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THE IDEA-EXPRESSION DICHOTOMY IN COPYRIGHT LAW

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I. INTRODUCTION

There is hardly a single principle of copyright law that is more basic or more often repeated than the so-called idea-expression dichotomy.[1] The doctrine is followed dutifully as an unquestioned

1. The definition(s) of the idea-expression dichotomy should become apparent during the course of discussion. A starting point is the basic statement contained on the first page of text of the REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW (1961), *reprinted in* 3 G. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 3 (1976) [hereinafter 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY], which formally started

principle in hundreds of cases: the "ideas" that are the fruit of an author's labors go into the public domain, while only the author's particular expression remains the author's to control. This principle, sometimes described as having constitutional origins, was developed by the common law, and has now been incorporated into the copyright act itself.[2]

Some commentators who have studied the idea-expression dichotomy in the greatest detail have criticized it, arguing that continued recognition of the dichotomy is neither justified nor helpful in deciding cases.[3] Yet, not only have the courts continued to embrace

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the 15-year process of recodification of the federal copyright laws. The Report stated:

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

Id.

2. Copyright Act of 1976, 17 U.S.C. § 102(b) (1982).

3. A classic and straightforward argument was made by Charles Collins in 1928 that the idea-expression dichotomy was explainable only by reference to obsolete copyright statutes, and that the doctrine should simply be abandoned. Collins, *Some Obsolescent Doctrines of the Law of Copyright*, 1 S. CAL. L. REV. 127 (1928). *See also* Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735 (1967) (a revised version of a National Nathan Burkan Award winner, published in 16 COPYRIGHT L. SYMP. 30 (1968)). In almost lyrical style, Mr. Libott took on the dichotomy directly and concluded that it "is a semantic and historic fallacy without meaningful application to the creative process, and that it results at best in judicial anomaly and at worst in substantial injustice." *Id.* at 736. *See also* Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932 (1939); Note, *Copyright Protection for Mass-Produced, Commercial Products: A Review of the Developments Following* Mazer v. Stein, 38 U. CHI. L. REV. 807 (1971).

In a similar vein, Professor Kaplan suggested in 1966 that the expansion of copyright to include the exclusive rights to translate and dramatize copyrighted works was inconsistent with the idea-expression dichotomy:

> In 1870 the statute was amended to allow authors to reserve the right not only to translate their works . . . but also to dramatize them. The latter enlargement of the monopoly to cover the conversion of a work from one to another artistic medium, taken together with the *Daly* decision, put the question whether any line could really be held, even as to imaginative works, between "idea," long supposed to be outside copyright protection, and "form," assumed to be the only thing within it. Was a copyrighted work now to be protected according to its "principle," as McLean thought it should be? The question will recur.

B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 32 (1966) (footnotes omitted). *See also infra* notes 90, 100.

Professor Ralph Brown, Simeon E. Baldwin Professor Emeritus at Yale Law School, and Visiting Distinquished Professor at New York Law School, has made

the idea-expression dichotomy, they have extended it to explain related copyright problems, which over the years had also led to confusion.[4] Nevertheless, the cases generally do not analyze the principle in detail; and rarely (if ever) is the doctrine actually decisive of particular cases. Perhaps this should not be surprising, since the doctrine is so general in its statement as to defy particular application. It is not a doctrine that could be used predictably to put a particular work either into the public domain or within the author's exclusive rights; instead, it seems to be an ex post facto characterization that justifies an outcome based upon other, more concrete, factors. Thus, if the outcome in a particular case is to be infringement, the work is deemed to be protectable expression; if the outcome is to be noninfringment, then the work is described as an "idea."[5]

Given the difficulty of defining the terms of the doctrine, some courts and commentators have developed an "abstractions" test[6] or a "patterns" analysis,[7] which purports to place a given work along a continuum between idea and expression. Although it is impossible to state precisely when a particular work has crossed the threshold from one end to the other, the courts are nonetheless supposed to struggle to apply the terms. These terms may not be precise, but they are no more imprecise than general concepts of negligence or fault, which the courts must also deal with on a case-by-case basis.[8] The general principle embodied in the idea-expression dichotomy is supposed to help in focusing the inquiry and resolving particular cases in accord with fundamental copyright values.

