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The Public Domain

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ARTICLES

THE PUBLIC DOMAIN

Jessica Litman*

Artists have been deluding themselves, for centuries, with the notion that they create. In fact they do nothing of the sort.

Spider Robinson

Our copyright law is based on the charming notion that authors create something from nothing, that works owe their origin to the authors who produce them. Arguments for strengthening copyright protection, whether predicated on a theory of moral deserts or expressed in terms of

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1 S. Robinson, Melancholy Elephants, in Melancholy Elephants 1, 16 (1985).
3 See id. § 1.06[A].
economic incentives,\textsuperscript{5} often begin with the premise that copyright should adjust the balance between the creative individuals who bring new works into being and the greedy public who would steal the fruits of their genius.\textsuperscript{6}

The process of authorship, however, is more equivocal than that romantic model admits. To say that every new work is in some sense based on the works that preceded it\textsuperscript{7} is such a truism that it has long been a cliche, invoked but not examined. But the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before;\textsuperscript{8} playwrights base their characters on bits and pieces drawn from real human beings and other playwrights’ characters;\textsuperscript{9} novelists draw their plots from lives and other plots within their experience;\textsuperscript{10} software writers use the logic they find in other software;\textsuperscript{11} lawyers trans-

\textsuperscript{5} See, e.g., Comment, A Rose By Any Other Name: Computer Programs and the Idea-Expression Distinction, 34 Emory L.J. 741 (1985) [hereinafter Comment, A Rose]; Comment, Copyright Protection for Citations to a Law Reporter: West Publishing Co. v. Mead Data Central, Inc., 71 Minn. L. Rev. 991 (1987) [hereinafter Comment, Copyright Protection].

\textsuperscript{6} See, e.g., Burcart, No Title to Titles: An Analysis of the Lack of Copyright Protection for Literary Titles, 32 Copyright L. Symp. (ASCAP) 75, 102 (1986); Hill, Copyright Protection for Historical Research: A Defense of the Minority View, 31 Copyright L. Symp. (ASCAP) 45, 60-61 (1984); Kernochan, Imperatives for Enforcing Authors’ Rights, 11 Colum.-VLA J.L. & Arts 587 (1987).


form old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already "out there" in some other form. This is not parasitism: it is the essence of authorship. And, in the absence of a vigorous public domain, much of it would be illegal.

Because copyright's paradigm of authorship credits the author with bringing something wholly new into the world, it sometimes fails to account for the raw material that all authors use. This tendency can distort our understanding of the interaction between copyright law and authorship. Specifically, it can lead us to give short shrift to the public domain by failing to appreciate that the public domain is the law's primary safeguard of the raw material that makes authorship possible.

Commentary on the public domain has tended to portray it either as the public's toll for conferring private property rights in works of authorship or as the realm of material undeserving of property rights. The current trend is to characterize material in the public domain as unprotected or uncopyrightable. This description has important implications, for it inspires the question "Why not?" Proponents of strong copyright protection have challenged the rationales for refusing copyright protection to authors' creations and have called for property rights to be given in material as yet unprotected by copyright law.

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13 See, e.g., B. Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 45-46 (1967); 1 M. Nimmer & D. Nimmer, supra note 2, §§ 2.01[B], 2.03; Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 COLUM. L. REV. 516, 521-22 (1981); Goldstein, supra note 7, at 222.

14 See infra note 189 and accompanying text.

15 See, e.g., Fleischmann, The Impact of Digital Technology on Copyright Law, 70 J. PAT. OFF. SOC'Y 5 (1988); Comment, A Rose, supra note 5, at 769-76.
To characterize the public domain as a quid pro quo for copyright or as the sphere of insignificant contributions, however, is to neglect its central importance in promoting the enterprise of authorship. The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.

This article examines the public domain by looking at the gulf between what authors really do and the way the law perceives them. Part I outlines the basics of copyright as a species of property and introduces the public domain's place within the copyright scheme. Copyright grants authors' rights modeled on real property in order to encourage authorship by providing authors with markets in which they can seek compensation for their creations. Because parcels of authorship are intangible, however, the law faces problems in determining the ownership and boundaries of its property grants. In particular, the concept of "originality," by reference to which copyright law purports to define property rights, provides an insufficient guide. The public domain—a commons that includes those aspects of copyrighted works which copyright does not protect—makes it possible to tolerate the imprecision of these property grants.

Part II of this article traces the historical development of the public domain in copyright case law. Courts have gradually come to deny copyright protection to ideas, methods, systems, plots, scenés à faire, and (sometimes) facts, even when blatantly copied from plaintiffs' works. The courts have not sought profound theoretical justifications for denying protection, and different classes of cases reveal different motivations. Courts have seemed to invoke the public domain, however, in cases where the breadth of plaintiffs' asserted property rights appeared to threaten the enterprise of authorship by curtailing the ability of authors to pursue their craft.

Part III explores familiar theoretical justifications for the public domain and finds them for the most part unsatisfactory. Therefore, Part IV

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17 Throughout this article, I use the terms "author" and "authorship" in their copyright sense, see 17 U.S.C. §§ 102(a), 201 (1988), rather than in the vernacular sense of a person who writes or the process of writing. Thus, I refer to the person responsible for the creation of any copyrightable work as its author. See 17 U.S.C. § 201.

18 "Scènes à faire" is a term used to describe stock scenes, cliches, and common expressive details. See infra notes 127-36 and accompanying text.
returns to the principle of copyright as property. This section argues that originality is a legal fiction. It is inherently unascertainable, and it is not the battleground on which infringement suits are in fact decided. Because authors necessarily reshape the prior works of others, a vision of authorship as original creation from nothing — and of authors as casting up truly new creations from their innermost being — is both flawed and misleading. If we took this vision seriously, we could not grant authors copyrights without first dissecting their creative processes to pare elements adapted from the works of others from the later authors’ recasting of them. This dissection would be both impossible and unwelcome. If we eschewed this vision but nonetheless adhered unwaveringly to the concept of originality, we would have to allow the author of almost any work to be enjoined by the owner of the copyright in another.

Part V of this article suggests that the public domain provides the solution to this dilemma and examines that solution from the perspectives of potential defendants, potential plaintiffs, and the system of copyright law as a whole. The public domain contains elements of authorship that easily seep into our minds and our language or that for other reasons can be claimed by many authors. A broad public domain protects potential defendants from incurring liability through otherwise unavoidable copying. It protects would-be plaintiffs by relieving them of the impossible and unwelcome obligation to prove the actual originality of all elements of their works. It protects the copyright system by freeing it from the burden of deciding questions of ownership that it has no capacity to answer.

The purpose of copyright law is to encourage authorship. When we embody that encouragement in property rights for authors, we can lose sight of a crucial distinction: Nurturing authorship is not necessarily the same thing as nurturing authors. When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship.
I. COPYRIGHT AND PROPERTY

Copyright law is a legal scheme, prescribed in the Constitution\(^\text{19}\) and put in place by Congress,\(^\text{20}\) to encourage the enterprise of authorship.\(^\text{21}\) In the 280 years since the enactment of the first copyright statute,\(^\text{22}\) the technicalities surrounding copyright have assumed diverse forms,\(^\text{23}\) but the essential mechanism has remained constant: The system creates legal rights akin to property rights.\(^\text{24}\)

According to a currently popular mode of analysis, property rights in intellectual works are necessary because intellectual creations pose a public goods problem: The cost of creating the works is often high, the cost of reproducing them is low, and once created, the works may be reproduced rapaciously without depleting the original.\(^\text{25}\) In a world in which such reproduction is not restrained, an author will be unable to recover the costs of creating a work and will therefore forgo the creative endeavor in favor of something more remunerative.\(^\text{26}\) To provide the author with a market in which she can seek compensation for her creation, we establish property rights in her work and allow her to sell or lease these rights to others. Thus, the copyright system encourages authors to create and encourages distributors to purchase rights in authors' creations so that the distributors may sell those creations to the rest of us.

