Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments

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Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments†

AMY B. COHEN*

INTRODUCTION

On July 12, 1989, the House of Representatives voted to cut the amount it had appropriated for 1990 for the National Endowment for the Arts (“NEA”). The reduction was made in order to express congressional disapproval of two projects which the NEA had previously funded: the photography of Robert Mapplethorpe, whose work was criticized for its homoerotic and sexual content, and of Andres Serrano, whose photograph of a crucifix submerged in urine was assailed. On July 26, 1989, Senator Jesse Helms of North Carolina proposed an amendment to the same appropriations bill, which provided in part that none of the appropriated funds could be used to support “obscene or indecent materials.” This amendment

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2. Representative Rohrabacher had proposed a cut of all NEA funding based in part on his reactions to the Serrano and Mapplethorpe works. Id. at H3637-38. His amendment was supported by Representative Dannemeyer of California who also cited the Serrano and Mapplethorpe works as justifications. Id. at H3640-41. Representative Williams of Montana opposed the amendment, citing many examples of works of art originally scorned but later appreciated. Id. at H3641. Although the Rohrabacher amendment to cut all funding was ultimately rejected, the House did eventually agree to an amendment which cut NEA funding by $45,000, the combined amount of the grants which had supported the Mapplethorpe and Serrano projects. Id. at H3653-55.
3. 135 CONG. REC. S8806 (daily ed. July 26, 1989). The full text of the Helms amendment provided:
    None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce—
       (1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or

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was also a reaction to the Mapplethorpe and Serrano projects, which Senator Helms described as "homoerotic pornography" and "blasphemy," respectively. Although Senator Metzenbaum of Ohio expressed concern about congressional involvement in defining art, the Senate agreed to the amendment. The bill was reported to the committee and, after much debate in both the House and the Senate, was eventually adopted with more limited language.

The Helms amendment controversy and the photographs of Robert Mapplethorpe and Andres Serrano focused attention on two questions: what is art, and should the government be involved in that determination? Many who opposed the Helms amendment expressed concern about any governmental role determining what is "art."

(2) material which demigrates the objects or beliefs of the adherents of a particular religion or non-religion; or
(3) material which demigrates, degrades, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.

Id. at S8807 (remarks of Sen. Helms).
5. Id. at S8808 (remarks of Sen. Metzenbaum).
6. Id. at S8809.
7. As adopted, the law provides in part:
None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.


8. In Congress, for example, Senator Danforth opposed the amendment, questioning, "[h]ow good are we at defining whether something is suitable art or not suitable art and how do we draw those definitions?" 135 Cong. Rec. S12116 (daily ed. Sept. 28, 1989). Senator Jeffords argued, in opposition to the Helms amendment: "We will be restricting the atmosphere in which the creative process occurs. We will be injecting an element of fear into the creative process, and adding an unprecedented and I believe an unconstitutional layer of censorship. We will be discouraging, not encouraging, the promotion and creation of art." Id. at S12131. Senators Cranston and Kerry were also vehement in their opposition to the Helms amendment. Senator Cranston warned that the amendment would "serve to move our country toward the kind of system of state censorship and control of thought and expression that we have fought wars against at great cost in blood and treasure." Id. at S12132. Senator Kerry observed that the amendment "will have a chilling effect within the art world and raise serious questions about standards which Congress should not be defining and, in fact, is ill equipped to define." Id.

In addition to these congressional comments, many others expressed similar concerns. E.g., Danto, Art and Taxpayers, NATION, Aug. 21/28, 1989, at 192, 193 ("[I]ndividual members of Congress have revealed themselves as enemies of freedom by letting their aesthetic attitudes corrupt their political integrity as custodians of the deepest values of a democratic society."); Healy, Government—a Good Patron but Bad Censor, N.Y. Times, Sept. 15, 1989, at A31,
The concern about the propriety of a governmental role in the definition of art, which has been played out so vividly in the NEA funding controversy, has also been an important factor in shaping the structure of American copyright law. While members of Congress have recently urged the NEA to take an active role in defining art and making the value judgments inherent in that definition, Congress and the courts have historically attempted to structure American copyright law to avoid these very value judgments.⁹

In 1903, Justice Holmes cautioned against courts making judgments about the merits of a given work in determining whether or not that work should be given copyright protection.⁰ Justice Holmes observed that “[it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹¹ These words and the view they express, so often relied upon and quoted by courts¹² and commentators,¹³ have substantially influenced the development of American copyright law in the twentieth century. Consistent with this opinion, both the courts and Congress have attempted to shape copyright doctrine so that decisions about the copyright protection provided to given works and decisions about the infringement of the copyright in such works can be made without regard to anyone’s assessment of the artistic value of the work.¹⁴
Determinations of eligibility for copyright protection are generally made without regard for the artistic value of the work. Judges have often relied on their assessment of the artistic value of the works at issue, however, in reaching decisions in cases of copyright infringement. When a court needs to determine whether a second work infringes the copyright in the first work, the court must compare the works in order to determine the scope of copyright protection to be afforded the first work. The way judges evaluate art inevitably affects this determination; their views as to the artistic value of the works before them has an effect on how far they will be willing to go to protect the first work by suppressing the second work.

This Article focuses on the problem of how artistic values affect determinations of copyright infringement. First, Part I shows that the copyright statutes embody a congressional desire to have determinations of eligibility for copyright made without regard for the artistic value of the work at issue. Part II explores the dangers that Justice Holmes and those who have followed his lead saw in using assessments of artistic value to make copyright decisions. Part III discusses how assessments of artistic value influence copyright infringement determinations, specifically through the application of the idea-expression dichotomy, a principle used to determine whether the copyright in a copyrighted work has been infringed. Finally, the Conclusion addresses the dilemma posed by the discussion in the preceding parts: if copyright infringement decisions necessarily rely on a judgment as to the artistic value of the works at issue, how do we address the dangers that worried Justice Holmes?

1. THE COPYRIGHT STATUTES AND CONGRESS’ ATTEMPTS TO AVOID RELIANCE ON ARTISTIC VALUES

As proclaimed in the Constitution, the purpose of copyright law is to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors the exclusive Right to their Writings.”

The ultimate objective of such protection is to ensure the dissemination of knowledge to the public; by providing authors with protection against copying

"artistic value" refers to the evaluation of a work of art on the basis of whatever factors are considered relevant to the particular judge or decision maker in assessing the value of a work of art, for example, the work’s ability to produce a pleasurable aesthetic reaction, the creativity and skill that the judge perceives as necessary to create that work, the work’s popular appeal and/or its reception in the fine arts or literary worlds and any other factors that are significant to that judge. Thus, when it is argued that a judge’s view of the artistic value of a given work of art affects that judge’s determination of the scope of copyright protection to be granted to that work, it is this definition of “artistic value” that is intended.

15. See infra notes 17-54 and accompanying text.
16. See infra notes 91-228 and accompanying text.
17. U.S. Const. art. 1, § 8, cl. 8.
for a period of time, Congress intended to provide authors with the incentive to create works. After that limited period of protection, the public is ensured free access to those works.\textsuperscript{18}

Since 1790, Congress has enacted statutes designed to accomplish this objective.\textsuperscript{19} In the twentieth century those statutes have revealed a congressional desire to provide copyright without regard for the artistic value of the work for which protection is sought. This desire is reflected in at least three aspects of the two principal copyright statutes of the twentieth century, the 1909 Copyright Act (the "1909 Act")\textsuperscript{20} and the Copyright Revision Act of 1976 (the "1976 Act");\textsuperscript{21} the liberal definition of works eligible for protection, the lack of any substantive evaluation of the merits of the particular work seeking protection and the provision for statutory damages.

A. The Liberal Definition of Works Eligible for Copyright Protection

Congress' desire to grant copyright protection regardless of the artistic value of a particular work is reflected in the very loose terms used in both the 1909 Act and the 1976 Act to define the type of works eligible for copyright protection. In the 1909 Act, Congress provided that "all the writings of an author" were eligible for copyright,\textsuperscript{22} a phrase lifted directly from the constitutional clause empowering Congress to provide copyright protection.\textsuperscript{23} No specific definition of "writing" or "author" was provided in the Act, and although in section five of the 1909 Act Congress listed several specific categories of copyrightable works, it explicitly indicated that these categories were not exclusive: "[t]he above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title,"\textsuperscript{24} that is, as "all the writings of an author."\textsuperscript{25} By comparing this to

\begin{itemize}
  \item \textsuperscript{18} See, e.g., Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984) (Copyright "is intended to motivate the creative activity of authors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. [T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.) ("The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works."); cert. denied, 449 U.S. 841 (1980). See generally 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.03, at 1-31 to 1-32 (1989).
  \item \textsuperscript{19} See infra notes 35, 53, 110.
  \item \textsuperscript{20} Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1978) (formerly codified at 17 U.S.C. §§ 1-216 (1976)).
  \item \textsuperscript{22} Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1075 (repealed 1978).
  \item \textsuperscript{23} U.S. Const. art. I, § 8, cl. 8.
  \item \textsuperscript{24} Act of Mar. 4, 1909, ch. 320, § 5, 35 Stat. 1075 (repealed 1978).
  \item \textsuperscript{25} Id. at § 4.
\end{itemize}
the definition of patentability in the patent statute which requires a showing of novelty, utility and non-obviousness,\textsuperscript{26} or the specific requirements for trademark registration provided in the Lanham Act, which denies eligibility to marks in part based on content.\textsuperscript{27} Congress' desire in 1909 not to impose substantive limitations on the works eligible for copyright is evident.\textsuperscript{28}

This desire not to impose substantive limitations on copyright eligibility is also revealed in the 1976 Act, where again Congress identified categories of works which were eligible for copyright, but provided that this list was not exclusive.\textsuperscript{29} Although Congress changed the definition of copyrightable works from "all the writings of an author" to "original works of authorship," the legislative history clearly indicates that the requirement that the work be "original" is only a minimal requirement that the work submitted be the work of the person claiming authorship and not copied from another work.\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{26} 35 U.S.C. § 101 (1988) (patent available to anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof "); 35 U.S.C. § 102(a) (1988) (patent denied if "the invention was known or used by others in this country before the invention thereof by the applicant for patent "); 35 U.S.C. § 103 (1988) (patent denied if "subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art ").
  \item \textsuperscript{27} \textit{E.g.}, 15 U.S.C. § 1052(a) (1988) (Trademark registration denied if mark "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute.").
  \item \textsuperscript{28} Earlier copyright statutes had been more restrictive, limiting copyright protection to specific categories of works. \textit{E.g.}, Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831) ("map, chart, book"); Act of Apr. 29, 1802, ch. 36, §§ 1, 2, 2 Stat. 171, 171 (repealed 1831) ("maps, charts, book or books any historical or other print or prints"); Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870) ("books, map, chart, musical composition, print, cut, or engraving"); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909) ("book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or painting, drawing, chromo, statue, statuary, and models or designs intended to be perfected as works of the fine arts ").
  \item \textsuperscript{29} 17 U.S.C. § 102 (emphasis added) ("Works of authorship include the following categories "): The legislative history of this provision makes it clear that congressional intention here was to maintain an open definition of "works of authorship." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 53 (1976) ("[T]he list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories."); \textit{see also id.} at 51 ("Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.").
  \item \textsuperscript{30} H.R. Rep No. 1476, 94th Cong., 2d Sess. 51. This concern with keeping aesthetic values out of copyright decisions is also indicated by the reaction many witnesses had to a proposed revision to the copyright law that would have modified the standards of copyrightability. In a report filed by the Register of Copyright in May, 1961, the Register recommended that a revised standard "should mention that any work, in order to be copyrightable, must be fixed in some tangible form and must represent the product of original creative authorship." 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, pt. 1, at 10 (Comm. Print July, 1961) (emphasis added). The use of the word "creative" in this proposal resulted in quite a stir; those who commented on this recommendation were overwhelmingly opposed
Congress explicitly stated that "[t]his standard does not include requirements of novelty, ingenuity, or esthetic merit," and was not intended to alter the standard of originality established by the courts under the 1909 Act. Congress also stated that "[t]he term 'literary works' does not connotate any criterion of literary merit or qualitative value" and that "the definition of 'pictorial, graphic, and sculptural works' carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality." Thus, in the 1976 Act, Congress shaped the definition of copyright eligibility so as wholly to exclude questions of artistic value.

B. The Lack of Substantive Evaluation as a Prerequisite to Copyright Protection

The 1909 Act provided copyright protection to all works without requiring a preliminary examination of the artistic value of the work or of the degree of skill or creativity involved in creating that work. The 1909 Act provided

to the insertion of the term "creative" due to fears that it would require a subjective evaluation of the merits of a work as a condition to copyright protection. See House Comm. on the Judiciary, 88th Cong., 1st Sess., Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, pt. 2, at 247 (Comm. Print Feb., 1963). M. Arthur Auslander commented, "The Register of Copyrights should not have the right to deny registration or reject copyrights on 'works of art' based upon a subjective evaluation as to what IS a work of art or the scope of creativity involved in a 'work of art' without a search or citation. Searching, further, does not seem appropriate for our copyright proceeding." Id. Similarly, the Authors League of America noted, "The qualification of 'creativity' should not be added to the Copyright Act." Id. at 260. "If courts were required to provide a definition for [creativity], a wide range of criteria could develop depending upon personal tastes of particular judges." Id. at 313 (remarks of Irwin Karp). "The word 'creative' IS subject to too many interpretations." Id. at 411 (remarks of Writers Guild of America); see also House Comm. on the Judiciary, 89th Cong., 1st Sess., Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, pt. 6, at 3 (Comm. Print May, 1965) (concern about "dangers of using a word like 'creative' led to its elimination). In the end, the word "creative" was dropped, and when the first bills to revise the copyright laws were introduced to Congress in 1964, neither the House bill, H.R. 11,947, 88th Cong., 2d Sess., 110 Cong. Rec. 16,256 (1964), nor the Senate bill, S. 3008, 88th Cong., 2d Sess., 110 Cong. Rec. 16,260 (1964), used that standard. Instead, the language that was eventually adopted in 17 U.S.C. § 102 was used, that is, "original works of authorship fixed in any tangible medium of expression."

32. Id.
33. Id. at 54 (quoting 17 U.S.C. § 101).
34. Id.
35. Congress has never required a preliminary examination of works seeking copyright protection to determine eligibility. The earliest statutes did, however, make registration and deposit formal prerequisites to copyright. E.g., Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (copyright begins "from the recording of title thereof in the clerk's office"); id. at § 3 ("[N]o person shall be entitled to the benefit of this act unless he shall first deposit a printed copy in the clerk's office"). There is also some indication that prior to the twentieth century, some courts allowed judgments as to the artistic merits of a work to affect copyright eligibility. See Umbreit, A Consideration of Copyright, 87 U. Pa. L. Rev.
that copyright could be obtained merely by publishing a work with notice of copyright; there was no requirement that the person seeking copyright file an application or submit the work for examination.\textsuperscript{36} Congress provided for registration and deposit of the copyrighted work\textsuperscript{37} and made registration a prerequisite to the right to sue for infringement,\textsuperscript{38} but Congress did not require either registration or deposit as prerequisites to copyright itself, nor did it require any substantive evaluation of the work being submitted.\textsuperscript{39}

The 1976 Act takes this informality one step further. Under the 1976 Act, federal copyright in "original works of authorship fixed in any tangible medium of expression"\textsuperscript{40} commences at the time of the work's creation and fixation.\textsuperscript{41} The person claiming copyright need not even attach a notice or publish the work in order to obtain federal copyright for the work; copyright exists once the work is fixed.\textsuperscript{42} Registration and deposit do have some impact on the rights provided to the owner of the copyright,\textsuperscript{43} but under the 1976 Act, as with the 1909 Act, these formalities are not prerequisites to protection and do not involve any substantive evaluation of the subject works.\textsuperscript{44}

\textsuperscript{36} Act of Mar. 4, 1909, ch. 320, § 10, 35 Stat. 1075 (repealed 1978) ("[A]ny person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title."). The 1909 Act did provide, however, that copyright in some unpublished works could be obtained by registration. \textit{Id.} at § 12.

\textsuperscript{37} \textit{Id.} at § 11.

\textsuperscript{38} \textit{Id.} at § 13.

\textsuperscript{39} See Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 37 (1939) (depositing work not necessary to secure copyright under the 1909 Act; publication with notice will do so); Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737, 740-41 n.2 (2d Cir. 1975) ("Registration of the copyright in a published work is thus not necessary to acquire the copyright, but is simply a recordation of it."); cert. denied, 424 U.S. 955 (1976); Krafft v. Cohen, 117 F.2d 579, 580 (3d Cir. 1941) ("One secures a copyright on published material by accompanying its publication with a copyright notice at the place and in the form required by the statute. Subsequent registration under the provisions of the statute does not create the copyright, but only records it."); 2 M. Nimmer & D. Nimmer, supra note 18, § 7.16[A], at 7-148.

\textsuperscript{40} 17 U.S.C. § 102(a).

\textsuperscript{41} \textit{Id.} at § 302(a).

\textsuperscript{42} See \textit{id.} at §§ 302, 405.

\textsuperscript{43} For example, the owner cannot sue for infringement unless the work has been registered. \textit{Id.} at § 411. Also, statutory damages and attorney's fees may not be available for infringing acts which occurred before registration. \textit{Id.} at § 412.