If the characterization, the abstraction, or the continuum is too vague to determine particular cases, however, then this principle is not as important as it might first appear. It is helpful to have a model that explains why certain decisions have to be made, and why not all cases will be easy to decide. But if other factors are at work in the idea-expression cases, then those specific factors should be examined more closely rather than blindly repeating the principle as dogma.

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the best case in favor of the idea-expression dichotomy. *See, e.g.*, Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579 (1985).

4. *See, e.g.*, *infra* text accompanying notes 411-42 (discussing "false" idea-expression cases).

5. At least in close cases, the classification that the court selects may simply state the result reached rather than the reason for it. *See* Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).

6. *See infra* notes 80-110 and accompanying text.

7. *See infra* note 81.

8. *Cf.* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (observing that decisions on the scope of copyright protection are necessarily imprecise, and "the decisions cannot help much in a new case"), *cert. denied*, 282 U.S. 902 (1931).

This discussion of the idea-expression dichotomy is divided into four sections. Part II traces the history and development of the doctrine; Part III analyzes and criticizes the doctrine; Part IV discusses the constitutional considerations involved in the doctrine; and Part V analyzes the relationship between the idea-expression dichotomy and other basic principles of copyright law.

II. THE IDEA-EXPRESSION DICHOTOMY: HISTORY AND DEVELOPMENT

Some of the early copyright cases, from which the idea-expression dichotomy developed, purported to establish a true dichotomy between the idea and the expression of a copyrighted work. Copyright in the early days protected only against *literal* copying, and not against a more abstract taking of a copyrighted work.

Judge Learned Hand explained the idea-expression dichotomy by means of a less precise "abstractions" test. He stated: "Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out."[9] At its most concrete level, a work was protected by copyright; but at some level of abstraction, it became more of an "idea," to which the protection of copyright did not extend. The abstractions test was significant because copyrighted works were given protection on *some* level of abstraction, although that protection did not extend to the *greatest* level of abstraction. Judge Hand's abstractions test thus has expanded the eligibility for copyright by protecting those works that might be somewhere along the continuum between the expression and the idea of a work.

Some recent computer copyright cases have expanded the scope of the idea-expression dichotomy even further, indicating a tolerance for protection of copyrighted computer programs at such an abstract level that one might wonder whether there is any vitality left in the idea-expression dichotomy at all.[10] The courts in these cases did not purport to lay down a special rule for computer programs; rather, they framed their analysis in terms of generally applicable copyright principles.[11] In order to understand the historical shift in the idea-expression dichotomy—from a presumption leaning toward the "idea" (and thus, nonprotection) to a presumption leaning toward the "expression" (and thus, protection)—it is first necessary to trace the idea-expression dichotomy to its roots.

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9. *Nichols*, 45 F.2d at 121. By his test, Hand repudiated some of the earlier, more narrow idea-expression cases. *See id.*

10. *See infra* notes 179-203 and accompanying text.

11. *Id.*

A. Formal Origin: Baker v. Selden

The idea-expression dichotomy in America is said to have originated in the United States Supreme Court case of *Baker v. Selden*.[12] The case was based in large measure upon others that were somewhat suspect, or that have been at least partially repudiated in this country as well as in England. Even if the reasoning in *Baker* may be attributed to a faulty or rejected reading of the law, the case has never been overruled; in fact, it has been so enthusiastically incorporated into the fabric of copyright law as perhaps to render its origins irrelevant.[13] In its explanation and development of what has come to be known as the idea-expression dichotomy, the case is shrouded in the limited view of copyright that was typical of its day. The weakness (or obsolescence) of the Supreme Court's argument does not necessarily compel a rejection of its holding. A careful analysis of the case, however, sheds light upon the role of the doctrine, and perhaps imposes upon those advocating the doctrine the burden of finding a more contemporary justification for its existence.

