



## 1 Nimmer on Copyright Author(s)

**Nimmer on Copyright**

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### **Author(s)**

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### § 2.03 The Scope of Protectable Works under Statutory Copyright

#### [A] Works of Authorship

Section 102(a) of the Copyright Act provides that copyright protection subsists in “original works of authorship.”<sup>1</sup> We have previously considered the meaning of the term “original.”<sup>2</sup> The meaning of “works of authorship” must now be explored.<sup>3</sup> It is clear that this phrase is not intended to be coextensive with an author’s “writings” in the constitutional sense.<sup>4</sup> That is, Congress elected in 1976 not to exercise its full authority to provide for copyright protection of all “writings”<sup>5</sup> (the same as it decided in 1909 when enacting the predecessor statute).<sup>6</sup> On the other hand, it is also clear that “works of authorship” are not necessarily limited to the eight broad categories of works listed under Section 102(a).<sup>7</sup> The House Report explicitly states that these categories are “illustrative

<sup>1</sup> [17 U.S.C. § 102\(a\)](#).

<sup>2</sup> See [§ 2.01](#) *supra*.

<sup>3</sup> It is clear that “works of authorship” are not confined to verbal locutions. “Under the bill it makes no difference what the form ... may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia ... .” H. Rep., p. 52. According to the Register’s Supplementary Report (interpreting identical language in an earlier version of the Revision Bill), “a musical composition would be copyrightable if it is written or recorded in words or any kind of visible notation, in Braille, on a phonograph disc, on a film sound track, on magnetic tape, or on punch cards.” Reg. Supp. Rep., p. 4 For an analysis of symbolic indicia in a freedom of speech context, see *Nimmer on Freedom of Speech*, § 3.06.

<sup>4</sup> See [§§ 1.06, 1.08](#) *supra*.

<sup>5</sup> “In using the phrase ‘original works of authorship,’ rather than ‘all the writings of the author’ now in section 4 of the [1909] statute, the committee’s purpose is to avoid exhausting the constitutional power of Congress to legislate in this field ... .” H. Rep., p. 51. One opinion has described “original works of authorship” under the 1976 Act as “equally inclusive” with the phrase “all the writings of an author” under the [1909 Act. \*Mitchell Bros. Film Group v. Cinema Adult Theater\*, 604 F.2d 852, 858 \(5th Cir. 1979\)](#), cert. denied, [445 U.S. 917, 100 S. Ct. 1277, 63 L. Ed. 2d 601 \(1980\)](#).

<sup>6</sup> As the passage from the House Report quoted in the previous footnote suggests, a similar question of scope was raised under the 1909 Act. In pertinent part, it provided, “The works for which copyright may be secured under this title shall include all the writings of an author.” 17 U.S.C. § 4 (1909 Act). As the House Report for the 1909 Act explained, “It was suggested that the word ‘works’ should be substituted for the word ‘writings,’ in view of the broad construction given by the courts to the word ‘writings,’ but it was thought better to use the word ‘writings’ which is the word used in the Constitution.” H.R. Rep. No. 2222, 60th. Cong., 2d Sess. p. 10. From this, one might conclude that copyright protection under the 1909 Act was coextensive with congressional authority under the Constitution. The courts nevertheless held that the “writings” protected under § 4 of the 1909 Act constituted a more limited class of works than the “writings” that are capable of copyright under the Constitution. See [Goldstein v. Cal.](#), 412 U.S. 546, 93 S. Ct. 2303, 37 L. Ed. 2d 163 (1973); [Mazer v. Stein](#), 347 U.S. 201, 210, 74 S. Ct. 460, 98 L. Ed. 630 (1954); [Capitol Records, Inc. v. Mercury Records Corp.](#), 221 F.2d 657 (2d Cir. 1955). Cf. [Reiss v. National Quotation Bureau](#), 276 F. 717 (S.D.N.Y. 1921). One case contains the odd suggestion that § 5 of the 1909 Act might protect works that are not “writings.” See [Bouve v. Twentieth Century-Fox Film Corp.](#), 122 F.2d 51, 74 App. D.C. 271 (D.C. Cir. 1941).

<sup>7</sup> The categories are: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures

and not limitative,’<sup>8</sup> and … do not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect.”<sup>9</sup> But, if “works of authorship” are neither so broad as to encompass all constitutional “writings,” nor so narrow as to be confined to the eight broad categories enumerated in Section 102(a), how is one to delineate the scope of eligible works? The House Report states that the phrase “works of authorship” is “purposely left undefined.”<sup>10</sup> A flexible definition was intended<sup>11</sup> that would neither “freeze the scope of copyrightable subject matter at the present stage of communications technology [n]or … allow unlimited expansion into areas completely outside the present congressional intent.”<sup>12</sup>

What manner of works may be said to lie “completely outside the present congressional intent”? Neither the Copyright Act nor the accompanying Committee Reports answer this question.<sup>13</sup> In discussing the expansion of the subject matter of copyright, the House Report suggests two general types of works: (1) those in which “scientific discoveries and technological developments have made possible new forms of creative expression that never existed before,” and (2) those “in existence for generations or centuries [but that] have only gradually come to be recognized as creative and worthy of protection.”<sup>14</sup> The House Report seems to imply that works of the second type should not be protected unless explicitly described either in the eight categories of Section 102(a), or by further statutory amendment. Thus, choreography, if fixed in tangible form, is clearly a constitutional writing, but was nevertheless not protected as such under the 1909 Act.<sup>15</sup> It is, therefore, regarded as a “work of authorship” under the present Act only because “the coverage of the present [1909] statute [is] broadened further by explicit recognition of all forms of choreography” under Section 102(a).<sup>16</sup>

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and other audiovisual works; (7) sound recordings; and (8) architectural works. They are considered individually in [§§ 2.04–2.10](#) *infra*. Note that the eighth category was added by amendment to the 1976 Act in 1990. See [§ 2A.09\[A\]](#) *infra*.

<sup>8</sup> This conclusion is reflected in the statutory language in that the enumeration of the eight categories is preceded by the phrase: “Works of authorship *include* the following categories:” given that the Act provides that the term “including” is “illustrative and not limitative.” [17 U.S.C. § 101](#). To the same effect was prior law—its enumeration of categories of protectable works was followed by the statement: “The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title . . . .” 17 U.S.C. § 5 (1909 Act). The latter, in turn, purported to protect “all the writings of an author.” 17 U.S.C. § 4 (1909 Act). Nevertheless, courts largely frustrated that legislative intent by implicitly (and sometimes explicitly) assuming that § 5 of the 1909 Act constituted an exhaustive enumeration of copyrightable works under the statute. See [Fuller v. Bemis](#), 50 F. 926 (C.C. S.D.N.Y. 1892) (choreography not protected unless a “dramatic work”); [Deutsch v. Arnold](#), 98 F.2d 686 (2d Cir. 1938). The Copyright Office assumed likewise. See [37 C.F.R. § 202.7 \(1959\)](#).

<sup>9</sup> H. Rep., p. 53. See [National Conference of Bar Examiners v. Multistate Legal Studies, Inc.](#), 495 F. Supp. 34 (N.D. Ill. 1980), aff’d, [692 F.2d 478 \(7th Cir. 1982\)](#), cert. denied, [464 U.S. 814](#), 104 S. Ct. 69, 78 L. Ed. 2d 83 (1983).

<sup>10</sup> H. Rep., p. 51.

<sup>11</sup> [Garcia v. Google, Inc.](#), 786 F.3d 733, 741 (9th Cir. 2015) (*en banc*) (Treatise cited).

<sup>12</sup> H. Rep., p. 51.

<sup>13</sup> Nonetheless, an earlier version of the House Report, explaining then-extant Section 102 (identical to Section 102(a) as ultimately enacted), suggested in a footnote the following as not in themselves constituting protectable works of authorship: “typography; unfixed performances or broadcast emissions; blank forms and calculating devices; titles, slogans, and similar short expressions; certain three dimensional industrial designs; interior decoration; ideas, plans and methods; systems mathematical principles; formats and synopses of television series and the like; color schemes; news and factual information considered apart from its compilation or expression.” H.R. Rep. No. 2237, 89th Cong., 2d Sess. 44 n.1 (1966), accompanying H.R. 4347. Is there a negative implication from the deletion of that footnote from the Senate and House Committee Reports for the bill as finally enacted, even though this particular statutory language remained unchanged? The ultimately enacted § 102(b) was not part of the bill then under consideration, rendering the footnote unnecessary as to some, but not all, of the above items. Later commentary suggests “typography, certain industrial designs, and broadcast emissions” as “possible examples” of constitutional “writings” that are not to be regarded as “works of authorship” under the Act. Reg. Supp. Rep. p. 3.

<sup>14</sup> H. Rep., p. 51.

<sup>15</sup> See [§ 2.07\[D\]](#) *infra*.

<sup>16</sup> H. Rep., p. 52.