\textsuperscript{44} \textit{Id.} at §§ 401-412. The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. § 101), even further reduced the significance of these formalities by eliminating any requirement of notice as a condition to copyright protection, even for works that are published. Notice is now completely optional, although Congress gave the owner incentives to attach notice by providing that no weight would be given to the defense of innocent infringement to mitigate damages in cases involving works which had included a copyright notice. \textit{Id.} at 2857; see 17 U.S.C. §§ 401-402.
The ease with which a party can obtain a copyright stands in stark contrast to the procedural obstacles which the applicant must overcome in order to obtain either a patent or a federal trademark. Federal patent law provides for an elaborate and detailed examination of an applicant's claim for a patent. That examination involves a substantive evaluation of the applicant's claims and can take a relatively long period of time. This examination attempts to determine whether the alleged invention, for which a patent is sought, is sufficiently novel, useful and non-obvious to merit federal patent protection. Obtaining a federal trademark is also more difficult than obtaining a copyright. The party seeking federal trademark protection must endure a lengthy application process during which the mark sought to be registered is examined in order to determine its eligibility for federal trademark registration. The distinctiveness of the mark, its potential conflict with preexisting marks and other factors are considered before registration is granted.

Thus, where Congress desires a mechanism for preliminary evaluation of an applicant's eligibility for other forms of federal intellectual property protection, it knows how to create one. Its decision not to impose such a mechanism as part of copyright law reflects its desire to keep artistic values out of determinations of copyright eligibility.

C. The Provision for Statutory Damages

Congress' desire to exclude artistic values from the determination of copyright protection is also reflected in both the 1909 Act and the 1976


46. In its annual report for fiscal year 1982, for example, the Commissioner of Patents and Trademarks reported that the average time to process a patent application from filing to issue was 24.2 months for utility, plant and reissue patents. 1982 COMM'R OF PATENTS AND TRADEMARKS, ANN. REP. 18.


50. The legislative histories of the 1909 Act and 1976 Act do not explicitly discuss the decision not to require preliminary examination of the merits of the work seeking copyright, perhaps because this aspect of copyright procedure dates back to the Statute of Anne, 1709, ch. 19, under which protection was granted to printed works without any preliminary evaluation of those works. See L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 143-46 (1968). Thus, Congress may have assumed, without discussion, that a preliminary examination of the merits of a work as a prerequisite to copyright would be inappropriate.

Act,\textsuperscript{52} by the provision for statutory ("in lieu") damages. Even if a plaintiff cannot prove financial injury resulting from infringement, he or she can be awarded monetary relief, in the discretion of the judge.\textsuperscript{53} Such provision for monetary relief where the plaintiff cannot prove any significant financial harm reflects Congress' belief that every work, even one without proven economic value, should be protected because the protection offered the author should not depend on market value.\textsuperscript{54} Here, again, Congress recognized that the artistic value of a work should not be the basis for determining the scope or existence of copyright in that work.

Thus, the core structure of the copyright statutes was designed to minimize, if not wholly to exclude, the role of artistic evaluation in the awarding of copyright protection. By providing copyrights to a liberally-defined set of works without a substantive examination of the merits of those works, and by allowing recovery of monetary awards in cases where there has not been any proven economic injury, Congress intended that copyright protection should not be dependent upon an assessment of the artistic value of the work.

II. THE "DANGEROUS UNDERTAKING" FEARED BY JUSTICE HOLMES

Why has copyright law been shaped by the desire to have copyright granted without regard for the artistic value of a work? What is so dangerous about judges "trained only to the law" making decisions about the eligibility of a given work for copyright based upon its artistic value? If there were an objective standard for determining how to evaluate art, then presumably judges could apply that standard, just as they apply other standards in resolving other issues.

During the eighteenth and early nineteenth centuries, many people did believe that there were objective criteria for determining what is good art or good literature. This view had its roots in the idea that art was mimesis or

\begin{quote}
\textsuperscript{52} 17 U.S.C. § 504(c).
\textsuperscript{53} The first American copyright statute, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25, similarly provided a fixed minimum penalty, payable by an infringer, a part of which went to the copyright owner suing for infringement, establishing an early form of the statutory damages remedy available today under § 504(c) of the 1976 Act.
Statutory damages have been a feature of the U.S. copyright statutes since 1790. The need for this special remedy arises from the acknowledged inadequacy of actual damages and profits in many cases: The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine.
\textit{Id.}, see also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 161 (1976) ("[T]he plaintiff in an infringement suit is not obliged to submit proof of damages and profits").
\end{quote}
imitation of nature and that "good art" was defined on the basis of the accuracy of the imitatio and the ability of the artist to extract universal truths from that observation and imitation of nature. During the Enlightenment period, Samuel Johnson, Sir Joshua

55. Plato viewed painting and poetry as imitative and inferior to the truth, which existed at a level twice removed from the painting or poem, see Plato, The Republic 277-91 (A. Bloom trans. 1968), but also believed that true beauty could be found by studying physical beauty first in particular instances and then on a more universal level, then studying moral beauty and the beauty of wisdom, and ultimately arriving at a sense of absolute beauty. See Plato, The Symposium 92-95 (W. Hamilton trans. 1980). For Plato, however, the arts did not seem to have any significant role in this search for the knowledge of beauty. Although Plato generally viewed poets skeptically, he did seem to believe that some poetry could reveal aspects of truth if the poet was instructed in principles of justice, goodness and nobility. See Plato, Phaedrus, in The Collected Dialogues of Plato 522-23 (E. Hamilton & H. Carms eds., R. Hackforth trans. 1961). In order to determine the success of a particular work, the work would have to be evaluated by one who had knowledge of the original object being imitated and knowledge of the accuracy of the copy and of the skill with which that copy had been made. See Plato, Laws 45-50 (A. Taylor trans. 1960).

Aristotle also believed that the arts were imitative of reality, but viewed this process of imitation more positively than did Plato. Aristotle believed that through imitation, the artist could reveal certain universal truths. Aristotle thus argued that art should be judged by the quality of the imitation and the artist's adherence to certain rules and structures that insured that the work would help to reveal these universal truths. This view of the purpose of art underlies Aristotle's conception of the purpose and structure of tragedy. In writing drama, Aristotle believed that the poet must create a plot based on actions that will necessarily or probably occur. In other words, the dramatic plot should imitate the universal pattern of human action in order to fulfill the purposes of art. See Aristotle, Poetics, in 2 The Complete Works of Aristotle 2316-40 (J. Barnes ed. 1984).


56. In his Preface to Shakespeare published in 1765, Johnson argued that the longevity of Shakespeare's excellent reputation was based on the fact that Shakespeare was "above all writers, at least above all modern writers, the poet of nature; the poet that holds up to us the faithful mirror of manners and of life." S. Johnson, Preface to Shakespeare, in Rasselas, Poems, and Selected Prose 263 (B. Bronson 3d ed. 1971) (1795). Johnson claimed that art should mirror life:

Nothing can please many, and please long, but just representations of general nature. The irregular combinations of fanciful invention may delight a while, by that novelty of which the common satiety of life sends us all in quest; but the pleasures of sudden wonder are soon exhausted, and the mind can only repose on the stability of truth.

Id. at 263. Imitating nature was not enough, however; Johnson criticized Shakespeare for seeming "to write without any moral purpose." Id. at 271. "He sacrifices virtue to convenience, and he is so much more careful to please than to instruct This fault the barbarity of his age cannot extenuate; for it is always a writer's duty to make the world better, and justice is a virtue independant [sic] on time or place." Id., see also S. Johnson, The Rambler No. 4, Saturday, March 31, 1750, in id. at 70 ("It is justly considered as the greatest excellency of art, to imitate nature; but it is necessary to distinguish those parts of nature, which are, most proper for imitation "). Johnson stated in S. Johnson, The History of Rasselas, in id. at 628-29 (1759):

The business of a poet is to examine, not the individual, but the species
But the knowledge of nature is only half the task of a poet; he must be acquainted
Reynolds, \textsuperscript{57} and others\textsuperscript{58} elaborated on this view and argued that through reason they could deduce specific rules and criteria which poets and painters should follow in order to achieve the Aristotelian goal of finding the universal principles of nature and human nature and thus create "good art."

By the nineteenth century, however, the view that art had to imitate nature and adhere to formal rules was challenged by the Romantic view that art

\begin{quote}
l likewise with all the modes of life. He must write as the interpreter of nature, and the legislator of mankind, and consider himself as presiding over the thoughts and manners of future generations; as a being superior to time and place.\end{quote}

\textit{Id.}

\textsuperscript{57} In his \textit{Discourses on Art}, Sir Joshua Reynolds attempted to instruct young artists on the principles and goals of good painting. Reynolds believed that only through the exercise of reason could one discover the standards of good taste. In December, 1776, he wrote:

\begin{quote}
[We] will conclude, that whatever goes under the name of taste, which we can fairly bring under the dominion of reason, must be considered as equally exempt from change. If therefore, in the course of this enquiry, we can shew that there are rules for the conduct of the artist which are fixed and invariable, it follows of course, that the art of the connoisseur, or, in other words, taste, has likewise invariable principles.\end{quote}

\textbf{J. REYNOLDS, DISCOURSES ON ART} 98-99 (S. Mitchell ed. 1963) (1776). Reynolds went on to say:

\begin{quote}
It is reason and good sense therefore which ranks and estimates every art, and every part of that art, according to its importance We will not allow a man, who shall prefer the inferior style, to say it is his taste; taste here has nothing, or at least ought to have nothing to do with the question. He wants not taste, but sense, and soundness of judgment.\end{quote}

\textit{Id.} at 105. He further commented:

\begin{quote}
[T]he real substance of what goes under the name of taste, is fixed and established in the nature of things; that there are certain and regular causes by which the imagination and passions of men are affected; and that the knowledge of these causes is acquired by a laborious and diligent investigation of nature\end{quote}

\textit{Id.} at 109.

Reynolds, like Johnson, believed that art should imitate nature, and further believed, as with Johnson's view of literature, that in imitating nature, the painter was to go beyond mere reproductions and to seek universal truths: "The wish of the genuine painter must be more extensive: instead of endeavouring to amuse mankind with the minute neatness of his imitations, he must endeavour to improve them by the grandeur of his ideas" \textit{Id.} at 27. In order to do this the artist had to study nature because only by "long laborious comparison" could that artist acquire "a just idea of beautiful forms" \textit{Id.} at 29. Ultimately, however, it was through the exercise of reason combined with this study of nature that the artist would find truth and thus beauty: "As our art is not a divine \textit{gift}, so neither is it a mechanical \textit{trade}. Its foundations are laid in solid science; and practice, though essential to perfection, can never attain that to which it aims, unless it works under the direction of principle." \textit{Id.} at 92 (emphasis in original).

\textsuperscript{58} \textit{E.g., J. DRYDEN, A Defence of an Essay of Dramatic Poesy}, in 1 \textit{ESSAYS OF JOHN DRYDEN} 110-33 (W Ker ed. 1900) (1668). Dryden wrote:

Poesy must resemble natural truth, but it must be ethical. Indeed, the poet dresses truth, and adorns nature, but does not alter them Therefore that is not the best poesy which resembles notions of things that are not, to things that are: though the fancy may be great and the words flowing, yet the soul is but half satisfied when there is not truth in the foundation.

should be a form of self-expression reflecting the emotions and personality of the artist. Wordsworth expressed such a view of poetry in writing:

"Poetry is the spontaneous overflow of powerful feelings: it takes its origin from emotion recollected in tranquillity: the emotion is contemplated till, by a species of re-action, the tranquillity gradually disappears, and an emotion, kindred to that which was before the subject of contemplation, is gradually produced, and does, actually exist in the mind. In this mood successful composition generally begins."

This emphasis on the individual artist and the expression of emotion was difficult to reconcile with any fixed, objective criteria for defining good art. As Coleridge wrote in 1817:

"The ultimate end of criticism is much more to establish the principles of writing, than to furnish rules how to pass judgment on what has been written by others. For, even as truth is its own light and evidence, discovering at once itself and falsehood, so is it the prerogative of poetic genius to distinguish by parental instinct its proper offspring from the changelings. Could a rule be given from without, poetry would cease to be poetry, and sink into a mechanical art." 60


"The peculiarity of poetry appears to us to lie in the poet's utter unconsciousness of a listener. Poetry is feeling confessing itself to itself in moments of solitude, and embodying itself in symbols which are the nearest possible representations of the feeling in the exact shape in which it exists in the poet's mind.


60. S. Coleridge, Biographia Literaria, c. XCIII (1817), in English Literary Criticism: Romantic and Victorian 87-89 (D. Hoffman and S. Hynes eds. 1963); see also M. Beardsley, supra note 55, at 247 (The Romantics broadened the scope of "good, or great, art to include works whose comparative looseness of form is considered to be offset by a more poignant or more individualized presentation of personal emotions.")

Immanuel Kant had provided some of the groundwork for questioning the notion of an objective definition of good taste. Kant believed that judgments of taste are not cognitive but subjective reactions where, in matters of pure taste, our aesthetic reactions to an object are based not on our interest in the function of the object or our desire for the object, but rather are based on a disinterested reaction to the aesthetic surface of the object, freed from its particular function. Although this reaction is described as "subjective," in the sense that it is not based on logic or cognition but based on producing pleasure in the subject experiencing the object, in Kant's view these subjective reactions were assumed to be universally shared, that is, that anyone viewing that object would react in the same way, based on the way that object would promote the harmony of their imagination and understanding. I. Kant, Critique of Judgment, in Philosophical Writings 150-200 (J. Meredith trans., E. Behler ed. 1986) (1790). Kant attempted to reconcile the conflict between the claim to the validity of individual taste and the claim to a "correct" universal standard of taste by describing judgments of taste as based not on determinate, but
There was thus a tension emerging between the classical view of the creative process and criticism of creative works and the Romantic view of these matters.

Justice Holmes' opinion in *Bleistem v Donaldson Lithographing Co.*\(^{61}\) and its often-quoted line about the dangers of judges making determinations of artistic merit\(^{62}\) reflects this tension between the classical view that creative works should conform to formal, objective criteria and the Romantic view that the creative process is a more subjective, personal reflection of the individual artist and thus that creative works are harder to judge on the basis of objective criteria. In *Bleistem*, the plaintiffs alleged that the defendant had infringed their copyright in certain circus advertising posters. Justice Holmes concluded that neither the fact that a work was used for commercial purposes nor the fact that a work was of "little merit or of humble degree"\(^{63}\) was a basis for denying copyright to such a work. He then explored the risks created if the courts were to make decisions about the artistic worthiness of a work.

In part, Justice Holmes' opinion reflected the view that there is no objective basis for evaluating art. Holmes worried that if judges decided copyright matters on the basis of artistic merit, "some works of genius would be sure to miss appreciation"\(^{64}\) because the decision makers might not be sophisticated enough to recognize the value of a given work at a given time. This would be especially true with works considered avant-garde: "Their very novelty would make them repulsive until the public had learned the new language in which their author spoke."\(^{65}\) Justice Holmes cited as one example the paintings of Manet,\(^{66}\) which met with public disapproval when first exhibited in the 1860s, but which, by 1903, were not only accepted but highly valued by the public as well as the art world.\(^{67}\) Justice Holmes seemed concerned that allowing decision makers to rely on their personal artistic values would lead to a denial of copyright protection for works that later generations might consider to be works of artistic genius. As a result, creative

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\(^{61}\) *U.S.* 239 (1903).

\(^{62}\) *See supra* notes 11-13 and accompanying text.

\(^{63}\) *Bleistem*, 188 *U.S.* at 251.

\(^{64}\) *Id.*

\(^{65}\) *Id.*

\(^{66}\) *Id.*

\(^{67}\) *Impressionism* 302-03 (J. Clay ed. 1973).
expression might stagnate because artists might be induced to follow traditional, conservative modes of expression, rather than to develop new and experimental modes of expression. Thus, Holmes recognized that artistic standards change over time and that there is no unchanging objective basis for evaluating art on which judges can rely in determining copyright protection.

Justice Holmes also realized that a second risk would be created if "persons trained only to the law" decided the worth of a creative work: "[C]opyright would be denied to pictures which appealed to a public less educated than the judge."68 That is, in Justice Holmes' view, although judges might not be sophisticated enough to appreciate the avant-garde, they could be too sophisticated to appreciate the tastes of the general public. Since such works have economic value, in Justice Holmes' view, the creator is entitled to protection from those who would copy such works and deny the creator the financial benefits to which he or she is entitled, even though such works may fail to meet Justice Holmes' personal view of good art. Justice Holmes did not, however, conceal his own low opinion of such taste, as revealed in his comment that such taste is "an ultimate fact for the moment, whatever may be our hopes for a change."69 However, he conceded that works that

68. Blestern, 188 U.S. at 251-52.
69. Id. at 252. Justice Holmes had very definite opinions about what constituted "good art" and "good literature." Born into an aristocratic and intellectual Boston family in 1841, he grew up surrounded by some of the "best table conversation" in Boston. THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS at xvii (M. Lerner ed. 1946) [hereinafter M. Lerner]. See generally S. Novick, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 9-28 (1989). His father, Dr. Oliver Wendell Holmes, was a famous physician and poet, and was active in the Boston literary world. He had very orthodox standards of good taste grounded in what he considered moral values and tried to instill those values and standards in his son, with varying degrees of success. M. Howe, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870, at 11-17 (1957); M. Lerner, supra, at xvii-xxi. Some of this influence was reflected in an essay the younger Holmes wrote while a student at Harvard College, in which he wrote that "there is nothing in literature so elevating" as the classic books of great literature, which he defined as including Shakespeare, Montaigne, Goethe, Plato, Confucius, among others, and that "[t]he great secret of all delight in literature is preserving this fineness of taste." M. Howe, supra, at 45 (quoting Books, 4 HARV MAG. 408 (1858)). Later college essays on Plato and Dürer and book reviews reflected Holmes' belief that art should seek to capture ideals and universal truths. M. Howe, supra, at 56-59, 60-61. Holmes apparently, however, was not narrowly selective in his choices of reading books; he was a voracious reader whose tastes ranged from philosophy and the classics to detective stories and modern novels. J. Monagan, THE GRAND PANJANDRUM: MELLOW YEARS OF JUSTICE HOLMES 103-08 (1988). Holmes also was very interested in art prints and engravings, which he studied and collected. Id. at 108. Max Lerner claimed that this personal interest is reflected in Holmes' ruling in Blestern that the copyright statute could protect lithographs. M. Lerner, supra, at 208-09.

