of research are entitled to copyright protection."¹²⁰ Such expressions are not considered original

116. N. HANSON, OBSERVATION AND EXPLANATION 12 (1971) (discussing the "theory-ladenness" of facts and observations).

117. *Contra* Suid v. Newsweek Magazine, 503 F. Supp. 146, 147 (D.D.C. 1980); H.R. REP. NO. 1476, *supra* note 57, at 56-57.

118. 650 F.2d 1365 (5th Cir. 1981).

119. *Id.* at 1368-69.

120. *Id.* at 1372. *See also* Worth v. Selchow & Righter Co., 827 F.2d 569, 573 (9th

works of authorship.

More complicated factual expressions in narrative works may evidence original authorship. Thus, Albert Einstein could copyright books explaining " $E = mc^2$," despite the fact that the simplest statements of the theory of relativity are unprotectible. Using the idea/expression dichotomy does not help courts to differentiate the protectible from the unprotectible in factual works.¹²¹ Nor does it aid in determining whether protection should extend only to the author's chosen language or chosen structural arrangement of the facts.¹²²

Whether factual works are actually different from other works in their union of expression with what is expressed is questionable. With simple factual statements, "forms of expressions . . . cannot be varied without altering the idea[s]," that is, the facts involved.¹²³ This, however, is true in any writing and its subject matter: the form of the writing does not add something to its content (its idea), but shapes it, and vice versa.¹²⁴ Because of the simplicity of many factual statements, factual works may differ by degree from other works in how integral the form is to the content of a writing. Nevertheless, all writings share this characteristic.

D. *Merger of Idea and Expression*

In factual and other works in which courts consider there to be only a narrow range of expression for a subject,¹²⁵ a special doctrine enters the analysis — the merger of idea with expression. This doctrine holds that when an idea can only be expressed in a certain way, the expression is not protectible.¹²⁶ The

Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Miller*, 650 F.2d at 1372.

121. *Harper & Row Publishers v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

122. *Id.*

123. *Atari, Inc. v. Amusement World*, 547 F. Supp. 222, 228 (D. Md. 1981). See generally Jones, *Is There a Property Interest in Scientific Research Data?*, 1 HIGH TECH. L.J. 447 (1986).

124. See *supra* notes 63-64 and accompanying text.

125. *Landsberg v. Scrabble Crossword Game Players*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 496 U.S. 1037 (1984).

126. See *Frybarger v. International Business Mach. Corp.*, 812 F.2d 525, 530 (9th Cir. 1987); *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 320 (9th Cir. 1987); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 436 (4th Cir. 1986); *Toro Co. v. R & R Prods.*

origins of this doctrine can be traced to the case of *Baker v. Selden*,¹²⁷ in which the Court examined whether blank accounting forms resulted in the merger of the unprotected system of accounting and its expression and were thus unprotectible.¹²⁸

The Court of Appeals for the Ninth Circuit stated the merger doctrine as follows: "If, in describing how a work is expressed, the description differs little from a simple description of what the work is, then idea and expression coincide."¹²⁹ In the words of another court, "if a work cannot be described in abstract terms, the expression adds nothing to the idea."¹³⁰ Thus, when expressions are so simple and straightforward that they virtually spring directly from the unprotectible material, there is "no original creative authorship."¹³¹

Courts recognize degrees of merger.¹³² Sometimes an expression is considered indispensable or necessary to an idea.¹³³ In

Co., 787 F.2d 1208, 1212 (8th Cir. 1986); *Goodson-Todman Enters., Ltd. v. Kellogg Co.*, 358 F. Supp. 1245, 1247 (C.D. Cal. 1973), *rev'd*, 513 F.2d 913 (9th Cir. 1975).

Merger is a major doctrine today in computer cases. *See, e.g.*, *Apple Computer v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); *NEC Corp. v. Intel Corp.*, 10 U.S.P.Q.2d (BNA) 1177, 1179 (N.D. Cal. 1989); *Digital Communications v. Softklone Distrib. Corp.*, 659 F. Supp. 449, 457-58 (N.D. Ga. 1987); *Broderbund Software v. Unison World*, 648 F. Supp. 1127, 1131 (N.D. Cal. 1986); *Atari*, 547 F. Supp. at 228.

127. 101 U.S. 99 (1879).

128. *Id.* at 101-03. *See also* *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987); *National Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352-53 (S.D. Cal. 1988); *Digital Communications*, 659 F. Supp. at 457. *See also* *Merritt Forbes & Co. v. Newman Inv. Sec.*, 604 F. Supp. 943, 951 (S.D.N.Y. 1985) (requisite originality for copyrightable material may be missing when the form of an expression is dictated solely by functional considerations).

129. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1168 n.10 (9th Cir. 1977); *see also* *Concrete Machinery Co. v. Classic Lawn Ornaments*, 843 F.2d 600, 606 (1st Cir.), *aff'd*, 867 F.2d 606 (1st Cir. 1988). The *Concrete Machinery* court stated that "[a]s idea and expression merge, fewer and fewer aspects of a work embody a unique and creative expression of the idea . . ." *Id.* at 607.

130. *Midway Mfg. Co. v. Bandai-America, Inc.*, 546 F. Supp. 125, 148 n.23 (D.N.J. 1982), *cert. denied*, 475 U.S. 1047 (1986).

131. *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967) (quoting *Morrissey v. Proctor & Gamble Co.*, 262 F. Supp. 737, 738 (D. Mass. 1967)).

132. Some commentators differentiate different types of merger. *See, e.g.*, *Francione, Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519, 573 n.265 (1986); W. PATRY, *supra* note 5, at 33.

133. *Atari, Inc. v. North Am. Phillips Consumer Elec. Corp.*, 672 F.2d 607, 616 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) (quoting *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971)); *Sid & Marty Krofft*, 562 F.2d at 1168

such circumstances, protecting the expression would confer a monopoly on the idea contrary to the intent of copyright law.¹³⁴ Consequently, copyright protection is not given "to a form of expression necessarily dictated by the underlying subject matter."¹³⁵ Copying any amount of such inseparable expressions is permitted.¹³⁶ In certain other circumstances, courts conclude that ideas and expressions are not inseparable, but that only a limited variation in the expression of an idea is possible; here, infringement occurs only with wholesale appropriation of a writing.¹³⁷ Thus, under this doctrine, the scope of protection for the writings increases only with the possibility of a variety of

(quoting *Kalpakian*, 446 F.2d at 742).

134. *Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co.*, 509 F.2d 64, 65 (2d Cir. 1974); *Kalpakian*, 446 F.2d at 742.

135. *Freedman v. Grolier Enterprises*, 179 U.S.P.Q. (BNA) 476, 478 (S.D.N.Y. 1973). See *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 436 (4th Cir. 1986); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981) (part of the jury instruction was not questioned by the district or the circuit court); *Broderbund Software, Inc. v. Unison World*, 648 F. Supp. 1127, 1131-32 (N.D. Cal. 1986).

136. See *Johnson Controls v. Phoenix Control Sys.*, 886 F.2d 1173, 1175 (9th Cir. 1989); *Concrete Mach. Co. v. Classic Lawn Ornaments*, 843 F.2d 600, 606-09. If, as the idea/expression dichotomy requires, ideas are truly unprotectible and also are not expressions, then any appropriation of ideas should not be protected against by copyright law. See *Whitfield v. Lear*, 582 F. Supp. 1186, 1188-89 (E.D.N.Y.), *rev'd on other grounds*, 751 F.2d 90 (2d Cir. 1984). Under the idea/expression dichotomy, it is conceptually clearer to say that when idea and expression merge completely, the expression is uncopyrightable rather than to argue that the expression is copyrightable but has no scope of protection. That is, the limit of copyrightability is reached when expression and idea merge, since priority is given to the free flow of information. See *National Theme Prods. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352-53 (S.D. Cal. 1988); *Digital Communications v. Softklone Distrib. Corp.*, 659 F. Supp. 449, 457 (N.D. Ga. 1987).

137. *Frybarger v. International Business Mach. Corp.*, 812 F.2d 525, 530 (9th Cir. 1987) (extended protection against virtually identical copying); *Landsberg v. Scrabble Crossword Game Players*, 736 F.2d 485, 489 (9th Cir. 1984), *cert. denied*, 496 U.S. 1037 (1984); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979-80 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); see generally *Atari*, 672 F.2d at 616; *Kalpakian*, 446 F.2d at 742; *Past Pluto Prod. Corp. v. Dana*, 627 F. Supp. 1435, 1444 (S.D.N.Y. 1986) (protection only against identical copying); *Worlds of Wonder v. Vector Intercontinental*, 653 F. Supp. 135, 139 (N.D. Ohio 1986); *Eckes v. Suffolk Collectables & C.P.U.*, 575 F. Supp. 459, 462 (S.D.N.Y. 1983) ("wholesale appropriation of form of expression"), *rev'd on other grounds*, 736 F.2d 859 (2d Cir. 1984). Courts have stated that, when expression and idea converge, the resulting expression is entitled only to a "weak" copyright protection (since the only protection is against identical copying). See *Franklin Mint Corp. v. National Wildlife Art Exch.*, 575 F.2d 62, 65 (3d Cir. 1978); *First Am. Artificial Flowers, Inc. v. Joseph Markovits, Inc.*, 342 F. Supp. 178, 186-87 (S.D.N.Y. 1972).

expressions.¹³⁸

The merger doctrine is open to criticism. It merely represents an epicycle generated by the faulty metaphysics of the idea/expression dichotomy: an "expression" would never be taken as adding anything to an "idea" unless an idea is treated as an abstract entity behind the expression.¹³⁹ Merger presupposes that normally there is room for substantial variation in the expression of ideas; only when there is little choice in the expression does the expression collapse into the idea.¹⁴⁰ But, as discussed above,¹⁴¹ this is also true of expressions in all contexts since the form and content of a writing shape each other. Writings at best differ from one another only in degree.