Titles also arguably constitute constitutional “writings.”<sup>17</sup> But despite what may be seen as an increasing recognition of the creativity of many titles, the 1909 Act made no explicit reference to titles as protectable works, and the courts denied that protection.<sup>18</sup> As Section 102(a) of the current Act does not include titles among its protectable categories, it follows that titles should not be regarded as “works of authorship” for statutory purposes.<sup>19</sup>

The status of certain other previously known forms of works, not expressly mentioned in the category enumeration, is more debatable.<sup>20</sup> As to new forms of creative expression that may emerge in the future as a result of scientific discoveries or technological developments, the fact that they are not included in the eight categories codified into Section 102(a) should not necessarily disqualify them as “works of authorship.”<sup>21</sup> If these new forms are sufficiently analogous to the kinds of works expressly protected in the eight categories, then they should be regarded as falling within “the present congressional intent,” even though the similarity is only by analogy.<sup>22</sup>

Let us imagine that videotape and videodiscs had been developed after the effective date of the current Act and that they were not included within the definition of “motion pictures” under Section 102(a)(6).<sup>23</sup> Under that imagined scenario, they would still be protected as works of authorship in that their respective functions are certainly analogous to motion picture film. By contrast, if we were to imagine that sound recordings had not been invented until after the effective date of the present Act,<sup>24</sup> it would be doubtful that sound recordings could be protected as works analogous to any of the other seven categories of works listed under Section 102(a).<sup>25</sup> Leaving the realm of imagination, it is difficult to envisage possible examples of new technology developed after 1976 that are not analogous to the eight categories of Section 102(a). The difficulty stems precisely from the fact that works not analogous to those with which we are already familiar are not easy to conjure up.

All that can be said by way of summary is that the concept “works of authorship” is intentionally left vague under the Act.<sup>26</sup> The courts are thereby permitted, but not required, to recognize as protectable types of works not expressly included in the category enumeration set forth in the statute.

<sup>17</sup> See [§ 1.08\[D\]](#) *supra*.

<sup>18</sup> See [§ 2.16\[A\]](#) *infra*.

<sup>19</sup> *Id.*

<sup>20</sup> Many subsequent sections bear on this matter. Included are factual works (see [§ 2.11](#) *infra*); characters (see [§ 2.12](#) *infra*); jokes (see [§ 2.13](#) *infra*); color arrangements (see [§ 2.14](#) *infra*); typeface designs (see [§ 2.15](#) *infra*); industrial designs; (see [§ 2A.08\[C\]](#) *infra*); dress designs (see [§ 2A.08\[H\]\[3\]](#) *infra*); and tattoos (see [§ 2A.15\[C\]](#) *infra*). Even more knotty problems in this regard are posed by works of utility (see [§§ 2A.03–2A.06](#) *infra*) and computer programs (see [§ 2A.10](#) *infra*).

<sup>21</sup> See [Worlds of Wonder, Inc. v. Veritel Learning Sys., Inc.](#), 658 F. Supp. 351, 355 (N.D. Tex. 1986).

<sup>22</sup> As a later Congress reiterated, “The Copyright Act of 1976 reflects a congressional understanding that the history of copyright law has been one of gradual expansion of the types of works afforded protection. By providing balance and flexibility, the Act neither freezes the scope of copyrightable technology nor permits unlimited expansion into areas completely outside the legislative intent in 1976.” H. Rep. (SHVA), p. 9.

<sup>23</sup> In fact, they are so included. See [§ 2.09\[C\]](#) *infra*.

<sup>24</sup> Of course, we also would need to postulate that Section 102(a)(7) were not included in the Act.

<sup>25</sup> Sound recordings are not analogous to musical works any more than motion pictures are analogous to the novels upon which they are based. However, motion pictures are arguably analogous to photographs, and would, therefore, be protected by analogy to Section 102(a)(5) (“graphic” works), even if Section 102(a)(6) did not expressly extend to motion pictures. See [Edison v. Lubin](#), 122 Fed. 240 (3d Cir. 1903), *appeal dismissed*, 195 U.S. 624, 195 U.S. 625, 25 S. Ct. 790, 49 L. Ed. 349 (1904); [American Mutoscope v. Edison](#), 137 Fed. 262 (3d Cir. 1905).

<sup>26</sup> The legislative purpose in deleting the phrase “all the writings of an author” as contained in Section 4 of the 1909 Act was to “eliminate the uncertainties” arising from that phrase. H. Rep., p. 51. It appears, however, that the uncertainties were merely

## [B] Fixation in Tangible Form

The statute itself speaks directly to tangibility. In order for “works of authorship”<sup>27</sup> to be eligible for statutory copyright, they must be “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>28</sup>

Fixation in tangible form is not merely a statutory condition to copyright;<sup>28.1</sup> it is also a constitutional necessity.<sup>29</sup> That is, unless a work is reduced to tangible form it cannot be regarded as a “writing” within the meaning of the constitutional clause authorizing federal copyright legislation.<sup>30</sup> Thus, certain works of conceptual art<sup>31</sup> stand outside of copyright protection.<sup>32</sup>

A previous section of this treatise explores whether oral conversations may form the basis for common law copyright protection.<sup>33</sup> Regardless of how that question is answered by the respective state courts, it is beyond question that federal copyright protection does not extend to oral presentations that are not themselves based on antecedent fixations.<sup>34</sup>

### [1] Perception by Machine or Other Device.

As already indicated, the fixation requirement is satisfied if the work as fixed can be perceived “either directly or with the aid of a machine or other device.” This language is intended<sup>35</sup> as legislative overruling of *White-Smith Publishing Co. v. Apollo Co.*<sup>36</sup> That case held that a piano roll failed to qualify as a “copy” of

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transferred to a different phrase, not eliminated. In fact, the phrase from former Section 4 may have been more certain, in that it was suggested that “the definition of ‘writings’ in Sec. 4 of the Copyright Act is intended to be read expansively [i.e., coextensively with the scope of constitutional ‘writings’], so long as limitations are not fixed elsewhere in the Act.” *Harcourt, Brace & World, Inc. v. Graphic Controls Corp.*, 329 F. Supp. 517 (S.D.N.Y. 1971). See *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955) (L. Hand, J., dissenting).

<sup>27</sup> See [§ 2.03\[A\]](#) *supra*.

<sup>28</sup> [17 U.S.C. § 102\(a\)](#). This fixation requirement is consistent with the governing Act of the Berne Convention, to which the United States adheres. Berne Convention (Paris text), art. 2(2). See Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 Stan. L. Rev. 499, 507 (1967) (protection for unfixed choreography would have been required under pre-Paris Acts of Berne Convention).

<sup>28.1</sup> The statute in question, of course, is Title 17 of the United States Code. Other nations, by contrast, are free to dispense with fixation as a condition to copyright protection. See [TeamLab Inc. v. Museum of Dream Space, LLC](#), 650 F. Supp. 3d 934, 948 (C.D. Cal. 2023) (Japanese law).

<sup>29</sup> See [§ 1.08\[C\]\[2\]](#) *supra*.

<sup>30</sup> But see [§ 8E.05\[A\]](#) *infra*.

<sup>31</sup> An example occurred when an Anti-Object artist threw colored streamers into the sky from an airplane, calling “attention to the higher spirit of mankind” by “sculpting in space.” Linda J. Lacey, *Of Bread and Roses and Copyrights*, [1989 Duke L.J. 1532, 1557](#) n.204 (condemned by Senator Proxmire as “artistic frou-frou”).

<sup>32</sup> [Kelley v. Chicago Park Dist.](#), 635 F.3d 290, 303 (7th Cir.), cert. denied, 132 S. Ct. 380 (2011) (paragraph of Treatise quoted). This opinion determined that a garden installation failed to qualify as a fixed work. See [§ 2A.15\[A\]](#) *infra*.

<sup>33</sup> See [§ 2.02\[C\]](#) *supra*.

<sup>34</sup> [Fritz v. Arthur D. Little, Inc.](#), 944 F. Supp. 95, 100 (D. Mass. 1996).

<sup>35</sup> See H. Rep., p. 52.

<sup>36</sup> [209 U.S. 1, 28 S. Ct. 319, 52 L. Ed. 655 \(1908\)](#).

the musical composition recorded thereon, so that defendant, in making an unauthorized piano roll of plaintiff's musical composition, did not thereby infringe plaintiff's "right to copy." In reaching this result, *White-Smith* established the doctrine that a "copy" must be "in a form which others can see and read."<sup>37</sup> Piano rolls, the Supreme Court held, are merely "parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act."<sup>38</sup>

Although *White-Smith* itself decided only what constitutes an infringing act of copying, Congress in the 1909 Act implicitly adopted that case's definition of "copy" for the purpose of determining the issue of copyrightability.<sup>39</sup> That is, unless a work was embodied in a form that one could "see and read" with the naked eye, it was not deemed to be in "copies" capable of deposit and registration, and hence was not regarded as copyrightable subject matter.<sup>40</sup>

The current Act definitively removes this doctrinal restriction. It clarifies that "it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'"<sup>41</sup> Thus, *White-Smith*'s restrictive concept—which Justice Holmes initially characterized as giving to copyright "less scope than its rational significance and the ground on which it is granted seem to me to demand"<sup>42</sup>—at long last reaches its deserved burial.<sup>43</sup>

In *Matthew Bender & Co. v. West Pub. Co.*,<sup>44</sup> West argued that Bender's CD-ROM case compilations constitute a "copy" of West's reporters, given that their order could be perceived with the aid of machine.<sup>45</sup> Bender had encoded cases on its ROM in chronological order rather than in the order in which they appear

<sup>37</sup> [Id. at 17](#).

<sup>38</sup> [Id. at 18](#).

<sup>39</sup> [Jones v. Virgin Records, Ltd.](#), 643 F. Supp. 1153, 1157 (S.D.N.Y. 1986) (*Treatise cited*); [Data Cash Sys., Inc. v. JS&A Group, Inc.](#), 480 F. Supp. 1063 (N.D. Ill. 1979) (*Treatise cited*), aff'd on other grounds, [628 F.2d 1038](#) (7th Cir. 1980).