In *Baker*, Selden[14] obtained a copyright in a book which disclosed his particular bookkeeping system.[15] The book contained forms "consisting of ruled lines, and headings, illustrating the system and showing how it is to be used and carried out in practice."[16] Baker published a book on accounting, which "use[d] a similar plan so far as results are concerned; but ma[de] a different arrangement of the columns, and use[d] different headings."[17] The complainant alleged Baker had *used* Selden's *system* of accounting, but did not allege that Baker had actually copied the particular forms contained in Selden's book.[18] The Supreme Court concluded that Selden had no

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12. 101 U.S. 99 (1880). Mr. Libott, following Professor Nimmer's lead, traced the origins to Seneca in the first century A.D., and the British origins to the famous cases of Millar v. Taylor, 98 Eng. Rep. 201, 229 (K.B. 1769) (Yates, J., dissenting) and Donaldson v. Beckett, 1 Eng. Rep. 837 (H.L. 1774). *See* Libbott, *supra* note 3; *see also* B. KAPLAN, *supra* note 3, at 9-25 (providing an excellent summary of the British law). I use American cases as my starting point, although I make tangential reference to British cases where appropriate.

13. *Cf.* Cardozo's classic defense of the common-law doctrine that a landlord's covenant to repair does not create tort liability in the landlord: "The doctrine, wise or unwise in its origin, has worked itself by common acquiescence into the tissues of our law. It is too deeply imbedded to be superseded or ignored." Cullings v. Goetz, 256 N.Y. 287, 291, 176 N.E. 397, 398 (1931).

14. Charles Selden was the testator of the complainant in the case. *Baker*, 101 U.S. at 99.

15. *Id.* at 100. The book was entitled "Selden's Condensed Ledger, or Bookkeeping Simplified." *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 101.

exclusive rights under the copyright laws to prevent the use of the accounting system.[19] The Court noted that "there is a clear distinction between the book, as such, and the art which it is intended to illustrate."[20] The former could be copyrighted, the latter could not.[21] The Court's conclusion can be characterized in four different ways: (1) a "use" test; (2) a "merger" theory; (3) a "categorical" approach; and (4) an "exclusive rights" test.

1. The Holding

a. The Use Test

The Court distinguished between the use of a work and the statement or explanation of it, implying that infringement depended upon the *purpose* for which a copy is made.[22] This approach, to the extent that it focuses upon the purpose of the actual user in making the copy (whether for use or for explanation), has been criticized.[23] Although the nature of the use might be relevant in determining otherwise relevant issues of fair use under section 107 of the Copyright Act,[24] or other specific limitations under other sections, the copyrightability of the subject matter in the first instance should not

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19. *Baker*, 101 U.S. at 104.

20. *Id.* at 102.

21. For example, a book on medicines or perspective would create no rights in the author to the *use* of the disclosed art.

22. The Court stated:

> Now, whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practise and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it.

Baker, 101 U.S. at 104. The Court may have been influenced by the differences in the wording of the copyright act and the patent act, the latter of which covers the exclusive rights to "make, sell, and use" the work. *Id. Cf.* 35 U.S.C. § 271 (1982).

23. *See, e.g.*, 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.18[C], at 2-202 (1988). Professor Nimmer argued that the Supreme Court in Mazer v. Stein, 347 U.S. 201 (1954), interpreted the *Baker* case narrowly, and "[b]y implication, at least . . . suggests that the Baker v. Selden distinction between copying for use and copying for explanation was a dictum which will no longer be followed." 1 M. NIMMER, *supra*, § 2.18[D], at 2-206. This conclusion is drawn from the Supreme Court's characterization in *Mazer* of the issue in *Baker*: "Thus, in Baker v. Selden, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings . . . ." *Mazer*, 347 U.S. at 217. The negative implication of this cursory reference may be exaggerated, although the Court does lean toward the fourth explanation of the *Baker* case—namely, the exclusive rights test.

24. 17 U.S.C. § 107 (1982).