In addition, in virtually any context — certainly in the contexts discussed in the reported merger cases — some variation in expression of the allegedly abstracted idea is always possible.¹⁴² Ideas (statements of the intellectual content of other statements) can be incorporated into at least some alternative sets of expressions and still convey the same meaning. Even the courts' characterizations of the merger doctrine, noted above,¹⁴³

138. *M. Kramer Mfg.*, 783 F.2d at 435-38; *Cooling Systems and Flexibles v. Stuart Radiator*, 777 F.2d 485, 491 (9th Cir. 1985); *Sid & Marty Krofft Television Prod. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977).

139. See *supra* notes 63-64 and accompanying text.

140. The doctrine in *Baker*, 101 U.S. 99, 101-03 (1879), is open to the same criticism as merger. In the words of Professor Nimmer: "It is factually erroneous to conclude that there is any system or method which can be performed by the use of only one particular form of written expression." 1 NIMMER, *supra* note 4, at § 2.18[C]. Nimmer would permit copyrighting works designed for recording information if they "evinced considerable originality in suggestions of specific items of information which are to be recorded, and in the arrangement of such items." *Id.* See *Whelan Assocs. v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1242-43 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

141. See *supra* notes 63-65 and accompanying text.

142. The Court of Appeals for the Ninth Circuit has suggested that merger renders the idea/expression dichotomy relevant only to infringement rather than to copyrightability. See *NEC Corp. v. Intel Corp.*, 10 U.S.P.Q.2d (BNA) 1177, 1179 (N.D. Cal. 1989). Professor Nimmer has said: "This fundamental distinction [of "expression" and "idea"] . . . constitutes not so much a limitation on the copyrightability of works, as it is a measure of the degree of similarity which must exist as between a copyrightable work and an unauthorized copy, in order to constitute the latter an infringement." 1 NIMMER, *supra* note 5, at § 2.03[D]. It is true that the creativity or lack of creativity in a writing may become apparent only after another author attempts to write about the same subject. As argued here, the distinction of idea from expression is not relevant to either copyrightability or infringement.

143. See *supra* notes 132-38 and accompanying text.

admit that some variation is possible. The two sets of sweepstakes rules at issue in *Morrissey v. Proctor & Gamble*¹⁴⁴ were virtually identical, but other expressions could accomplish the same end. The bee pins at issue in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*¹⁴⁵ were visually distinguishable and reflect a common idea only because the court, imposing its own value judgments,¹⁴⁶ constructed a common idea. Even scientific research may be conducted with different measuring systems, with the resulting data differing in expression, if not in substance.¹⁴⁷ Thus, the extreme scenario of an idea with only one means of expression, as envisioned by the merger doctrine, will never be reached.

In short, the entire scheme of possible variety of expressions, versus the lack of such variety, is misconceived. Although the merger doctrine is based on the idea/expression dichotomy, there is also a fundamental inconsistency between the underlying idea/expression dichotomy doctrine and the merger doctrine. Abstracted ideas and expressions can merge only if they are the same type of entities — if they were truly and irredeemably different, they could never have enough in common to merge. In short, ideas must be expressions, or expressions ideas, for merger to occur. Even if idea and expression are differentiated only by the degree of detail in the expression, merger is not possible — under the idea/expression dichotomy, something is either an idea or an expression and cannot simultaneously be both. “Idea” and “expression” remain either/or categories. Thus, a court cannot state that an “idea and the expression will coincide when the expression provides nothing new or additional over the idea”¹⁴⁸ and at the same time consistently adhere to the idea/expression dichotomy. The treatment of a resulting merged statement as an idea rather than an expression only enhances the confusion.

In conclusion, the terms “idea” and “expression” are used

144. 379 F.2d 675, 678-79 (1st Cir. 1967).

145. 446 F.2d 738, 742 (9th Cir. 1971).

146. See *supra* text following note 74.

147. Cf. *Toro Co. v. R & R Prod. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986) (random numbering system open to various expressions).

148. *Sid & Marty Krofft Television Prods., v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977).

in copyright law in different senses, with "idea" sometimes used to denote a class of expressions (i.e., unprotectible expressions) and with certain obvious types of expressions not being labelled "expressions." If in no other way, the terminology of the idea/expression dichotomy thereby introduces confusion into copyright doctrine. Part IV will show that in addition to introducing confusion, no advantage is gained by the use of the idea/expression dichotomy when deciding infringement cases.

IV. Infringement

A. *Infringement of Both "Idea" and "Expression"*

The idea/expression dichotomy pervades infringement cases since courts use it in attempting to distinguish what is protected from what is unprotected in a writing. For the axiom is that, because copyright protection extends only to the protected expression in a writing, copyright protects against the unauthorized copying of an author's expression, while allowing anyone to exploit the ideas in that author's work.¹⁴⁹

In this way, the idea/expression dichotomy becomes central in establishing whether someone has taken more than a *de minimis* amount of an author's protected expression.¹⁵⁰ Courts look for substantial similarity between the protected expressions in the allegedly infringing and infringed works. Under the idea/expression dichotomy it would be logical to assume that courts determine substantial similarity by first establishing what the protected expression is in the allegedly infringed work, and then comparing the expressions in each work to determine whether the alleged infringer has appropriated a substantial portion of the first author's protected expression. Some courts, however,

149. *E.g.*, *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 912-13 (2d Cir. 1980); *Sid & Marty Krofft*, 562 F.2d at 1165-71.

150. *Sid & Marty Krofft*, 562 F.2d at 1162-63. To establish infringement, one must prove ownership of the work, the defendant's access to the work, and substantial copying of its protectible elements. *Id.* at 1162; *see also* *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). Access is not always a separate issue from similarity of the works: proof of "striking similarity" of the allegedly infringed and infringing works lessens the need to prove access. *Meta-Film Assocs. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984); *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973). *See* 3 NIMMER, *supra* note 43, at § 13.02[B] (criticizing *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984)).

have required that both the unprotected ideas and the protected expression be appropriated.

For example, in 1946, the Court of Appeals for the Second Circuit set forth a two-part test in *Arnstein v. Porter*¹⁵¹ for determining whether a substantial taking of protected writings has occurred: (1) there must be sufficient similarities of the works to prove copying has occurred, and (2) if copying is proven, then unlawful appropriation of the expression must be shown.¹⁵² The first prong of the *Arnstein* test requires the court to look for similarity of the work as a whole. Only when there is copying of the whole does the court focus on its second prong — whether there is infringing copying of protectible material.¹⁵³

The Court of Appeals for the Ninth Circuit adapted the *Arnstein* test in terms of the idea/expression dichotomy. This approach “requires that all of the elements of the work, including the uncopyrightable text, be considered as a whole in determining copyright infringement.”¹⁵⁴ Under this interpretation, the first prong of the test requires copying of the ideas expressed in a protected work, and the second prong requires copying of the protected expression.¹⁵⁵ Thus, to find infringement, both the ideas and the expressions must be substantially copied.¹⁵⁶ However, one may ask what it means to claim that works could have similarities of “expressions” without also having similarities of “ideas.” The first prong of the test, therefore, may become redundant under the Ninth Circuit’s interpretation.

More importantly, the Ninth Circuit’s position may inad-

151. 154 F.2d 464 (2d Cir.), *aff’d on rehearing*, 158 F.2d 795 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

152. *Id.* at 468. The Second Circuit apparently abandoned the two-prong approach in *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1023 (2d Cir. 1966), but restored it in *Walker v. Time Life Films*, 784 F.2d 44, 48-51 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986).

153. *Arnstein*, 154 F.2d at 468.

154. *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 320 (9th Cir. 1987).

155. *Sid & Marty Krofft Televisions Prods. v. McDonald’s Corp.*, 562 F.2d 1157, 1164-65 (9th Cir. 1977). The Eighth Circuit follows the Ninth Circuit. *Hartman v. Hallmark Cards*, 833 F.2d 117, 120 (8th Cir. 1987).