\(^{19}\) See U.S. Const. art I, § 8, cl. 8.


\(^{21}\) Commentators have described the purpose of copyright in various ways, such as providing an incentive for authors to create by securing remuneration for their work, see Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 Colum. L. Rev. 1600 (1982), encouraging the dissemination of knowledge and its addition to the public domain, see Gorman, supra note 13, at 560; see also 1 M. Nimmer & D. Nimmer, supra note 2, § 1.03[A], at 1-32, and attracting private investment to the production of original expression, see Goldstein, supra note 7. The common ground among opposing camps of commentators is that copyright seeks either directly or indirectly to encourage authorship.

\(^{22}\) Great Britain enacted the world's first copyright law in 1710. Statute of Anne, 1710, 8 Anne 19. See generally A. Latman, R. Gorman & J. Ginsburg, Copyright for the Nineties 1-4 (1989); L. Patterson, Copyright in Historical Perspective 143-79 (1968).

\(^{23}\) See generally A. Latman, R. Gorman & J. Ginsburg, supra note 22, at 3-12, 30-40.

\(^{24}\) See, e.g., 1 M. Nimmer & D. Nimmer, supra note 2, § 1.03[A], at 1-32 to -33; Gordon, supra note 21, at 1604.


The model for these property rights is real property. We cast the author's rights in the mold of exclusive rights of control. Invasion of these rights is actionable on a strict liability basis, akin to the traditional formulation of trespass to land. We describe the exceptions to the exclusive control attending ownership as privileges. Copyrights are fully alienable, subject to a copyright statute of frauds. They may be inherited, bequeathed, mortgaged, and distributed equitably upon divorce.

Treating intellectual property as if it were real property, of course, can be problematic. The aspects of intellectual property that create the public goods problems that the property regime is intended to repair also make it difficult to fit intellectual property within the real property rubric. One difficulty, discussed at length in a recent article by Professor Wendy Gordon, is that intellectual property lacks the tangible qualities associated with real property. In the face of intellectual property's lack of "thingness," the law must supply alternative concepts to take the place of physi-

28 See 17 U.S.C. § 106 (1988). The constitutional provision on which U.S. copyright statutes are based is article I, section 8, clause 8, which speaks of exclusive rights: "The Congress shall have Power ... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
Professor L. Ray Patterson, however, has argued that the constitutional language, when interpreted within its historical context, directs Congress to establish a regulatory structure rather than a system of property rights. See Patterson, supra note 13, at 13-36. Patterson views the modern tendency to equate copyright with property as a dangerous error in interpreting the copyright clause.
29 See, e.g., Edwards & Deutsch Lithographing Co. v. Boorman, 15 F.2d 35 (7th Cir.), cert. denied, 273 U.S. 738 (1926); Gordon, supra note 4, at 1390-91.
30 See, e.g., Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. Rev. 359 (1951).
31 See, e.g., Gordon, supra note 4, at 1391-92. Thus, the fair use privilege codified in 17 U.S.C. § 107 (1988) shares a kinship with the privilege of necessity.
35 See 1 Copyright L. Rep. (CCH) ¶ 4100, at 2601 (Sept. 1989).
37 See Lange, supra note 7, at 150.
38 See Gordon, supra note 4, at 1378-79.
Consider, for example, the problem of determining ownership. To ascertain who owns a parcel of real property, we look to possession and to the chain of record title. We can rely on the fact that the parcel is unique in assessing possession and can resolve conflicts in the paper title chain with reference to temporally-based priorities. A parcel of intellectual property, however, is neither tangible nor unique. Possession and temporal priority are therefore less than helpful concepts. How then is the law to determine who owns an intellectual property and what that property comprises? Different regimes of intellectual property approach this problem in different ways.

The patent system recognizes property rights only when the claimant can prove the analogues of uniqueness and temporal priority. The inventor must demonstrate that the invention is new and that the inventor was the first to create it. If the claimant cannot meet this burden of proof, no patent will issue. The inventor must also specify the scope of the rights that she claims in the invention and demonstrate that she is entitled to them.

The trademark system takes a different approach. The trademark claimant proves ownership of a mark by proving that she has actually used it in trade and that the public has come to recognize that mark as her
signature. The property rights she gains from such a showing are limited to the exclusive use of the mark in circumstances in which the public is likely to perceive it as emanating from her. Thus, ownership of a trademark gives rise to what is, in essence, a homonym. The trademark owner has the exclusive right to use the mark in contexts in which it will be understood in its trademark sense, but has no exclusive rights to the use of the word in other contexts. For example, Proctor & Gamble's exclusive rights in the trademark Tide®, in connection with laundry detergent, do not extend to the use of the word "tide" referring to oceans. Although the common meaning of the word "tide" may well have influenced Proctor and Gamble's choice of it for a detergent mark, Proctor & Gamble's use of Tide®, in connection with laundry detergents, has, in effect, created a homonym with a very different meaning.

Thus, the patent system imposes a real property-like set of uniqueness and temporal priority requirements to determine the ownership and set the boundaries of a patent grant. The trademark system relies on actual use in trade as an analogue to possession to determine ownership, and it sets the boundaries of the exclusive rights to correspond with the public's perception of the meaning of a mark.

What is copyright's analogue to these doctrines? Surprisingly, the system demands no comparable analysis or evaluation until actual litigation.
occurs, and there is remarkably little analysis even during litigation.\textsuperscript{48} Copyright vests automatically in your shopping lists, your vacation snapshots, your home movies, and your telephone message slips.\textsuperscript{48} There is nothing that you need to prove in order to ensure that your copyright endures until fifty years after your death. To provide the illusion of boundaries confining your property rights, we invoke a copyright postulate: You own only such aspects of your writings as you added, or only what is original with you.\textsuperscript{60} Put another way, you own only those portions that you did not copy from someone else.\textsuperscript{51}

This concept of originality is a keystone of copyright law.\textsuperscript{52} A work is ineligible for copyright protection except to the extent that it reflects original authorship.\textsuperscript{63} Authorship is a term used to describe the requirement of a non-trivial amount of creative expression;\textsuperscript{54} originality requires that the expression "owe its origin" to the author\textsuperscript{55} rather than be copied from another source.\textsuperscript{66} Where a work of authorship is based on preexisting sources, copyright will protect only the portions of it that are original.\textsuperscript{57}

\textsuperscript{48} See Adelman & Francione, supra note 43, at 675-76 & n.7, 705-06.


\textsuperscript{50} See, e.g., Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); 1 P. Goldstein, Copyright § 2.2.1, at 62 (1989).


\textsuperscript{52} See, e.g., 1 P. Goldstein, supra note 50, § 1.2.2.3; Yankwich, Originality in the Law of Intellectual Property, 11 F.R.D. 457 (1951).

\textsuperscript{53} 17 U.S.C. § 102(a) (1988); see, e.g., John Mueller & Co. v. New York Arrows Soccer Team, 802 F.2d 989 (8th Cir. 1986).


\textsuperscript{55} See, e.g., 1 P. Goldstein, supra note 50, § 1.2.2.3, at 14-15.

\textsuperscript{56} 17 U.S.C. § 103(b) (1988). Indeed, the common wisdom reflected in the statute, its legislative history, and dictum in the cases is that any portion of such a work that infringes the copyrights in preexisting works may not be copyrighted, even if it incorporates distinguishable variations or improvements. 17 U.S.C. § 103(a); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 57-58 (1976); see, e.g., Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936), aff'd, 309 U.S. 390 (1940). \textit{But see infra} notes 233-40 and accompanying text.
Thus, originality determines the boundaries of the copyright. Its mirror image defines the scope of copyright infringement since the statute protects the author only from another's copying, or use, of the original portion of her work and does not prohibit the independent (and thus original) creation of other similar works.\textsuperscript{58}

The principle of limiting copyright protection to only those aspects of a work that are original with its author, while remarkably easy to state, proves to be impossible to apply.\textsuperscript{59} We lack the capacity to ascertain the sources of individuals' inspirations. Thus, the boundaries of copyright are inevitably indeterminate. To mitigate the mischief this could cause, we rely on the public domain.