On the other hand, Holmes did recognize that there might not be unanimity in matters of taste. In 1902, he wrote to Lady Pollock about some books that he had been reading. Although he stated his own opinions on literature quite vehemently ("a picture of a squalid and worthless life is a kind of art in which I take little pleasure"), he also recognized that others' tastes could
appeal to the public's taste must be given copyright protection because "the taste of any public is not to be treated with contempt." Thus, Holmes' opinion reflects the paradox presented by the tension between the classical and Romantic views of art: there is no objective basis for evaluating art, but some art is better than other art.

This paradox presented by the tension between the classical and Romantic views of art has been exacerbated during the twentieth century by the continuing challenge to the view that artistic value can be objectively determined. George Santayana wrote in 1896 that "beauty is a species of value," and that "[v]alues spring from the immediate and inexplicable reaction of vital impulse, and from the irrational part of our nature." Santayana argued that determinations of beauty are not intellectual judgments or judgments of fact, but judgments of value that are based on whether or not the given work produces the sensation of aesthetic pleasure. An accurate imitation is aesthetically valuable not because it is true or realistic, but because our perception of that truth or realism produces pleasure. Santayana also recognized that the claim of universality in aesthetic judgment was inaccurate.

There is notoriously no great agreement upon aesthetic matters; and such agreement as there is, is based upon similarity of origin, nature, and

differ from his:

Well, to be civilized is to be potentially master of all possible ideas, and that means that one has got beyond being shocked, although one preserves one's own moral and aesthetic preferences. I regard the latter, however, as more or less arbitrary, although none the less dogmatic on that account. We tacitly postulate that if others were as intelligent and well educated as we they would be compelled to agree with us—but that is a mere ideal, not an actuality.

Letter from O.W. Holmes to Lady Pollock (Sept. 6, 1902), reprinted in 1 HOLMES-POLLOCK LETTERS 105 (M. Howe ed. 1941).

Recognizing these individual differences, however, did not mean for Holmes that there was no "objective reality in which is to be found the unity of our several compulsions "; ultimately, he left that as a question to be addressed by philosophers. Similarly, in a letter to Harold J. Laski in 1926, Holmes responded to Laski's "raptures over Jane Austen," with which Holmes appeared to disagree as follows: "She shines in the firmament of your world You are the God of that, but the religion of taste is polytheistic." Letter from O.W. Holmes to H.J. Laski (Aug. 5, 1926), reprinted in HOLMES-LASKI LETTERS 863 (M. Howe ed. 1953).

Thus, although Holmes held very strong views of what he liked in art and literature, he recognized that others could hold different views. This is generally consistent with Holmes' overall view that law is not based on moral absolutes, but developed by human beings to meet and to reflect the circumstances of the times. See Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897). See generally Laski, The Political Philosophy of Mr. Justice Holmes, 40 HARV. L. REV. 683, 685-89 (1931); McKinnon, The Secret of Mr. Justice Holmes, 36 A.B.A. J. 261 (1950). McKinnon describes the nihilistic aspects of Holmes' philosophy. Id. at 344. That is, there may be a conflict between the philosophic views Holmes promoted in his writings and those deeply held values upon which he actually acted in deciding cases.

70. Bleistein, 188 U.S. at 252.
72. Id.
73. Id. at 25-26.
circumstance among men, a similarity which, where it exists, tends to bring about identity in all judgments and feelings. It is unmeaning to say that what is beautiful to one man ought to be beautiful to another. If their senses are the same, their associations and dispositions similar, then the same thing will certainly be beautiful to both.74

Although Santayana thus believed aesthetic values were subjectively determined and based to some extent on the personal background of the observer, he also believed that taste was a value that could be developed and that exposure to beauty led to a finer aesthetic sensibility.75 Thus, like Justice Holmes, he believed that all taste was relative, but that some people's taste was better than others.

John Dewey, writing in 1934, criticized the art establishment for removing the experience of art from the realities of ordinary experience. He objected to setting art on a pedestal and to "the rise of the compartmental conception of fine art."76 Dewey also objected to traditional art criticism which imposed formal rules and standards on art in order to judge it, and he specifically rejected the neoclassical approach to judging art. He also, however, rejected the opposite approach to criticism which denied the existence of any objective values at all, or what he described as the "impressionistic" approach in which the critic claims that all that criticism can provide is simply the individual reactions of the critic to the particular work of art. Dewey argued that true criticism should state "what a work of art is as an experience" because doing so "may render particular experiences of particular works of art more pertinent to the object experienced, more aware of its own content and intent."77 Thus, according to Dewey, critics should know about the history of art, about the background of the individual artist and about that artist's other works in order to understand and appreciate the experience of the artist in creating the work of art. For Dewey, "[t]he function of criticism is the reeducation of perception of works of art . . . . The conception that its business is to appraise, to judge in the legal and moral sense, arrests the perception of those who are influenced by the criticism that assumes this task."78 Thus, Dewey believed that a work of art should be valued for the experience that created it and for what the work can tell an audience about

74. Id. at 44 (emphasis in original).
75. See id. at 80-82, 114, 127-30.
76. J. DEWEY, ART AS EXPERIENCE 8 (1934). He attributed this in part to capitalism and the development of modern industry and commerce and saw works of art becoming economic commodities valued as investments and as status symbols, not for their aesthetic qualities. Id. at 8-9.
77. Id. at 309; see also id. at 298-309.
78. Id. at 324. Other writers who rejected the neoclassical view that art should imitate nature and conform to certain formal rules and standards include Benedetto Croce, see generally B. CROCE, AESTHETIC AS SCIENCE OF EXPRESSION AND GENERAL LINGUISTIC 170-210 (D. Ainslie trans. 1909), and R. Collingwood, see generally R. COLLINGWOOD, ESSAYS IN THE PHILOSOPHY OF ART 55-77, 121-28 (A. Donegan ed. 1964).
that experience, not for its ability to conform to specific objective criteria.

In current discourse, many writers argue that our definitions and modes of evaluating and criticizing art and literature are culturally determined and reflect the individual background and identity of the individual viewing the work. For example, Barbara Herrnstein Smith claims that “[o]ur interpretation of a work and our experience of its value are mutually dependent, and each depends upon what might be called the psychological ‘set’ of our encounter with it: the nature and potency of our own assumptions, expectations, capacities, and interests with respect to it.”

Smith suggests:

[W]hat we may be doing ... when we make an explicit value judgment of a literary work is (a) articulating an estimate of how well that work will serve certain implicitly defined functions (b) for a specific implicitly defined audience, (c) who are conceived of as experiencing the work under certain implicitly defined conditions.

In other words, Smith believes that all judgments about a literary work (or any other work of art, for that matter) are a function of the identity and background of the observer and the expectations that the observer has with respect both to the function or classification of the work being experienced and to the particular audience that will also be experiencing that work.

Thus, according to Smith, there can only be “universally shared objective standards” in a totally homogeneous society that is insulated from external influences and safe from internal dissension. Smith argues that with the more typical heterogeneous society, individuals will agree on matters of taste with respect to works that satisfy the types of needs and interests that are widely shared by the individuals in that community; conversely, the individuals in that same community will tend to disagree on matters of taste with respect to works that satisfy the types of needs and interests which are not widely shared by the individuals in that community. Those in authority in such communities will thus have an interest in validating the community’s shared taste in order to maintain stability and justify their authority. It is essentially through this kind of process, according to Smith, that the established Western canon of literary and artistic works was established and is perpetuated.

Other writers have made similar claims. Terry Eagleton has argued that what we mean by literature is a “highly valued kind of writing,” and that since

80. Id. at 13.
81. See generally id. at 9-16, 30-35.
82. Id. at 93.
83. Id. at 24-27, 35-53.
84. E.g., T. Eagleton, Literary Theory: An Introduction (1983). Eagleton claims that
value-judgements are notoriously variable. There is no such thing as a literary work or tradition which is valuable in itself, regardless of what anyone might have said or come to say about it. 'Value' is a transitive term: it means whatever is valued by certain people in specific situations, according to particular criteria and in the light of given purposes.  

Others have argued that all definitions of art are institutionally determined by the art world and its cultural practices and conventions and that there are no external, objective determinants of what is art. The tendency in postmodern art and literature to collapse the boundaries between "high culture" and popular culture and between different genres and art forms has also been seen as a rejection of the classical definition of art and of the rise of English literature in the eighteenth and nineteenth centuries was essentially political, that is, that literature was used by the political and economic elite as propaganda to "communicate to [the working classes] the moral riches of bourgeois civilization and curb in them any disruptive tendency to collective political action." Id. at 25. After discussing the various theories and approaches to literary criticism, Eagleton concludes that all literary theory is also political and ideological and that "[d]epartments of literature in higher education are part of the ideological apparatus of the modern capitalist state," id. at 200, which perpetuate the reactionary notion that literature can be defined and criticized in a way that is not based on political values. See generally id. at 194-205.

85. Id. at 10.

86. Id. at 11; see also J. Wolff, AESTHETICS AND THE SOCIOLOGY OF ART (1983). Wolff claims:

Criticism, and the history of art and literature, then, are ideological, both in the sense that they originate and are practiced in particular social conditions, and bear the mark of those conditions, and in the sense that they systematically obscure and deny these very determinants and origins. It is for this reason that aesthetics can take no reassurance from criticism that 'the great tradition' really is great. The great tradition is the product of the history of art, the history of art history, and the history of art criticism, each of which, in its turn, is the social history of groups, power relations, institutions and established practices and conventions.

Id. at 16; see also N. Hadjinicolaou, ART HISTORY AND CLASS STRUGGLE (L. Asmal trans. 1978). Hadjinicolaou argues that all works of art contain a visual ideology, which he defines as "the way in which the formal and thematic elements of a picture are combined on each specific occasion. This combination is a particular form of the overall ideology of a social class." Id. at 95. In other words, every work of art alludes to a particular social reality that is a reflection of a particular social class. See id. at 95-183. Hadjinicolaou concludes that judgments concerning the aesthetic value of a given work of art are a product of the identity of the particular judge: "[A]esthetic effect is none other than the pleasure felt by the observer when he recognizes himself in a picture's visual ideology." Id. at 182; see also Bourdieu, THE ARISTOCRACY OF CULTURE, 2 MEDIA, CULTURE AND SOCIETY 225 (1980) (author considers high culture as a product of the aristocracy that is best appreciated by those living under certain conditions and that is valued for how it facilitates class distinctions).

In addition, psychological studies have been done to demonstrate that aesthetic reactions vary, to some extent, based on gender, age and cultural background. R. Pickford, PSYCHOLOGY AND VISUAL AESTHETICS 150-80 (1972) (survey of studies comparing reactions to colors, pictures, patterns, portraits and other visual works, based on race, gender, age and cultural background).

notion that artistic value can be objectively determined. Although some dispute these views and criticize the consequences of relativism and "standardlessness" that they fear these views may cause, there is no doubt that the view that there is an objective definition of artistic value is no longer taken as a given.

This growing twentieth-century skepticism regarding the existence of any objective or neutral definition of artistic value helps to explain why Congress and the courts are reluctant to allow copyright determinations to be made on the basis of a judge's view of a work's artistic value. If determinations of artistic value reflect the background and identity of the individual decision maker and there is no objective test of artistic merit, then works created by those and for those whose background and values are different from those of the decision maker may not be appreciated by that decision maker. The cultural understanding and values that would be reflected in copyright decisions could be startlingly narrow if based upon judges' views of artistic value.

Justice Holmes' warnings about the "dangerous undertaking" are thus understandable. If writers such as Smith and Eagleton are right and there is

88. See L. Hutcheon, A Poetics of Postmodernism 3-20, 40-43 (1988). Hutcheon claims: [Postmodernism] does not so much deny as contest the "truths" of reality and fiction—the human constructs by which we manage to live in our world. Fiction does not mirror reality; nor does it reproduce it. It cannot. There is no pretense of simplistic mimesis in historiographic metafiction. Instead, fiction is offered as another of the discourses by which we construct our versions of reality Id. at 40; see also F Jameson, Postmodernism and Consumer Society, in Post Modernism and Its Discontents 13-29 (E. Kaplan ed. 1988).

89. See, e.g., E. Hirsch, Jr., Cultural Literacy: What Every American Needs to Know (1987); A. Bloom, The Closing of the American Mind (1987). Hirsch disagrees with those who argue that teaching the traditional literary canon is a means of preserving the status quo and criticizes those changes in our educational system that have meant that children are not being exposed to the established elements of our literate culture. E. Hirsch, supra, at 20-24, 125-26, 144. On the other hand, Hirsch recognizes that the formation of a national culture, as well as the creation of national languages, is a conscious process done for the purpose of creating certain shared experiences and values to facilitate communication among members of that nation. Id. at 70-93. Hirsch thus is not contending that the elements of our literate culture are objectively better than other works or cultures, but rather that it is essential for members of our culture to have the background knowledge of those elements in order to function within this culture. Bloom is less tempered in his condemnation of what he considers "cultural relativism": "The unrestrained and thoughtless pursuit of openness, without recognizing the inherent political, social or cultural problem of openness as the goal of nature, has rendered openness meaningless. Cultural relativism destroys both one's good and the good." A. Bloom, supra, at 38. Bloom criticizes contemporary education for failing to require students to read what Bloom considers the classics, id. at 62-67, and considers feminism "the latest enemy of the vitality of classic texts." Id. at 65. Bloom says that "[t]he failure to read good books both enfeebles the vision and strengthens our most fatal tendency—the belief that the here and now is all there is." Id. at 64. Bloom calls for a return to a traditional "Great Books" approach to liberal education, in which students read the "classic" texts. Id. at 336-47

90. This is also evident in the heated debate going on in academic circles over the proper content of the educational curriculum. See, e.g., Berger, Ibn Batuta and Sitar Challenging Marco Polo and Violin in Schools, N.Y Times, Apr. 12, 1989, at A1, col. 1.
no objective basis for determining artistic value, then allowing judges to determine copyright protection on the basis of their view as to a work's artistic value would result in subjective determinations based upon the judges' own cultural experiences and values. Given the problems and unfairness that this would cause, it would be best if copyright infringement decisions could be made without regard to a judge's view of the artistic value of the work. Part III will explore how the courts have attempted to accomplish that goal.

III. THE COURTS' ATTEMPTS TO AVOID ARTISTIC VALUES IN DETERMINING COPYRIGHT INFRINGEMENT: THE IDEA-EXPRESSION DICHOTOMY

In Part I, we discussed how Congress designed the basic structure of the copyright statutes to ensure that a given work would be eligible for copyright, regardless of its perceived artistic value.91 As a practical matter, however,

91. Although there have been cases where the lack of merit in a particular work has been a factor relied upon in denying copyrightability to the overall work, e.g., Toro Co. v. R & R Prod. Co., 787 F.2d 1208, 1213 (8th Cir. 1986) (numbering system used in plaintiff's catalogs for sales of replacement parts for lawn care machines held uncopyrightable because "[t]he random and arbitrary use of numbers in the public domain does not evince enough originality to distinguish authorship"); Durham Industries v. Tomy Corp., 630 F.2d 905, 910 (2d Cir. 1980) (plastic reproductions of cartoon characters lacked sufficient originality to be copyrightable since there was "nothing recognizably the author's own contribution" to the previously created characters); L. Batlin & Son v. Snyder, 536 F.2d 486 (2d Cir.) (plastic replica of an antique bank not sufficiently skilled or original to be copyrightable), cert. demed., 429 U.S. 857 (1976), by and large, the initial question of copyrightability has been answered without regard to the underlying artistic value of the work as perceived by the judge. One broad exception is the rule that provides:

[The design of a useful article shall be considered a pictorial, graphic or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

17 U.S.C. § 101 (1988). Many commentators have argued that the application of this rule in determining the copyrightability of a useful article violates the Bleistein nondiscrimination principle because it is easier to identify artistic features that can exist independently of the useful article if those features are in a traditional, representational style than if they are abstract, contemporary designs. E.g., Dencola, Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles, 67 MINN. L. REV 707 (1983); Reichman, Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976, 1983 DUKE L.J. 1143; Note, Works of Applied Art: An Expansion of Copyright Protection, 56 S. CAL. L. REV. 241 (1982); Note, Copyright Law—Copyright Protection for Industrial Designs Under the 1976 Copyrights Act, 25 WAYNE L. REV. 923 (1979). These commentators all believe in the wisdom of the Bleistein rule and have proposed different ways of determining the copyrightability of useful articles to avoid the subjectivity that the "separability" test seems to produce. For example, Professor Dencola suggests that the focus should be on the process of creating the work, not on the end product itself; the determination of copyrightability should be based on the extent to which the process of creating the work "reflects artistic expression uninhibited by functional considerations." Dencola, supra, at 741. Professor Reichman, on the other hand, contrasts the American approach to useful articles with the systems used in other nations, for example, the French failure to distinguish useful
the real test of copyright is not whether the plaintiff is considered to have
created a work that is generally eligible for copyright protection, but whether
the plaintiff will be able to obtain relief against someone who has allegedly
infringed that copyright. In other words, the real value of the copyright in
a given work is measured by the scope of protection it provides to the
copyright owner who claims that his or her copyright in that work has been
infringed. These decisions determining the scope of copyright protection in
a work alleged to be infringed have been substantially affected by determin­
ations of that work's artistic value. In order to appreciate how these
determinations of artistic value affect infringement decisions, one must first
understand how courts determine copyright infringement.