156. *See, e.g.*, *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 572 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *McCulloch*, 823 F.2d at 319; *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). It is not clear whether ideas under this interpretation are the abstractions behind actual protectible expressions in the work or if they are the unprotectible expressions in the work.

vertently extend copyright protection to ideas. At a minimum, this position makes proving "substantial similarity of ideas"¹⁵⁷ an element of an infringement case.¹⁵⁸ It is doubtful that the Second Circuit in the first prong of the *Arnstein* test was referring to copying ideas, since those cases cited by the court that are clear on the issue refer only to copying expressions.¹⁵⁹ In *Arnstein*, no abstraction of ideas apart from expressions is present — only similarities of the actual works are considered. Thus, the first prong of the test refers to copying and the second prong to the amount of copying. The Court of Appeals for the First Circuit recently construed the *Arnstein* test in this manner without imposing the idea/expression dichotomy; instead, the copying component was understood to refer only to copying an author's protected expression.¹⁶⁰ The Second Circuit takes the first prong of the *Arnstein* test to require sufficient similarity of the whole works without differentiating "ideas" from "expressions."¹⁶¹ This interpretation does not require copying of ideas to prove infringement. The second step (unlawful appropriation) is proven by copying too much of what is valuable in the plaintiff's protected expression.¹⁶²

Ironically, it is the Second Circuit's position, and not the Ninth Circuit's, that is consistent with the axiom of the idea/expression dichotomy that copyright protection does not extend to the ideas.¹⁶³ For, if ideas are indeed unprotectible, copying

157. *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

158. *Walt Disney v. Fimlition Assocs.*, 628 F. Supp. 871, 877 (C.D. Cal. 1986) (describing the extrinsic and intrinsic tests for determining the substantial similarity of ideas); *See, e.g., Berkic*, 761 F.2d at 1293; *Litchfield*, 736 F.2d at 1356.

159. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir.), *aff'd on rehearing*, 158 F.2d 795 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). *See Barry, Toward a Model for Copyright Infringement*, 33 COPYRIGHT L. SYMP. (ASCAP) 1, 27 (1987); 3 NIMMER, *supra* note 57, at § 13.03[E].

160. *Concrete Mach. Co. v. Classic Lawn Ornaments*, 843 F.2d 600, 608-09 (1st Cir.), *aff'd*, 867 F.2d 606 (1st Cir. 1988). Two additional circuits follow the Second Circuit and disregard the idea/expression dichotomy when applying the *Arnstein* test. *See Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975); and *Scott v. WKJG* 376 F.2d 467, 469 (7th Cir.), *cert. denied*, 389 U.S. 832 (1967).

161. *Walker v. Time Life Films*, 784 F.2d 44, 48-51 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986).

162. *Id.*

163. *Id.* at 48-49; *Warner Bros. v. American Broadcasting Cos.*, 654 F.2d 204, 208

any amount of the ideas is simply irrelevant to the issue of infringement.¹⁶⁴ Such copying is neither necessary nor sufficient to establish infringement, because copyright law only prohibits taking the protected expression. Any substantial similarity between the unprotectible ideas contained in both works is irrelevant. Even if each work as a whole expresses the same abstract idea, the issue will remain only whether protected expression was taken. Recently, the Ninth Circuit also realized that analyzing ideas actually involves analyzing expressions and, therefore, the two prongs under this interpretation cannot be separated.¹⁶⁵

B. *Learned Hand's Abstraction Test*

Infringement may occur by verbatim or non-verbatim copying. Infringement in the former category involves exact similarity between works, while infringement in the latter category requires substantial similarity between works.¹⁶⁶ In the former category, determining what is idea and what is expression is irrelevant, if the work is protectible. The idea/expression dichotomy appears in the non-verbatim category when the protected expression of the allegedly infringed work is being determined.

The most often cited approach to the problem, at least for narrative works, is Judge Learned Hand's "abstraction" test.¹⁶⁷ This involves abstracting levels of increasingly general expression in a work by omitting levels of detail.¹⁶⁸ Such a process must focus on the substance of a work "behind" its form. At a certain point in this process, the abstractions no longer represent what is protectible. Hand noted that nobody has been able to fix the exact boundary in this process of abstraction between the protectible and unprotectible, but that the ideas in, for example, Shakespeare's plays are "as little capable of mo-

(2d Cir. 1981), *aff'd*, 720 F.2d 231 (2d Cir. 1983).

164. See *supra* notes 132-39 and accompanying text.

165. Anderson v. Stallone, 1989 Copyright L. Dec. (CCH) ¶ 26,427 at 22,674 (1989).

166. NIMMER, *supra* note 57, at § 13.03[A] (Nimmer stated the difference in terms of two forms of similarity: fragmented literal similarity and comprehensive nonliteral similarity.). See also Walker v. Time Life Films, 615 F. Supp. 430, 436-37 (S.D.N.Y.), *aff'd*, 784 F.2d 44 (2d Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

167. See *supra* notes 40-41 and accompanying text.

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

nopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species."¹⁶⁹

Professor Chafee advanced a similar "pattern" test:

Should protection be limited to the precise words? If so, a translation, which uses entirely different words, would not infringe. Yet, if we protect more than precise words, where shall we stop? The line is sometimes drawn between an idea and its expression. This does not solve the problem, because "expression" has too wide a range. To some extent, the expression of an abstract idea should be free for use by others. No doubt the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the protection covers the "pattern" of the work [i.e., the sequence of events, and the development of the interplay of characters]. This is not a solution, but I find it helpful as an imaginative description of what should not be imitated.¹⁷⁰

Professor Nimmer found that the problem of differentiating expression from idea is probably susceptible of no more precise a principle.¹⁷¹

Nevertheless, the fatal problem with this approach is obvious: the abstraction approach does not indicate where in the series of abstractions the line between unprotectible idea and protectible expressions should be drawn.¹⁷² The only concern is to prevent inhibiting the creativity of other authors which the Copyright Clause¹⁷³ is supposed to promote.¹⁷⁴ But any number of abstractions is possible — nothing in the process aids in determining what is protectible. Cases merely state that no one infringes a protected work unless he or she "descends so far into what is concrete as to invade its expression."¹⁷⁵ Common law protection of ideas also requires that the idea, in addition to be-

169. *Nichols*, 45 F.2d at 121.

170. Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513 (1945).

171. 3 NIMMER, *supra* note 57, at § 13.03[A].

172. Goldwag, *supra* note 53, at 6.

173. U.S. CONST. art. I, § 8, cl. 8.

174. *Gund, Inc. v. Smile Int'l*, 691 F. Supp. 642, 644 (E.D.N.Y. 1988), *aff'd*, 872 F.2d 1021 (2d Cir. 1989).

175. *National Comics Publications v. Fawcett Publications*, 191 F.2d 594, 600 (2d Cir. 1951). *See also* *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 240-43 (2d Cir. 1983).

ing novel, must be concrete.¹⁷⁶ These cases, however, do not define when an expression is concrete.¹⁷⁷ Without the determination of when an idea is concrete enough to warrant protection, this requirement is of no help in the courts' decision-making process.

Thus, the notion of abstracting ideas is extraneous in the decision-making process. An individual can always find an abstract level of commonality between two works if he searches for one. The idea may be some language common to the two works, or a description or categorization of the two works. On the other hand, an individual can define the idea of a work in such detail that only verbatim copying would be disallowed.¹⁷⁸ That is, the idea may be defined expansively to create less protection for the expression in a work; or it may be defined narrowly to expand such protection.¹⁷⁹ When deciding what is labelled an idea, factors other than those used to determine what expresses an idea must be considered. In short, because abstraction is merely find-

176. Note, *Beyond the Realm of Copyright: Is There Legal Sanctuary for the Merchant of Ideas?*, 41 BROOKLYN L. REV. 284, 288 (1974). Cases involving the common law protection of ideas are decided without reference to an idea/expression dichotomy, although a distinction between "abstract" and "concrete" ideas is central. *Id.* See, e.g., *Sellers v. American Broadcasting Cos.*, 668 F.2d 1207, 1210 (11th Cir. 1982); *Desny v. Wilder*, 46 Cal. 2d 715, 728, 299 P.2d 257, 263 (1956) (there may be "some nebulous middle area between an abstract idea and a literary composition, wherein the idea has been cast in 'concrete' form but not 'concrete' enough to constitute literary property."). See also 3 NIMMER, *supra* note 57, at § 16.08[A] (concreteness as development of an idea for immediate use).

177. 1 NIMMER, *supra* note 5, at § 2.02. For a discussion on the relation of concreteness to tangible form in copyright doctrine, see Barrett, *The 'Law of Ideas' Reconsidered*, 71 J. PAT. TRADEMARK OFF. SOC'Y 691, 712-16 (1989).

178. See *Midway Mfg. Co. v. Bandai-America*, 546 F. Supp. 125, 148 (D.N.J. 1982), *aff'd*, 775 F.2d 70 (3d Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986) (criticizing such a ploy).