The concept of the public domain is another import from the realm of real property.\textsuperscript{60} In the intellectual property context, the term describes a true commons\textsuperscript{61} comprising elements of intellectual property that are ineligible for private ownership.\textsuperscript{62} The contents of the public domain may be mined by any member of the public.\textsuperscript{63}

The lay understanding of the public domain in the copyright context is that it contains works free from copyright.\textsuperscript{64} Works created before the enactment of copyright statutes, such as Shakespeare's \textit{Macbeth} or

\textsuperscript{58} See, e.g., \textit{Landes & Posner, supra} note 7, at 344-45.

\textsuperscript{59} See infra notes 223-56 and accompanying text.

\textsuperscript{60} The term public domain gained widespread use in the late nineteenth century when the Berne Convention adopted the term \textit{domaine public} from the French. In the U.S., we had already been using the phrase "public domain" (apparently derived from the British Royal demesne) to describe lands owned by the federal government intended for sale, lease, or grant to members of the public.


\textsuperscript{62} See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989). The concept of a vigorous public domain is well recognized as central to the patent law scheme, and the Supreme Court has repeatedly insisted that material that the patent system leaves in the public domain belongs to the public and may not be withdrawn. \textit{See id.} The role of the public domain in the copyright system is less widely acknowledged. \textit{See infra} notes 189-222 and accompanying text.

\textsuperscript{63} The public domain in land, in contrast, is no longer a commons. The public domain is, rather, such unreserved land as the federal government holds in fee on the public's behalf. The government administers this land as if it were private property, and no member of the public is entitled to enter the public domain without the federal government's permission. \textit{See generally G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW} xix-xxxi, 1-17 (1981).

\textsuperscript{64} \textit{See, e.g., WEBSTER'S THIRD INTERNATIONAL DICTIONARY} 1836 (1986).
Pachabel's *Canon*, are available for fourth grade classes across the nation to use for school assemblies without permission from any publisher or payment of any royalties. Another class of old works in the public domain are works once subject to copyright, but created so long ago that the copyright has since expired, such as Mark Twain's *Huckleberry Finn*. An even larger class of uncopyrighted works in this country entered the public domain because they were ineligible for U.S. copyright or failed to comply with a formal prerequisite for securing it. The United States' first copyright statute expressly thrust all published works by foreign nationals into the public domain. That policy continued for the next century, until it was grudgingly replaced with an extension of copyright to foreign works conditioned upon compliance with United States procedures. Both domestic and foreign works fell into the public domain through inadequate compliance with statutory formalities. Although this second class of works became less significant when Congress eliminated most formal prerequisites and international distinctions in 1988, it represents a massive body of public domain works.

But the class of works not subject to copyright is, in some senses, the least significant portion of the public domain. The most important part of the public domain is a part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect. Judge Learned Hand discussed this facet of the public domain in connection with an infringement suit involving a play entitled *Abie's Irish Rose*:

> We assume that the plaintiff's play is altogether original, even to an extent that in fact it is hard to believe. We assume further that, so

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65 Samuel Clemens registered the copyright in *Huckleberry Finn* in 1884 under the 1831 copyright statute for a term of 28 years. Clemens died in 1910, and in 1912, his daughter Clara Gabriowitsch renewed the copyright in *Huckleberry Finn* for an additional 28 years. The novel entered the public domain in 1940.

66 See Act of May 31, 1790, ch. 15, 1 Stat. 124.


far as it has been anticipated by earlier plays of which she knew nothing, that fact is immaterial. Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain.\textsuperscript{70}

The concept that portions of works protected by copyright are owned by no one and are available for any member of the public to use is such a fundamental one that it receives attention only when something seems to have gone awry.\textsuperscript{71} Although the public domain is implicit in all commentary on intellectual property, it rarely takes center stage. Most of the writing on the public domain focuses on other issues: Should the duration of copyright be extended?\textsuperscript{72} Should we recognize new species of intellectual property rights?\textsuperscript{73} Should federal intellectual property law cut a broad preemptive swathe or a narrow one?\textsuperscript{74} Copyright commentary emphasizes that which is protected more than it discusses that which is not. But a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all.

\section{II. Historical Background}

Ever since the first U.S. patent statute, the patent system appears to have incorporated a strong vision of the divide between patentable inven-

\textsuperscript{70} Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir.), cert. denied, 282 U.S. 902 (1930).


\textsuperscript{73} See, e.g., Brown, Eligibility for Copyright Protection: A Search for Principled Standards, 70 MINN. L. REV. 579 (1985); Lange, supra note 7.

tions and technology in the public domain. The copyright system, in contrast, has boasted no analogous overarching scheme. Instead, both the scope of copyrightable subject matter and the outlines of the public domain developed gradually by accretion. The first U.S. copyright statute made copyright available for "books" but did not spell out what portions of such books might be subject to copyright protection. When copyright owners brought lawsuits asserting broad claims of ownership, the courts took on the task of defining the nature of the rights in the copyright bundle. In so doing, they drew the contours of the public domain bit by bit. This section of the article will trace this historical development in order to begin to develop the reasons why a public domain is essential to the enterprise of authorship and to establish a common ground for further analysis.

The idea that a statutory copyright carries with it a dedication to the public of aspects of or rights in the copyrighted work emerged in the case law of the mid-nineteenth century as a matter of statutory construction. Early copyright statutes granted limited rights in limited classes of works for a term of short duration. Judicial opinions construing these statutes, and the English law on which they were based, concluded that in order to give effect to the limited statutory term and the "Limited Times" language of the Copyright Clause, statutory copyright must extinguish common law literary rights (which authors and publishers had argued existed as natural rights in perpetuity). The courts reasoned that since Congress had expressed statutory copyright in terms of specific rights, any other literary rights, whether or not they had once been protected at common law, must pass into the public domain upon the vesting of statutory copyright. Publication was the dividing line: Once a work was pub-

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77 Act of May 31, 1790, ch. 15, 1 Stat. 124.
78 The first U.S. copyright statute, for example, granted authors of maps, charts, or books the rights to "print, reprint, publish or vend" for a 14 year term that could be renewed for a further 14 years. Act of May 31, 1790, ch. 15, 1 Stat. 124. See generally L. Patterson, supra note 13, at 180-221; Patterson, supra note 13, at 33-48.
79 See supra note 28.
lished, statutory copyright became available. If the author published her work but failed to avail herself of statutory procedures, the entire work entered the public domain. If she complied with the copyright statute, she gained statutory rights, but any other rights in her work became part of the public domain.

In the 1850s, Harriet Beecher Stowe published *Uncle Tom's Cabin: or Life among the Lowly* and secured statutory copyright under the Copyright Act of 1831. This statute gave authors of books, maps, charts, musical compositions, prints, cuts, or engravings the “sole right and liberty of printing, reprinting, publishing, and vending” their works. Stowe then commissioned a German translation of *Uncle Tom's Cabin* so that she could market her book in Pennsylvania’s German-speaking community and secured a copyright in the translation. When a competing, unauthorized, German translation appeared in a Philadelphia German-language newspaper, Stowe sued to enjoin its further publication. The court held that an unauthorized translation did not infringe on Stowe’s statutory rights:

> By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much publici juris as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, play-rights and poetasters. They are no longer her own — those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished. All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it, and those only can be called infringers of her rights or pirates of her property, who are guilty of printing, publishing, importing or vending without her license, “copies of her book.” A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.

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82 Id. at § 1. The rights subsisted for a term of 28 years, renewable for a further 14-year term.
83 Id. at §§ 1, 2.
84 Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).
85 Id. at 208 (footnotes omitted).
In 1870, Congress expanded copyright to permit authors to "reserve the right to dramatize or to translate their own works." The analysis of the *Stowe* case, however, outlived its holding on the narrow issue of whether translations infringed. Courts interpreted the scope of the copyright grant narrowly and continued to hold that what Congress did not grant to the author became common property upon publication of the work containing it.