<sup>40</sup> For a full account of the legislative history relating to this issue under the 1909 Act, see Ringer, *The Unauthorized Duplication of Sound Recordings*, U.S. Copyright Office Study No. 26. This doctrine, as it specifically limited statutory copyright for sound recordings, was later overruled by the Sound Recording Amendment, [85 Stat. 391](#), further amended by [88 Stat. 1873](#)). See [§ 2.10\[A\] infra](#).

<sup>41</sup> H. Rep., p. 52.

<sup>42</sup> [White-Smith](#), 209 U.S. at 19 (Holmes, J., concurring specially).

<sup>43</sup> But what of works created and published prior to the effective date of the present Act? If they were not eligible for copyright under the 1909 Act because of its more restrictive fixation requirement, may they claim copyright under the present Act? See [§ 2.03\[G\] infra](#).

<sup>44</sup> [158 F.3d 693](#) (2d Cir. 1998), cert. denied, [526 U.S. 1154](#), [119 S. Ct. 2039](#), [143 L. Ed. 2d 1048](#) (1999). For a general discussion of that case, see [§ 3.03\[B\]\[2\] infra](#). As disclosed therein, this writer served as Bender's counsel.

<sup>45</sup> The argument here relies on the statutory definition of "copies" as "material objects ... in which a work is fixed by any method ... and from which the work can be perceived ... with the aid of a machine or device." [17 U.S.C. § 101](#). Every previous case to construe that provision had considered it "solely to ascertain whether a work has met the fixation requirement, not to determine the arrangements and rearrangements of the work fixed on the material object." [158 F.3d at 704](#). West's contrary construction, which the dissent adopted, requires the strained construction that "the word 'work' in the statutory text refers in the first instance to the infringing work, and in the second instance to the infringed work." [Id. at 710](#) (Sweet, J., dissenting).

in West's rival products; nonetheless, a user could manipulate their contents via her own computer, West maintained, in order to perceive cases in the order in which West had arranged them. That argument misconstrues this provision of the statute not simply as an attempt to overrule *White-Smith*, but as a new statement of when substantial similarity takes place. The court rightly rejected that construction:

[W]e conclude that a CD-ROM disc infringes a copyrighted arrangement when a machine or device that reads it perceives the embedded material in the copyrighted arrangement or in a substantially similar arrangement. At least absent some invitation, incentive, or facilitation not in the record here, a copyrighted arrangement is not infringed by a CD-ROM disc if a machine can perceive the arrangement only after another person uses the machine to *re-arrange* the material into the copyrightholder's arrangement.<sup>46</sup>

## [2] Stability of Fixation.

A work is not "fixed" under the Copyright Act unless its embodiment in tangible form is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>47</sup> Thus, live radio and television broadcasts are embodied in a "medium of expression"<sup>48</sup> ... from which they can be perceived, reproduced, or otherwise communicated,"<sup>49</sup> but the projected sounds and images are ephemeral,<sup>50</sup> and hence not "fixed."<sup>51</sup> In order to protect live broadcasts, the Act sets forth a special provision: "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title, if a fixation of the work is being made simultaneously with its transmission."<sup>52</sup> Once a work is fixed for a period of more than transitory duration, it does not lose copyright protection because thereafter all authorized copies are destroyed.<sup>53</sup>

<sup>46</sup> [158 F.3d at 702](#) (emphasis original). The case arose over star pagination. See [§ 3.03\[B\]\[2\] infra](#). That feature, as the court noted, "may incidentally reveal to the reader how the reader could create a copy of West's arrangement by various computer key operations; but by the same token, if the CD-ROM discs were published on paper in the same order as the cases are embedded in the CD-ROM disc, a reader so minded could assemble a 'copy' of the West arrangement by use of scissors." [Id. at 705](#). The only CD-ROM user West could adduce who actually replicated West's arrangement in an infringing fashion was its own counsel, who undertook "this thankless toil" as part of the litigation. [Id. at 706](#). As a result, Bender was not liable as a contributory infringer. [Id. at 707](#). See [§ 12.04\[A\]\[3\]\[a\] infra](#).

<sup>47</sup> [17 U.S.C. § 101](#). See [Conrad v. AM Community Credit Union, 750 F.3d 634, 636 \(7th Cir. 2014\) \(Treatise cited\)](#).

<sup>48</sup> Is television a "tangible" medium of expression? One can touch and feel the television screen, but not the images appearing thereon. Is radio? Apparently, for statutory purposes, any medium capable of embodying a work for more than a transitory period is a "tangible" medium. [17 U.S.C. § 101](#).

<sup>49</sup> [17 U.S.C. § 102\(a\)](#).

<sup>50</sup> The same is true of a reproduction "captured momentarily in the 'memory' of a computer." H. Rep., p. 53. That reference to "momentarily" hearkens back to the era of "batch processing" via punch cards, as opposed to later technology whereby the subject information remained resident in RAM. See [§ 8.08\[A\]\[2\] infra](#).

<sup>51</sup> The fixation and hence copyrightability of a live television broadcast should not be confused with the same issue regarding a work that may be the subject of such a broadcast. Thus, a play may be "fixed" in that it is reduced to paper in scenario form. If such a play were performed on a live television broadcast, an unauthorized reproduction of the play by a videotape recording of the broadcast would clearly infringe the statutory copyright in the play. It would not, however, infringe any copyrightable elements in the broadcast *per se*, *i.e.*, the camera angles, lighting, etc. If a live broadcast is not based upon a work of authorship, as in the case of a sporting event, a parade, etc., then no statutory copyright infringement would result from its reproduction. See [§ 2.09\[F\]\[2\] infra](#). See also [Production Contractors, Inc. v. WGN Continental Broadcasting Co., 622 F. Supp. 1500, 1503 \(N.D. Ill. 1985\) \(Treatise cited\)](#). Alternatively, the reproduction of a broadcast of a motion picture film of a parade would infringe the copyright in the motion picture, although the parade *per se* is unprotectable. See *id.* (competitor may mount his own independent broadcast of parade, but may not rebroadcast a rival telecast).

<sup>52</sup> [17 U.S.C. § 101](#). See [Trenton v. Infinity Broadcasting Corp., 865 F. Supp. 1416, 1423 \(C.D. Cal. 1994\)](#).

Because it is common practice for radio and television broadcasters to simultaneously record live broadcasts, this extension of the concept of fixation would seem to effectively protect virtually all broadcasts.<sup>54</sup> However, to regard these live broadcasts as “fixed” implicates potential vulnerability as a constitutional matter.<sup>55</sup>

One case posed a challenge to the fixation of a television broadcast. In *National Football League v. McBee & Bruno's, Inc.*,<sup>56</sup> the network broadcasted a football game via two satellite transmissions. First, the network sent to its studio a “clean feed” consisting only of video and audio from the game and commentators. Virtually simultaneously, after mixing in commercials, station breaks, and other interruptions, the network sent a “dirty feed” for broadcast by affiliates over the air.<sup>57</sup> Plaintiffs registered the dirty feed for copyright protection; defendants, using satellite dish antennae, intercepted the clean feed and performed it at their taverns, thus violating a local television blackout. Defendants maintained that their performance of the clean feed, which they claimed was unfixed, could not violate plaintiffs’ copyright in the dirty feed. The district court found that it is “the football game between the Cardinals and another team that the television viewers take delight in and not the inserted commercials.”<sup>58</sup> The Eighth Circuit agreed that “the game, and not the inserted commercials and station breaks, constituted the work of authorship.”<sup>59</sup>

These fine distinctions create a curious dichotomy between that which is registered and the “true” work of authorship<sup>60</sup> and moreover rely problematically on subjective value judgments.<sup>61</sup> In any event, it is submitted that they are unnecessary. Plaintiffs fixed and obtained ownership in the dirty feed, which included all of the clean feed plus additional material. By intercepting the clean feed, defendants appropriated almost all of plaintiff’s copyrighted material. Defendants are in a position analogous to one who goes to a poetry reading of a registered work, commits the poem to memory, and thereafter reproduces 98% of it. Although this hypothetical auditor, like defendants in *McBee & Bruno's*, may appropriate his particular material from an unfixed work (the poetry recital or the clean feed), his use of virtually all the content of a work fixed and registered with the Copyright Office plainly infringes a subsisting copyright.<sup>62</sup>

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<sup>53</sup> *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984). For an extended meditation on that theme, see Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 Harv. J.L. & Technology 1 (1996).

<sup>54</sup> This status nonetheless does not apply to the simultaneous fixation of performances that are not being broadcast or otherwise transmitted. See [§ 1.08\[C\]\[2\] supra](#).

<sup>55</sup> See [§ 1.08\[C\]\[2\] supra](#).

<sup>56</sup> [792 F.2d 726 \(8th Cir. 1986\)](#).

<sup>57</sup> [Id. at 728](#).

<sup>58</sup> [621 F. Supp. 880, 886 \(E.D. Mo. 1985\)](#).

<sup>59</sup> [792 F.2d at 732](#).

<sup>60</sup> Given that registration of copyright is a condition for instituting a copyright action, it is anomalous to hold that the work whose copyright is violated is a different work from that registered in the Copyright Office. See [§§ 7.16\[A\]–7.16\[B\] infra](#).

<sup>61</sup> As previously noted, judges of the law should not style themselves judges of artistic worth. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 23 S. Ct. 298, 47 L. Ed. 460 (1903). See [§ 2.01\[B\]\[1\] supra](#). It likewise seems ill-advised for judges to segregate out the “true artistic component” or “that which causes delight” from the registered work as a whole.

<sup>62</sup> See [§ 8.01 infra](#). As noted above, the opinion treated the two feeds as created simultaneously. See [792 F.2d at 732](#) (“near instantaneous nature of the picture’s journey from stadium to viewer”). Query whether, absent such a factual finding, the rationale for the case would collapse.