179. Certain computer cases have defined "idea" very narrowly, thereby rendering virtually all aspects of a computer program protectible. *Whelan Assocs. v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1236 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Broderbund Software v. Unison World*, 648 F. Supp. 1127, 1132 (N.D. Cal. 1986). Cases involving the "total concept and feel" approach to protectible expression also expand what is protectible in a work. See *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 320-21 (9th Cir. 1987) (quoting *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970); Yen, *supra* note 53, at 407-16. Computer cases focusing on the "look and feel" of a computer program also may extend protection into unprotectible areas of processes and methods. See Forsten, *It Walks and Talks Like My Duck, So How Come It's Not Infringement?: The Case Against "Look-and-Feel" Protection for Computer Programs*, 70 J. PAT. & T. OFF. SOC'Y 639 (1988).

ing patterns of increasing generality, the idea of a work can be defined as broadly or narrowly as the court chooses, and a court's ultimate classification will depend upon considerations other than a supposed dichotomy of ideas and expressions.

Related to this is the problem that each abstraction will be an expression, even if the abstracted expression is labelled an "idea." There are no ideas "apart from their expression,"¹⁸⁰ despite what courts say. An idea is not a null around which various rings of developed expressions radiate. Abstractions are like an indefinite series of Russian dolls — inside each expression is another expression. No matter how far the process of abstraction proceeds, an abstract idea free of expression is never reached. Only adherence to the idea/expression dichotomy would incline one to think otherwise.

The process of abstraction is also irrelevant in another sense. In deciding infringement cases, courts must compare only the actual statements or other forms in the two works at issue. Any idea behind an expression need not be utilized as part of the decision-making process. Courts are engaging in an artificial construction when they consider any such idea. For example, the idea behind Mickey Mouse is simply a cartoon mouse. However, Walt Disney did not create merely a cartoon mouse but only a specific artistic depiction. The idea is an abstraction that the author did not create — only various actual cartoon mice will be compared in infringement cases. Abstracting such an idea from the actual expressions, even if it were possible, would be unimportant. Saying that an alleged infringer did not take the expression of Mickey Mouse but took only the idea of a cartoon mouse is a jargon-filled and confusing way of stating that the alleged infringer's drawing of a mouse does not capture the particular creativity embodied in Mickey Mouse. What is required for the issue of infringement is determining whether each character is a sufficiently original delineation to warrant protection and whether this originality has been infringed. Courts must focus exclusively on the concrete creations of the authors, not categorizations or other abstract entities.

Abstracting levels of commonality is also irrelevant where

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

judges must consider possible infringement of the organization or structure of a work, as with cases involving possible infringement of the plot of narrative works. Focusing on the sequence of events that develop a story requires focusing on only one element of a work (the overall structure of the work). But this procedure does not involve abstracting ideas behind the expressions in the story; it merely requires focusing on structure rather than individual statements. In such cases, abstraction is no more than a new name "for comparing 'similarity of sequences of incident.'"¹⁸¹

In other cases, abstraction is at best a description of the process whereby judges apply their general knowledge of a subject matter to a specific expression of that subject to determine what is protectible and what has been infringed.¹⁸² When connected to the idea/expression dichotomy, the "abstraction" test reduces merely to creating different levels of expression until a level of commonality is reached which the court considers unprotectible. This level is then labelled the "idea." In fact, though, this means that the label is merely the conclusion reached after protectibility has been decided. And, if the dichotomy does not play a role in determining what is protectible, then deciding what is an idea is not an active element in the courts' decision-making process for determining whether an infringement has occurred. This, in turn, means that labelling some expressions "ideas" and others "expressions" is not a step needed in infringement cases at all.

Judge Hand himself realized that there are limitations on the "abstraction" test. Late in his career, he said:

181. *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533, 537 (2d Cir. 1938).

182. For example, in factual works, the more precise the statement of fact, the less protection there is. See *supra* notes 117-20 and accompanying text. In the recent words of the court in *Nash v. Columbia Broadcasting Sys.*, 704 F. Supp. 823 (N.D. Ill. 1989):

[T]he abstraction and pattern tests can produce paradoxical results when the material at issue is a work of historical nonfiction. As one moves down the levels of "abstractions," under Judge Hand's analysis, or closer to the author's "precise form," under Professor Chafee's theory, one would expect increasingly greater copyright protection. However, describing a piece of historical nonfiction with ever greater specificity and particularity brings one closer to simply relating the facts of the subject matter of the piece, e.g., the actual events in the life of the subject of a biography. Of course, these facts are not copyrightable.

Id. at 827 n.2.

The test for infringement of a copyright is of necessity vague. In the case of verbal "works" it is well settled that although the "proprietor's" monopoly extends beyond an exact reproduction of the words, there can be no copyright in the "ideas" disclosed but only in their "expression." 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*.¹⁸³

In short, as Professor Kaplan has noted: "The job of comparison is not much eased by speaking of patterns, nor is the task of deciding when the monopoly would be too broad for the public convenience made much neater by speaking of ideas and expression."¹⁸⁴

The idea/expression dichotomy is not merely "a distinction easier to state than to apply."¹⁸⁵ The dichotomy, according to Professor Nimmer, reformulates the problem but does not solve it.¹⁸⁶ Nothing in the idea/expression dichotomy offers guidance as to what is protectible beyond that provided by copyright law in general. And without some guidance in determining what is protectible, the dichotomy provides no assistance whatsoever to courts in deciding when someone has appropriated too much of another's creativity.

C. Total Concept and Feel

Under a second approach to the issue of substantial similarity, courts do not isolate particular protectible expressions from the unprotectible "ideas" and then focus exclusively upon the copyrightable elements. Instead, courts using this analysis look

183. *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). *Goodson-Todman Enters. v. Kellogg Co.*, 358 F. Supp. 1245, 1246 (C.D. Cal. 1973), *rev'd*, 513 F.2d 913 (9th Cir. 1975). *Cf. Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) ("At least in close cases, one may suspect, the classification [of idea and expression] the court selects may simply state the result reached rather than the reason for it."); *Nichols*, 45 F.2d at 121 ("Nobody has ever been able to fix that boundary, and nobody ever can."); *Fitch v. Young*, 230 F.743, 745-46 (S.D.N.Y. 1916).

184. Kaplan, *supra* note 6, at 48.

185. *Walker v. Time Life Films*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986). *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 239 (2d Cir. 1983).

186. 3 NIMMER, *supra* note 57, at § 13.03[A].

to the "total concept and feel"¹⁸⁷ of each work. The Court of Appeals for the Ninth Circuit, in *Roth Greeting Cards v. United Card Co.*,¹⁸⁸ introduced this test. Later, in a case involving two tellings of a children's folktale, the Second Circuit in *Reyher v. Children's Television Workshop*¹⁸⁹ did not analyze similarities in the sequence of events, but concluded that no infringement occurred because the works differed in the "total concept and feel" of treatment, details, scenes, events, and characterization.¹⁹⁰ The Ninth Circuit in *Sid & Marty Krofft Television Productions v. McDonald's Corp.*,¹⁹¹ using this test, found that infringement occurred when there were some similarities in the setting and characters of the works, and their "total concept and feel" was the same.¹⁹² Various courts since then have applied this approach to computer programs.¹⁹³

This approach renders the idea/expression dichotomy absolutely useless, despite the use of the terminology in the cases. In a case involving cartoon-like characters, the Second Circuit considered the "totality of the characters' attributes and traits,"¹⁹⁴ and concluded that the idea alone was taken.¹⁹⁵ However, in the words of the Ninth Circuit, under the "total concept and feel" approach, "all of the elements of the work, including uncopyrightable text, [must] be considered as a whole in determining copyright infringement."¹⁹⁶ Under this approach, therefore, the unprotected ideas along with the protected expressions are all considered in determining infringement. Arguably, such a totality approach allows material that is not copyrightable to be

187. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

188. *Id.* The "total look and feel" of a work is also subsumed under the second prong of the Ninth Circuit's interpretation of the *Arnstein* test. See *Narell v. Freeman*, 872 F.2d 907, 913 (9th Cir. 1989); *Anderson v. Stallone*, 1989 Copyright L. Dec. (CCH) ¶ 26,427 at 22,674 (1989).

189. 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).

190. *Id.* at 91.

191. 562 F.2d 1157 (9th Cir. 1977).

192. *Id.* at 1167.

193. *Whelan Assocs. v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1234 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp.*, 672 F.2d 607, 619-20 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *E.F. Johnson Co. v. Uniden Corp. of America*, 623 F. Supp. 1485, 1493 (D. Minn. 1985).

194. *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 241 (2d Cir. 1983).

195. *Id.* at 245.

196. *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 320 (9th Cir. 1987).

protected by copyright law.¹⁹⁷ At a minimum, this approach cannot determine whether any substantial similarity results solely from unprotectible elements. More generally, what is the relevance of determining what is an idea and what is an expression in such a totality approach? Such an issue could have no role in deciding infringement cases when the overall structure or "the mood evoked by a work as a whole,"¹⁹⁸ rather than the details of particular expressions, become the central consideration. In short, under both approaches currently employed by the courts to decide infringement cases, the idea/expression dichotomy is irrelevant.