In 1879, the United States Supreme Court articulated this principle in more general terms in *Baker v. Selden*. The plaintiff in *Baker v. Selden* asserted copyright claims in a series of books about bookkeeping and in the bookkeeping system that they described. Plaintiff Selden accused defendant Baker of copying the Selden bookkeeping system and pirating the bookkeeping forms published in Selden's books. The Court held that the copyrights in the books neither conferred rights in the bookkeeping system itself, nor protected the forms required to use the system. Both system and forms belonged to the public:

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101 U.S. 99 (1879).

Charles Selden was a Cincinnati accountant who devised a bookkeeping method chiefly valuable for condensing numerous columns of numbers onto only two forms. Selden wrote, published, and copyrighted five books describing his bookkeeping system; each of the books contained copies of the ruled forms Selden had developed. With his copyrights secured, Selden engaged a salesman to travel through Ohio and Indiana and attempt to sell the Selden bookkeeping system to midwestern accountants. According to the testimony given at trial, the salesman gave his sales pitch at the Xenia, Ohio, office of one William C. Baker, the auditor for Green County, and left one of Selden's books for Baker's perusal. Baker allegedly recommended that Green County switch to the Selden system, but the county commissioners balked at paying Selden's price. The following year, Baker apparently developed his own variant of the Selden system and designed his own variant of the Selden condensed ledger forms. After successfully introducing his own forms to Green County, Baker achieved their adoption by county and state government auditors throughout Ohio. Selden discovered Baker's activities but died before bringing suit. His widow sued Baker the following year. See Transcript of Records at 1-19, Baker v. Selden, 101 U.S. 99 (1879) (No. 99-184).

Baker's forms were not identical to Selden's, but they adopted the same essential strategy. See Transcript of Records, supra note 88, at 16.
The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.  

_Baker v. Selden_ spawned several overlapping lines of authority on what aspects of a copyrighted work a copyright will not protect. The most straightforward application of _Baker v. Selden_ denies copyright to blank forms. A second line of cases denies copyright protection to utilitarian articles. The third, most fundamental line of authority prohibits copyright protection for ideas, theories, processes, or systems. The fourth outgrowth of _Baker v. Selden_ is known as the merger doctrine. Where the unprotectible ideas in a work are inseparable from the work’s expression, copyright may not prohibit the use of expression necessary to convey the ideas.

In the twentieth century, Congress extended the scope of copyright enormously by granting more expansive rights in an increasingly inclusive array of works. Most of what _Baker v. Selden_ and later cases assigned

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Supra note 51, at 32-34. See, e.g., _W. Patry_, supra note 51, at 32-34. See, e.g., _Herbert Rosenthal Jewelry Corp. v. Kalpakian_, 446 F.2d 738 (9th Cir. 1971); Continental Casualty Co. v. Beardsey, 253 F.2d 702 (2d Cir.), _cert. denied_, 358 U.S. 816 (1958); see also _Morrissey v. Proctor & Gamble Co._, 379 F.2d 675 (1st Cir. 1967).
to the public domain has nonetheless remained unprotected. Some commentators have attributed this to the innate conservatism of courts and have suggested that *Baker v. Selden* and its progeny be reinterpreted as obsolete constructions of superseded statutes.\(^7\) Others have insisted that Congress relied on the limitations derived from *Baker v. Selden* in choosing to extend copyright's boundaries.\(^8\) In either case,\(^9\) the doctrines that evolved from *Baker v. Selden* have ascended to the level of copyright axioms.\(^10\)

Like most legal axioms, the doctrines derived from *Baker v. Selden* have never been applied with consistency. Courts have denied protection in one case, concluding that a defendant appropriated only the plaintiff's ideas, and found infringement in a seemingly indistinguishable case.\(^11\) Courts have held one work to be fatally utilitarian and then turned around and protected another that seems equally utilitarian.\(^12\) They have refused to enjoin the copying of one blank form while imposing liability for the reproduction of another, equally blank form.\(^13\) The case law does not supply many reliable indicia describing what aspects of a copyrighted work are proprietary and what aspects are common property. Trends in

\(^7\) See 1 M. Nimmer & D. Nimmer, *supra* note 2, § 2.18[A]-[D]; Goldstein, *supra* note 7, at 228-32. Professor Goldstein's more recent work appears to retreat from this view. See 1 P. Goldstein, *supra* note 50, at 77-78.


\(^9\) Analysis of the legislative history accompanying the 1909 and 1976 copyright statutes indicates that the Register of Copyrights and the private parties who negotiated among themselves to arrive at the language of the bills that Congress enacted paid significant attention to these court-crafted limitations although the members of Congress themselves paid little attention to such details. See Litman, *supra* note 96, at 334-37.


lines of cases, however, shed some light on the strains to which courts were responding when they consigned particular sorts of material to the public domain.

In the wake of the Copyright Act of 1909,104 courts developed rules for particular classes of works and determined infringement according to the class of the works in dispute. Three lines of cases, which I will term the systems cases, the motion picture cases, and the directory cases, reveal three different approaches to the public domain.

A. The Systems Cases

The line of cases denying protection to systems followed a common pattern, seen earlier in Baker v. Selden. In these cases, plaintiff had secured a copyright in a book, lecture, or chart explaining a system or procedure and sought to parlay the copyright into a monopoly on the use of the system or procedure.105 Courts consistently held that publication of the work describing the system dedicated the system itself to the public.106 In order to secure protection of a way of doing things, the courts explained, an author must seek protection under the patent laws.107 In Aldrich v. Remington Rand, Inc.,108 for example, the author of a manual on municipal tax assessment and collection sued the City of Fort Worth for adopt-

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105 See, e.g., Dorsey v. Old Surety Life Ins. Co., 98 F.2d 872 (10th Cir. 1939) (family group insurance policies); Selzer v. Corem, 107 F.2d 75 (7th Cir. 1939) (rules for roller derby races); Affiliated Enters. v. Gruber, 86 F.2d 958 (1st Cir. 1936) (promotional lotteries in motion picture theaters); Brief English Sys. v. Owen, 48 F.2d 555 (2d Cir. 1931) (shorthand system using Roman characters); Chautauqua School of Nursing v. National School of Nursing, 238 F. 151 (2d Cir. 1916) (illustrated twelve-step instruction in hypodermic injections); Aldrich v. Remington Rand, Inc., 52 F. Supp. 732 (N.D. Tex. 1942) (tax bookkeeping system); Crume v. Pacific Mut. Life Ins. Co., 55 U.S.P.Q. (BNA) 267 (N.D. Ill. 1942) (reorganization of insurance company), aff'd, 140 F.2d 182 (7th Cir. 1944); Muller v. Triborough Bridge Auth., 43 F. Supp. 298 (S.D.N.Y. 1942) (traffic separation system for bridge on-ramps); Long v. Jordan, 29 F. Supp. 287 (N.D. Cal. 1939) (pension system); Stone & McCarrick, Inc. v. Digan Piano Co., 210 F. 399 (E.D. La. 1914) (piano promotion), aff'd, 220 F. 837 (5th Cir. 1915).


ing the system described in his manual and the forms he had devised to illustrate the system. The court dismissed the plaintiff’s suit with the following observation:

The basic distinction between rights under patents and rights under copyrights must be constantly kept in mind, one being that the public is not free to use the invention described in a patent, but it is privileged to use whatever information is imparted in a copyrighted book about any system, art or manufacture described in it; furthermore, that such use is the consideration the public receives for the grant of copyright.\textsuperscript{109}

The systems cases reflect the notion that the public domain exacts a toll as the price for a statutory copyright and that courts will enforce the public’s claim to common property even when the ideas or systems reflected in works are ingenious.

B. The Film Cases

Early cases were protective of the proprietary interests that authors and producers claimed in dramatic material.\textsuperscript{110} The growth of the motion picture industry, however, deluged the courts with claims of infringement.\textsuperscript{111}

\textsuperscript{109} Id. at 734.