A. The Process of Determining Infringement and the Role
of the Idea-Expression Dichotomy

Congress did not provide any clear guidelines for courts to use in deter­
mining infringement, but left it to the courts to develop their own method­
ology and standards.92 In essence, courts today engage in a two-step process
in determining copyright infringement. First, the court must determine if the
alleged infringer had access to the plaintiff's work. Since copyright law only
protects against actual copying of the protected material, not the coincidental
independent creation of a similar work, a party cannot be held liable for
infringement if that party never saw the protected work. Thus, the first step

92. See Cohen, Masking Copyright Decisionmaking: The Meaninglessness of Substantial
In analyzing an infringement claim is determining whether the defendant saw, or had an opportunity to see, the protected work. 93

If access can be established, the court must then determine if the allegedly infringing work is substantially similar to the copyrighted work. The precise meaning of "substantial similarity" is not at all clear because courts have used varying standards to determine whether the similarity is substantial. 94 One indispensable corollary of that rule is that the substantial similarity must be in the protectable "expression" and not just in the underlying "ideas" of the two works. A work that copies only "ideas" and not the way those ideas are expressed does not infringe the copyright because only "expression" is protected by copyright. "Ideas" are considered to be in the public domain. 95

93. See, e.g., Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) (there must be evidence sufficient to infer that there was a reasonable possibility that defendant had access to plaintiff's work); Smith v. Little, Brown & Co., 24 F. Supp. 451 (S.D.N.Y. 1965) (evidence of opportunity to see protected work is sufficient to establish access), aff'd, 360 F.2d 928 (2d Cir. 1966); Schwarz v. Universal Pictures Co., 85 F. Supp. 270 (S.D. Cal. 1945) (access not established if no proof that protected work was actually seen by defendant); see also 3 M. Nimmer & D. Nimmer, supra note 18, § 13.02[A] (arguing that it is more just to require a plaintiff to prove only that a defendant had the opportunity to see the protected work rather than that a defendant actually did see it).

94. See generally Cohen, supra note 92.

95. In the 1976 Act, 17 U.S.C. § 102(b) (1988), Congress made this principle part of the statutory law by excluding from the subject matter of copyright "any idea, procedure, process, system, method of operation, concept, principle, or discovery."; see also Mazer v. Stein, 347 U.S. 201, 217 (1954) (copyright extends to particular form of plaintiff's statuettes, but not to idea of using statuette of human figures as lamp base); Baker v. Selden, 101 U.S. 99, 104 (1879) (copyright protects author's explanation of bookkeeping method, but not method itself); Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930) (copyright on play does not extend to basic idea of lovers of different backgrounds and parental disapproval of their relationship), cert. denied, 282 U.S. 902 (1931). The courts have used different procedures to determine if two works are substantially similar in ideas or also in expression. In some cases the courts first define the unprotected idea and then consider the nature of the similarities between the two works. See, e.g., Mattel, Inc. v. Azrak-Hamway Int'l, 724 F.2d 357, 360 (2d Cir. 1983) (idea of superhuman muscleman defined before expression of toys compared); Eden Toys, Inc. v. Marshall-Field & Co., 675 F.2d 498, 500 (2d Cir. 1982) (idea of snowman defined before considering similarities in parties' expression of that idea in toys); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 741-42 (9th Cir. 1971) (idea of jewel-encrusted bee pin defined before expression in jewelry compared). In other cases the courts never address this issue directly, but once finding access simply go on to compare the works to determine if they are substantially similar. In these cases the courts seem to assume that the similarities are in matters of expression. See, e.g., Kenbrooke Fabrics, Inc. v. Holland Fabrics, Inc., 602 F. Supp. 151, 154 (S.D.N.Y. 1984) (no discussion of idea-expression principle in comparing fabric designs); Custom Decor, Inc. v. Nautical Crafts Inc., 502 F. Supp. 154, 157 (E.D. Pa. 1980) (two sculptures of duck heads considered substantially similar without any consideration of the possibility that the idea of a duck dictates some similarities in expression).

In the Ninth Circuit, the courts follow the procedures outlined in Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). In that case the court ruled that after determining access, a court should engage in a two-step analysis to determine substantial similarity. First, the court should compare the ideas in the two works to see if they are substantially similar, using an extrinsic, analytic approach to do so. Then, if the
Thus, within any copyrighted work, a line is drawn between those elements that the copyright protects, the "expression," and those elements that the copyright does not protect, the "ideas." In order to understand and evaluate the scope of a copyright owner's interest in a copyrighted work, it is therefore necessary to determine where courts draw the line between the protected "expression" and the unprotected "ideas." A review of the philosophical roots and the historical development of this doctrine reveals why courts applying this doctrine today follow an approach that necessarily implicates the courts in artistic evaluation of the works at issue.

1. The Roots of the Idea-Expression Dichotomy

The view that the "expression" in a work of art can be distinguished from the "ideas" it expresses can be traced to Plato. For Plato, all art was simply the imitation of ideas. There were two levels of such imitation: the production of actual physical objects and the production of images. Both levels of imitation, however, were lower forms of reality than the true essence of the object, the "Idea" or "Form." The artist or artisan who tried to imitate this "Idea" either by making an image of it or by making the actual object, could never, in Plato's view, truly capture that essence, but only imitate it on a lower level of reality. Aristotle also distinguished the artist's work from the ideas it reflected. Aristotle believed that the artist or poet should attempt to imitate the universal principles that exist in nature and in human nature in order to educate society about these truths. Thus, a work

ideas are substantially similar, the court should compare the similarities in expression, using an intrinsic, non-analytic approach to determine if the defendant took "so much of what is pleasing to the audience" to be held liable. Id. at 1164-65. As applied, the Krofft test has often led courts to label as "ideas" elements of the works that others would consider "expression" in order to be able to compare those elements analytically. Compare Litchfield v. Spielberg, 736 F.2d 1352, 1356-57 (9th Cir. 1984) (court compared as "ideas" the basic subject of alien stranded on earth and the sequence of events, dialogue, characters and mood of works to find no substantial similarity in "ideas"), cert. denied, 470 U.S. 1052 (1985), with Universal City Studio v. J.A.R. Sales, Inc., 1982 COPYRIGHT L. REP. (CCH) ¶ 25,460 (C.D. Cal. 1982) (in comparing E.T. character with doll made by defendant, court considered only the basic subject of an alien character as "ideas" and found substantial similarity in "ideas" of two works). Thus, the Krofft approach has led to even greater confusion about the distinction between an idea and its expression. The court, moreover, does not explain why the works need to be substantially similar in ideas if ideas themselves are not copyrightable. See Cohen, supra note 92, at 753-57. See generally Samuels, The Idea-Expression Dichotomy in Copyright Law, 56 TENN. L. REV. 321, 410-23 (1989) (author describes courts' tendencies to confuse idea-expression and substantial similarity tests).

96. Plato used the example of a couch and defined the three levels as the idea of the couch as a universal reality, the physical object of a particular couch made by the craftsman and the painting of the couch's image by the artist. PLATO, THE REPUBLIC, supra note 55, at 277-81 Plato then wrote that "the mimetic art is far removed from the truth, and this, it seems, is the reason why it can produce everything, because it touches or lays hold of only a small part of the object and that a phantom." Id. at 281.

97 See supra note 55 and accompanying text.
of art was viewed as distinct from a transcendental essence that could not be captured or possessed but only imitated; in other words, what the artist or author expressed was considered distinct from the underlying idea.

These classical views on the distinction between an "idea" and its "expression" had considerable influence in the early modern period although the definition of "idea" was modified. For example, John Locke's discussion of ideas reflects this distinction. For Locke, "idea" did not refer to some absolute reality as it did for Plato, but to "the Object of the Understanding when a Man thinks . . . or whatever it is, which the Mind can be employ'd about in thinking . . . ." 98 These ideas were not innate, but derived from experience and reflection. Locke, however, reflected Plato's influence by distinguishing those ideas that exist in people's mind from the words and language people use to express them. Locke believed that ideas must exist before there is a word that will become a sign for the idea, and that words are only symbols used to communicate ideas to another. As such, that symbol's effectiveness is limited by the extent to which it signifies the same idea to the listener as it does to the speaker. Underlying this discussion is Locke's distinction between the conceptual, intangible idea and the words and symbols people use in attempting to express those ideas. 99 Thus, for Locke, intangible, conceptual ideas were distinguished from the tangible, perceptible expression; every work of art reflected the artist's attempt to convey an intangible, essential idea through some perceptible form of expression.

This conception of the nature of the creative process seemed to underlie copyright jurisprudence during the nineteenth century. During the nineteenth century and up through the first twenty years of the twentieth century, the courts did not focus on a distinction between an "idea" and its "expression" for purposes of determining copyright infringement. Instead, the critical issue for courts determining copyright infringement was whether the defendant had engaged in independent creation. 100 This can be explained in part by the

100. E.g., Daly v. Palmer, 6 F Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3552) ("The true test of whether there is a piracy or not, is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a bona fide original compilation, made up from common materials and common sources . . . ."); Green v. Bishop, 10 F Cas. 1128, 1134 (C.C.D. Mass. 1858) (No. 5763) ("[T]he main question is, whether the author of the work alleged to be a piracy has resorted to the original sources alike open to him and to all writers,
more limited definition of "idea" that was applied in copyright cases at this time.

For example, in *Holmes v Hurst*,101 in discussing the general nature of copyright in a case involving publication without notice, the Supreme Court observed in dictum:

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 sunlight; 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.102

or whether he has adopted and used the plan of the work which it is alleged he has infringed”). As late as 1924, Judge Learned Hand wrote in *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), that copyright infringement will exist if one copies a plot from an author who had independently created that plot, even though that same plot might have been used in an earlier work. If the author's contribution was original to that author, even though it might be considered an "idea," it was protected by the copyright. *Id.* at 150. Judge Hand reasoned:

[O]riginality is alone the test of validity. Any subsequent person is, of course, free to use all works in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice or in law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed.

*Id.*, cf. *Bachman v. Belasco*, 224 F. 817, 818 (S.D.N.Y. 1913) (where defendant had no access to plaintiff's protected work and wrote play similar to plaintiff's, using a common source, no infringement was found, since creating a similar work is permitted, "provided one gets the idea from the common source, not from the copyrighted play"); *Johnson v. Donaldson*, 3 F. 22, 24 (S.D.N.Y. 1880) (although "[a]n artist cannot acquire such an exclusive right to the conception embodied and expressed in his picture as to preclude others from the exercise of their own creative genius," those others are only spared liability if their works were independently created). Thus, even those elements such as old dramatic plots which courts today would consider unprotectable "ideas" were considered, to some extent, protectable and could not be copied from a protected work.

101. 174 U.S. 82 (1899). Interestingly, the unsuccessful plaintiff in this case was Dr. Oliver Wendell Holmes, Sr., Justice Holmes' father. Holmes, Sr., lost the case as a result of the court's finding that he had published his work without notice, thereby forfeiting his copyright protection. It is possible to speculate that Justice Holmes' essentially pro-copyright views may be a reflection of his father's interests and experiences. See, for example, Holmes' opinions in *Herbert v. Shanley Co.*, 242 U.S. 591 (1917) (playing copyrighted music in a restaurant is performing work "for profit" and thus a violation of copyright owner's rights); *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) (transforming book into movie is a violation of copyright owner's right to dramatize the work); *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) (Holmes, J., concurring) (copyright should not be limited to particular format in which work appears, but should extend to intangible conceptualization); and *United Dictionary Co. v. G. & C. Merrim Co.*, 208 U.S. 260 (1908) (publication of work in England without American copyright notice did not forfeit copyright in United States). *But see Louis Dejonge & Co. v. Breuer & Kessler Co.*, 235 U.S. 33 (1914) (each reproduction of design on gift wrap required a separate notice of copyright; one notice per sheet was inadequate).

102. *Id.* at 86 (emphasis added); *see also Johnson v. Donaldson*, 3 F. 22, 24 (S.D.N.Y. 1880) ("A copyright secures the proprietor against the copying, by others, of the original work, but does not confer upon him a monopoly in the intellectual conception which it expresses.").
Thus, in this court's view an idea was an intangible, unexpressed concept that existed only in the author's mind, a view reminiscent of Locke. The copyright only protected the specific arrangement of words selected by the author to express that idea.

Similarly, in *White-Smith Music Publishing Co. v. Apollo Co.*,\(^{103}\) the Supreme Court in 1907 held that a perforated roll used to create the sounds of a musical composition when placed in a player piano did not infringe the copyright in the underlying musical composition because:

A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can see and read. *The statute has not provided for the protection of the intellectual conception apart from the thing produced*, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.\(^{104}\)

Here again, the noncopyrightable "idea" was the pure conceptualization not existing in tangible form; the copyright only protected the particular form in which that idea was expressed.\(^{105}\) Once that idea was expressed in a particular form or format, the copyright prohibited copying of the form or format in which that idea was expressed. In *White-Smith*, however, because a different medium was used, it was found that "expression" had not been copied, but that only the unprotected "idea" had been taken.\(^{106}\)

\(^{103}\) 209 U.S. 1 (1908).

\(^{104}\) *Id.* at 17 (emphasis added).

\(^{105}\) See Hopkins, *Ideas, Their Time Has Come: An Argument and A Proposal for Copyrighting Ideas*, 46 ALB. L. REV. 443, 452 (1982) ("The idea underlying the words is said to be analogous to the elements of matter, and such elements are said to exist in the mind alone and no property interest can be claimed in them."). Hopkins recognized that in practice this definition was not applied and that "ideas" were often blended with "expression" in determining copyright protection, resulting in some limited protection of ideas. Hopkins would go further than this and provide copyright protection to ideas themselves, defined by him to include "those things that individuals derive from their experience which have utility and are marketable in the world of commerce." *Id.* at 452 n.50. This is obviously a far more restricted definition of "idea" than generally used in copyright matters, where "ideas" include such non-utilitarian items as literary plots and the subject matter of paintings. Within the limited definition of "ideas" that he proposes, however, Hopkins would have Congress amend the copyright law to extend protection to them, arguing that the traditional reluctance to protect ideas was appropriate in an agrarian pre-industrial society, but not in our modern economy where skills, services and intangibles are important assets. Although Hopkins' concern with the market value of ideas is not a primary concern in this Article, his view does reflect the modern tendency to treat ideas and expression as indistinguishable.

\(^{106}\) The outcome in *White-Smith* was consistent with the statutory law in effect at the time. Prior to the 1909 Act, the copyright statutes provided only very limited protection against transformation of a copyrighted work into a different medium. The first copyright statute, Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831), only provided to the authors of "any map, chart, book or books" the sole rights of "printing, reprinting, publishing and vending"
Thus, in these cases copyright jurisprudence defined "ideas" and "expression" in ways that reflected a classical conception of the nature of the such works, *id.* at § 1; protection was extended to prints in 1802, but the protection was still limited to the rights described in the 1790 statute, see Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171. Musical compositions were added to the list of protectable works in Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, but there was no exclusive right of performance provided to the copyright of such works, only the limited rights of printing, reprinting, publishing and vending. These limited rights did not even protect the author against a translation of a literary work, as Harriet Beecher Stowe discovered in 1853 when she was unsuccessful in suing the author of a German translation of her book, *Uncle Tom's Cabin.* The court reasoned that the "only property which the law gives to [the copyright owner] is the exclusive right to multiply copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed." *Stowe v. Thomas,* 23 F. Cas. 201, 206-07 (C.C.E.D. Pa. 1853) (No. 13,514). When those ideas were translated by another into a different language, that "particular combination of characters" had not been copied so no violation of the copyright had occurred. "A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book." *Id.* at 208.

Justice Holmes concurred in the outcome in *White-Smith* on these statutory grounds, but he expressed serious doubts about the wisdom of a statute that so narrowly defined the limits of copyright protection.

One would expect the protection to be coextensive not only with the invention, which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the result which gives to the invention its meaning and worth. A musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy

209 U.S. at 19-20 (Holmes, J., concurring). Holmes' view that copyright should protect more than the literal representation of the author's ideas in a specific tangible form is also reflected in his majority opinion in *Kalem,* 222 U.S. 55, in which the court found that the copyright on a book was infringed by one who used its story in a motion picture. See infra notes 112-14 and accompanying text.

107. Another influential case is the Supreme Court's 1879 decision in *Baker v. Selden,* 101 U.S. 99 (1879). In ruling that blank account books could not be protected by copyright, the court reasoned that copyright protection did not extend to the system or method of bookkeeping which the plaintiff's book was written to illustrate, and that since this system could not be used without using the arrangement of lines and headings that plaintiff provided in his book, plaintiff could not claim copyright in those arrangements since to do so would grant plaintiff a monopoly on the system as well. *Id.* at 103-04. The case is therefore often cited for the proposition that copyright does not protect ideas. *E.g., Mazer v. Stein,* 347 U.S. 201, 217 (1954); Whelan Assoc., Inc. v. Jaslow Dental Laboratory, 797 F.2d 1222, 1234 (3d Cir. 1986), *cert. denied,* 479 U.S. 1031 (1987); Toro Co. v. R & R Prods. Co., 787 F.2d 1208, 1212 (8th Cir. 1983); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1250 (3d Cir. 1983), *cert. denied,* 464 U.S. 1033 (1984). See generally *Samuels,* supra note 95, at 326-30. The Court's explanation for its conclusion that copyright did not extend to the underlying system is interesting, however, for its limited scope: "To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright." *Baker,* 101 U.S. at 102. The Court is thus not basing its reasoning on a view that ideas by their very nature belong in the public domain, but, rather, on the differentiated treatment intended by Congress in enacting the patent and copyright statutes. Moreover, the kind of "idea" that the Court considered outside the scope of copyright is limited in this case
creative process in which an artist attempted to convey an intangible "idea" through perceptible forms of expression, such as words or symbols. Copyright only protected those specific perceptible words and symbols; anyone was free to use their own words and symbols, their own "expression," to convey the underlying "ideas," as long as they did so independently. Because the "ideas" existed in the abstract, they were not part of the creator's contribution to the work and could be used by anyone. Only the particular forms of expression that had been contributed by that creator could be protected against infringement.