V. Protection and Infringement Without the Idea/Expression Dichotomy

If the idea/expression dichotomy is truly irrelevant, what remains to be shown is that protectibility and infringement can be expounded without reference to it. And, in fact, both of these areas of copyright doctrine can be articulated without invoking any concept other than the central requirement that protection is extended only to "original works of authorship"¹⁹⁹ embodied in a tangible medium of expression.

A. Creativity, Originality, and Original Works of Authorship

The Supreme Court recently defined "author" in a commonsensical manner that does not necessarily entail the idea/expression dichotomy: "[T]he author is the party who actually creates the work, that is, the person who translates an idea into

197. Francione, *supra* note 132, at 552. Cf. Collins, *supra* note 6, at 134: [I]t appears that all the elements of an imaginative work — plot, characters, dialogue, etc., — are to be compared to ascertain if there has been an infringement in fact; and that the old doctrine that there is no copyright in ideas, if it has not become altogether meaningless, is to be understood only in the very modified and restricted sense that copyright gives no monopoly of theme — that similarity of theme does not of itself support a complaint of infringement.

Id.

198. See *v. Durang*, 711 F.2d 141, 144 (9th Cir. 1983). See also *Kisch v. Ammirati & Puris, Inc.*, 657 F. Supp. 380, 384 (S.D.N.Y. 1987) (rational trier of fact could find infringement of the "underlying tone or mood" of a photograph). See also *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

199. 17 U.S.C. § 102(a) (1988).

a fixed, tangible expression entitled to copyright protection."²⁰⁰ That is, an author is anyone who expresses his or her ideas in a protectible manner in a tangible medium. Copyright protects only that which has been contributed by an author, although the phrase "original works of authorship" was purposely left undefined by Congress in enacting the Copyright Act of 1976.²⁰¹ Late in the last century, the Supreme Court defined an author as one "to whom anything owes its origin; originator; maker; one who completes a work of science or literature."²⁰² This definition has been supplemented by courts to require both originality and minimal creativity.²⁰³

Originality means little more than that the author must not have copied the work from another author.²⁰⁴ The author must contribute "something more than a 'merely trivial' variation, something recognizably 'his own,' "²⁰⁵ to be considered an author rather than a copier. To fulfill this requirement, all that is required is that the author contribute a variation from previously protected and unprotected works that is irreducibly the

200. *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2171 (1989).

201. H.R. REP. NO. 1476, *supra* note 51, at 51.

202. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). *See also* *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 101 (2d Cir. 1951).

203. Courts often merge the originality and creativity components. But more properly they should be distinguished. *See* *Atari Games Corp. v. Oman*, 888 F.2d 878, 882 (D.C. Cir. 1989); *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 n.6 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987); *John Muller & Co. v. New York Arrows Soccer Team, Inc.* 802 F.2d 989, 990 (8th Cir. 1986); *Gardenia Flowers v. Joseph Markovits, Inc.*, 280 F. Supp. 776, 781-82 (S.D.N.Y. 1968).

204. *Cf. Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903); *Herbert Rosenthal Jewelry Corp v. Kalpakian*, 446 F.2d 738, 740 (9th Cir. 1971); *Alfred Bell*, 191 F.2d at 100, 103; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940). Courts occasionally state that only the "unique expression of ideas" is protectible. *E.g.*, *Ring v. Estee Lauder, Inc.*, 702 F. Supp. 76, 78 (S.D.N.Y. 1988), *aff'd*, 874 F.2d 109 (2d Cir. 1989); *see also* Note, "Expression" and "Originality" in *Copyright Law*, 11 WASHBURN L.J. 400 (1972). But "uniqueness" in the sense of novelty in patent law is not required. *See generally* Yankwich, *Originality in the Law of Intellectual Property (Its Meaning from a Legal and Literary Standpoint)*, 11 F.R.D. 457 (1951). "Novelty" in patent law means that "no similar work predates the work in question." *Denicola, supra* note 111, at 521 n.24; *see* *Lee v. Runge*, 404 U.S. 887, 889-93 (Douglas, J., dissenting from denial of certiorari advocating the use of the "novelty" standard of patent law to be used in copyright law). This would include the content, not merely the form, of a work.

205. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976) (quoting *Alfred Bell*, 191 F.2d at 103).

author's.²⁰⁶

In addition to the requirement of independent effort, there must be a "minimal element of creativity."²⁰⁷ Defining or measuring artistic or intellectual creativity is virtually impossible, and courts have not attempted to do so.²⁰⁸ Thus, the creativity requirement in copyright law does not mean that courts make judgments as to a work's aesthetic or literary merit.²⁰⁹ This requirement for creative contribution is a modest one,²¹⁰ but a "faint trace" of creativity is nevertheless required.²¹¹ If courts cannot discern this minimal creativity, a work will not be considered a protectible work of authorship,²¹² even though the work is not copied from any other work.

In short, to be protectible, a work needs independent creation and minimal creativity. Any work exhibiting the requisite originality, a modicum of creativity, and fixed in a tangible medium of expression is a "writing" under the Constitution's Copyright Clause.²¹³ The Supreme Court has interpreted "writings" expansively to include "any physical rendering of the fruits of

206. *U.S. v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978).

207. *Batlin*, 536 F.2d at 490 (quoting 1 M. NIMMER, *THE LAW OF COPYRIGHT* § 10.2 (1975)). See also, *Universal Athletic Sales*, 511 F.2d 904, 908 (3d Cir. 1975). Courts sometimes use "originality" when creativity is meant. See, e.g., *Weissman v. Freeman*, 868 F.2d 1313, 1321 (2d Cir.), *cert. denied*, 110 S. Ct. 219 (1989) ("an unmistakable dash of originality").

208. See *Gracen v. Bradford Exchange*, 698 F.2d 300, 304 (7th Cir. 1983); see also *Bleistein*, 188 U.S. at 251-52.

209. *Bleistein*, 188 U.S. at 251-52. The creativity requirement also appears in computer cases. See *Apple Computer v. Franklin Computer Corp.*, 714 F.2d 1240, 1252-53 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); *Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp.*, 672 F.2d 607, 617 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1983).

210. *Durham Industries v. Tomy Corp.*, 630 F.2d 905, 910 (2d Cir. 1980).

211. *Dan Kasoff, Inc. v. Novelty Jewelry Co.*, 309 F.2d 745, 746 (2d Cir. 1962). See also *Bleistein*, 188 U.S. at 250 ("a very modest grade of art has in it something irreducible, which is one man's alone").

212. *Financial Information, Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 207-08 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986); *Gracen*, 698 F.2d at 304 (perceptible differences of a painting are not sufficient to render it a work of authorship); *Haan Crafts Corp. v. Craft Masters*, 683 F. Supp. 1234, 1243 (N.D. Ind. 1988); *Hearn v. Meyer*, 664 F. Supp. 832, 840-01 (S.D.N.Y. 1987); *Magic Mktg. v. Mailing Servs. of Pittsburgh, Inc.*, 634 F. Supp. 769, 771-72 (W.D. Pa. 1986); 1 NIMMER, *supra* note 5, at § 2.01[B].

213. U.S. CONST. art. I, § 8, cl. 8; see also 17 U.S.C.A. § 102(a) (1988).

creative intellectual or aesthetic labor.”²¹⁴ Thus, although unprotectible expressions are no less writings in the ordinary sense of the word than are original and creative expressions, they are not original works of authorship and, therefore, not writings in the sense required by copyright law.

As previously discussed, ideas cannot exist without expression.²¹⁵ Hence, if they exhibit the requisite originality and creativity, they too should be considered writings under the above definition and thus be open to copyright protection. Although Professor Nimmer distinguished ideas from expressions, he rightly pointed out that if an idea “exhibits a modicum of intellectual labor and a reduction to tangible form, there seem to be no valid constitutional grounds for denying to an idea the status of a writing.”²¹⁶ Only a commitment to the classification inherent in the idea/expression dichotomy would lead anyone to treat “ideas” otherwise.

B. *Protectible Writings*

The confusion generated by the idea/expression dichotomy can be avoided by shifting attention from the alleged dichotomy to the requirement of originality and creativity.²¹⁷ For copyright protects only creativity in composing the form (i.e., expression) of a writing. Not every expression of an idea (i.e., every reduction of an idea to a concrete embodiment) is protected, as courts employing the idea/expression dichotomy suggest.²¹⁸ Any statement of an idea is an expression of the idea, but only a creative and original statement or other form of the idea is protectible. Thus, the important distinction is between protectible and unprotectible expressions. Protectible expressions are only those writings whose form exhibit originality and minimal creativity. Conversely, expressions that do not exhibit originality and the

214. *Goldstein v. California*, 412 U.S. 546, 561 (1973); *see also* *United States v. Steffens*, 100 U.S. 82, 94 (1879) (“the fruits of intellectual labor”). On the expansion of the scope of protectible “writings,” *see* *Harper & Bros. v. Kalem Co.*, 169 F. 61, 64-65 (2d Cir. 1909), *aff’d*, 222 U.S. 55 (1911); *Mazer v. Stein*, 347 U.S. 201, 220-21 (1954) (Douglas, J., separate opinion).