### [3] Under Authority of Author.

In addition to the foregoing requirements, a work is not “fixed” under the Copyright Act unless its embodiment in tangible form takes place “by or under the authority of the author.”<sup>63</sup> Thus, to the extent that someone bootlegs a live musical performance by taping it, the result is not to create copyrightable subject matter.<sup>64</sup>

Given the statutory reference to fixation taking place under the author’s “authority,” it is not necessary for a singer to personally set up the microphone, an actor to operate the camera, or the like. To the extent that a band member voluntarily participates in a recording session, or an actor voluntarily participates in a film shoot, the resulting product may be considered pursuant to the requisite authority. These issues seldom rise to the fore.<sup>65</sup>

The exceptional case arose when Cindy Garcia claimed that she had been duped into acting in a desert romance which was altered into *Innocence of Muslims*, an anti-Islamic screed replete with dubbing of lines in which her character called Mohammed a child molester.<sup>66</sup> The ensuing fatwa calling for her death impelled her to file suit for copyright infringement.<sup>67</sup> Everything about the case was highly unusual, including her allegation that the copyrightable subject matter at hand consisted not in the subject motion picture, but instead in her five-second performance.<sup>68</sup> Given that plaintiff specifically disclaimed consenting “to the film’s ultimate rendition or how she was portrayed in *Innocence of Muslims*,” the *en banc* Ninth Circuit concluded that “she can hardly argue that the film or her cameo in it was fixed ‘by or under [her] authority.’ ”<sup>69</sup>

Property construed, this case does not heighten the loose antecedent standards for fixing copyrightable subject matter. It merely stands for the proposition that there are multiple defects<sup>70</sup> with attempting to style a performance *per se* as a work subject to copyright protection.<sup>71</sup>

### [C] The Distinction Between the Work and the Material Object: Copies and Phonorecords

An “original work of authorship,” as that phrase is used in the Copyright Act,<sup>72</sup> should not be confused with the material objects in which the work must be embodied in order to satisfy the fixation requirement.<sup>73</sup> That material

<sup>63</sup> [17 U.S.C. § 101](#).

<sup>64</sup> The Copyright Act defines that conduct as violating a neighboring right. See [§ 8E.03](#) *infra*.

<sup>65</sup> In the domain of publication, a parallel requirement exists that, to qualify, the dissemination of copies must take place with the author’s authorization. See [§ 4.03\[B\]](#) *infra*. More dissension has arisen in that domain. *Id.*

<sup>66</sup> [Garcia v. Google, Inc., 786 F.3d 733 \(9th Cir. 2015\)](#) (*en banc*).

<sup>67</sup> [Id. at 738](#).

<sup>68</sup> See [§ 2.12\[B\]\[3\]](#) *infra*.

<sup>69</sup> [786 F.3d at 744](#).

<sup>70</sup> The current defect, relating to unauthorized fixation, arises when the putative author simultaneously maintains that the work in question (a) was fixed without her authorization; (b) constitutes a copyrightable composition; and (c) infringes her copyright.

<sup>71</sup> See [§ 2.12\[B\]\[3\]](#) *infra*. Among the eleven judges participating in this appeal, one did view the performance *per se* as a copyrightable work, stating in that context that “a performer need not operate the recording equipment to be an author of his own performance.” [786 F.3d at 751](#) (Kozinski, J., dissenting) (Treatise cited as to [§ 2.10\[A\]\[3\]](#) *infra*). The cited authority for that proposition is this treatise’s discussion of sound recordings. Given that this latter subject matter is unambiguously subject to copyright, all could presumably agree to the reformulation of those remarks as follows: “a performer need not operate the recording equipment to be a contributor to a qualifying work of authorship, such as a fixed sound recording or motion picture.”

<sup>72</sup> See [§ 2.03\[A\]](#) *supra*.

object, or “tangible medium of expression,”<sup>74</sup> consists of either a copy<sup>75</sup> or a phonorecord.<sup>76</sup> “Copies” and “phonorecords” together,<sup>77</sup> by definition, “comprise all of the material objects in which copyrightable works are capable of being fixed.”<sup>78</sup> Ownership of those tangible materials is distinct from ownership of intangible rights under copyright.<sup>79</sup> Although it is now only of historical significance, the very word *copyright* derives from this noun rather than, as commonly supposed, from the verb *to copy*.<sup>80</sup>

As used in the Copyright Act, a “literary work”<sup>81</sup> is a work of authorship, but a “book” is not.<sup>82</sup> A “book” is merely a material object that may embody, and hence constitute, a *copy* of a given *literary work*. The same literary work may also be embodied in other types of copies, such as periodicals, computer punch cards, and microfilm.<sup>83</sup> In fact, even non-standard items may qualify as the requisite tangible material—such as the after-dinner napkin containing the Laffer Curve<sup>84</sup> or branded condoms and other sex products.<sup>85</sup> The work likewise may be embodied in phonorecords such as tape recordings, discs, *etc.*<sup>86</sup> Similarly, a given *motion picture*

<sup>73</sup> See *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 628 (7th Cir. 1982) (*Treatise cited*).

<sup>74</sup> [17 U.S.C. § 101](#).

<sup>75</sup> “‘Copies’ are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘copies’ includes the material object, other than a phonorecord, in which the work is first fixed.” [17 U.S.C. § 101](#).

<sup>76</sup> “‘Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘phonorecords’ includes the material object in which the sounds are first fixed.” [17 U.S.C. § 101](#). Congress does not always maintain a hermetic boundary between a “phonorecord,” which is a material object, and a “sound recording,” a species of copyrightable composition capable of fixation solely in phonorecord form. See [§ 8.22\[D\]\[1\]\[a\]\[iii\]](#) N. 208 *infra*.

<sup>77</sup> Though the two are intended to be wholly distinct, courts sometimes loosely use the word “copy” to encompass all physical media in which copyrightable compositions may be fixed, thereby subsuming “phonorecords” within that term. See [§ 8.13\[B\]\[3\]\[c\]\[ii\]\[III\]](#) N. 220 (instance of Supreme Court’s conflation of those terms).

<sup>78</sup> H. Rep., p. 53.

<sup>79</sup> See [§ 10.09](#) *infra*.

<sup>80</sup>

Originally the word “copie” was a noun, indicating the manuscript. Ownership of the “copie” thus meant ownership of the manuscript for the purposes of publishing it. Today, “copy” has become a verb, meaning the act of reproduction of a work. But in the development of copyright law it was intended to be a term of art, indicating a reproduction of a work for publication. Failure to understand and apply this distinction has confused many courts (assisted by overzealous advocates) into too expansive a view of the scope of the copyright monopoly.

[Suntrust Bank v. Houghton Mifflin Co.](#), 268 F.3d 1257, 1259 n.19 (11th Cir. 2001). See David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, [38 Hous. L. Rev.](#) 1, 193 (2001).

<sup>81</sup> See [§ 2.04\[A\]\[1\]](#) *infra*.

<sup>82</sup> The 1909 Act did not make this distinction, and hence included “books” under the classification of copyrightable works. 17 U.S.C. § 5(a) (1909 Act).

<sup>83</sup> H. Rep., p.53. One can update that enumeration to encompass CD-ROMs, web servers, eBooks, and all types of new media.

<sup>84</sup> See [Rockford Map Pub., Inc. v. Directory Serv. Co. of Colo.](#), 768 F.2d 145, 148 & n.2 (7th Cir. 1985) (*dictum*), cert. denied, [474 U.S. 1061](#), [106 S. Ct. 806](#), [88 L. Ed. 2d 781](#) (1986).

<sup>85</sup> See [Crispin v. Christian Audigier, Inc.](#), 839 F. Supp. 2d 1086, 1088 (C.D. Cal. 2011).

constitutes a work of authorship whereas its *copies* may take different forms, such as celluloid, videotape, Blu Ray discs, and the like.<sup>87</sup> There is but a single work of authorship, no matter how numerous and diverse the copies. By like reasoning, the “author” is the originator of the intangible material (e.g., the novel), rather than the individual who fixes it into particular copies (e.g., the stenographer).<sup>88</sup>

The same distinction subsists between *sound recordings*,<sup>89</sup> which are works of authorship, and *phonorecords*, which merely embody those sounds. It may be wondered why the drafters of the Copyright Act chose to define “phonorecords” as the “material objects in which sounds … are fixed,”<sup>90</sup> and then to place “copies” in a sort of residual category, as “material objects other than phonorecords … .”<sup>91</sup> An unnecessary complexity in a necessarily complex statute could have been avoided by defining copies to include all material objects in which works of authorship are fixed, regardless of whether or not the work itself consists of sound.<sup>92</sup> The drafters may have feared that the doctrine of *White-Smith v. Apollo*<sup>93</sup> would somehow survive in the courts, thereby casting doubt on the concept that a sound recording can be embodied in a “copy.” Nonetheless, given that the statute contains a distinction between copies and phonorecords, the distinction is useful to limit the scope of compulsory licenses<sup>94</sup> and record store rentals,<sup>95</sup> as well as for other purposes.<sup>96</sup>

## [D] Protection Limited to Expression

### [1] Distinction Between Idea and Expression.

Copyright may be claimed only in the “expression” of a work of authorship, not in its “idea.”<sup>97</sup> This fundamental distinction, arguably required by the freedom of speech guarantee of the *First Amendment*,<sup>98</sup>

<sup>86</sup> *Id.* For special considerations applicable to audio books, see [§ 8.12\[C\]\[3\] infra](#).