2. Romantic and Modern Views of "Idea" and "Expression" and Their Impact on Copyright Law

The classical conception of the creative process and its distinction between an idea and its expression was challenged during the nineteenth century by art and literary critics and philosophers. As discussed previously, the Romantic view changed the way art and artists were perceived. Instead of conceiving of art as imitating universal truths and ideas, the creation of art was seen as a process that reflected the emotions and personality of the individual artist. In addition, art was seen as a symbol of the human unconscious. To the extent that copyright jurisprudence had relied on the classical distinction between an "idea" and its "expression," that jurisprudence was

108. See supra notes 59-60 and accompanying text.

109. Edward Lucie-Smith drew a distinction between the use of symbols as allegory in Renaissance and post-Renaissance art and the use of symbols in the second half of the nineteenth century.

The theorists of the Symbolist Movement [of the nineteenth century] recognized that the symbol could be something which existed in its own right, diffusing a mysterious influence around itself, and affecting the whole context in which it was placed. In traditional allegory, on the other hand, it was assumed that what the symbol stood for was something rationally decided in advance; symbolic objects were therefore regarded simply as units of language.

threatened with obsolescence. If art was no longer viewed as the formal expression of fundamental, abstract ideas, but rather as the expression of the individual feelings of the particular artist, then the view that copyright should protect only the author’s specific way of expressing the ideas, but not those fundamental, abstract ideas themselves, had lost its philosophical basis. According to the Romantic view, the entire work could be considered to reflect the individual personality of the artist. Therefore, more than just the particular arrangement of words or visual characteristics should be protected because the work as a whole reflected the emotions and individual contributions of the artist.

By the middle of the nineteenth century, the copyright statutes began to reflect a broader view of the creative process, as seen in the copyright statutes of 1856, 1870 and 1891, in which Congress both enlarged the category of works eligible for protection and expanded the rights provided to copyright owners. The real shift in the nature of the protection provided to copyright owners, however, was first clearly manifested in the 1909 Act, in which Congress recognized explicitly that an author had a cognizable claim of copyright infringement even when the purported infringer had transformed the work into a different medium. The copyright owner now could recover

110. In 1856, Congress slowly began to enlarge the nature of the copyright owner’s rights. In that year Congress expanded the scope of copyright to include dramatic compositions and provided the owner of the copyright in such works with the “sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place.” Act of Aug. 18, 1856, ch. 169, 11 Stat. 138. Owners of copyrights in other works were not given any additional rights, however, so that a dramatization or translation of a book would still not constitute infringement. In 1870, Congress added many new categories of works eligible for copyright, including paintings, drawings and statues, and provided the owners with the sole rights of “printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing” it, and for the first time, provided that “authors may reserve the right to dramatize or to translate their works.” Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212. This right to dramatize or translate a literary work did not become an automatically-granted exclusive right until 1891. Act of Mar. 3, 1891, ch. 565, 26 Stat. 1107. Owners of the copyright in musical compositions were finally granted the right of public performance in 1897. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (amending Title 60, ch. 3, sec. 4966 of the Revised Statutes). Thus, by the end of the nineteenth century, Congress was beginning to realize that an author needed to be protected against more than the literal copying of the physical format in which the work appeared, but it was not until the 1909 Act that Congress enacted a statute that more fully provided copyright owners with rights against those who transformed their works into different media. See infra note 111.

111. The 1909 Act provided the copyright owner with the exclusive right to transform the protected work into different formats, for example, to dramatize a nondramatic work and to translate a literary work or “to make any other version thereof,” Act of Mar. 4, 1909, ch. 320, § 1(b), 35 Stat. 1175 (emphasis added), and with the right to perform works publicly; dramatic works whether for profit or not and musical and nondramatic works if for profit. Id. at §§ 1(d), (e). The 1909 Act also specifically addressed the issue raised in White-Smith, 209 U.S. 1, and provided in § 1(e) that the owner of the copyright in a musical composition had the exclusive right to “make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded
not only against one who used the particular words or visual characteristics used in the copyrighted work, but also against one who took some elements of the copyrighted work and created a work that transformed those elements in some way, whether by changes in medium, format or otherwise.

The expansion in the scope of copyright is evident in some of the first cases in which authors recovered against defendants who transformed the copyrighted work into a different medium. In Kalem Co. v. Harper Bros.,112 a case involving a defendant who had made a motion picture of the copyrighted book Ben Hur, Justice Holmes upheld a finding of infringement based on the author’s exclusive right to dramatize his own work.113 Justice Holmes specifically rejected the defendant’s argument that to find infringement here would extend copyright to “ideas” as distinguished from “expression,” observing that “there is no attempt to make a monopoly of the ideas expressed.”114 “Expression” was clearly no longer considered limited to the literal elements of the copyrighted work. This decision laid the groundwork for subsequent cases in which a plaintiff claimed that a film was an infringement of the expression in a literary work, in spite of the change in medium.115 Similarly, this broader conception of the scope of copyright was also applied to copyrighted visual works that were transformed and from which it may be read or reproduced.116

The 1976 Act also specifically recognized that the copyright owner has the exclusive right to “prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2) (1988). A “derivative work” is defined as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (1988). Thus, under current law the copyright is infringed whenever someone takes the copyrighted expression and transforms it into a different medium in a way that is considered substantially similar to the copyrighted work. See, e.g., Horgan v. Macmillan, Inc., 789 F.2d 157 (2d Cir. 1986) (still photographs of a ballet could be considered derivative work infringing copyright in choreography of the ballet, if substantially similar). This broad right to control derivative works has been seen as evidence that copyright does in fact protect ideas, at least in artistic works. See Note, supra note 107, at 809-12.

112. 222 U.S. 55 (1911).
114. Kalem, 222 U.S. at 63.
115. E.g., International Film Serv. v. Affiliated Distriburs., 283 F. 229 (S.D.N.Y. 1922); see also Harold Lloyd Corp. v. Witwer, 65 F.2d 1 (9th Cir.), cert. dismissed, 296 U.S. 669 (1933); Roe-Lawton v. Hal E. Roach Studios, 18 F.2d 126 (S.D. Cal. 1927) (courts recognized the potential for a film to infringe the copyright in a literary work, although they did not find sufficient evidence to support a finding of infringement in these particular cases).
by the defendant. In *King Features Syndicate v Fleischer*, the court held that making a three-dimensional toy based on a copyrighted cartoon character constituted infringement in spite of the change in medium.

Thus, we have a recognition that what is protected by the copyright is not limited to the particular form or medium or the literal words or visual features, but that copyright protects elements of a work that are intangible and conceptual. That is, to use the example at issue in *White-Smith*, a musical composition is protected even when it is embodied in many different forms and formats: sheet music, piano rolls, records, tapes and compact discs. What is protected is not only the physical, tangible item which can produce that musical composition, but the musical sounds themselves. Similarly, with visual art works and literary works what is protected is not only the precise format or medium used to display the art work or the specific words with which a story is told, but also the conceptual and intangible elements: the details and structure of that art work or literary work. Thus, the copyright owner now could recover for infringement in cases where before the courts would have found that only ideas, but not expression, had been copied. This new willingness to allow the creator to protect not only the specific arrangement of words or the particular selection of visual characteristics may reflect the Romantic view of the creative process as organic and emotional, and of the whole work as a reflection of the contributions of the individual artist.

In the cases decided after these statutory changes were made in 1909, a critical determination became whether the elements of the copyrighted work that had been copied or transformed by the alleged infringer into the new work were elements of the copyrighted work that the copyright, in fact, protected. In deciding these cases, the courts continued to use the labels "idea" to refer to features of a work that the defendant could use without liability and "expression" to refer to those features that, if copied, could result in liability. For example, in 1913, the district court in *Eichel v Marcin* reasoned that because free access to "ideas" is critical to the development of creative works, a playwright who copied a plot from a copyrighted work did not infringe the copyright as long as he or she did not take the new embellishments added to the plot. The court reasoned:

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116. 299 F 533 (2d Cir. 1924).
117 Id. at 538.
118 See Umbret, *supra* note 35, at 947-51 (author ties expansion of copyright to "derived products" to change to Romantic view of literature); cf. Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. Rev 735, 743-47 (1967) (author tracks expansion in copyright protection from protecting only literal copying to protecting works when transformed into different media, attributing that expansion to the growing market for secondary uses of literary works).
119. 241 F 404 (S.D.N.Y 1913).
If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted.\textsuperscript{120}

Thus, the basic plot itself was an “idea” which the copyright did not prevent others from using in creating their own works. The embellishments on the plot, however, were “expression.” Although the focus was no longer on “expression” as tangible and “ideas” as intangible, as it had been, for example, in\textit{Hurst},\textsuperscript{121} the courts continued to use the labels “idea” to refer to unprotected features and “expression” to refer to protected features.\textsuperscript{122}

The continued use of the terms “idea” and “expression” to define the scope of copyright in works of art became increasingly out of step with evolving views of the creative process. Benedetto Croce, for example, wrote in the early twentieth century that artistic creation is an intuitive process, not an intellectual one, and that the essence of artistic activity is not the production of an external physical object, but an internalized aesthetic synthesis of impressions and sensations.\textsuperscript{123} In the 1930s, John Dewey wrote that art is a reflection of and outgrowth of the experience of the artist interacting with the materials used to make the art object. Dewey claimed that during this organic, creative experience, the artist’s emotions and ideas are transformed and expressed as the artist works with the physical materials. Thus, for Dewey there was no distinction between an artist’s abstract idea and the ultimate expression; rather, the work of art reflected the living experience of the artist who created the work.\textsuperscript{124}

\textsuperscript{120.} \textit{Id.} at 408 (emphasis added).
\textsuperscript{121.} 174 U.S. at 86.
\textsuperscript{122.} In\textit{Roe-Lawton}, for example, the court found no infringement of the plaintiff’s wild horse stones by the defendant’s film. Although the same theme was used in both works, the court found no substantial identity in the protected details in the scenes and specific plot incidents and concluded that those similarities that did exist “belong to the character of natural and expected happenings, considering the normal action of animals and persons placed as the characters are in the environment in which we find them.” \textit{Roe-Lawton}, 18 F.2d at 127. Similarly, in Guthrie v. Curlett, 36 F.2d 694 (2d Cir. 1929), the court held that copyright protection for a consolidated freight tariff did not cover the basic idea of such an index, but only the particular ways in which the plaintiff had expressed that idea that were not necessitated by the nature of the idea. On the other hand, in Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131 (8th Cir.),\textit{cert. denied}, 287 U.S. 666 (1932), the court found infringement of the plaintiff’s copyrighted advertisement because the defendant had not only taken the unprotected ideas, but also had copied aspects of the work considered expression: the illustrations, the language used and the arrangements of the material.

\textsuperscript{123.} B. CROCE, AESTHETIC AS SCIENCE OF EXPRESSION AND GENERAL LINGUISTIC 1-19 (D. Amslie trans. 1909); see H. OSBORNE, \textit{supra} note 55, at 222-23.
\textsuperscript{124.} J. DEWEY, \textit{supra} note 76, at 49-52, 56, 64-65. Dewey noted:

The act of expression that constitutes a work of art is a construction in time, not an instantaneous emission. It means that the expression of the self in and
These views have seen further development more recently in the work of conceptual artists, who create art that sometimes has no permanent form and in some cases does not exist in any form at all, other than in the documentation used to describe it. Their belief that art need not have any form at all as long as the artist has a conception in mind is a blatant rejection of the notion that a line can be drawn in any given work of art between the idea and its expression.\textsuperscript{125} Other contemporary schools of art, such as minimalist art and found art, further illustrate the growing tension between contemporary art and the idea-expression dichotomy as expressed in the classical conception of art.\textsuperscript{126}

In spite of these changes in the view of the creative process, courts have continued to apply the labels of "idea" and "expression," resulting in serious ambiguities in determinations of infringement. These ambiguities have left the door wide open for decisions based upon assessments of artistic value.\textsuperscript{127}

Through a medium, constituting the work of art, is itself a prolonged interaction of something issuing from the self with objective conditions, a process in which both of them acquire a form and order they did not at first possess.\textsuperscript{Id. at 65 (emphasis in original).} Additionally, he stated:

The work is artistic in the degree in which the two functions of transformation are effected by a single operation. As the painter places pigment upon the canvas, or imagines it placed there, his ideas and feeling are also ordered. As the writer composes in his medium of words what he wants to say, his idea takes on for himself perceptible form.\textsuperscript{Id. at 75.}

\textsuperscript{125} Joseph Kosuth, one of the leading conceptual artists, rejected what he called the Formalist tradition in art that defined art on the basis of form and structure, arguing that "[f]ormalist criticism is no more than an analysis of the physical attributes of particular objects that happen to exist in a morphological context. But this doesn't add any knowledge (or facts) to our understanding of the nature or function of art." J. KOSUTH, Art After Philosophy, I and II, in IDEA ART: A CRITICAL ANTHOLOGY 70, 79 (G. Battcock ed. 1973). Kosuth claimed that the physical objects were insignificant; what was valuable was what the art work contributed to the conception and definition of "art." Id. at 77-83. According to Kosuth, "[a]rt 'lives' through influencing other art, not by existing as the physical residue of an artist's ideas." Id. at 82.

Advance information about the concept of art and about an artist's concepts is necessary to the appreciation and understanding of contemporary art. Any and all of the physical attributes of contemporary works, if considered separately and/or specifically, are irrelevant to the art concept. The art concept must be considered in its whole.\textsuperscript{Id. at 89.} Based on this view of the purpose and nature of art, Kosuth and other conceptual artists, such as Robert Barry, Douglas Huebler and Lawrence Weiner, have created art which may be perceptible only through the documentation which describes it or not at all. \textsuperscript{See Rose, Four Interviews, id. at 140-49; Jamieson, The Importance of Being Conceptual, 45 J. AESTHETICS & ART CRITICISM 117-23 (1986).}


\textsuperscript{127} Others have recognized that there is no objective way to distinguish an idea from its expression. Robert Yale Libott wrote that the idea-expression dichotomy is "a semantic and historic fallacy without meaningful application to the creative process, and that it results at best
A review of some of the cases applying the idea-expression dichotomy to works in the visual arts, that is, pictorial, sculptural and graphic works, and

in judicial anomaly and at worst in substantial injustice." Libott, supra note 118, at 736. Noting the inconsistent treatment by courts of plot and characters, sometimes as ideas and sometimes as expression, Libott concluded that there is no real definition of "idea" for copyright purposes, but only a label applied by a court "as a ready means of demonstrating the court's ad hoc decision that this plot, this theme, or these characters should not be granted the sanctuary of the copyright laws." Id. at 740 (emphasis in original). Libott also pointed to the wide range in the way the word "idea" is defined in leading dictionaries as an indication of why there is no consistent application of that term by judges deciding copyright cases. For the limited purposes of his discussion, Libott used a definition of "idea" as the "spine" of a dramatic work or "the continuing directional force or structure to which each of the sub (or sub-sub) components is connected, and from which they radiate." Id. at 742. He then argued that as so defined, the principle that ideas are not copyrightable is contrary to market realities where such ideas are considered highly valuable, as demonstrated by the example of television formats (written descriptions of the basic framework of a proposed television series). Id. at 755-61. After showing the weaknesses of alternative theories available under state law to protect such ideas, Libott concludes that "not only the idea-expression fallacy, but also the entire concept of the non-protectability of ideas [should] be excised from the law of copyright." Id. at 769.

Other commentators have also recognized this problem. Professor Reichman discusses how the courts use the idea-expression principle "in a heavy handed manner" to limit the scope of copyright protection in articles of industrial design by finding a "thin" level of expression and the copying of that expression by the purported infringer. Reichman, supra note 91, at 1234. In discussing Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971), a case which involved a jeweled bee pin, see infra notes 133-39 and accompanying text, Reichman suggested that "[t]his court may have thought the design commonplace, in which case it was in part grappling with the problem of the degree of creative content." Reichman, supra note 91, at 1234 n.476. Another author, focusing on the protection provided to commercially valuable ideas under state law, observed that the line drawn by such state law between ideas considered unprotected because too general and abstract and those ideas that were sufficiently concrete and novel to receive protection was analogous to the line drawn by copyright law between "idea" and "expression." Note, Beyond the Realm of Copyright: Is There Legal Sanctuary for the Merchant of Ideas?, 41 BROOKLYN L. REV. 284 (1974). The author found that the location of this line was "incapable of exact determination, and obfuscated by the decisions which have been rendered in this area." Id. at 288. The author said that the inconsistency in results in two cases applying this line to advertising ideas was explainable only by result-oriented decisionmaking. The author concluded:

Characterization of ideas as 'abstract' or 'concrete' and requirements of 'novelty' and 'originality' are meaningless criteria as prerequisites for recovery. The courts' indulgence in such amorphous and undefinable terms merely confuses the issues before the court and the rights and obligations of the party litigants. It is apparent that decisions cannot be based upon words which neither the courts nor the parties can adequately define. Nevertheless, the courts' use of such terms is ultimately determinative.

Id. at 322. Although the author's focus is on state law protection of ideas, his comments are equally relevant to the idea-expression dichotomy in copyright law.