\textsuperscript{110} See, e.g., Chappell & Co. v. Fields, 210 F. 864 (2d Cir. 1914); Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

In the typical case, plaintiff was the author of a book, play, or story that had enjoyed only moderate success, and claimed that defendant’s motion picture had been based on plaintiff’s work. Many of the claims were plausible, and most were sincere. Courts, however, manifested increasing reluctance to find infringement.

Some cases denied relief on the ground that the plot of the plaintiff’s work was an old one and could be found in other works already in the public domain. Courts, however, had difficulty articulating why the mere fact that a work incorporated a standard plot should mean that its copying was not actionable. Neither the language of the copyright statute nor the cases construing it seemed to impose a requirement that copyright should protect only that which was new in some absolute sense. Both the statute and the case law extended protection to modest recasting of old material. Motion picture defendants, nonetheless, introduced sundry examples of prior similar works into the record, but were rarely successful.


14 See, e.g., London v. Biograph Co., 231 F. 696, 698 (2d Cir. 1916) (“The plot is highly dramatic and calculated to appeal powerfully to reader or spectator. But it is an old one; it appears in Chaucer’s Pardoner’s Tale.”); see also Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 23 (9th Cir.), rev’d on other grounds 46 F.2d 792 (S.D. Cal. 1930), cert. dismissed, 296 U.S. 669 (1933); Ornstein v. Paramount Prods., Inc., 9 F. Supp. 896 (S.D.N.Y. 1935); Nichols v. Universal Pictures Corp., 34 F.2d 145 (S.D.N.Y. 1929), aff’d, 45 F.2d 119 (2d Cir.), cert. denied, 282 U.S. 902 (1930).

15 Section 4 of the Copyright Act of 1909 extended copyright protection to “all the writings of an author.” Copyright Act, ch. 320, 35 Stat. 1075, 1076 (1909). Section 5 included in its enumeration of copyrightable works “directories, gazetteers and other compilations” as well as “[r]eproductions of a work of art.” Id. at 1076-77.

16 See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Burrow Giles Lithographing Co. v. Sarony, 111 U.S. 53 (1884); Edwards & Deutsch Lithographing Co. v. Boorman, 15 F.2d 35 (7th Cir.), cert. denied, 273 U.S. 738 (1926); American Code Co. v. Rensinger, 282 F. 824 (2d Cir. 1922).
in demonstrating that plaintiffs had in fact relied upon them.\textsuperscript{118}

Courts might have permitted copying in situations in which the defendant studio could demonstrate that it had drawn its story from Chaucer rather than the plaintiff,\textsuperscript{119} but in many cases the evidence that the motion picture producers had in fact relied on the plaintiff’s work was compelling.\textsuperscript{120} Furthermore, the alleged similarities between the accusing story and the accused motion picture typically went beyond a story’s broad outlines and overall themes, encompassing similarities of setting, action, character, and detail that could not easily be attributed to old classics.\textsuperscript{121}

Although courts might have wished to seek refuge in a standard that excused unintentional duplication, the principle that unintentional or subconscious copying gave rise to liability had been well settled for some time.\textsuperscript{122} Moreover, in some cases the proof of conscious copying was persuasive. Courts, therefore, turned to the rationale that had enabled them to rule for defendants in the systems cases: They claimed plots, themes, titles, characters, ideas, and situations on behalf of the public domain.

In \textit{Nichols v. Universal Pictures Corp.},\textsuperscript{123} for example, the plaintiff

\textsuperscript{118} See, e.g., Sheldon v. Metro-Goldwyn Pictures Corp, 81 F.2d 49 (2d Cir. 1936), aff’d, 309 U.S. 390 (1940); Ornstein v. Paramount Prods., Inc., 9 F. Supp. 896 (S.D.N.Y. 1935); see also Haas v. Leo Feist, Inc., 234 F. 105 (S.D.N.Y. 1916) (plaintiff’s song repeats chorus from \textit{HMS Pinafore}, but there is no evidence that plaintiff ever heard \textit{HMS Pinafore}).
\textsuperscript{119} See London v. Biograph Co., 231 F. 696, 698 (2d Cir. 1916).
\textsuperscript{120} See, e.g., Ornstein v. Paramount Prods., Inc., 9 F. Supp. 896 (S.D.N.Y. 1935); Witwer v. Harold Lloyd Corp., 46 F.2d 792 (S.D.Cal. 1930), rev’d, 65 F.2d 1 (9th Cir.), cert. dismissed, 296 U.S. 669 (1933); Nichols v. Universal Pictures Corp., 34 F.2d 145 (S.D.N.Y. 1929), aff’d, 45 F.2d 119 (2d Cir.), cert. denied, 282 U.S. 902 (1930). Other cases were decided on the assumption that any similarities were the result of copying, thereby permitting the court to enter judgment on the pleadings and avoid a full trial. See, e.g., Caruthers v. R.K.O. Radio Pictures, Inc., 20 F. Supp. 906 (S.D.N.Y. 1937); Shipman v. R.K.O. Radio Pictures, Inc., 20 F. Supp. 249 (S.D.N.Y. 1937), aff’d, 100 F.2d 533 (2d Cir. 1938).
\textsuperscript{122} See, e.g., Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924); Haas v. Leo Feist, Inc., 234 F. 105, 129 (S.D.N.Y. 1916). \textit{But cf.} Harold Lloyd Corp. v. Witwer, 65 F. 2d 1, 17 (9th Cir.) (although unintentional copying is actionable, plaintiff’s complaint alleges only deliberate copying, cert. dismissed, 296 U.S. 669 (1933)).
\textsuperscript{123} 34 F.2d 145 (S.D.N.Y. 1929), aff’d, 45 F.2d 119 (2d Cir.), cert. denied, 282 U.S. 902 (1930).
claimed that the film *The Cohens and the Kelleys* infringed her successful play *Abie’s Irish Rose*. Both the play and the motion picture were romantic comedies about a Jewish family and an Irish Catholic family whose children had secretly married. Nichols presented evidence that Universal Pictures had tried to purchase the motion picture rights to *Abie’s Irish Rose*, that Universal screenwriters had studied the play in preparing the movie scenario, and that Universal had advertised *The Cohens and the Kelleys* as an *Abie’s Irish Rose* for the screen.\(^{124}\) The trial court agreed that Universal had relied on Nichol’s play in making its film, but held that it had taken only that which anyone was entitled to use.\(^{125}\) On appeal, the Second Circuit expressly declined to base its affirmance on the theory that the plaintiff had harvested her plot from older sources in the public domain and could therefore not claim to own it. The court assumed that everything in the play owed its origin to Nichols, but held that the play’s broad outlines and the ideas it expressed nonetheless were part of the public domain.\(^{126}\)

Assimilating the broad outlines of a story’s plot to the systems and ideas in the public domain, however, did not suffice to dispose of many claims. Plaintiffs commonly drew the courts’ attention to a variety of similarities of a more detailed nature.\(^{127}\) The courts excused many of those similarities on the grounds that they were trite,\(^{128}\) stock,\(^{129}\) common,\(^{130}\) or cliche.\(^{131}\) In the early 1940s, Judge Leon Yankwich, a literate francophile sitting on the federal district court for the Southern District of California, gave these sorts of details the name *scènes à faire*.\(^{132}\) *Scènes à faire*, Judge

\(^{124}\) *Id.* at 150.

\(^{125}\) *Id.* at 148-50.

\(^{126}\) Nichols, 45 F.2d at 122.


\(^{129}\) See, e.g., Nichols, 34 F.2d 145.


The other small details, on which stress is laid, such as the playing of the piano, the prayer, the hunger motive, as it called, are inherent in the situation itself. They are what the French call “*scènes à faire*”. Once having placed two persons in a church during a big storm, it was inevitable that incidents like these and others which are, necessarily, associ-
Yankwich explained, “are the common stock of literary composition — ‘cliches’ — to which no one can claim literary ownership.”