<sup>87</sup> See [§ 2.09\[C\] infra](#). In *United States v. Goss*, 803 F.2d 638 (11th Cir. 1986), failure to appreciate that a ROM constituted the material object in which an audiovisual work was embodied resulted in overturning a criminal conviction. See *id. at 642*.

<sup>88</sup> See [§ 1.06\[A\] supra](#).

<sup>89</sup> See [§ 2.10 infra](#).

<sup>90</sup> [17 U.S.C. § 101](#). This category does not, however, include sounds “accompanying a motion picture or other audiovisual work.” See N. 76 *supra*.

<sup>91</sup> [17 U.S.C. § 101](#).

<sup>92</sup> As previously noted, courts sometimes unconsciously elide the complexity, thereby blurring the Act’s intended distinctions. See N. 77 *supra*.

<sup>93</sup> See discussion of this case in [§ 2.03\[B\]\[1\] supra](#).

<sup>94</sup> See [§ 2.03\[B\]\[1\] supra](#). See also [§ 8.25\[B\]\[1\] infra](#).

<sup>95</sup> See [§ 8.12\[C\]\[1\] infra](#).

<sup>96</sup> For instance, unlike copies, phonorecords do not require copyright notices to protect the literary and musical works contained therein. See [§ 7.12\[B\] infra](#). In addition, no display right exists for phonorecords. See [§ 8.20\[A\] infra](#). Congress also excluded phonorecords from the criminal sanctions for fraudulent removal or alteration of a copyright notice. See [§ 15.02](#) N. 1 *infra*. (The exclusion, probably inadvertent, means that it is not a criminal offense to remove the copyright notice protecting the sound recording on a phonorecord. See *id.*) See also [§ 4.05\[B\]\[1\]](#) N. 24 *infra*.

<sup>97</sup> *Dunlap v. G&L Holding Group, Inc.*, 381 F.3d 1285, 1296 (11th Cir. 2004) (*Treatise quoted*); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1234 (3d Cir. 1986) (*Treatise cited*), cert. denied, 479 U.S. 1031, 107 S. Ct. 877, 93 L. Ed. 2d 831 (1987); *Close to My Heart, Inc. v. Enthusiast Media LLC*, 508 F. Supp. 2d 963, 967 (D. Utah 2007) (*Treatise cited*); *Custom*

constitutes not only a limitation on the copyrightability of works but also functions as a measure of the degree of similarity that must exist between a copyrightable work and an unauthorized copy, in order to constitute the latter an infringement.<sup>99</sup> It is, therefore, analyzed in depth through later sections of this treatise, dealing with both the genesis of this feature<sup>100</sup> and with the requirement of substantial similarity.<sup>101</sup>

Although long recognized by the courts,<sup>102</sup> the idea-expression dichotomy won express statutory recognition for the first time in the current Copyright Act. Section 102(b) provides:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work.<sup>103</sup>

The House Report makes clear that the above provision “in no way enlarges or contracts the scope of copyright protection under the present [1909] law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.”<sup>104</sup> It would, then, be a misreading of Section 102(b)<sup>105</sup> to interpret it to deny copyright protection to “the expression” of a work, even if that work happens to consist of an “idea, procedure, process” *etc.*<sup>106</sup>

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[Dynamics, LLC v. Radiantz LED Lighting, Inc.](#), 535 F. Supp. 2d 542, 548 (E.D.N.C. 2008) (*Treatise quoted*); [Craft v. Kobler](#), 667 F. Supp. 120, 123 (S.D.N.Y. 1987) (*Treatise cited*).

<sup>98</sup> See [§ 19E.04\[B\]\[2\]](#) *infra*.

<sup>99</sup> [Diamond Direct, LLC v. Star Diamond Group, Inc.](#), 116 F. Supp. 2d 525, 529, n.29 (S.D.N.Y. 2000) (*Treatise quoted*); [Lexmark Int'l, Inc. v. Static Control Components, Inc.](#), 253 F. Supp. 2d 943, 962 (E.D. Ky. 2003) (*Treatise quoted*), vacated, 387 F.3d 522, 538 (6th Cir. 2004) (*Treatise quoted*). Lexmark explains the basis of its disagreement with the district court as to the above discussion, which each quotes:

As a matter of practice, Nimmer is correct that courts most commonly discuss the idea-expression dichotomy in considering whether an original work and a partial copy of that work are “substantially similar” (as part of prong two of the infringement test), since the copyrightability of a work as a whole (prong one) is less frequently contested. But the idea-expression divide figures into the substantial similarity test not as a measure of “similarity”; it distinguishes the original work’s protectable elements from its unprotectable ones, a distinction that allows courts to determine whether any of the former have been copied in substantial enough part to constitute infringement. Both prongs of the infringement test, in other words, consider “copyrightability,” which at its heart turns on the principle that copyright protection extends to expression, not to ideas.

[Id. at 538](#).

<sup>100</sup> See [§ 2A.06\[A\]\[3\]\[a\]](#) *infra*.

<sup>101</sup> See [§§ 13.03\[A\]\[1\], 13.03\[B\]\[2\]\[a\]](#) *infra*.

<sup>102</sup> See, e.g., [Mazer v. Stein](#), 347 U.S. 201, 74 S. Ct. 460, 98 L. Ed. 630 (1954).

<sup>103</sup> [17 U.S.C. § 102\(b\)](#).

<sup>104</sup> H. Rep., p. 57. Truly scientific boundaries could be charted here, given a sufficiently precise definition of “idea.” But even scientists have yet to reach consensus on the concept: What is a concept? See D. Hofstadter, *Fluid Concepts and Creative Analogies* 294, 366 (1995).

<sup>105</sup> Judge Alsup quotes this proposition, along with contrary points of view, as an “issue that has been debated” among scholars. [Oracle Am., Inc. v. Google Inc.](#), 872 F. Supp. 2d 974 (N.D. Cal. 2012) (*Treatise quoted*). The Federal Circuit reversed that aspect of the opinion. [750 F.3d 1339, 1362 \(Fed. Cir. 2014\)](#), cert. denied, [135 S. Ct. 2887 \(2015\)](#). For a discussion, see [§§ 2A.06\[A\]\[3\]\[b\], 2A.10\[B\]\[4\]](#) *infra*.

<sup>106</sup> An “expression” is infringed, even if the copy is somewhat more abstract than a word-for-word reproduction. On drawing the line between an unprotected “idea” and its protectable “expression,” see [§ 13.03\[A\]\[1\]](#) *infra*.

Thus, if a given “procedure” is reduced to written form, the result constitutes a protectable work of authorship, so as to preclude the unlicensed copying of “the expression” of the procedure,<sup>107</sup> even if the procedure *per se* constitutes an unprotectable “idea.”<sup>108</sup> Therefore, although Section 102(b) denies that copyright may “extend to” an “idea, procedure, process” as contained in a given work, it does not deny copyright to the work itself, merely because it consists of an “idea, procedure, process,” *etc.*<sup>109</sup>

The Supreme Court actually uses two locutions to describe the lack of protection for ideas discussed above. It calls the principle in question “the idea/expression or fact/expression dichotomy,” noting that it “applies to all works of authorship.”<sup>110</sup> A later section<sup>111</sup> delves into the details of non-protection of facts.<sup>112</sup>

## [2] Requirement of Subjectivity.

When matters are factual, they are often conceptualized as *objective*.<sup>113</sup> By contrast, artistry inherently involves an author’s *subjectivity*. Cases often highlight subjective choices as a necessary ingredient for protection to arise. Consider the case of catalogs and directories.<sup>114</sup> To the extent that the directory is objectively dictated—the phone number of everyone in a given locality, listed alphabetically, for example—then it stands outside copyright protection.<sup>115</sup> By contrast, “the subjective judgment and selectivity involved in determining which members of a given population merit inclusion in the author’s list” has been deemed sufficient to invest the resulting list with copyright protection.<sup>116</sup> When the creativity that goes into a list consists of its selection—as distinguished from arrangement<sup>117</sup>—it has been commented that “significant subjective judgment” as to social status may suffice to confer protection.<sup>118</sup>

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<sup>107</sup> For example, copyright may be claimed in the literal wording of instructions for the playing of a game, so as to prevent a complete or closely paraphrased reproduction. See [§ 2A.14\[C\]\[1\] \*infra\*](#). Similarly, computer programs may be protectable. See [§ 2A.10 \*infra\*](#).

<sup>108</sup> [Honeywell Int’l, Inc. v. Western Support Grp., Inc.](#), 947 F. Supp. 2d 1077, 1081 (D. Ariz. 2013) (*Treatise quoted*); [SecureInfo Corp. v. Telos Corp.](#), 387 F. Supp. 2d 593, 611 (E.D. Va. 2005) (*Treatise quoted*). See [Affiliated Enters., Inc. v. Gruber](#), 86 F.2d 958 (1st Cir. 1936) (system for playing “Bank Night” held unprotectable).

<sup>109</sup> Much more detail on this score is set forth in [§ 2A.06\[A\]\[3\] \*infra\*](#).

<sup>110</sup> [Feist Publications, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 350, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991).

<sup>111</sup> See N. 109 *supra*.

<sup>112</sup> See [§ 2.11 \*infra\*](#).

<sup>113</sup> Of course, matters can become clouded when we encompass non-standard forms such as “false facts” or “invented facts.” See [§ 2.11\[F\]](#).

<sup>114</sup> See [§ 2.04\[B\] \*infra\*](#).

<sup>115</sup> See [Feist Publications, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), discussed in [§ 3.04\[B\]\[2\]\[a\] \*infra\*](#).