Professor Samuels examined the idea-expression dichotomy and its flaws and concluded that other copyright doctrines—principally, originality and substantial similarity—were far better approaches to determining copyright infringement than the idea-expression dichotomy. Samuels, supra note 95, at 462. He considered the idea-expression dichotomy troublesome because it determined the lack of copyrightability of material in a work rather than simply having courts conclude that work had not been infringed. Samuels, supra note 95, at 408-09. In this way, according to Samuels, the idea-expression dichotomy was overly broad in its impact on the
to fictional literary works, that is, books, plays and movies, reveals the impact that artistic evaluation has had on these determinations.128

B. The Idea-Expression Dichotomy Applied

1. Works of the Visual Arts

The idea-expression dichotomy has been applied both to two-dimensional works of the visual arts, such as pictures, photographs and fabric designs, and to three-dimensional works, such as sculptures and stuffed toys. Although Judge Hand concluded in a case involving the alleged infringement of a fabric design that it was obvious that "no principle can be stated as to when an imitator has gone beyond the 'idea,' and has borrowed its scope of copyright protection provided to works of authorship. See Samuels, supra note 95, at 462.

See also Kaplan, Implied Contract and the Law of Literary Property, 42 CALIF. L. REV 28, 32-33 (1954) (idea-expression distinction no longer clear now that copyright not limited to protection only against literal copying, but also against transformation of a work into a different medium); Meadow, Television Formats: The Search for Protection, 20 COPYRIGHT L. SYMP (ASCAP) 73, 87-96 (1970) (as applied to television formats, idea-expression dichotomy is vague, arbitrary and leads to ad hoc decisions by courts as to what should be protected; rather, courts should analyze formats, looking for theatrical value based on dramatic potential, special, unique elements or gimmicks, and completeness to determine line between protected and unprotected television formats); Umbret, supra note 35, at 944-45, 952-53 (author concludes that there is no objective way to determine infringement); Note, Reading Copyright Cases: The Ad Hoc Approach, 2 COMM/ENT 671 (1980) (metaphysical nature of subject matter at issue in copyright necessitates an ad hoc approach where the attitudes and backgrounds of the judges affect their decisions); Note, Derivative Works and the Protection of Ideas, 14 GA. L. REV 794, 800 (1980) (idea-expression dichotomy should only be applied to works valued for conveying practical information, not to artistic or literary works valued for creative effort where the application of that principle "provides no guidance for the identification of the protectable as opposed to the non-protectable elements"); Note, Copyright Protection for Mass-Produced Commercial Products: A Review of the Developments Following Mazer v. Stein, 38 U. CHI. L. REV 807 (1971) (author argues that as applied to mass-produced commercial products, the idea-expression dichotomy has been manipulated by the parties and the courts to reach results based on external factors, such as the business morality of the defendant); Recent Developments, 67 MICH. L. REV 167, 170 (1968) (author prefers the mathematical finiteness approach used in Morrissey to the subjective approach used by courts through the idea-expression dichotomy, which the author claims "is little more than a labeling technique applied to the results of particular cases"); cf. Goldman, Observations on Copyright and Ideas, 44 N.Y.U. L. REV 574 (1969).

128. This issue has become even more difficult as courts have attempted to apply it in the context of works such as computer programs. See generally Halvey, A Rose by Any Other Name: Computer Programs and the Idea-Expression Distinction, 35 COPYRIGHT L. SYMP (ASCAP) 1 (1989); Note, Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software, 35 UCLA L. REV 723 (1988). A discussion of this area is beyond the scope of this Article.
most of the opinions reflect an attempt to find such a principle. The most important doctrinal point that has emerged from this attempt to find a principled way to draw the line between an idea and its expression is the notion that even where two works are nearly identical in appearance, if those similarities in appearance are held to have necessarily resulted from the defendant’s use of the same idea as that used by the plaintiff, there will be no infringement. Thus, the subject matter and those elements which are necessary or commonly used to depict it are defined as the uncopyrightable “idea” in works of the visual arts.130

The court recognized, for example, that in Franklin Mint Corp. v. National Wildlife Art Exchange:131

[In the world of fine art, the ease with which a copyright may be delineated may depend on the artist’s style. A painter like Monet when dwelling upon impressions created by light on the facade of the Rouen Cathedral is apt to create a work which can make infringement attempts difficult. On the other hand, an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique. A copyright in that circumstance may be termed ‘weak,’ since the expression and the subject matter converge. In contrast, in the impressionist’s work the lay observer will be able to differentiate more readily between the reality of subject matter and subjective effect of the artist’s work.]

129. Peter Pan Fabrics, Inc. v. Martin Werner Corp., 274 F.2d 487 (2d Cir. 1960). In trying to determine if the copyright on the plaintiff’s fabric design had been infringed, Judge Hand concluded that “[t]he test for infringement is of necessity vague. 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.” Id. at 489 (emphasis in original). Judge Hand reasoned that in comparing plaintiff’s design with the defendant’s alleged copy, the court should consider the ultimate function of the design when used on an article of clothing and “how far its overall appearance will determine its aesthetic appeal when the cloth is made into a garment.” Id. Given that function, Judge Hand concluded that even though the patterns were not identical, the similarities in color and in the shapes and symbols used in the pattern were enough that the ordinary observer would “regard their aesthetic appeal as the same.” Id. Thus, Judge Hand seemed willing to concede that these determinations cannot be principled, and in the end are based on how the works appeal to the tastes of the decision maker.

130. See infra notes 131-90 and accompanying text. This principle is often referred to as the “merger” doctrine—that is, when the uncopyrightable idea necessitates the form of expression, that form of expression must be treated as uncopyrightable as well because it merges with the unprotectable idea. See, e.g., Samuels, supra note 95, at 382-95. Samuels criticizes this theory as misleading, since he finds that “true merger” rarely occurs, id. at 386-91, and as unnecessarily broad in the way that it limits the scope of copyright protection. Id. at 391-95. In the latest edition of Nimmer’s treatise on copyright, the authors also argue that it would be preferable not to treat the common elements that are considered necessary to express a certain idea as uncopyrightable; rather, the authors suggest that the courts should consider this “merger” factor simply as part of the defense to infringement in a particular case. See 3 M. NIMMER & D. NIMMER, supra note 18, § 13.03[B][3], at 13-58, 59.


132. Id. at 65 (citations omitted).
In other words, to distinguish the "expression" from the "idea" in a work of visual art, the judge has to determine if a given theme or subject matter by its very nature defines the way the artist has rendered it. An artist who depicts something as it is actually perceived will have little in the work that will be considered copyrightable expression. The artist who uses a nontraditional or nonrepresentational style of depicting the basic subject matter will have a stronger claim to copyright because the judge will not be forced to conclude that the basic subject matter dictated that particular style of expression.

What the courts have not generally been willing to recognize, however, is that these determinations are based on the court's assessment of the artistic value of the works at issue. First of all, the courts have considerable flexibility in determining how narrowly to define the underlying "idea" in a given work; this definition is critical because it determines how much of the work will be considered protectable expression and how much will be unprotected by the copyright. As the cases discussed below indicate, often a court's view of what constitutes the "idea" is influenced by how novel or creative the court considers the works at issue to be; courts also seem influenced by the relative commercial success of the works, their market value and the reputations of their creators. Having defined the "idea," the court's second determination, that is, how much of the expression used was dictated by that idea, is determined also in part by the court's assessment of the artistic value of the work. The determination that a particular work is life-like and, thus, less an original work of the artist than one that has a distinctive style, is a value judgment that reflects the judge's view as to what is "life-like" and as to what constitutes a distinctive, and therefore copyrightable, "style."

In *Herbert Rosenthal Jewelry Corp. v Kalpakian,* for example, the plaintiff's copyright of a jewel-encrusted bee pin was held not to be infringed by the defendants' nearly identical rendition of the same subject because "[t]here is no greater similarity between the pins of plaintiff and defendants than is inevitable from the use of jewel-encrusted bee forms in both." The court observed that the pins "were life-like representations of a natural creature" and relied on the defendants' testimony that the arrangement of the jewels on the pin "was simply a function of the size and form of the bee pin and the size of the jewels used." The court's willingness to conclude that the arrangement of the jewels was "simply" a function of the size of the jewels and the size and shape of the pin overlooks the fact that use of those particular elements themselves reflects some individual choice. That is, if the underlying idea had been defined as simply a "bee," then

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133. 446 F.2d 738 (9th Cir. 1971).
134. *Id.* at 742.
135. *Id.* at 741.
136. *Id.* at 740.
the choices of style, size, decoration and material could all have been considered protectable expression that had been copied. The court’s conclusion that only the uncopyrightable ideas and the elements necessary to express it were copied may have had to do with the defendants’ “standing as designers of fine jewelry” and the court’s judgment that there was little creativity involved in the plaintiff’s design since it replicated the court’s view of a real bee and thus had little distinctive style. The court itself admitted that, “[a]t 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.”

A comparison of two cases involving toys representing human figures further reveals how evaluations of style and commercial value and thus assessments of artistic value affect definitions of “idea” and “expression.” In *Mattel, Inc. v. Azrak-Hamway International, Inc.*, the court applied the idea-expression dichotomy to two works, both expressing the unprotected idea of “a superhuman muscleman crouching in what since Neanderthal times has been a traditional fighting pose.” The court reasoned that only those elements not necessarily dictated by that idea could be protected, such as “the particular form created by the decision to accentuate certain muscle groups.” Since those elements, that is, which muscle groups were accentuated, were different in the two works, no copyright infringement was found. The court’s conclusion that the “idea” here was a muscleman in a traditional pose was essential to this conclusion. If using that pose itself had been considered protected expression, the plaintiff might have been more successful. The court’s willingness to see that pose as an “idea” reflected its view that the pose was recognized since “Neanderthal times” as “traditional,” in other words, too common to receive copyright protection. This

137. *Id.* at 741.
138. *Id.*, see also Rechman, *supra* note 91, at 1234 n.476.
139. *Herbert Rosenthal Jewelry Corp.*, 446 F.2d at 742.
140. 724 F.2d 357 (2d Cir. 1983).
141. *Id.* at 360.
142. *Id.*
143. *Id.* Similarly, in *Aliotti v. R. Dakin & Co.*, 831 F.2d 898 (9th Cir. 1987), the plaintiff’s copyrighted stuffed toy dinosaurs were held not to be infringed by defendant’s toy dinosaurs. The plaintiff could have no copyright on the idea of a stuffed dinosaur or on those “elements of expression that necessarily follow from the idea,” *id.* at 901, meaning in this case that plaintiff could not point to similarities that arose “from either the physiognomy of dinosaurs or from the nature of stuffed animals.” *Id.* Thus, the similarities in body shape and posture and the similarities in the nature of the soft materials used were not similarities in protected expression. Characteristics such as the distinctive stitching and distinctive facial features and body shapes could be protected, but defendant’s works differed with respect to those elements. *Id.*, see also *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498 (2d Cir. 1982) (toy differed in elements of expression not dictated by idea of snowman, for example, hats, feature size, head shape and material).
conclusion itself is a reflection of the court’s view that the artistic value of such toys is based on their novelty.144

On the other hand, in *Quaker Oats Co. v Mel Appel Enterprise,*145 the court granted plaintiff’s motion for a preliminary injunction against the defendant who was manufacturing dolls alleged to be infringements of plaintiff’s copyrighted dolls. Both dolls were almost the same size, about five inches long, and made of material that enabled them to be squeezed and concealed inside an adult hand. Both were made of similar silky fabrics; both dolls had legs and arms that were outstretched and enlarged at the ends. The clothing on both dolls was drawn on the bodies; the features of the faces on both dolls were simply drawn, and both had half-moon smiles. Defendant’s dolls sold, however, for half, or less than half, of the price at which plaintiff’s dolls were sold. Although the court identified several differences between the dolls, for example, in hair color, in hair styling, and in detailing of facial features, the court found substantial similarity in protected expression.

The *Quaker Oats* court rejected defendant’s claim that only the ideas and those features necessary to express those ideas had been copied.146 The court also distinguished *Mattel* by reasoning that unlike the basic idea of a life-like human being in a fighting pose used in *Mattel,* in the case before it, “plaintiff’s work is not a version of a standard human form or a standard doll form but an abstract work which is entirely original.”147 The court’s determination that the *Quaker Oats* dolls were “entirely original” and “abstract” works and not versions of a “standard doll,” as were at issue in *Mattel,* reflected the court’s assumptions about and experiences with dolls and its own assessment of the artistic value of such works, including their “style” and commercial value. If the court had defined the “idea” of plaintiff’s doll more specifically to be a five-inch, squeezable doll with

144. To some extent, there seems to be an overlap between considerations of originality and the idea-expression dichotomy in these determinations. That is, courts such as the *Mattel* court seem to define the “idea” based on whether the way the subject matter has been expressed is “original.” If the mode of expression is well-known, then the author’s use of that mode of expression may not be “original,” but making that determination of originality would require an examination of the first author’s creative process. As Judge Hand observed in Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), cert. denied, 298 U.S. 669 (1936), “if by some magic a man who had never known it were to compose a new Keats’ Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’” *Id.* at 54. To dismiss a mode of expression as an uncopyrightable idea because it is considered common rather than having a specific, separate discussion of the question of originality is clearly misleading. Simply because the court considers a mode of expression to be “traditional” does not necessarily mean that the mode was not original to the author seeking copyright protection. See also Samuels, supra note 95, at 426-38 (discussing originality as a prerequisite for copyright protection).


146. *Id.* at 1060.

147. *Id.*
outstretched arms and half-moon smiles, defendant might not have been held liable.

The implication of artistic values that occurs when the judge defines what he or she considers to be that underlying "idea" and then makes some evaluation of the style of representation of the idea in the work is also illustrated by two cases involving three-dimensional representations of dogs. In both cases the court might have concluded that the underlying idea was simply to depict a dog, and that any specific choice made by the creator in depicting a dog was thus protectable expression to the extent not dictated by the general idea of a dog. In both cases, however, the courts defined the underlying idea more specifically. In *Gund, Inc. v Smile International Inc.*, the court defined the underlying idea behind plaintiff's stuffed toy dog as a "more or less realistic, non-rigid stuffed toy dog that 'flops' down on its stomach." Observing that it is "a common sight to see puppies act this way" and that there are only "a limited number of ways" to express this idea, the court denied plaintiff's motion for a preliminary injunction because it found that the defendant had only copied this idea of a floppy dog and those elements essential to expressing it. The court observed that "similarity in expression is non-infringing to the extent the nature of the creation makes similarity necessary." Because the court refused to see the choice of pose in the plaintiff's work as "expression," the plaintiff was denied relief.

In contrast, the court in *Knickerbocker Toy Co. v. Gene Toys, Inc.* granted summary judgment for the plaintiff where the defendant had manufactured a stuffed dog in a train engineer's uniform that was nearly identical to plaintiff's copyrighted work with respect to size, shape, color, eyes, nose, mouth, other facial characteristics and clothing. The minor difference in skin tone and the elimination of a handkerchief used on plaintiff's toy were not enough to overcome what the court found to be substantial similarities in expression. The court rejected defendant's suggestion that the similarities were dictated by the common, unprotected idea of a dog in an engineer's uniform, characterizing the argument as approaching "new heights in absurdity." The court reasoned that, "[w]hile such a phenomenon might exist, it is hardly so common as to require the conclusion that this combination is common or somehow in the public domain. The court's reaction to the subject matter as novel thus affected its refusal to treat that subject

149. *Id.* at 645.
150. *Id.*
151. *Id.*
152. *Id.* at 645.
154. *Id.*
156. *Id.*
matter as "idea." The court’s attention to the fact that plaintiff’s dog was a commercial success and was "enjoyed by children and adults alike" and its observation that defendant’s toy dog was “clearly a cheaper version of that produced by plaintiff,” may also indicate why the court was so willing to treat defendant’s argument that the similarities were based on the use of the same basic idea of a dog in an engineer’s costume as absurd. Thus, because the court in Knickerbocker refused to define the unprotected “idea” as "a dog in an engineer’s costume,” the plaintiff’s toy dog in that case was granted protection, whereas the court’s willingness to define the idea behind the plaintiff’s toy dog in Gund as “floppy dog” resulted in a denial of protection. The determination that a “floppy dog” is a common, unprotected idea, but that a “dog in an engineer’s costume” is not, is a value judgment that reflects what that judge knows and feels about dogs, toys and these stuffed toy dogs in particular.

*Edwards v Ruffner* also indicates the way that personal experience and values affect how restrictively courts define the “idea” and those elements necessary to express it in any given work. In *Edwards*, plaintiff’s copyright in a photograph of a ballet dancer’s lower legs posed in ballet’s fifth position was held not to be infringed by defendant’s photograph of the same subject. The defendant’s model wore different clothes on her legs, and the photograph had been taken from a different angle and with a different overall presentation and effect. Although the court here explicitly observed that this was not a case in which it was difficult to separate the “idea” from its “expression,” the court might have ruled that although the basic idea of photographing a ballet dancer was not protectable, plaintiff’s decision to

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157. *Id.* at 527  
158. *Id.* at 528.  
159. In another case involving the artistic depiction of dogs, *F W Woolworth Co. v. Contemporary Arts*, 193 F.2d 162 (1st Cir. 1951), aff’d, 344 U.S. 228 (1952), the First Circuit said that “a copyright on a work of art does not protect a subject, but only the treatment of a subject.” *Id.* at 164. In the case before it, involving models of cocker spaniel dogs posed in traditional show position, the court interpreted this to mean that the copyright would not protect the subject of a cocker spaniel model or the size, color or materials, or pose used because those were elements of “subject” or “idea,” but the copyright would protect the proportion, form, contour and configuration of the models because those were original contributions of the artist. *Id.* Because the defendant’s work was substantially similar in proportion and configuration, for example, in the configuration of the curls and folds of the fur on the dog models, the finding of infringement was upheld, even though one model showed the dog with long hair on its body and neck and the other showed it with short hair. *Id.* at 165. The court’s decision to consider the pose of the dogs, that is, the “traditional show position,” as part of the unprotectable “idea” is arguably a reflection of the court’s judgment that the traditional pose is so common that it should be treated as unprotected by the court. The court may also have been influenced by the fact that plaintiff’s dogs sold for prices up to $15, whereas defendant’s sold for $1.19.  
161. *Id.*  
162. *Id.*
photograph just the legs from the knee down, placed in fifth position, was itself a particularized way of expressing an idea that the defendant had substantially copied. The court's assessment of the work's artistic value based on its feelings about and knowledge of ballet and photography, undoubtedly affected how broadly the court was willing to define the unprotected idea in that case.