215. *See supra* text accompanying notes 63-64.

216. 1 NIMMER, *supra* note 5, at § 1.08[D].

217. *See* Yen, *supra* note 53, at 435 n.200.

218. *See supra* notes 79-83 and accompanying text.

minimal creativity are not protectible, even though they are no more "ideas" than protectible expressions.²¹⁹ In the words of Judge Leval of the District Court for the Southern District of New York, it is only "the author's craftsmanship and art in the presentation of material" that is protected in a protectible writing.²²⁰

The intellectual content (the "ideas" or "facts") of the writing is not an issue for copyright protection. Originality and creativity of a writing's content, to the extent it can be separated from originality of expression, is irrelevant to copyright law. If this aspect of the writing is creative and original, it may be open to other types of protection (e.g., common law protection of ideas, patents, and trade secrets).²²¹ Actions for infringement of ideas are not preempted by the federal copyright law.²²² Nevertheless, any idea abstracted from a protectible writing remains itself an expression. Thus, unoriginal or uncreative expressions are not covered by federal law, and therefore misappropriation of unprotectible expression is not subject to federal law. But any original and creative statements of the intellectual content of

219. See *supra* text following note 214.

220. *Craft v. Kobler*, 667 F. Supp. 120, 123 (S.D.N.Y. 1987); see also *Salinger v. Random House*, 650 F. Supp. 413, 418 (S.D.N.Y.), *rev'd*, 811 F.2d 90 (2d Cir. 1986), *cert. denied*, 484 U.S. 890 (1987).

221. See generally *Hopkins*, *supra* note 53; Rubinstein, *Copyright Protection for 'Elaborated Ideas'*, 224 LAW TIMES 296 (1957).

222. The issue relevant to the topic at hand is whether ideas fall within the "subject matter of copyright." See 17 U.S.C. § 301(b)(1)(1988). Arguments can be presented both for and against preemption on this point. See 1 NIMMER, *supra* note 5, at § 1.01[B][2][c]. See 3 NIMMER, *supra* note 57, at § 16.04[C] n.42; PATRY, *supra* note 5, at 34-35. Compare H.R. REP. NO. 1476, *supra* note 51, at 131, which states:

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the . . . [Act] prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.

with W. PATRY, *supra* note 5, at 57: "Section 102(b) [concerning the unprotectibility of ideas] in no way enlarges or contracts the scope of copyright protection under the present law." Under the law prior to the 1976 Act, ideas were open to state protection. See *Richter v. Westab, Inc.*, 529 F.2d 896, 901 (6th Cir. 1976).

While the case law is not entirely consistent, the majority of cases favors no preemption. See, e.g., *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1532 n.16 (S.D.N.Y. 1985); *Whitfield v. Lear*, 582 F. Supp. 1186, 1188-89 (E.D.N.Y.), *rev'd*, 751 F.2d 90 (2d Cir. 1984); *Bromhall v. Rorvik*, 478 F. Supp. 361, 366-67 (E.D. Pa. 1979); but see *Suid v. Newsweek Magazine*, 146, 149 (D.D.C. 1980). The better argument also favors no preemption. See Barrett, *supra* note 177, at 717-22.

other writings are protectible. The issue for copyright law is only creativity and originality of expression, not what is being expressed.²²³ But since form and content are integral to the same entity (a writing), courts will need to make value judgments as to which type of protection, if any, to provide.

Since the subject matter of any creative writing (the idea) is irrelevant to copyright law, distinguishing substance from form — idea from expression — is irrelevant. The idea/expression dichotomy misdirects attention by calling for such a distinction.²²⁴ Instead, courts must focus exclusively on the writing's expressions alone. Because the subject matter is irrelevant, the process of abstraction also is irrelevant: the only issue is whether the writing's expression exhibits creativity.²²⁵ To determine this, courts need to focus only on the writing's actual expressions, rather than construct any other expressions behind those expressions. They need not look for any additional underlying expressions. The courts' general knowledge (hopefully informed by the parties' counsel) of the type of work at issue is crucial to determining if originality and creativity are involved, but introducing abstractions is not.²²⁶

The decision-making process for the issue of protectibility must involve consideration not only of the originality and creativity requirements, but also the balance between society's first amendment interests and authors' potential property interests.²²⁷ This balance between competition and protection is a core value of copyright law.²²⁸ However, reference to the idea/expression dichotomy is not needed to realize this value.²²⁹ With

223. See *supra* notes 213-14 and accompanying text.

224. See *supra* notes 64-73 and accompanying text. See also *supra* notes 215-16 and accompanying text (ideas, if they are creative and original and reduced to tangible form, should also be protectible).

225. See *supra* text accompanying notes 97-98 and 200-14.

226. *Id.* See also *supra* notes 178-83.

227. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 580-81 (1985) (Brennan, J., dissenting); see also notes 53-62 and accompanying text.

228. *Apple Computer v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

229. See Samuels, *supra* note 6, at 405-07. Samuels states: "In short, the first amendment hardly depends upon the idea-expression dichotomy for its vitality, since the first amendment either is implicated in numerous other principles of copyright law, or is capable of specific attention on its own terms in those few situations in which first

regard to the dissemination of each expression, courts must decide whether the public interest lies in the free flow of the particular expression or in the incentive provided to authors by copyright law for protected expressions. Thus, courts must decide which expressions are protectible and which are freely available in light of the public interest.²³⁰ Copyright protection of the content (idea) of a work is never the issue. In deciding to protect a writing, courts must conclude that the writing is creative enough that its protection warrants denying access to the public for copying purposes. This denial will encourage the potential creativity of other authors. However, when courts conclude that the public's right to access outweighs the author's property interest, the expression will not be protected.

Copyright protects the authors' creativity in their approach to a subject matter, e.g., in creating characters or in developing plots. Such a protectible writing is an expression that is not distinct from ideas. However, copyright protects more than just the copying of an exact string of words that authors have used. That is, an author's protectible writing is any embodiment of his or her creativity in approaching a subject.²³¹ Other authors are free to rework an author's work by utilizing unprotected expressions or the subject matter of the author's protected expressions, but other authors may not use, either verbatim or by paraphrasing, what is distinctive about the author's presentation.

Because copyright protects more than one form, a family of related creative expressions is protected.²³² The creativity is manifest in the forms an author used, but creativity encompasses more. Thus, protectible expression is as much an abstract entity as ideas supposedly are. Therefore, the term "expression" as used in copyright law must mean creativity manifested in

amendment interests are extreme." *Id.* at 406; Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1004-07 (1970) (fair use as means of accommodating first amendment and copyright interests); Libbott, *supra* note 6, at 775-76 (same).

230. Goldstein, *supra* note 229, at 1055. Different standards do not apply for any class of factual or fictional works. In the words of the Supreme Court: "It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike." *Harper & Row*, 471 U.S. at 559.

231. See *supra* notes 200-13 and accompanying text.

232. See L. WITTEGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, §§ 65-71 (2d ed. 1958) (on "family resemblance" of concepts).

constructing expressions. This also means that, to the extent that an expression of idea under the idea/expression dichotomy is taken to mean only one form, the dichotomy once again distorts the nature of copyright protection.

Relevant to the issue of originality and creativity is the degree of detail in an author's original development of a subject matter, but any manifestation of creativity will suffice. Short phrases, general plots and themes, *scènes à faire*,²³³ and other unprotectible expressions are generally unprotectible precisely because they usually do not evidence an original or creative writing. They usually are "cliches or ordinary unoriginal combinations of words."²³⁴ However, different treatment of these phrases can be protected if the writing evidences sufficient creativity.²³⁵ The issue in each case is whether the specific expression evidences originality and the requisite creativity. Thus, for example, labelling an expression *scènes à faire* is a conclusion reached after the lack of originality and creativity of an expression has been determined; but original and creative expressions remain possible utilizing stock characters and situations.

Similarly, highly complex and original ideas that are expressed in quite simple terms are not expressions protectible by copyright law. The merger doctrine is invoked only with an uncreative statement or representation of an idea or fact.²³⁶ Only writings evidencing more original and creative form are protectible. For example, the theory of relativity expressed as " $E = mc^2$ " is the product of immense amounts of intellectual labor and creativity, but this equation itself does not exhibit creativity in its expression, and thus is not open to copyright protection. Whether the idea is general or particularized is irrelevant — an uncreative expression of a "particularized" idea is unprotectible,

233. See *supra* text accompanying note 100.

234. *Salinger v. Random House*, 650 F. Supp. 413, 419 (S.D.N.Y. 1986) *rev'd* 811 F.2d 90 (2d Cir.) *cert. denied*, 484 U.S. 890 (1987).