Analyzed within this framework, most motion picture claims evaporated. The defendant studio may have availed itself of plaintiff’s ideas, themes, and general plot and may have expressed those ideas, themes, and plot through the same standard scenes and common details that plaintiff had used, but these aspects of plaintiff’s work were public property.

What accounts for the courts’ reluctance to resolve these plagiarism claims in plaintiffs’ favor? Some courts were undoubtedly responding to their perceptions of economic realities. Even if Harold Lloyd had appropriated the plot for his film The Freshman from H.C. Witwer’s magazine story, the film’s million-dollar success owed more to Lloyd’s performance than it did to Witwer’s plot. Similarly, the success of the film Stowaway had more to do with its star, Shirley Temple, than with the premise that Twentieth Century-Fox allegedly plagiarized from Joan Storm’s play Dancing Destiny. Beyond the courts’ sensitivity to the financial equities in particular cases, however, there also appears to be an awareness of the limitations inherent in dramatic and film art forms. The motion pictures before the court and the stories that were claimed to inspire them were typical. If one motion picture infringed because it told a familiar story, other films not before the court were equally vulnerable.


135 See Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 18 (9th Cir.), cert. dismissed, 296 U.S. 669 (1933); id. at 46-47 (McCormick, J., dissenting).

136 See Dezendorf v. Twentieth Century-Fox Film Corp., 32 F. Supp. 359 (S.D. Cal. 1940), aff’d, 118 F.2d 561 (9th Cir. 1941).
C. The Directory Cases

In the systems and motion picture cases, the solicitude of the courts for the creative process led them to assert public ownership of creative material. One might have expected such courts to be especially reluctant to protect facts under the rubric of copyright. Surprisingly, however, courts gave copyright protection to facts without seriously questioning the propriety of doing so.\textsuperscript{137}

The uncopyrightability of facts themselves is well settled today,\textsuperscript{138} but was far from certain early in the century. News was thought to be uncopyrightable,\textsuperscript{139} but that proposition remained untested for many years because of the impracticality of daily registration.\textsuperscript{140} Neither courts nor commentators generalized from the public domain status of news to any conclusion about whether other facts or information could be protected.\textsuperscript{141} The question of the copyrightability of facts \textit{qua} facts was not squarely raised before a U.S. court until the 1919 decision in \textit{Myers v. Mail & Express Co.}\textsuperscript{142} Judge Learned Hand's opinion in \textit{Myers} concluded that facts recorded in a historical work were dedicated to the public and could be used freely by subsequent authors.\textsuperscript{143} None of the authority on which

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\begin{footnote}{139} See International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918); Chicago Record-Herald Co. v. Tribune Ass'n, 275 F. 797, 798 (7th Cir. 1921); Davies v. Bowes, 209 F. 53, 55-56 (S.D.N.Y. 1913), aff'd on other grounds, 219 F. 178 (2d Cir. 1915); R. BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 87-89 (1912).
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\begin{footnote}{140} See International News Serv. v. Associated Press, 248 U.S. at 233.
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\begin{footnote}{141} See, e.g., American Trotting Register Ass'n v. Gocher, 70 F. 237 (C.C.N.D. Ohio 1895); List Publishing Co. v. Keller, 30 F. 772 (C.C.S.D.N.Y. 1887); E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 394-99 (1879); \textit{see also} T. SCRUTTON, THE LAW OF COPYRIGHT 110-23 (4th ed. 1903) (British law).
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\begin{footnote}{142} 36 C.O. Bull. 478 (S.D.N.Y. 1919). One earlier decision, Kennerley v. Simonds, 247 F. 822 (S.D.N.Y. 1917), presented the same question but was decided on other grounds. Defendant Simonds had written a history book and assigned the copyright to a publisher. Simonds subsequently wrote another history book on the same subject, and the publisher brought suit for copyright infringement. The court held for Simonds on the ground that in writing the second book he had consulted the same preexisting sources that he had used for his earlier book, rather than copying the book itself. See \textit{id.} at 826.
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\begin{footnote}{143} Meyers, 36 C.O. Bull. at 478-79.
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Hand relied, however, was squarely on point, and the Myers decision remained unreported until 1970.\textsuperscript{144} Two years after Myers, in an opinion involving competing directories of jewelers' trademarks, Judge Hand repeated his conclusion that facts themselves are common property.\textsuperscript{145} He suggested in dictum, however, that the author of a factual directory was not entitled to copy its information from a competing directory.\textsuperscript{146} On appeal, the Second Circuit went further, resting its decision on the holding that the reproduction of information from a copyrighted directory was itself infringement.\textsuperscript{147} The Ninth Circuit relied on the Second Circuit's analysis in ruling that the reproduction of information from a copyrighted telephone directory was infringement.\textsuperscript{148} Other courts followed.\textsuperscript{149}

The directory cases predicated protection of factual works on the labor involved in compiling facts.\textsuperscript{150} A subsequent compiler was not permitted to rely on a copyrighted directory, although she was free to publish an identical collection of facts if she first obtained those facts through consultation of preexisting sources.\textsuperscript{151} There was nothing innovative about these cases: A long line of British cases had protected factual compilations against competing second-comers,\textsuperscript{152} and nineteenth-century American cases had followed their British counterparts.\textsuperscript{153} What makes the directory cases noteworthy is their coexistence with cases holding facts to be unprotectible in other contexts. During the same period that courts took a protectionist view in directory cases, opinions considering historical fiction, drama, and film insisted that facts belonged in the public domain.\textsuperscript{154}

\textsuperscript{144} See 36 C.O. Bull. at iii.
\textsuperscript{146} Jewelers', 274 F. at 935.
\textsuperscript{147} See Jewelers', 281 F. at 92-95.
\textsuperscript{148} See Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937).
\textsuperscript{149} See, e.g., Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., 131 F.2d 809 (7th Cir. 1942); Sammons v. Larkin, 38 F. Supp. 649 (D. Mass. 1940).
\textsuperscript{151} See, e.g., Produce Reporter Co. v. Fruit Produce Rating Agency, 1 F.2d 58 (N.D. Ill. 1924).
\textsuperscript{152} See cases cited in Lurvey, supra note 137, at 273-76.
\textsuperscript{153} See, e.g., American Trotting Register Ass'n v. Gocher, 70 F. 237 (C.C.N.D. Ohio 1895); List Publishing Co. v. Keller, 30 F. 772 (C.C.S.D.N.Y. 1887); cases cited in Lurvey, supra note 137, at 276-81.
\textsuperscript{154} See, e.g., Caruthers v. R.K.O. Radio Pictures, Inc., 20 F. Supp. 906 (S.D.N.Y. 1937);
While courts in the motion picture cases dissected similarities between works to determine whether the similarities involved copyrightable expression rather than unprotectible plot, theme, scène à faire, or fact, the same courts in directory cases engaged in no comparable inquiry. If plaintiff could prove that defendant had used plaintiff’s directory as the source of its own, then plaintiff recovered for copyright infringement without regard to the copyrightability of the copied material. Although these cases are still followed today, the modern view is that their reasoning was aberrant.

Courts and commentators have advanced a variety of theories to explain the paradox between protecting information in compilations of facts and insisting that facts are public property in connection with other works. I will offer my own modest suggestions for reconciling these cases in a subsequent section of this article. For now, it is enough to note that the three lines of cases turned to the refuge of the public domain in response to different sorts of pressure.

In the systems cases, authors sought to establish ownership of an entire way of doing things through the simple expedient of writing a book about it. Although the patent statute offered a rigorous procedure for claiming property rights in innovative solutions and proving the scope of one’s entitlement, these authors sought to cripple their competitors while avoiding the rigors of the patent system. Courts responded by advancing the quid pro quo argument that the public exacts a toll in return for statutory

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166 See, e.g., Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Produce Reporter Co. v. Fruit Produce Rating Agency, 1 F.2d 58 (N.D. Ill. 1924).