Similar factors are reflected in Steinberg v Columbia Pictures Industries, where the court compared the plaintiff's poster of a New Yorker's view of the world with the promotional poster defendant had used to advertise its film, Moscow on the Hudson. There was no dispute as to the defendant's access to plaintiff's very popular poster. In granting plaintiff's motion for summary judgment, the court found that although defendant was free to use the idea of "a map of the world from an egocentrically myopic perspective," the defendant had gone beyond the idea and copied too much of the plaintiff's particularized expression of that idea. Both posters showed four city blocks in detail in the foreground; in both, those blocks were placed at the intersection of a wide two-way cross street and two avenues. Such specific choices the court considered to be protected expression as a reflection of the artist's original work. The court reasoned that "one can hardly gainsay the right of an artist to protect his choice of perspective and layout in a drawing, especially in conjunction with the overall and individual details." Although the defendant had argued that such choices, that is, of the perspective and the use of elements found in a typical city intersection, were dictated by the use of the same idea, the court rejected that argument. In concluding that the choice of this particular perspective was an element of expression, the court observed that "this is not an inevitable way of depicting blocks in a city with a grid-like street system, particularly since most New York City cross streets are one-way." Thus, the use of two-way streets as cross streets was considered protectable expression because it was not dictated by the reality of New York City's one-way cross streets. Given the limited choices of using either two-way or one-way streets, the court could as easily have concluded that this choice was not protectable expression.

The court also found that the posters were similar in the use of a sketchy, whimsical style. The court observed, "[e]ven at first glance, one can see the

164. Id. at 712.
165. Id.
166. Id.
167. Id. at 713. The court also considered the many differences between the posters, for example, the depiction of Moscow in detail in the background and the realistic likenesses of the movie's stars in the foreground of defendant's poster, as not sufficient to eliminate the substantial similarities in expression between the two posters. Id.
168. Id. at 712.
striking stylistic relationship between the posters, and since style is one ingredient of 'expression,' this relationship is significant."  

The court's willingness to assume that it could distinguish and identify the "style" used in the poster and the court's comments on the plaintiff's fame and the popularity of the poster reveal how its assessment of the work's artistic value affected its decision. The court itself recognized the ad hoc nature of its decision; the court observed that "[n]o rigid principle has been developed to ascertain when one has gone beyond the idea to the expression," and quoting Judge Frankel, noted that "'good eyes and common sense may be as useful as deep study of reported and unreported cases, which themselves are tied to highly particularized facts.'"  

The application of the idea-expression dichotomy to fabric designs also reveals that assessments of artistic value may influence how broadly courts will define the basic idea in a given work and the elements necessary to express them. Thus, in Kenbrooke Fabrics, Inc. v Holland Fabrics, Inc., the court found substantial similarity between the plaintiff's and defendant's fabric design of a double floral border with a field of flowers in the center, even though there were differences in details and style, because the court concluded that the ordinary observer would consider the two fabrics to have the same aesthetic appeal. The court did not address the possibility that these similarities resulted from the use of the same idea. Yet, in Hedaya Brothers, Inc. v Capital Plastics, Inc., the court found no infringement of plaintiff's fabric design depicting various types of fruit in mason jars with a gingham check background by defendant's fabric design depicting the same kinds of fruit in mason jars on a gingham check background. Noting the differences in the shapes of the jars and in some minor details in how the fruit was arranged in those jars, as well as some differences in color and style, the court concluded that there was no infringement because the copyright did not protect the idea of fruit in jars on a gingham background, an idea the court considered "old hat." Rather, plaintiff's expression of that idea, which the court considered to be of minimal originality, was not substantially similar to defendant's expression of that idea. The court's
decision that the design of fruit in jars on a gingham background was only "old hat" and thus an unprotectable idea is a reflection of the court's assessment of the artistic value of the work at issue.

In *E. Mishan & Sons, Inc. v. Marycana, Inc.*,

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In *E. Mishan & Sons, Inc. v. Marycana, Inc.*, 179 E. Mishan & Sons brought an action for declaratory judgment against Marycana, the owner of the copyright in refrigerator magnets made to look like traditional Americana samplers. Marycana argued that the copyright had been infringed by magnets made by the plaintiff. Both the copyrighted magnets and the alleged infringing copies consisted of a square white card pasted onto a cardboard square that was covered with a calico or gingham fabric with a fringe of eyelet lace. On the white card a "homey" message was written in calligraphy and an imitation flower was glued. The copies differed from the copyrighted magnets, however, with respect to the specific sayings, the flat rather than gathered appearance of the lace, and the type of imitation flowers used. In spite of these differences, the court found that Mishan had taken more than the idea of a kitchen magnet made to look like an Americana sampler, but had also "explicitly copied those aspects of [the copyrighted] work that were the product of its independent authorship, including what might be called the artistic details of [the copyrighted] work." The court noted that the infringing magnet "looks like a cheap copy of [the protected work] with a few changes made and a different saying, which is exactly what it is." The court concluded that there had been infringement of Marycana's copyright in the kitchen magnets. Thus, although one could argue that only the idea of a magnet looking like an Americana sampler and those elements commonly used to depict it had been taken here, as was found in *Hedaya*, this court defined Marycana's idea more narrowly, leaving more of the work to be considered protectable expression that had been copied by Mishan.

Thus, the application of the idea-expression dichotomy to works of the visual arts has required the court to identify the basic unprotected idea and those details that are necessary or commonly used to depict that idea. Those aspects of the work, that is, the idea and those elements that are necessary or commonly used to depict that idea, are then considered non-copyrightable. Only those details that reflect a personal choice of the artist, not dictated by the choice of the basic idea, are considered to be protected by the copyright. Each of these determinations, that is, the definition of the basic idea and of those elements necessary to depict it, however, is a reflection of the personal reaction of the judge to the style and novelty of the plaintiff's

180. Id. at 1340.
181. Id. at 1345-46.
182. Id. at 1345.
183. Id.
184. Id. at 1346.
and defendant's works, the relative commercial value and success of the works and the reputation of the creators of those works, reactions that implicate the judge's subjective view of the artistic value of the works at issue.

2. Literary Works

Judge Learned Hand's analysis of the idea-expression issue in *Nichols v. Universal Pictures Corp.*[^185] is probably the best place to begin a review of the application of the idea-expression dichotomy to literary works. Consistent with his later view expressed in *Peter Pan Fabrics*,[^186] Judge Hand observed in *Nichols* that there is no precise, predictable point where ideas end and expression begins. In discussing whether the defendant's movie about lovers from different religious backgrounds infringed the copyright in plaintiff's play which involved a similar plot, Judge Hand reasoned:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.[^187]

In other words, in a literary work, the copyright protection clearly extends beyond literal repetition of the words used by the author, but Judge Hand claimed that there is no precise way of defining how far that protection will go.[^188] As applied to the case before him, Judge Hand found that the

[^186]: 274 F.2d at 489.
[^187]: *Nichols*, 45 F.2d at 121 (citations omitted).
[^188]: Professor Chafee, using *Nichols* as an example, attempted to find a rational method for separating an idea from its expression in the context of literary works. Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV 503, 513 n.24 (1945). Professor Chafee proposed a "pattern" test in which the line between an idea and its expression, and thus between non-liability and liability, would be crossed when the "pattern of a play—the sequence of events and the development of the interplay of the characters"—was copied. *Id.* at 514. Copying the basic idea was permissible, and since "some resemblance in characters and situation is inevitable," *id.* at 513-14, that would be permitted as well. Professor Chafee did not, however, provide any guidelines for finding this "pattern" or how detailed it needed to be in order for it to no longer be considered an inevitable way of expressing the basic idea.

Nimmer and Nimmer, although recognizing that the problem of separating the idea from its expression "is probably susceptible of no more precise principle than that of the Chafee 'pattern' test," 3 M. NIMMER & D. NIMMER, *supra* note 18, § 13.03[A][1], at 13-27, attempted to refine that test, commenting that "[t]he pattern test, if correctly applied, offers a guide to decision which avoids the abandonment of reasoned analysis implicit in the conclusion that nothing more can be said than that each case turns on its own facts." *Id.* at 13-28. Nimmer
similarities in plot between the two works were not enough to find that protected expression had been taken. Even though both works involved a relationship between a Jewish family and an Irish family, a secret marriage between the son and daughter of these two families, a conflict between the two fathers and an ultimate reconciliation, the plaintiff was not allowed to prevail against the defendant for copying these elements because in the court's view these similarities were "too generalized an abstraction from what she wrote. It was only a part of her 'ideas.'" The elaboration of this general theme in defendant's work was found to be sufficiently different from the elaborations in plaintiff's work to avoid copyright infringement. As Judge Hand reasoned:

[H]er copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain. We have to decide how much, and while we are aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases.

In this case, the court found that the defendant had not crossed the line between idea and expression in creating a work with a similar plot structure and Nimmer illustrated this "reasoned analysis" by applying the pattern test to compare *Romeo and Juliet* and *West Side Story*. Considering it "clear that anyone could borrow the 'idea' of a romance between members of two hostile families," *id.*, Nimmer and Nimmer then identified thirteen similarities in the sequence of events that occur in each work and concluded that "[t]hese thirteen points are sufficiently concrete to state the essential sequence of events and character interplay in each of the two works." *id.* at 13-29 to 13-30. Thus, infringement should be found, even though there were other details and important story points that differed, as well as differences in dialogue, setting and characterization. Nimmer and Nimmer recognized that not all courts would agree that these similarities constituted a "sufficiently concrete expression of an idea" to result in a finding of infringement, but Nimmer and Nimmer criticize those courts that consider "plot" as equivalent to "idea" instead of applying the "pattern" definition of a plot, that is, "the sequence of events by which the author expresses his 'theme' or 'idea,'" *id.* at 13-31 (quoting Shipman v. RKO, 100 F.2d 533, 537 (2d Cir. 1938)), and treating it as expression. Nimmer and Nimmer do not discuss how a court is to decide whether particular plot incidents are included as essential to the structure of the plot and thus how much of that plot must be copied before the copier will cross the line between an idea and its expression. Nimmer and Nimmer seem to agree with the outcome in *Nichols*, even though one could find some basic similarities in the sequence of events used to express the idea. 3 M. Nimmer & D. Nimmer, *supra* note 18, at 13-28 n.26. *See generally* Libott, *supra* note 118, at 751-52. Thus, even those who have attempted to find a rational method for distinguishing an idea from its expression in the context of literary works have not avoided the fundamental problem that every such determination is ultimately grounded in some subjective reaction to the merits of the work.

189. *Nichols*, 45 F.2d at 122; *see also* Dymow v. Bolton, 11 F.2d 690, 692 (2d Cir. 1926) (plot as "the mere concept of a situation around which to build and develop literary adornment is not copyrightable"); Giangrasso v. CBS, Inc., 534 F Supp. 472 (E.D.N.Y. 1982) (radio script not infringed by television show where both used idea of a radio show being broadcast from a remote location that is interrupted by a hold-up, but where the emphasis, story line and characterization were very different).

190. *Nichols*, 45 F.2d at 122.
and similar characters. Thus, the "idea" in a literary work is not limited to the basic subject matter, but includes some of the details used to develop and convey that subject matter. On the other hand, at some point certain details are considered "expression" and are protected from copying.

The difficulties that Judge Hand recognized in drawing the line between those details that are unprotected as part of the idea and those details that are protected as part of the expression in literary works are evident in other cases. For example, in Twentieth Century-Fox Film Corp. v Stonesifer, the court found substantial similarity between plaintiff's play and defendant's movie where both told the story of a young woman moving into a residential hotel for women in New York City. In both works, the woman is almost seduced by an older man and is shot at by the man's jealous lover. In spite of the fact that there were several plot differences between the two works and the fact that many of the similarities in character and plot could have been considered to have evolved necessarily from the basic plot idea and locale, the court, citing Nichols, concluded that the movie infringed the play.

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191. The easiest cases are those like Becker v. Loews, 133 F.2d 889 (7th Cir.), cert. denied, 319 U.S. 772 (1943), where the plaintiff's work was an essay on the economic and political problems of the 1930s, with a special emphasis on the impact of such problems on young people. Plaintiff claimed that defendant's movie about the economic struggles of a young couple during the 1930s infringed his copyright. The court held that there was no liability because the similarity between the two works was limited to the basic idea of the problems faced by youth during the Great Depression. Id. at 892-94. Plaintiff's book was an essay with no characters, story line or dialogue, whereas defendant's work was a traditional movie with characters, plot, romance and dialogue. In this case there was similarity only in idea, not expression, because there was no similarity in the way the basic theme or idea was presented. Id.

A less clear case is presented in Musto v. Meyer, 434 F Supp. 32 (S.D.N.Y 1977), aff'd mem., 598 F.2d 609 (2d Cir. 1979), where plaintiff was the author of an article which appeared in a psychology journal. The author included in his generally scientific discussion of cocaine use a fictional sketch about Sherlock Holmes' use of cocaine and his cure of this addiction through Freudian methods. Even though the basic idea of this sketch and all the key incidents of the plot were used in defendant's book, the court found no infringement, reasoning that these were similarities of idea only and that the differences in audience appeal, plot delineation and literary skill were sufficient to deny a finding of infringement. Id.

192. 140 F.2d 579 (9th Cir. 1944).

193. Id. at 581.

194. Id. For example, in plaintiff's play, the young woman is brought to the city by her father and returns home to her family. In defendant's movie, the young woman comes to the city alone to be near her boyfriend. The boyfriend at first rejects her, but ultimately realizes his love for her after she is endangered. In the end, she stays with the boyfriend. The court did not address these thematic differences or how they should be treated, but did comment that many of the other differences between the works could be attributed to the differences between live theater and film. Id. at 583.

195. One could claim that the similarities in character—a worldly actress, an unemployed actress, a model, an innocent young woman from a small town, an evil man interested in seducing the young woman, and hotel employees—are either obvious characters one would find in a New York residential hotel or characters essential to the unprotected basic plot idea of the dangers facing an innocent young woman moving to New York City.

196. Stonesifer, 140 F.2d at 584.
It seems difficult to reconcile these two cases on any basis that relies entirely on some abstract line between an idea and its expression. In Nichols, both works were based on the idea of star-crossed lovers from families of different religious backgrounds; in Stonesifer, both works were based on the idea of a young woman living in a New York City residential hotel. In both cases, the essential structures of the stories told in the two works were similar: in Nichols, both works told the story of a secret marriage between the lovers, a conflict between the fathers, the birth of grandchildren and a family reconciliation; in Stonesifer, both works told the story of the young woman's arrival in New York, her relationships with residents of the hotel, an evil man's attempt to seduce her, a threat by the man's jealous lover and her ultimate recognition of the dangers of the city. In both works there were also many thematic, plot and character differences. Despite the fact that in both cases the two works at issue arguably had very comparable degrees of similarity and of difference, in Nichols no infringement was found because the court concluded that only unprotected material had been taken. To the contrary, in Stonesifer, the court concluded that there were sufficient similarities in some of the details used in the works to find infringement; and although it cited Nichols in support of its conclusion, the Stonesifer court never considered whether those similarities derived from the use of the same basic idea.

Although it is possible to dismiss the differences in outcome as a reflection of the Stonesifer court's careless reading of Nichols, it is also possible that the court's determination in Nichols that the similarities were unprotected reflected the court's view that stories of star-crossed lovers are too common to be protectable, whereas perhaps the court in Stonesifer found the story of a young woman living in a New York City residential hotel to be novel and creative enough to merit broader protection. The more established and "old hat" the basic idea seems to the decision maker, the more likely the details that express that idea will also be considered too established and "old hat" and thus unprotectable. This decision, that some plots are so common as to be unprotectable ideas, whereas others are still novel enough to be protectable expression, may be rooted in what the judge knows about and values in literary works.

Similar questions are raised when we compare Stonesifer with Reyher v. Children's Television Workshop. In that case, the Second Circuit upheld a dismissal of the plaintiff's claim where defendant's magazine story told the same basic story as the plaintiff's copyrighted book: a child who is separated from his or her mother describes the mother as "the most beautiful person in the world" to someone who offers to help find her. Many

197. 533 F.2d 87 (2d Cir.), cert. demed, 429 U.S. 980 (1976).
198. Id. at 92.
beautiful women are brought to the child, but none is the mother; finally, a plain woman appears, and she is the child's mother. Recognizing that "[t]he difficult task in an infringement action is to distill the non-protected idea from protected expression," the court focused on the different settings, the different moral emphasis of each story and the fact that plaintiff's work had far more textual detail in finding no basis for infringement. The court also concluded that the similarities between the plot incidents could be explained as those that "necessarily result from identical situations." Thus, the court concluded that "[s]ince both present only the same idea, no infringement as to protected expression occurred."