<sup>116</sup> [Dow Jones & Co. v. Board of Trade](#), 546 F. Supp. 113 (S.D.N.Y. 1982). This case held that selection of certain blue-chip stocks, representing a variety of business endeavors, as the basis for the determination of “Dow Jones Averages” constituted a copyrightable list. The court contrasted that subjectivity with a mere list of ingredients “dictated solely by functional considerations” and for that reason not copyrightable. See [§ 2A.13 \*infra\*](#).

<sup>117</sup> See [§ 3.04\[B\]\[2\] \*infra\*](#).

<sup>118</sup> [New York Times Co. v. Roxbury Data Interface, Inc.](#), 434 F. Supp. 217, 223 n.2 (D.N.J. 1977). The actual holding in this case concerns an index to the New York Times; the court denied a preliminary injunction on the basis of fair use. See [§ 13F.02 \*infra\*](#).

The succeeding sections will return to the *leitmotif* of subjectivity. We will see further exploration of this theme in the context of factual works,<sup>119</sup> compilations,<sup>120</sup> and elsewhere.<sup>121</sup>

## [E] Discoveries

One of the items falling outside of copyright protection enumerated in Section 102(b) is a “discovery.”<sup>122</sup> Even if it were not merely an “idea,”<sup>123</sup> an independent reason for denying copyright protection to any discovery is that it fails to qualify as an original work of authorship.<sup>124</sup> The “discoverer” of a scientific fact as to the nature of the physical world, an historical fact, a contemporary news event, or any other “fact,” may not claim to be the “author” of that fact.<sup>125</sup> If anyone may claim authorship of facts, it must be the Supreme Author of us all.

The discoverer merely finds and records.<sup>126</sup> He may not claim that the facts are “original” with him,<sup>127</sup> although there may be originality and hence, authorship in the manner of reporting, *i.e.*, the “expression,” of the facts.<sup>128</sup> As copyright may only be conferred on “authors,”<sup>129</sup> it follows that, even apart from their status as “ideas,” discoveries as facts *per se* may not be subject to copyright protection.<sup>130</sup>

## [F] The Significance of a Section 408(c)(1) Classification

Copyright proprietors may voluntarily register their works in the records of the United States Copyright Office,<sup>130.1</sup> a subject matter to which later chapters will devote a great deal of attention.<sup>130.2</sup> But protection arises automatically once an eligible work has been fixed in a tangible medium of expression,<sup>130.3</sup> regardless whether

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<sup>119</sup> See [§ 2.11\[F\] infra](#).

<sup>120</sup> See [§§ 3.03\[B\]\[3\], 3.04\[B\]\[2\]\[c\] infra](#).

<sup>121</sup> See [§ 13.03\[B\]\[3\] infra](#).

<sup>122</sup> [17 U.S.C. § 102\(b\)](#).

<sup>123</sup> See [§ 2.03\[D\] supra](#).

<sup>124</sup> See [§ 2.01 supra](#). In [Feist Publications, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), the Court discounted protection for census data on the grounds that originality therein was lacking. [Id. at 347 \(Treatise cited\)](#).

<sup>125</sup> [Feist Publications, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 348, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991) (*Treatise cited*); [Harney v. Sony Pictures Television, Inc.](#), 704 F.3d 173, 182 (1st Cir. 2013) (*Treatise cited*); [Warren Publ. v. Microdos Data Corp.](#), 115 F.3d 1509, 1524 (11th Cir.) (*en banc*) (Godbold, Hatchett, & Barkett, JJ., dissenting) (*Treatise cited*), *cert. denied*, 522 U.S. 963, 118 S. Ct. 397, 139 L. Ed. 2d 311 (1997); [Rubin v. Boston Magazine Co.](#), 645 F.2d 80 (1st Cir. 1981) (*Treatise cited*); [Peckarsky v. American Broadcasting Co.](#), 603 F. Supp. 688, 695 n.17 (D.D.C. 1984) (*Treatise cited*).

<sup>126</sup> See [Feist Publications, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 347, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991) (*Treatise quoted*).

<sup>127</sup> [Miller v. Universal City Studios, Inc.](#), 650 F.2d 1365 (5th Cir. 1981) (*Treatise quoted*).

<sup>128</sup> [Rubin v. Boston Magazine Co.](#), 645 F.2d 80 (1st Cir. 1981).

<sup>129</sup> See [§ 1.06 supra](#). But note that under the patent provisions of the Copyright and Patent Clause of the U.S. Constitution, “Inventors” may be accorded an exclusive right to their “Discoveries.” Art. I, § 8, cl. 8.

<sup>130</sup> [New York Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.](#), 497 F.3d 109, 114 (2d Cir. 2007) (paragraph of *Treatise quoted*), *cert. denied*, 552 U.S. 1259, 128 S. Ct. 1669, 170 L. Ed. 2d 357 (2008). See [§ 2.11 infra](#).

<sup>130.1</sup> See [§ 7.26\[A\] infra](#).

<sup>130.2</sup> See [§§ 7.16, 14.04\[D\] infra](#).

it is ever registered. Although the “essential screenlessness of the federal copyright system has caused copyrights to become ever more numerous, and many authors have expressed reservations about this trend,”<sup>130.4</sup> one pair of commentators celebrates the ease of copyrights arising as compared to the elaborate registration protocols required to obtain patent protection.<sup>130.5</sup>

Section 408(c)(1) of the Act sets forth a scheme for classifying works subject to copyright.

The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.<sup>131</sup>

The legislative intent expressed in that last sentence<sup>132</sup> means that errors in the form used to register a work cannot serve as a basis for invalidating the copyright.<sup>133</sup> One may, nonetheless, question whether it is possible to divorce the Register’s classification system from *any* “significance with respect to the subject matter of copyright or the exclusive rights provided” by the Copyright Act. Despite a similar disclaimer under the 1909 Act,<sup>134</sup> in practice, a work could not be registered, and hence, its copyright was unenforceable, unless it fell within one of the Section 5 classifications,<sup>135</sup> and the scope of the rights available for a given work turned on its particular classification.<sup>136</sup>

Pursuant to the delegation of authority under Section 408(c)(1), the Register has promulgated the following streamlined<sup>137</sup> registration classifications under the current Act:<sup>138</sup>

Class TX: *Nondramatic Literary Works*. This class includes all published and unpublished nondramatic literary works. Examples: Fiction; nonfiction; poetry; textbooks; reference works; directories; catalogs; advertising copy; and compilations of information.<sup>139</sup>

<sup>130.3</sup> See [§ 2.03\[B\]](#) *supra*.

<sup>130.4</sup> David Fagundes & Jonathan S. Masur, *Costly Intellectual Property*, [65 Vand. L. Rev. 677, 706 \(2012\)](#).

<sup>130.5</sup> *Id.* at 708, 728.

<sup>131</sup> [17 U.S.C. § 408\(c\)\(1\)](#).

<sup>132</sup> “It is important that the statutory provisions setting forth the subject matter of copyright be kept entirely separate from any classification of copyrightable works for practical administrative purposes.” H. Rep., p. 153.

<sup>133</sup> See [S.C. Johnson & Son, Inc. v. Turtle Wax, Inc.](#), [14 U.S.P.Q.2d 1254, 1255 \(N.D. Ill. 1989\)](#). But see [Jefferson Airplane v. Berkeley Sys., Inc.](#), [886 F. Supp. 713, 717 \(N.D. Cal. 1994\)](#), criticized in § 7.16[B][5][c] N. 342 *infra*.

<sup>134</sup> The 1909 Act contained a classification of copyrightable works and then added that “any error in classification [shall not] invalidate or impair the copyright protection secured under this title.” 17 U.S.C. § 5 (1909 Act). But that feature referred only to erroneous classifications.

<sup>135</sup> For one possible exception, see [Deutsch v. Arnold](#), [98 F.2d 686 \(2d Cir. 1938\)](#).

<sup>136</sup> But cf. [Universal Pictures Corp. v. Harold Lloyd Corp.](#), [162 F.2d 354 \(9th Cir. 1947\)](#); [Tiffany Prods. v. Dewing](#), [50 F.2d 911 \(D. Md. 1931\)](#) (Section 5 classifications merely for the ministerial convenience of the Copyright Office, and cannot affect substantive rights).

<sup>137</sup> Former law featured a bewildering array of different classifications. See [Appendix 21](#) *infra*. It is often confusing to identify a work by its registration number. Some clues in that regard can be gleaned from the history set forth in [Appendix 22](#) *infra*.

<sup>138</sup> For a discussion of the various Section 102(a) classifications, see [§§ 2.04–2.10](#) *infra*. For a discussion of a single registration covering several types of copyrightable elements incorporated into a single work, see [§ 7.18\[C\]\[3\]](#) *infra*.