167 See, e.g., Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937).


169 See, e.g., Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1369-70 (5th Cir. 1981); 1 M. Nimmer & D. Nimmer, supra note 2, § 3.04; W. Patry, supra note 51, at 63-64; Gorman, supra note 13, at 573-76.


171 See infra notes 285-89 and accompanying text.
copyright. In the film cases, courts struggled with competing claims to exclusive ownership of themes and embellishments common to myriad fictional works. They replied by holding the familiar elements incapable of private appropriation. Finally, in the directory cases, authors claimed ownership in material they could not plausibly assert that they had originated, but that they had nonetheless expended significant labor in collecting. Courts granted protection to the labor involved.

The courts' strategy seems to have been a reactive one, and it yielded no blueprint of the public domain's outer limits and no overall rationale for its existence. There is, however, a common thread in these three lines of cases. Courts invoked the public domain when the breadth of plaintiffs' asserted property rights threatened, as a practical matter, to prevent many other authors from pursuing their craft. Courts thus seem to have recognized, at least implicitly, that copyright should promote the enterprise of authorship and that this goal may at times be inconsistent with protecting or rewarding individual authors.

D. Statutory Codification

By the late 1950s, when Congress began the revision process that culminated in the 1976 Copyright Act, the outlines of the public domain in copyrighted works were reasonably clear. Some of the rules defining the public domain were incorporated into the 1976 statute; other aspects were expressed in Copyright Office regulations. Still more aspects appeared only in the case law.

Copyright did not protect ideas, methods, systems, facts, utilitarian

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165 See, e.g., Reyher v. Children's Television Workshop, 533 F.2d 87 (2d Cir.) (scènes à faire), cert. denied, 429 U.S. 980 (1976).
objects,\textsuperscript{168} titles,\textsuperscript{169} themes,\textsuperscript{170} plots,\textsuperscript{171} \textit{scènes à faire},\textsuperscript{172} words, short phrases and idioms,\textsuperscript{173} literary characters,\textsuperscript{174} style,\textsuperscript{175} or works of the federal government.\textsuperscript{176} This hodgepodge of unprotectible matter was without overarching justification then, and it remains so today.

In the years since the enactment of the 1976 Copyright Act, litigation has put increasing pressure on the public domain. The 1976 Act's expansion of subject matter eligible for copyright protection has multiplied copyright cases and nurtured new claims to exclusive rights in the basic building blocks of a variety of different forms of expression.\textsuperscript{177} The statute's protection of television broadcasts, for example, has led to litigation over how much of what we see on television can be claimed as property.\textsuperscript{178} The extension of federal copyright protection to unpublished works has created disputes over what aspects of the content of unpublished works are proscribed to the researcher.\textsuperscript{179} Copyright protection of computer software

\textsuperscript{168} See, e.g., Fulmer v. United States, 103 F. Supp. 1021 (Ct. Cl. 1952).
\textsuperscript{171} See, e.g., Scott v. WKJG, Inc., 376 F.2d 467 (7th Cir.), cert. denied, 389 U.S. 832 (1967).
\textsuperscript{177} See, e.g., Raskind, supra note 51, at 479-80.
has generated lawsuits claiming that copyright provides exclusive rights to the "look and feel" of programs\(^{180}\) or to the user interfaces they employ.\(^{181}\)

Some courts have responded to the flood of litigation and to the breadth of asserted claims by expanding the boundaries of categories of public domain material. The Second and Ninth Circuits have extended the doctrine that facts are common property to encompass analysis of facts, theories about facts, and ordinary ways in which facts may be described.\(^{182}\) Courts have revived the \textit{scènes à faire} doctrine, invented in the context of motion picture infringement cases,\(^{183}\) and applied it to a variety of new contexts.\(^{184}\) Other courts, in contrast, have questioned the policies underlying the law's failure to recognize property rights in valuable categories of public domain material\(^{185}\) or have interpreted the scope of such categories narrowly.\(^{186}\)


\(^{183}\) See \textit{supra} notes 127-33 and accompanying text. In the years between 1959, see \textit{Bradbury v. Columbia Broadcasting Sys.}, 174 F. Supp. 733 (S.D. Cal. 1959), \textit{rev'd}, 287 F.2d 478 (9th Cir.), \textit{cert. dismissed}, 368 U.S. 801 (1961), and 1976, see \textit{Reyher v. Children's Television Workshop}, 533 F.2d 87 (2d Cir.), \textit{cert. denied}, 429 U.S. 980 (1976), the \textit{scènes à faire} doctrine was cited by no court and appeared to be moribund.


III. THEORETICAL JUSTIFICATIONS

Copyright protection, once limited to maps, charts, and books, now extends to an extraordinary variety of products that saturate our society. Copyright cases no longer can be classified within subject-matter lines, and courts and commentators have sought to articulate general principles dividing what copyright protects or should protect from what it does not or should not.

Meanwhile, the term "public domain" has fallen out of fashion as a description of unprotectible aspects of copyrighted works. Courts and commentators speak instead of "uncopyrightable" or "nonprotectible" material. The distinction is a minor one, but the new vocabulary obscures the positive rationale for denying copyright protection and, instead, draws attention to the negative rationales. As Congress has enacted statutes expanding the range of subject matter entitled to copyright, the categories of material that copyright does not protect have struck many as increasingly anomalous. Protectors of the public domain have found themselves on the defensive. When they have explained why it is that copyright should not protect ideas, facts, stock scenes, titles, or characters, they have attempted to explain what aspects of copyrightable works of authorship it is that ideas, facts, stock scenes, titles, or characters lack. These arguments have in turn been vulnerable to attack.

187 See supra note 77.
188 See, e.g., Gracen v. Bradford Exch., 698 F.2d 300 (7th Cir. 1983); 1 P. Goldstein, supra note 50, § 2.3; Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information 59-94 (1986); Goldstein, supra note 7; Hughes, supra note 41; Landes & Posner, supra note 7.
190 See generally A. Latman, R. Gorman & J. Ginsburg, supra note 22, at 8-12, 31-32; Litman, supra note 96.
191 See, e.g., 1 M. Nimmer & D. Nimmer, supra note 2, § 2.15 (typeface designs); id. § 2.16 (titles); Birmingham, A Critical Analysis of the Infringement of Ideas, 5 Copyright L. Symp. (AS-CAP) 107, 125 (1954) (ideas); Fleischmann, supra note 16, at 15-16 (individual recorded musical notes); Hill, supra note 6, at 58-59 (facts); Note, Copyright Infringement: An Argument for the Elimination of the Scène à Faire Doctrine, 5 Comm/Ent L.J. 147 (1982).
192 See, e.g., 1 P. Goldstein, supra note 50, § 2.7.3; B. Kaplan, An Unhurried View of Copyright 45-46 (1967).
The debate over copyright in factual works furnishes one example of this phenomenon. Copyright does not protect facts, theories about facts, or the research that yields them, it is said, because facts are not original. The late Professor Melville Nimmer described it this way:

The "discoverer" of a scientific fact as to the nature of the physical world, an historic fact, a contemporary news event, or any other "fact," may not claim to be the "author" of that fact. If anyone may claim authorship of facts, it must be the Supreme Author of us all. The discoverer merely finds and records. He may not claim that facts are "original" to him, although there may be originality and hence authorship in the manner of reporting, i.e., the "expression" of the facts. Since copyright may only be conferred upon "authors," it follows that quite apart from their status as "ideas," discoveries as facts per se may not be the subject of copyright.