235. *Regents of the Univ. of Minnesota v. Applied Innovations*, 685 F. Supp. 698, 707 (D. Minn. 1987), *aff'd*, 876 F.2d 626 (8th Cir. 1989); see also *Universal Picture Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 364 (9th Cir. 1947); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887, 1891 (S.D.N.Y. 1988) (original selection, organization and presentation of stock game show devices); *Sebastian Int'l v. Consumer Contact (PTY) Ltd.*, 664 F. Supp. 909, 913 (D.N.J.), *vacated on other grounds*, 847 F.2d 1093 (3d Cir. 1987), *aff'd in part and rev'd in part*, 887 F.2d 262 (3d Cir. 1989).

236. See *supra* notes 125-38 and accompanying text.

and a creative expression of a "general" idea is protectible.²³⁷

Factual works are less open to protection only because they usually do not exhibit the requisite originality and creativity of expression. The words most commonly used in stating any facts are not considered an author's original creation. Whether there is a possibility of a variety of different expressions of the idea in factual works is not necessary to justify protection for an expression.²³⁸ Similarly, the amount of detail or concreteness is not the issue. Rather, as with any work, protectibility is a matter of whether the writing's expressions are original and creative. No expression necessarily flows from a fact, nor are any facts or ideas expressible only in stereotyped form. It may require creativity to express a fact in a creative and original manner, but the result will be considered an "original work of authorship." That is, a factual work manifesting a striking literary style and quality will be considered "more than a mere chronicle of facts news" and will be protectible.²³⁹ If an individual's statements are neither original nor creative, they will not be protectible and thus, they will not be considered an infringement upon someone else's work.²⁴⁰

In sum, the relevant dichotomy in copyright law is not between the form (expression) and substance (idea) of a writing, but between two types of forms (expressions): protectible and unprotectible. The only relevant criteria for distinguishing unprotectible from protectible expressions are originality and creativity of the expressions in a work. Thus, what is central to determining protection is not demarcating idea from expression but identifying original and creative forms in a writing. All expressions in a writing can be placed on a continuum, with protection more warranted when the author's creativity is more clearly evident.²⁴¹ However, the exact point on such a continuum

237. *Contra, e.g.,* Gund v. Smile Int'l, 691 F. Supp. 642, 644-45 (E.D.N.Y. 1988), *aff'd*, 872 F.2d 1021 (2d Cir. 1989).

238. See *supra* notes 117-24 and accompanying text.

239. *Chicago Record-Herald v. Tribune Ass'n*, 275 F.2d 797, 799 (7th Cir. 1921). See also *Business Trends Analysts v. Freedonia Group*, 700 F. Supp. 1213, 1230 (S.D.N.Y. 1988), *rev'd in part on other grounds*, 887 F.2d 399 (2d Cir. 1989).

240. See generally, *Musto v. Meyer*, 434 F. Supp. 32, 36 (S.D.N.Y. 1977), *aff'd*, 598 F.2d 609 (2d Cir. 1979). The one qualification is the possibility of wholesale appropriation. See *supra* notes 137-38 and accompanying text.

241. Determining the appropriate unit of expression in a protectible work will de-

and hence cannot be confined to a separate category from other expressions. Second, form and substance of any writing interact — they are not completely separable. Third, the dichotomy makes a vertical distinction (abstracting the idea behind an expression), when the only relevant distinction for copyright law is a horizontal one (protectible from unprotectible expressions). Unprotectible expressions under the idea/expression dichotomy are accounted for by the awkward merger doctrine (which brings together the category of expressions with that of unprotectible ideas)²⁴² or by other grounds warranting the denial of protection to what are clearly expressions.

C. *Infringement*

In short, a writing in copyright law is only a matter of originality and creativity of form (expression). If a writing exhibits sufficient originality and creativity in its forms to be copyrightable, the author's original contribution is protectible.²⁴³ Such a requirement of originality and creativity is mandated by the basic nature of an original work of authorship. Infringement in these circumstances consists of taking too much of an author's creativity in composing a writing's form.²⁴⁴ Thus, infringement should be understood in terms of taking an author's original and creative expression, not in terms of taking expression rather than abstracted ideas in a work as required by the idea/expression dichotomy. It is a matter of which expressions are taken, not a matter of a distinction between the "literary form" and the "ideas or information contained in a copyrighted work."²⁴⁵

To render this requirement operative, courts need not refer to the idea/expression dichotomy. Instead, courts can decide infringement cases by first determining whether expressions in the allegedly infringed work are sufficiently original and creative to

242. See *supra* notes 166-86 and accompanying text.

243. See *supra* notes 200-13 and accompanying text.

244. If the author's creativity is small, more copying may be necessary to establish infringement. But the issue remains whether the creativity has been infringed. There are no degrees of protection for copyrightable works or different scopes of protection for different types of works; verbatim, wholesale appropriation of uncreative and unoriginal expressions has no place in copyright doctrine.

245. *Contra* *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 582 (Brennan, J. dissenting).

warrant protecting the writing in question. Second, courts must decide whether the alleged infringer has taken a substantial portion of the first author's protected elements. The issue is whether the alleged infringer has taken material of substance and value²⁴⁶ from the author's creativity of expression, not anything concerning the expression of ideas. The essence of infringement lies in taking the particular creative expression of a subject through "similarities of treatment, details, scenes, events and characterization"²⁴⁷ or whatever type of development is appropriate to the subject being developed.

Courts must first distill protectible from unprotectible expressions.²⁴⁸ Next they must compare the plaintiff's and the defendant's works to determine if an actionable amount of the plaintiff's protectible expression has been appropriated. Protected versus unprotected expression is the only important distinction since, if someone has taken only unprotectible expressions, no infringement has occurred. This remains true no matter how much unprotected expression is taken.²⁴⁹

Substantial similarity of original and creative expression is the standard for infringement.²⁵⁰ The more markedly creative an

246. *Sid & Marty Krofft Prods. v. McDonald's Corp.* 562 F.2d 1157, 1164 (9th Cir. 1977); *Arnstein v. Porter* 154 F.2d 464, 473 (2d Cir. 1946) ("The question . . . is whether the defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.C. Mass. 1841) ("If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*.").

247. *Reyher v. Children's Television Workshop*, 533 F.2d at 91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).

248. *E.g.*, *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966). Dissection (with the usual accompaniment of expert testimony) is more problematic under the "total concept and feel" approach. See *Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 939 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1124 (1990); *Atari, Inc. v. North Am. Phillips Consumer Elecs.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982). However, without dissecting the protectible from the unprotectible, this approach cannot guarantee that any substantial similarity in "total concept and feel" results only from unprotectible material in each work. See also *supra* text accompanying notes 187-98.

249. *Cf. McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 320 (9th Cir. 1987); *Sid & Marty Krofft*, 562 F.2d at 1168; *Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

250. See, *e.g.*, *Warner Bros. v. American Broadcasting Cos.* 654 F.2d 204, 208 (2d Cir. 1981), *aff'd*, 740 F.2d 231 (2d Cir. 1983). For a discussion of problems in this area,

expression is, the less of it that needs to be taken to find infringement. This may involve only a small but distinctive portion of each work.²⁵¹ But an author's art and craftsmanship in expression may be taken by less than verbatim copying. Paraphrasing may well capture the author's original and creative contribution of expression too closely and thus be an infringement.²⁵² Similarly, the medium of an infringing work need not be the same as the original work. Three-dimensional objects can take the creativity of expression of two-dimensional works;²⁵³ a play may be infringed without taking any of its words;²⁵⁴ and silent films may take the creativity of expression embodied in a novel.²⁵⁵

The creativity in expression may also be in the development of the plot, the organization, or the "total concept and feel"²⁵⁶ of a work rather than in individual statements or other forms. In *Sid & Marty Krofft Television Productions v. McDonald's Corp.*,²⁵⁷ the defendants misappropriated the plaintiff's creativity in the cartoon-like characters at issue — even though there was little likelihood of confusion between the characters, the essence of the authors' creativity in delineating characters was taken.²⁵⁸ That is, the original and creative "total concept and feel" of the plaintiff's work was protectible as creative expres-

see Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987).

251. *Baxter v. MCA*, 812 F.2d 421, 425 (9th Cir.), *cert. denied*, 484 U.S. 954 (1987); *Burroughs v. Metro-Goldwyn-Mayer*, 683 F.2d 610, 624 n.14 (2d Cir. 1982); *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 713 (S.D.N.Y. 1987); *Elsmere Music v. National Broadcasting Co.*, 482 F. Supp. 741, 744 (S.D.N.Y.) *aff'd* 623 F.2d 252 (2d Cir. 1980); *Higgins v. Baker*, 309 F. Supp. 635, 637 (S.D.N.Y. 1970).

252. *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989); *Craft v. Kobler*, 667 F.Supp. 120, 124 (S.D.N.Y. 1987); *see also Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 583 n.5 (1985) (Brennan, J., dissenting); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 360 (9th Cir. 1947); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

253. *E.g.*, *Durcham Indus. v. Tomy Corp.*, 630 F.2d 905, 910 (2d Cir. 1980); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490-01 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976); *King Features Syndicate v. Fleischer*, 229 F. 533, 536 (2d Cir. 1924).

254. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940); *Frankel v. Irwin*, 34 F.2d 142, 143 (S.D.N.Y. 1918).

255. *Harper & Bros. v. Kalem Co.*, 169 F. 61, 63-64 (2d Cir. 1909).

256. *See supra* text accompanying notes 187-95.

257. 562 F.2d 1157 (1977).

258. *Id.* at 1161.

sion and was infringed. In this manner, the analysis of the works at issue must focus on more than merely isolated segments of the works. Nevertheless, only the original and creative elements of the work remain the exclusive concern, however difficult factoring out the unprotectible elements may be.

Furthermore, courts need not construct any common idea behind the two expressions to determine infringement because infringement is exclusively a matter of the protected expressions themselves. Introduction of abstracted ideas would only needlessly complicate the process, since the expressions — not what they express — alone are relevant. Introducing categories of abstract ideas occurs only when the courts have determined whether the actual expressions in the work exhibit or lack originality and the requisite creativity. Thus, such abstractions do not in fact play a role in the decision-making process.²⁵⁹ Instead, courts must focus only on the plaintiff's and defendant's actual expressions to determine if the plaintiff's original and creative expression has been appropriated.

The removal of the idea/expression dichotomy, however, will not solve the courts' actual decision-making process. The creativity and originality requirement "does not perform the function of excluding common-place matters in the public domain from copyright status very effectively."²⁶⁰ Deciding if an expression warrants protection and deciding if there is substantial similarity of protected expression will be, as Judge Hand noted, *ad hoc* rather than principled.²⁶¹ In the words of a commentator, the "nebulous area of similarity" is the "most evasive

259. The plot-pattern expressed in the development of a narrative work may be a protectible element, but abstracting unprotected levels of pattern and labelling them ideas is not necessary to determine whether one work's pattern infringes another's. Only the actual pattern in each work must be examined for originality and creativity before comparison.

260. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d at 486, 492 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976).

261. *Peter Pan Fabrics v. Martin Weiner Corp.* 274 F.2d 487, 489 (2d Cir. 1960). *See also Whelan Assocs. v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1241 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984) ("the line [between idea and expression] must be a pragmatic one . . ."); *Caueur Int'l v. Opulent Fabrics*, 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 case, which themselves are tied to highly particularized facts.").

part" of copyright law.²⁶² Each case will remain highly fact-specific. However, by removing the misconceived idea/expression dichotomy, a court's attention will be shifted away from distinguishing the form from the content of a writing to its proper focus: distinguishing protectible from unprotectible expressions, and determining if an author's protected elements of the writing have been infringed.

When substantial copying has been established, the defense to infringement of "fair use" of the protected elements is often raised.²⁶³ This defense does not require the idea/expression dichotomy. Fair use is an "equitable rule of reason"²⁶⁴ that "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."²⁶⁵ Thus, creativity in composing a writing's form is once again central. And, as discussed above,²⁶⁶ the concept of creativity does not need the idea/expression dichotomy to be operational in copyright law. Indeed, the dichotomy is needlessly applied to many fair use issues. For example, in biographies of authors, a major issue is how much of that author's exact expressions may be used.²⁶⁷ However, the judgment

262. Fleming, *Substantial Similarity: Where Plots Really Thicken*, 19 COPYRIGHT L. SYMP. (ASCAP) 252, 262 (1971).

263. 17 U.S.C. § 107 (1982); see also Libbott, *supra* note 6, at 75.

264. H.R. REP. NO. 1476, *supra* note 51, at 65 (cited in *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 549 (1985) and in *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 448 (1984)); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968). Fair use is also used to resolve potential conflicts between first amendment and copyright property interests. See, e.g., *Weissman v. Freeman*, 868 F.2d 1313, 1323 (2d Cir 1988), *cert. denied*, 110 S. Ct. 219 (1989); *Wainwright Sec., Inc. v. Wall Street Transcript Corp.* 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

265. *Iowa State Univ. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

266. See *supra* notes 217-26 and accompanying text.

267. E.g., *New Era Publications Int'l V. Henry Holt & Co.*, 873 F.2d 576 (2d Cir), *reh'g denied*, 884 F.2d 659 (1989); *Salinger v. Random House Inc.*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987). In *New Era*, certain judges suggested a distinction relevant to determining fair use between copying protected expression to enliven a biographer's book and copying that protected expression necessary to report facts accurately. *New Era*, 695 F. Supp. at 1503-04. In the latter category (when expressions are, in effect, the facts to be reported), a problem arises for the idea/expression dichotomy. Since facts are uncopyrightable (see *supra* note 108 and accompanying text), one should be permitted to copy any amount (with the possible exception of wholesale appropriation). Therefore, under this approach, one should be permitted to copy any number of original and creative expressions that are treated as facts in themselves. However, if the

as to how much of an author's expressions may be used is not a matter of whether the author's ideas can be expressed in other ways, but a matter of the value of the author's exact expression. The author's protected expressions themselves are the only concern.

In sum, judgments will remain, both as to what is protectible and as to whether a substantial amount has been taken. These judgments are not clarified by introducing the jargon of the idea/expression dichotomy; the relevant judgments concern only types of expressions, not a distinction between the expressions and what is expressed.

VI. Conclusion

If the challenge to the "essence" of copyright law advocated here is correct, all references to a contrast between ideas and expressions will be rendered superfluous, both for decision-making and for our understanding. Two important dichotomies lie at the foundation of copyright: (1) the subject matter of a writing versus protectible expressions of that subject matter, and (2) unprotectible versus protectible expressions. The idea/expression dichotomy does not clearly articulate either of these distinctions under the guise of its baseless distinction between ideas and their expressions. The dichotomy further complicates infringement cases by relying upon an irrelevant notion of "abstracting" ideas from expressions. Only the basic copyright requirements for original works of authorship and the infringement of such works must be considered. For the proper axiom of protectibility is not that expressions of ideas are protectible while ideas themselves are not, but merely that original and creative expressions alone are protectible.

Needless to say, it makes sense to speak of ideas in the context of copyright law as the substance or subject matter of a writing. But the conclusion of this Article is that a contrast of

idea/expression dichotomy is rejected, the problem disappears. One can copy any amount of unoriginal or uncreative expressions, but copying original and creative expressions is subject to fair use, whether the original and creative expressions are treated as facts themselves or not. Under the idea/expression dichotomy, the nature of a statement as a fact should render the statement free to be copied. But an original and creative expression, even if the expression is important in itself, should be subject to the basic principles of copyright.

abstract ideas and expressions and any process of abstracting ideas from expressions are both irrelevant to copyright doctrine. The relevant distinction with regard to protectibility is not between alleged abstract ideas and certain of their embodiments, but between unprotectible and protectible expressions. The idea/expression dichotomy misleads by drawing attention to a tenuous distinction between the form and substance of a writing when the proper focus of attention for copyright law is between the two classes of expressions. Indeed, the dichotomy is a needless introduction of metaphysics of abstract entities into the law.

Courts do not have to abstract ideas from expressions but only to separate unprotectible from protectible expressions in the work. Courts should focus on the actual expressions in the work, not think in terms of alleged abstract ideas and their embodiment. Opinions framed in terms of the dichotomy can be rewritten with less legal jargon and without a commitment to alleged expressionless ideas. Thus, claiming that, for example, basic plots fall into the category of ideas means simply that uncreative or unoriginal developments of plots are unprotectible. Courts must decide if the particular development of a plot in a work is a protectible element and whether it has been infringed — characterizing it as an idea or expression does not help in deciding either question. Decisions written without these terms would thereby be simplified and, more importantly, clarified.

This change will clarify our understanding by deleting reference to a dichotomy that is difficult to understand or apply and that is ultimately useless. Copyright doctrine is unnecessarily confusing because the terms ideas and expression are each used in different senses. The truism that the subject matter of a writing cannot be copyrighted is obscured by using “idea” and “expression” as terms of art in an unnecessary dichotomy. At best, “idea” is simply shorthand for “unprotectible expression,” and “expression” is shorthand for “protectible expression.” This reveals how uninformative and unhelpful the idea/expression dichotomy really is — the dichotomy merely expresses a conclusion and offers no guidance whatsoever in determining what is protectible. The claim that ideas cannot be copyrighted reduces ultimately only to a tautology: expressions that cannot be copyrighted cannot be copyrighted.

The most important conclusion is a corollary of the last point: courts will have to articulate grounds other than the alleged idea/expression dichotomy to distinguish protectible and unprotectible expressions. Since "idea" and "expression" are simply labels applied to the conclusions reached after a court has examined particular expressions at issue in a case, merely invoking the dichotomy as justification would be circular. Reasons related to the originality and creativity involved in devising the form of a writing will need to be advanced. That the dichotomy appears to be part of a court's decision-making process at all is an illusion. At best, the idea/expression dichotomy is superfluous; at worst, it disguises the court's true reasoning as to which expressions are protectible.