Class PA: *Works of the Performing Arts*. This class includes all published and unpublished works prepared for the purpose of being performed directly before an audience or indirectly by means of a device or process. Examples: Musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; and motion pictures and other audiovisual works.<sup>140</sup>

Class VA: *Works of the Visual Arts*. This class<sup>141</sup> includes all published and unpublished pictorial, graphic, and sculptural works. Examples: Two dimensional and three dimensional works of the fine, graphic, and applied arts; photographs; prints and art reproductions; maps, globes, and charts; technical drawings, diagrams, and models; and pictorial or graphic labels and advertisements.<sup>142</sup>

Class SR: *Sound Recordings*. This class includes all published and unpublished sound recordings fixed on and after February 15, 1972. Claims to copyright in literary, dramatic, and musical works embodied in phonorecords may also be registered in this class under paragraph (b)(3) of this section if: (A) Registration is sought on the same application for both a recorded literary, dramatic, or musical work and a sound recording; (B) the recorded literary, dramatic, or musical work and the sound recording are embodied in the same phonorecord; and (C) the same claimant is seeking registration of both the recorded literary, dramatic, or musical work and the sound recording.<sup>143</sup> As a consequence, “although they are separate works, a musical composition and sound recording may be registered together on a single application if ownership of the copyrights in both is exactly the same.”<sup>143.1</sup> When ownership is not co-extensive, by contrast, then collective registration is precluded.<sup>143.2</sup>

Class SE: *Serials*. A serial is a work issued or intended to be issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely. This class includes periodicals; newspapers; annuals; and the journals, proceedings, transactions, etc. of societies.<sup>144</sup>

The foregoing registration classifications combine, in five classifications, the eight categories of Section 102(a). Of course, real-world distinctions are not always as neat as the categories specified above. When a work “contains elements of authorship in which copyright is claimed which fall into two or more classes, the application should be submitted in the class most appropriate to the type of authorship that predominates in the work as a whole.”<sup>145</sup>

<sup>139</sup> [37 C.F.R. § 202.3\(b\)\(1\)\(i\)](#).

<sup>140</sup> [37 C.F.R. § 202.3\(b\)\(1\)\(ii\)](#).

<sup>141</sup> Confusingly, a 1990 amendment used the same nomenclature of “works of visual art”—but to refer instead to physical objects, rather than to the instant category of conceptual types subject to copyright protection. See [§ 2.08\[C\]\[3\] infra](#).

<sup>142</sup> [37 C.F.R. § 202.3\(b\)\(1\)\(iii\)](#).

<sup>143</sup> [37 C.F.R. § 202.3\(b\)\(1\)\(iv\)](#).

<sup>143.1</sup> [Tuff-N-Rumble Mgmt., Inc. v. Sugarhill Music Pub., Inc.](#), 75 F. Supp. 2d 242, 247 (S.D.N.Y. 1999). The same applies to a literary work, rather than a musical composition, underlying a given sound recording.

<sup>143.2</sup> See [Alicea v. Machete Music](#), 744 F.3d 773, 780 (1st Cir. 2014).

<sup>144</sup> [37 C.F.R. § 202.3\(b\)\(1\)\(v\)](#).

<sup>145</sup> [37 C.F.R. § 202.3\(b\)\(2\)\(ii\)\(C\)](#). The regulation further specifies that “[i]n the case of contributions to collective works, applications should be submitted in the class representing the copyrightable authorship in the contribution. In the case of derivative works, applications should be submitted in the class most appropriately representing the copyrightable authorship involved in recasting, transforming, adapting, or otherwise modifying the preexisting work.” *Id.* Nonetheless, “in any case where registration is sought for a work consisting of or including a sound recording in which copyright is claimed the application shall be submitted on Form SR.” *Id.*

If the Copyright Office were to reject a registration on the ground that it does not fall within any of the specified classifications, questions of copyrightability of the implicated subject work would inevitably arise. It is true that, by reason of the last sentence of Section 408(c)(1), its rejection would not be binding on the courts—but that proposition would equally pertain even had the last sentence not been included.<sup>146</sup> On the other hand, it appears inevitable that, even with the last sentence included, an administrative determination of nonregistrability by the Copyright Office will prove more or less persuasive to the courts.<sup>147</sup> When the Register does not deny registration but instead assigns the work to a classification that accords with a given Section 102(a) category, again, the courts would most likely follow that determination in evaluating the rights available.<sup>148</sup>

As was true under the 1909 Act,<sup>149</sup> it remains true, under the current Act, that the rights available for a given work vary, depending on the particular category in which it falls.<sup>150</sup> Thus, the copyright owner's reproduction right against libraries is much greater with respect to the categories of musical works, pictorial, graphic, and sculptural works, and audiovisual works, than with respect to other categories of work.<sup>151</sup> Performance and display rights vary depending on the category of the work,<sup>152</sup> reproduction rights in pictorial, graphic, and sculptural works are subject to special restrictions,<sup>153</sup> sound recordings are denied performance rights,<sup>154</sup> and only nondramatic musical works are subject to a compulsory license as to reproduction and distribution rights,<sup>155</sup> as well as to performance rights in jukeboxes.<sup>156</sup> Only nondramatic musical works, and pictorial,

<sup>146</sup> See *Seltzer v. Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938); *Seltzer v. Corem*, 107 F.2d 75 (7th Cir. 1939). Note that the procedure for challenging an erroneous refusal to accept registration has been simplified under the present Act. See [§ 7.21\[B\]](#) *infra*.

<sup>147</sup> See [§ 7.21\[A\]](#) *infra*.

<sup>148</sup> A glitch arose in one case, in which plaintiff had registered its songs under Form PA, based on which it alleged infringement by defendants. See *Valley Entm't, Inc. v. Friesen*, 691 F. Supp. 2d 821 (N.D. Ill. 2010). Although plaintiff also possessed a separate Form SR for its sound recordings of those works, its untimely submission caused that latter form to be stricken from the record. *Id. at 826*. Evidently, defendants then convinced the court that Form PA covers only sheet music—that proposition, combined with the fact that defendants admittedly did not copy from any sheet music, defeated the copyright claim. *Id. at 824*. But the defect in that logic is that Form PA actually protects lyrics and music in any form—whether recorded on vinyl (or plastic) or notated via sheet music. To the extent defendants copied those lyrics and music, then they should have been held accountable for infringing the musical composition, notwithstanding the holding of this case.

<sup>149</sup> “Even a cursory reading of the act reveals the fact that certain provisions thereof pertain to all copyrighted matter, while others relate specifically to music, or to the drama or to some other special category. The precise scope of such class therefore becomes important in ascertaining the extent to which special provisions apparently applicable to one class may be governing as to other copyrighted matter.” *Seltzer v. Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938).

<sup>150</sup> The details of the matters to be summarized below are all set forth in *Chap. 8 infra*.

<sup>151</sup> [17 U.S.C. § 108\(i\)](#). See [§ 8.03\[B\]](#) *infra*.

<sup>152</sup> Cf. [17 U.S.C. § 110\(2\)](#) (exemption applicable only to nondramatic literary works and musical works); [17 U.S.C. § 110\(3\)](#) (exemption applicable to nondramatic literary works, musical works and dramatico-musical works of a religious nature); [17 U.S.C. § 110\(4\)](#) (exemption broader with respect to nondramatic literary works and musical works); [17 U.S.C. §§ 110\(6\)](#) and [\(7\)](#) (exemption applicable only to nondramatic musical works); [17 U.S.C. § 110\(8\)](#) (exemption applicable only to literary works); and [17 U.S.C. §§ 110\(1\)](#) and [\(5\)](#) (exemption applicable to all works).

<sup>153</sup> See [17 U.S.C. § 113](#).

<sup>154</sup> See [17 U.S.C. § 114\(a\)](#). Note, however, the very circumscribed performance rights accorded to sound recordings in 1995 for “digital audio transmission.” [17 U.S.C. § 114\(d\)](#). See [§ 8.22](#) *infra*.

<sup>155</sup> See [17 U.S.C. § 115](#).

<sup>156</sup> See [17 U.S.C. § 116](#).

graphic, and sculptural works are subject to the compulsory licensing provision for public broadcasting.<sup>157</sup> Until their expiration on July 1, 1986, the manufacturing and importation limitations were applicable only to nondramatic literary works.<sup>158</sup> It is, then, of considerable significance to which category a given work corresponds—and the Register's classification system is no doubt of great practical relevance in the determination of that category, notwithstanding the last sentence of Section 408(c)(1).

Moreover, the last sentence in the 1976 language of the statute may be rendered questionable by a later amendment. Since 1990, dual protection has been accorded to works that qualify as both technical drawings<sup>159</sup> and architectural works.<sup>160</sup> The pertinent regulation provides:

Where dual copyright claims exist in technical drawings and the architectural work depicted in the drawings, any claims with respect to the technical drawings and architectural work must be registered separately.<sup>161</sup>

If given rigorous effect, that requirement casts a further cloud over the purported non-significance of registration mandated by the statute.<sup>162</sup>

## [G] Works That Have Entered the Public Domain

A previous section has discussed the difficulties under the Copyright Clause of attempting to resurrect works that have already entered the public domain.<sup>163</sup> Apart from those constitutional considerations, the current Act itself specified, at its passage in 1976, that works which had entered the public domain before its effective date, January 1, 1978, could not be eligible for copyright protection.<sup>164</sup>

Under the current Act, works whose copyright term or terms have expired are obviously not protected.<sup>165</sup> But even if the period of protection has not yet elapsed, a work may have entered the public domain by reason of the failure to satisfy certain statutory formalities.<sup>166</sup> Therefore, as to works first created before the effective date of the current Act, it is necessary to consult both common law and statutory law as it existed prior to enactment of the current Act, in order to determine whether a work entered the public domain before 1978.<sup>167</sup>

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<sup>157</sup> See [17 U.S.C. § 118](#).

<sup>158</sup> See [17 U.S.C. § 601\(a\)](#).

<sup>159</sup> See [§ 2A.08\[C\]\[1\]](#) *infra*.

<sup>160</sup> See [§ 2A.09\[B\]\[2\]](#) *infra*.

<sup>161</sup> [37 C.F.R. § 202.11\(c\)\(4\)](#). See [Thomas v. Artino, 723 F. Supp. 2d 822, 830 \(D. Md. 2010\)](#) (Treatise cited). It has been held that fewer rights accrue to a work registered as a building plan rather than as an architectural work. See [Oravec v. Sunny Isles Luxury Ventures L.C., 469 F. Supp. 2d 1148, 1162–1163 \(S.D. Fla. 2006\)](#).