Both Stonesifer and Reyher involved relatively simple stories that are very similar in basic structure, but different in details, thematic emphasis and language. In fact, in terms of overall plot and character, there are more variations between the two works in Stonesifer than there are between the two works in Reyher, yet there was infringement of protected expression found in Stonesifer and not in Reyher If the characters and plot details in Reyher were a necessary consequence of the basic idea, it is not clear why the same cannot be said of Stonesifer

A comparison of other cases leads to further muddying of any clear line between an idea and its expression. In Litchfield v. Spielberg, the lower court had granted summary judgment in favor of the defendant, whose movie, E.T., was alleged to be an infringement of plaintiff's play, Lokey from Maldemar Both works concerned friendly aliens who were stranded on earth and who befriended a young child. In both stories, the alien had telekinetic powers and supernatural healing powers. In both plots, the child

199. Id. at 91.
200. Id.
201. Id. at 92. This principle is often referred to as the scenes a faire doctrine, that is, the notion that certain similarities in basic plot will require similarities in the scenes and incidents used to develop that plot. E.g., See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983); A.A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir.), cert. denied, 449 U.S. 841 (1980); Reyher, 533 F.2d 87; see also Schwartz v. Universal Pictures Co., 85 F Supp. 270, 275-76 (S.D. Cal. 1945) (application of scenes a faire doctrine to work not protected by federal copyright but by common law). The doctrine has been criticized by one author as lacking uniformity and continuity and as overused by defendants; that author concludes that some of these inconsistencies are due to the fact that judges may not have the same understanding as to what is common to a certain genre or motif. Note, Copyright Infringement: An Argument for the Elimination of the Scenes a Faire Doctrine, 5 COMMENT 147 (1982); see also Kurtz, Copyright: The Scenes a Faire Doctrine, 41 U. FLA. L. REV. 79 (1989) (scenes a faire doctrine is considered by author as a useful tool to determine substantial similarity, but author concludes that treating scenes a faire as uncopyrightable may be unnecessary); 3 M. NIMMER & D. NIMMER, supra note 18, § 13.03[B][4], at 13-61 (footnotes omitted) ("Labeling certain stock elements as 'scenes a faire' does not imply that they are uncopyrightable; it merely states that similarity between plaintiff's and defendant's works that are limited to hackneyed elements cannot furnish the basis for finding substantial similarity.").
202. Reyher, 533 F.2d at 92-93.
203. 736 F.2d 1352 (9th Cir. 1984).
taught the alien a little about human culture and about love. Both stories ended with the aliens going home. In spite of these similarities, the plaintiff was denied a trial, and summary judgment for the defendant was affirmed. The Ninth Circuit concluded that there was no substantial similarity in mood, dialogue, characters or sequence, and that those similarities that did exist were “only at the general level for which plaintiff cannot claim copyright protection.” It is arguable, however, that plaintiff's unprotected idea was the basic subject of an alien stranded on earth, and that the plaintiff's particular story of what happened to the alien stranded on earth was all protected expression and that the various similarities in detail between plaintiff's story and defendant's—for example, the alien's telekinetic and special healing powers, the befriending of a single parent and children, the exposure to human emotions and human culture—are details not necessarily predictable from that subject matter and thus protectable.

Although there were also significant differences in the details of the two alien stories, such differences have not always been enough to defeat a claim of infringement in literary works. There were many differences, for example, between the works at issue in Stonesifer, where infringement was found, and also in MacDonald v. DuMaurier, where the Second Circuit found sufficient allegations of similarities to justify reversing the grant of the defendant's motion for judgment on the pleadings. In that case, the plaintiff claimed that her novel about a young woman who became the second wife of an older, wealthy man, had been infringed by defendant's novel, Rebecca. In both works, the new wife was bothered by the seeming continuing influence of the first wife over the husband, the servants, the house itself, and the husband's friends. In both works the second wife considered leaving the husband, but ultimately learned that the husband truly loved her and had not loved the first wife. Some of the more particular details of the story also appeared in both works, for example, gifts of hair brushes, a book with the first wife's handwriting, an incident with a mirror, and the first wife's use of a pet name for the husband. For purposes of the motion for judgment on the pleadings, the court considered these

204. Id.
205. Id. at 1357.
206. Plaintiff's play was a musical; there were two aliens, not one; the child they befriend was a girl living with her brother and father at a research center on the North Pole, not a boy living with his brother, sister and mother in suburban America; the aliens cure the father, not a flower or a cut finger, as in E.T., the aliens go to Japan and elsewhere and meet a witch before leaving earth. They do not almost die, nor does the child, as occurred in E.T.
207. 144 F.2d 696 (2d Cir. 1944).
208. Id. at 701.
209. Id. at 697.
210. Id. at 698-99.
211. Id. at 697-98.
212. Id. at 699.
sufficient similarities in protected elements of the plaintiff's work to withstand the defendant's motion, even though there were several, very significant differences in plot, characterization, theme, and endings of the two works.\footnote{213} Although the court seemed primarily concerned with the premature nature of the proceeding, the court, assuming the truth of the allegations of access and copying for purposes of the motion, reasoned:

In the case at bar the suppositious borrowings are not in the general outline of plot and character: in "ideas" as opposed to "expression." On the contrary they consist in a series of concrete incidents and details, and if in fact these were all borrowed from the plaintiff, we cannot properly hold that the common matter was outside the protection of the copyright law \footnote{214}

It is not easy to understand why these similarities were enough to defeat defendant's motion for judgment on the pleadings in MacDonald, but the similarities between the works at issue in Litchfield (for example, levitation of objects and special healing powers) were not enough to defeat that defendant's summary judgment motion. In both cases, it was assumed, for purposes of the preliminary motions, that the defendants had access to the plaintiffs' work,\footnote{215} and both cases appear to involve works that are essentially quite different in plot, character and theme, yet the outcomes of the preliminary motions in the two cases were different.

At the other end of the spectrum are cases in which it seems clear that the line between an idea and its expression has been crossed because so much of the plot, character and theme (or feel) of a work have been taken. For example, in Universal City Studios v Film Ventures International, Inc.,\footnote{216} the owner of the copyright in the hit movie Jaws was granted a preliminary injunction against the defendant who had produced the movie Great White.\footnote{217} The court found that there was a significant likelihood that the plaintiff would prevail on the merits given the substantial similarity not only in the general idea of each movie—an Atlantic Coast town terrorized by a great white shark—but in the basic story line, the sequence of events and the development and interplay of the major characters.\footnote{218} The court identified a
long series of plot and character similarities. These included conflicts between surprisingly similar main characters including a local politician more concerned with tourism than safety and a salty skipper with an English accent out to capture the shark. The court also noted a number of similar scenes which included nearly identical opening scenes in which a shark attacks while teenagers play on the beach as well as scenes in which sharks knock victims off boats, fishermen are found dead in boats, children are injured, politicians apologize, and similar final scenes in which the sharks swallow fatal explosive devices after eating the skippers.219 The court rejected the defendant’s argument that these scenes necessarily grew from the unprotected basic idea and found that these were similarities in expression that would be considered substantial by the ordinary observer.220

Although this conclusion seems correct, the defendant’s argument is not entirely frivolous. The court might have concluded that the similarities in the basic plot structure grew naturally and necessarily out of the basic idea of a shark terrorizing an Atlantic coast town. Even at the next level of detail, it can be argued that a conflict between a hero out to capture the shark and a villain who is indifferent is also a common way of developing that basic idea. If all those similarities—that is, in basic idea, in the core structure of the plot and in the conflict between a hero and a villain—could be considered unprotectable, then many of the other similarities could be considered just common or necessary ways to develop those unprotected elements. For example, that the hero would be a skipper of a boat and that the skipper would have an English accent and be “salty” hardly seem like original details.221

219. Id. at 1137-39.
220. Similarly, in Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983), the thirteen plot details identified by the court as common to both the plaintiff’s film, Star Wars, and defendant’s Battlestar Galactica, were considered sufficient evidence of similarities in expression at least to provide plaintiff with an opportunity for a trial and thus to deny defendant’s motion for summary judgment. The similarities included the following: both works were about a war between a galaxy’s democratic and totalitarian forces; the hero in both was the son of a leader of the democratic forces; the leader was a wise and mystical man; their heroine is imprisoned; a planet is destroyed; a friendly robot is injured; there is a romance between the heroine and the hero’s friend; there is a scene with weird creatures in a bar; the totalitarian headquarters are attacked and the movies both end with an awards ceremony. See also Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Co-op Prods., Inc., 479 F Supp. 351 (N.D. Ga. 1979) (musical-comedy condensed version of Gone With the Wind using different names and different dialogue held to be an infringement by use of same settings, characters, situations and story line); cf. Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610 (2d Cir. 1982) (where defendant had right to use Tarzan character but not story in plaintiff’s book, no infringement found where, though basic outline of story was very similar, court considered differences in perspective, emphasis and incidents sufficient to find no substantial similarity in expression).

221. With respect to fictional characters, it has been recognized that there is a conflict between an author’s right to control the use of the characters they create and other authors’ needs for access to characters that are part of our culture. “Every artist builds upon the
Thus, as with the application of the idea-expression dichotomy to works of the visual arts, the application of that rule to fictional literary works often requires courts to determine what aspects of a given work are natural or necessary outgrowths of the use of the same basic idea. The plot details or characterizations that seem to be common or essential ways of expressing that basic idea are not considered copyrightable and can be freely used by others. On the other hand, those details such as specific choice of words or plot incidents and characterizations not dictated by the basic idea are considered protected expression and, if substantially copied, will result in liability for copyright infringement.

Each of these decisions, however, reflects the judge's view of the artistic value of the works at issue based on what the judge knows about and values in literary works on that subject. E.D Hirsch, Jr. described how people use their past knowledge and experiences to interpret what they are reading. He described the way people learn to classify and associate certain facts through their experience and education so that they create various schema or prototypes that they use to interpret language. Hirsch indicated that the substance of these schema varies, depending on the particular background and experience of the individual; he described as an example a study that showed how the word "bird" had different associations for Australians than it did for Americans. By extension, one could argue that when a judge tries to extrapolate the "idea" from the "expression" in a literary work, his or her judgments as to what is necessary to express a given idea will reflect the particular background knowledge and associations of that judge, as a reader of language and works of his or her literary culture. That is, any determination that a specific detail in plot or character is itself an idea or the necessary outgrowth of an idea is a determination based on the decision maker's judgment as to the originality of that detail: is it so common and predictable that it does not merit protection, or is it new enough or personal enough that the author deserves copyright protection?

creativity of the past, and the creations of others are among the raw materials used to create new works of art." Kurtz, The Independent Legal Lives of Fictional Characters, 1986 Wis. L. Rev 429, 438. Kurtz argues that "only the copying of distinctive and well-developed qualities constitutes copying of expression rather than ideas. If the use of broad or stereotypical qualities were considered infringement, lists of human characteristics would be withdrawn from the pool of what authors need to create fiction." Id. at 463. Kurtz proposes a two-part determination, first separating the ideas from expression and second, determining if the defendant has taken so many of the protected character traits that his or her character is recognizable as taken from the plaintiff's character. Although Kurtz recognizes that "the law does not possess the tools to distinguish great art from trash," id. at 438, the test that she proposes for courts to determine copyright infringement of literary characters would, in effect, involve the law in making such distinctions without the tools. Deciding if a quality is too "broad or stereotyped" and thus an unprotected idea is itself a judgment about the worthiness of the character that has been created.

222. See E. HIRSCH, supra note 89.  
223. E. HIRSCH, supra note 89, at 48-60.
As with works of the visual arts, another factor that affects a court's determination of where to draw the line between idea and expression in a given case involving literary works is the relative commercial success of the works at issue and the reputations of their creators. In Universal City Studios, for example, the court mentioned the enormous success of Jaws and its commercial value. These factors may have affected the court's decision finding so many aspects of the film protectable. Likewise, when one considers the case against Spielberg's E.T., the most successful film of all time, one has to wonder whether Spielberg would not have had better luck suing the author of Lokey, if he had been the plaintiff claiming that the play infringed his copyright in E.T. The fact that the plaintiff's play was not well-known and that the defendant's movie was a commercial blockbuster may very well have had some impact on the court's willingness to grant defendant's motion for summary judgment.

C. The Idea-Expression Dichotomy Unmasked

Looking back over the summary of the way the idea-expression dichotomy has been applied to fictional literary works and works of the visual arts, one can make some general observations about the value of this principle. In the context of both types of work, the critical determinations for defining the line between protected and unprotected aspects of a given work are, first, the determination of what is the basic idea or subject matter and, then, a determination of what aspects of the work are necessary or common ways of developing that idea and are thus unprotected. The determination that a second work is similar only in idea and not in expression is thus easiest when the first artist or author has created a work that is rich in

224. 543 F Supp. at 1136 (court found that the movie had been exhibited "throughout the United States and the world to millions of members of the public"). Id. at 1139 ("The properties 'Jaws' and 'Jaws 2' have great value. Universal has derived substantial revenue in the past from these properties, is continuing to receive substantial revenues now, and expects to continue receiving substantial revenues in the future from these properties.").

225. Litchfield, 736 F.2d 1352.

226. Id. at 1354. The trial court had found that "[d]espite repeated efforts to find a receptive buyer for her works, plaintiff failed to find success in Hollywood." Id.

227. The relative fame and success of a given work and the scope of its circulation, are, of course, relevant to the determination of access. The more well-known the plaintiff's work is, the more reasonable it is to infer that the defendant saw or had an opportunity to see that work. Compare, e.g., Selle v. Gibb, 741 F.2d 896, 902 (7th Cir. 1984) (limited distribution of plaintiff's song a factor in finding no proof of access) with Abkco Music Inc. v. Harrisons Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983) (fact that plaintiff's song was a number one hit considered as a factor in finding defendant's access to that song).

These two factors should have no bearing, however, on the determination of substantial similarity in which the issue is whether so much expression has been copied that the defendant should be held liable for copyright infringement. See generally Cohen, supra note 92, at 735-39.
particularized details that are not necessarily dictated by the basic idea or subject matter, and the second artist has not copied those particularized details. Conversely, the determination that expression has been copied is also easiest in those cases involving works rich in particularized details that are not necessarily dictated by the basic idea, if the second artist has, in fact, copied those particularized details.

In most cases, however, that determination is not simple because there are no defined, objective criteria for deciding whether a particular detail is dictated by the subject matter or a common way of expressing the basic idea and therefore unprotected. A review of the cases has revealed that this critical determination is little more than a determination of what is considered meritorious in a given work, based on particular judges' assessments of the artistic value of works, including their assessment of the style, novelty and commercial value of those works and the reputation of their creators. This assessment, in turn, is a reflection of what a particular judge knows about and values in such works.

Thus, the determination of the line between an idea and its expression in a given work is a determination that reflects the values of the particular judge who is judging the works at issue. The line between an idea and its expression, and therefore the line between liability and non-liability for copyright infringement, are thus lines drawn on the basis of assessments of artistic value determined by "persons trained only to the law," the very thing warned against by Justice Holmes.228

CONCLUSION

We started with the assumption that it would be best if copyright determinations, including determinations of infringement, could be made without regard for the artistic value of the works at issue. This assumption was based on the view that determinations of artistic merit inevitably reflect the subjective values and experiences of those who make them and that therefore there can be no objective determinations of artistic merit. Thus, if copyright determinations were made on such a basis, the existence and value of a copyright would be dependent on the cultural values and backgrounds of the judges who made these determinations.

We then explained how courts and Congress attempted to avoid this problem by structuring copyright law in a way that minimized the role that assessments of artistic value would have. In the context of determinations of infringement, courts have used the idea-expression dichotomy in an attempt to provide some objective framework. The doctrine that there is a dichotomy between the protectable expression in a work and the unprotect-

228. See supra notes 55-90 and accompanying text.
able idea it expresses has its roots in the classical view that artistic works reflect some universal truths or transcendent essence that cannot and should not be captured or controlled by one artist. Consistent with this view, copyright law at one time protected only the particular form and format used by the artist to express his or her ideas, and determinations of infringement focused principally on the issue of independent creation.

In the nineteenth and twentieth centuries, there has been a change in the prevailing view of the creative process. Romantic and post-Romantic views of art and literature no longer see the creation of art and literature as revealing or imitating universal truths, but rather see it as a process that is valued for what it tells us about the artist and the artist's perceptions of art. Thus, it is no longer necessary or valuable or even possible to dissect a work of art to uncover the universal truths or ideas which must remain freely available to all future authors. If people value instead that creative process itself, rather than a particular end product, as conceptual artists do, then copyright's focus on that end product seems misplaced. Every work of art, even if a copy of another's work, could be seen as valuable in the sense that it was unique to the particular artist who engaged in that process. To the extent that copyright law rests on the view that the government should prohibit copying of expression in order to protect the original artist but allow the copying of ideas in order to encourage the creation of new works, it may be missing the point. There may be no way for the new artist to extract the "idea" without the "expression" of it, and moreover, there may be no point in making that artist attempt to do so because that artist's creation of his or her work may be considered valuable as a reflection of that artist and that artist's definition of what is art.

For these reasons, the idea-expression dichotomy, conceptually grounded in classical and neoclassical views of art that are no longer widely accepted, is doomed to fail. Courts have no philosophical or objective basis on which to rely in trying to distinguish the ideas from the expression in works of art. Thus, the judge's assessment of the artistic value of the work, a subjective

229. See Hughes, supra note 99. Hughes suggests that in a Lockean view of intellectual property, "idea" and "expression" could be distinguished by viewing "expression" as that part of the process which involves labor, given the Lockean view of property as based on labor. Hughes also recognizes, however, that often people cannot separate the "idea" from the labor used to express or execute that idea because the labor precedes or occurs simultaneously with the development of the idea itself. Id. at 310-12, 314.

230. See supra note 125 and accompanying text.

231. See Bernstein, The Fake as More, in IDEA ART, supra note 125, at 41-45. Bernstein suggests that the art of painter Hank Herron, who produces "fake" paintings, that is, exact reproductions of paintings by Frank Stella, has value for its philosophical statement about the denial of originality. See also Battin, Exact Replication in the Visual Arts, 38 J. AESTHETICS & ART CRITICISM 153-58 (1979) (author describes the humanistic values of copying other works of art).
determination that reflects the personal values and background of the judge, has filled the vacuum in infringement determinations.

Since this subjectivity is unavoidable in the context of determining infringement, the courts should not hide behind the seemingly objective labels of idea and expression. A straightforward and self-aware form of decision-making and opinion writing is one necessary step in minimizing the problems that are created when judges make copyright infringement decisions on the basis of their assessments of the artistic merits of the works before them.