<sup>162</sup> One court mitigated the harshness of the regulation by allowing a work registered as a technical drawing to be transmuted into one for an architectural work, without the need to file a new certificate. See [Home Design Servs., Inc. v. Starwood Constr., Inc., 801 F. Supp. 2d 1111, 1117 \(D. Colo. 2011\)](#).

<sup>163</sup> See [§ 1.05\[B\]\[2\]](#) *supra*.

<sup>164</sup> 17 U.S.C., Trans. Supp. Provs., Sec. 103.

<sup>165</sup> [Cordon Art B.V. v. Walker, 40 U.S.P.Q.2d 1506, 1509 \(S.D. Cal. 1996\)](#) (Treatise cited). Works in statutory copyright, as of the effective date of the current Act, are protected for an original term of 28 years and, if properly renewed, for a second term of 67 years, for a total of 95 years. See [§ 9.08](#) *infra*.

<sup>166</sup> See [Chap. 7](#) *infra*.

<sup>167</sup> [Cordon Art B.V. v. Walker, 40 U.S.P.Q.2d 1506, 1509 \(S.D. Cal. 1996\)](#) (Treatise cited); [Data Cash Sys., Inc. v. JS&A Group, Inc., 628 F.2d 1038 \(7th Cir. 1980\)](#) (Treatise cited); [Conner v. Mark I, Inc., 509 F. Supp. 1179 \(N.D. Ill. 1981\)](#) (Treatise cited).

When the United States joined the Berne Convention in 1989, the question was posed whether the preceding state of affairs should persist. That treaty facially requires newly adhering countries, such as the United States, to accord retroactive protection to works that are still protected in their Berne countries of origin.<sup>168</sup> Notwithstanding that feature of international law, the domestic law implementing Berne within the United States explicitly mandated that it “does not provide copyright protection for any work that is in the public domain in the United States.”<sup>169</sup> Thus, works that had already lost United States copyright protection as of March 1, 1989, were not thereupon resurrected by virtue of the BCIA, even if still protected in their countries of origin.<sup>170</sup>

Although Congress declined in 1989 to bring United States copyright law into conformity with Berne standards, it nonetheless left the door open for revisiting this decision.<sup>171</sup> The decision to step through that door came when international trade began to dominate the copyright arena.<sup>172</sup> Under the Uruguay Round Agreements Act,<sup>173</sup> Congress resurrected from the United States public domain durationally eligible<sup>174</sup> works by qualifying foreign authors, including Berne nationals.<sup>175</sup> That restoration of copyright protection took effect as to all (non-U.S.) nationals of the Berne Union no later than January 1, 1996.<sup>176</sup> Accordingly, the United States has belatedly recognized its Berne obligations and, for these purposes, confers copyright protection on foreign-authored works that had previously entered the public domain.<sup>177</sup>

## [H] Diminution of the Scope of Protectable Works

We have considered above whether the current reference in Section 102 to “works of authorship” *enlarges* the scope of works protected under the 1909 Act’s coverage of the “writings of an author.”<sup>178</sup> It is necessary to

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<sup>168</sup> See [§ 9A.02](#) *infra*.

<sup>169</sup> BCIA, § 12. See § A.01[B] *supra*. Taken literally and minimally, that provision merely expresses the truism that works in the public domain are *ipso facto* not protected by copyright. Its intent, nonetheless, was clearly not merely to legislate a tautology, but to avoid according retroactive protection by virtue of Berne adherence. S. Rep. (BCIA), p. 48; H. Rep. (BCIA), pp. 51–52.

<sup>170</sup> This conclusion applied equally to works already adjudicated in the public domain within the United States and to works not yet ruled on, but as to which a fatal flaw exists as of February 28, 1989—presumably even if that flaw (e.g., absence of copyright notice) would not be fatal on or after March 1, 1989.

<sup>171</sup> Upon Berne accession, the House stated that its “Committee takes these points [about the requirement to resurrect] seriously,” but determined nonetheless to address the question of the retroactivity required by Berne at a later date, “when a more thorough examination of Constitutional, commercial and consumer considerations is possible.” H. Rep. (BCIA), p. 52.

<sup>172</sup> See [§ 18.05](#) *infra*.

<sup>173</sup> See [§ 18.06\[C\]](#) *infra*.

<sup>174</sup> This provision exerts no impact on works whose maximum terms have expired. Even if a given foreign work that was published in 1922 failed to enjoy any protection as a matter of U.S. copyright law over succeeding decades, and even though it might still be protected by copyright in its home country, that work will still acquire no protection today under U.S. law by virtue of the Uruguay Round Agreements Act (or otherwise). As noted above, durationally ineligible works fall categorically outside the scope of U.S. copyright protection as a statutory matter.

<sup>175</sup> See [§ 9A.04\[A\]](#) *infra*. As noted above, works could have entered the U.S. public domain on account of formal defects. Such works are now eligible for resurrection under this 1994 amendment. *Id.*

<sup>176</sup> See [§ 9A.04\[B\]\[1\]\[b\]\[ii\]](#) *infra*.

<sup>177</sup> See [§§ 9A.04\[A\]\[4\], 9A.06\[A\]](#) *infra*. The disparity between Berne Convention dictates and that treaty’s implementation within the United States from March 1, 1989, until resurrection became effective on January 1, 1996, is of practical import to litigants in United States courts only if they may place reliance directly on a treaty provision, which in turn raises the issue whether the Berne Convention is self-executing under United States law. See [§ 1.12\[A\]](#) *supra* (setting forth that it is not).

<sup>178</sup> See [§ 2.03\[A\]](#) *supra*.

inquire further whether the reference to “works of authorship” under the current Act in some degree *diminishes* the scope of works protected under the 1909 Act.

The Senate Report is explicit on this point: “In the aggregate, the [Section 102(a)] list covers all categories of works now [i.e., under the 1909 Act] copyrightable under title 17 . . .”<sup>179</sup> Without making any change to the statutory text, the subsequent House Report is more equivocal: “In the aggregate, the [Section 102(a)] list covers all classes of works now specified in section 5 of title 17 . . .”<sup>180</sup>

It may be argued that there is no substantive difference between the Senate and House formulations on this issue because, if a work were “copyrightable under title 17” within the meaning of the Senate phrase, then that work necessarily fell within one of the “classes of works now specified in section 5” within the meaning of the House phrase.<sup>181</sup> Still, one wonders why the House Committee thought it necessary to reword the Senate formulation. This doubt is given substance when one considers the change in the statutory definition of “pictorial, graphic and sculptural works” adopted by the House, and contained in the bill as finally enacted. For reasons set forth elsewhere,<sup>182</sup> it is arguable that this change in definition reduced the scope of protection available for certain types of works, such as typeface designs.<sup>183</sup> On the other hand, the Senate Committee, in joining in the final Conference Report,<sup>184</sup> did not indicate any departure from its view quoted above that the new Act protects everything that was “copyrightable” under the 1909 Act.

## [I] Overlap of Protectable Categories

The sections that follow consider first the Section 102(a) categories,<sup>185</sup> followed by an analysis of various types of works that do not precisely fit into any Section 102(a) category.<sup>186</sup> In addition, it should be noted that the distinction into categories is not intended to slot every production into one, and only one, type of protectable work; as the legislative history notes, “The items [listed in Section 102(a)] are also overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories.”<sup>187</sup>

Throughout this discussion, two analytically separate questions should be borne in mind: (1) is a work within the subject matter of copyright; and (2) what is the extent of its copyright protection.<sup>188</sup> “The first question relates to the *existence* of copyright, the second, to the *scope* of protection.”<sup>189</sup> A later chapter addresses that latter inquiry,<sup>190</sup> whereas the current chapter and its successor focus on the former.<sup>191</sup>

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<sup>179</sup> S. Rep., p. 52.

<sup>180</sup> H. Rep., p. 53.

<sup>181</sup> As indicated above, Section 5 under the 1909 Act was generally held to constitute an exhaustive enumeration of all of the types of works copyrightable under the 1909 Act. See [§ 2.03\[F\]](#) *supra*.

<sup>182</sup> See [§ 2A.08\[B\]\[2\]](#) *infra*.

<sup>183</sup> See [§ 2.15\[A\]](#) *infra*.

<sup>184</sup> H. Rep. No. 94-1733, 94th Cong., 2d Sess. (Sept. 29, 1976).

<sup>185</sup> See Part II *infra*.

<sup>186</sup> See Part III *infra*. Note that the enumeration continues throughout the next chapter, as well. See [§ 2A.01](#) *infra*.

<sup>187</sup> H. Rep., p. 53.

<sup>188</sup> Depending on the work—and not its categorizations under [17 U.S.C. § 102\(a\)](#)—the protection accorded could be expansive or narrow. For instance, both fantasy novels and catalogs of radiator parts fall within the copyrightable category of “literary works.” See [§ 2.04\[A\]\[1\]](#) *infra*. Yet the former enjoys more sweeping protection than the latter. See [Cooling Sys. & Flexibles, Inc. v. Stuart Radiator Inc.](#), 777 F.2d 485 (9th Cir. 1985). Note that computer programs also qualify as a type of “literary work.” See [§ 2.04\[C\]\[2\]](#) *infra*.

<sup>189</sup> [Atari Games Corp. v. Oman](#), 888 F.2d 878, 882 (D.C. Cir. 1989) (emphasis original).

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<sup>190</sup> See **Chap. 8** *infra*.

<sup>191</sup> As previously noted, the discussion of copyright law's subject matter is spread over both the current chapter and the next one. See [Chap. 2A](#) *infra*.