Thus articulated, the argument invites its own rebuke. As Professor Jane Ginsburg has aptly demonstrated, such an analysis rests on what Ginsburg has dubbed the "Platonic fact precept." The fallacy of the Platonic fact precept is its tenet that facts are already there, suspended in the ether for the hapless researcher to stumble upon. Facts, however, do not exist independently of the lenses through which they are viewed. Those lenses may be theoretical, methodological, or perceptual; they may be colored by experience or bias or may be shaped by the scope of the researcher's inquiry. Researchers seeking to unearth facts must sift through available evidence, design new avenues of inquiry, choose among myriad conflicting indicia, and supply interpretive paradigms to structure incoherent collections of minutia. Researchers can thus be said to be composing their facts as they go along. In this sense, facts are no more

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185 Ginsburg, supra note 182, at 658.
186 See id.
188 See, e.g., id. at 277-91.
“out there” than are plots, words, or sculptural forms. If one discards the Platonic fact precept, it is hard to maintain the position that facts and theories about facts are still less original than other works of authorship that copyright protects. Denial of protection must be predicated on some alternate ground.

A proponent of the economic analysis of law might argue that because copyright’s purpose is to provide incentives for the creation of works that are valued by society at large, copyright should protect the portions of such works that society most values. Because the most valuable contribution of many factual works is the facts themselves, she might continue, copyright ought to protect those facts. Its failure to do so arguably deters the appropriate level of investment in fact-finding, which results in underproduction of valuable fact-based works. A rival economist might retort that non-copyright incentives already encourage a plethora of fact-based works; a third might suggest that protecting facts would impose inefficient transaction costs on later authors who wish to incorporate the same facts in their works. Each of these economic arguments has been persuasive to at least one court.

The unruly brawl among these hypothetical economists illustrates a problem endemic to their approach. Their models are most helpful when empirical data is available to test their conclusions. In the absence of empirical data, the result of economic analysis is dictated by the model’s

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201 See, e.g., Hill, supra note 6, at 58-59.


203 See, e.g., Abramson, supra note 193, at 142-45; Jones, Copyright: Factual Compilations and the Second Circuit, 52 Brooklyn L. Rev. 679 (1986); cf. Comment, Copyright Protection, supra note 5, at 1023.

204 Cf. Breyer, supra note 72, at 309-21 (arguing that abolishing copyright for textbooks would not seriously affect production).

205 See, e.g., Landes & Posner, supra note 7, at 353.

placement of the burden of proof. Economists who begin with the assumption that the copyright incentive should be no greater than necessary to encourage authorship will conclude that the case for increased protection is, at best, "not proven." Economists who begin with the assumption that any diminution of or condition on the copyright incentive should be eschewed until its proponents demonstrate that it will not, at the margin, deter authorship, will similarly leave the argument unpersuaded. Most arguments over the appropriate scope of copyright protection, unfortunately, occur in a realm in which empirical data is not only unavailable, but is also literally uncollectible.

The weary proponent of a vigorous public domain in general, and of a public domain in facts in particular, turns to precedent as a justification. We should not protect facts, she argues, because a long line of copyright cases forbids it. This argument dissolves when the directory cases are raised. Indeed, even if the directory cases are dismissed as sui generis and fundamentally misconceived, there is ample precedent deciding almost every copyright issue in almost every conceivable direction. The myriad variations among decisions make it possible to assemble long lines of cases to support — or refute — any position. The copyrightability of works of fact is no exception.

This weakness in the common justifications offered in support of the public domain takes different forms with respect to different categories of unprotected material. When explaining courts' failure to protect scènes à faire, some commentators have explained that scènes à faire are indispensable to the expression of common themes. This explanation, if accurate, would pose a particular case of the idea/expression merger prob-

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207 See, e.g., Breyer, supra note 72, at 321-23, 350-51; Fisher, supra note 25, at 1717-19.
208 See, e.g., Brennan, supra note 26.
211 See supra notes 91-103 and accompanying text.
212 See generally Shipley & Hay, supra note 138, at 129-51, and cases cited therein. Thus, all commentators arguing for or against protection of particular works or particular rights have some case law on their side and have been arguing not with each other but past each other.
213 See, e.g., Brinson, Copyrighted Software: Separating the Protected Expression from Unprotected Ideas, A Starting Point, 29 B.C.L. Rev. 803, 814 (1988); Note, Screen Displays are Proper Subject Matter for Copyright Protection, 1988 U. Ill. L. Rev. 757, 766.
lem,\textsuperscript{214} denying protection to expression to avoid giving a monopoly in unprotected ideas. Only when one examines the cases to ascertain what sorts of scènes à faire have been denied protection does the explanation dissolve. A German beer hall scene may be an expected embellishment in a work exploring who caused the explosion of the Hindenburg dirigible,\textsuperscript{215} but it would be difficult to characterize it as indispensable. Nor is it plausible that the use of sand dollars for currency or seahorses for transportation would strike a trial court as essential to express the idea of an underwater civilization.\textsuperscript{216} The lack of protection given to scènes à faire seems to lie more in their triteness than their necessity.\textsuperscript{217} But why that should be so is rarely explained.\textsuperscript{218}

Indeed, the justifications for the public domain become least satisfactory at the most fundamental level. Why is it that copyright does not protect ideas? Some writers have echoed the justification for failing to protect facts by suggesting that ideas have their origin in the public domain.\textsuperscript{219} Others have implied that "mere ideas" may not be worthy of the status of private property.\textsuperscript{220} Some authors have suggested that ideas are not protected because of the strictures imposed on copyright by the first amendment.\textsuperscript{221} The task of distinguishing ideas from expression in order to explain why private ownership is inappropriate for one but desirable for the other, however, remains elusive.\textsuperscript{222}

\textsuperscript{214} See supra notes 94-95 and accompanying text.
\textsuperscript{217} Accord Ginsburg, supra note 182, at 664.
\textsuperscript{218} One might argue that the very triteness of scènes à faire dispels the inference that they were copied from plaintiff's work, were it not for the fact that the doctrine is most frequently invoked to privilege copying that has been otherwise established. See, e.g., cases cited supra note 184.
\textsuperscript{219} See, e.g., Patterson, supra note 13, at 7; see also Hughes, supra note 41, at 311-15 (exploring same suggestion in the context of Lockean labor theory).
\textsuperscript{220} See, e.g., 3 M. Nimmer & D. Nimmer, supra note 2, § 13.03[A].
\textsuperscript{222} Indeed, most courts and commentators are satisfied to invoke Learned Hand's explanation that there is no way to draw such a line: "Nobody has ever been able to fix that boundary, and nobody ever can." Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir.), cert. denied, 282 U.S. 902 (1930). In a recent article, Justin Hughes suggests that a useful reformulation of the distinction between ideas and expression within the context of Lockean labor theory would assimilate the expression portion of the distinction to the portion of a work that requires labor in its execution. See
To return to first principles, let us go back to the concept of copyright as property. The realm protected by copyright is privately owned; the unprotected realm is the public domain. What we rely on in place of physical borders, to divide the privately-owned from the commons and to draw lines among the various parcels in private ownership, is copyright law's concept of originality.

Copyright's threshold requirement of originality is quite modest. It requires neither newness nor creativity, but merely creation without any copying. The classic formulation is Judge Learned Hand's oft-quoted aside:

Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an "author"; but if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author," and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.

The man who never knew Keats but composed an identical Ode by magic is a mythical fellow who has not yet troubled the courts, but he is useful for illustrating black-letter law. Imagine a slight variation: two schoolboys encounter Keats' Ode when their teacher reads it aloud to them in class. Neither pays close attention. The first of the boys forgets the Ode utterly; the second has no conscious memory of the poem, but Keats' turns of phrase stick in his subconscious mind. Both boys grow up to be poets with no further contact with the works of Keats, and each composes the Ode on a Grecian Urn with no awareness that Keats has anticipated him. The similarities of the first poet's poem to that of Keats are sheer coincidence, and he is entitled to copyright his poem. The second poet, of course, relied unknowingly on his subconscious memory, and he is not entitled to a

Hughes, supra note 41, at 305-14.

See supra notes 60-71 and accompanying text.

See supra notes 52-58 and accompanying text.


Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936), aff'd, 309 U.S. 390 (1940); see, e.g., Olson, Copyright Originality, 48 Mo. L. Rev. 29, 32 n.16 (1983).
copyright because he copied his poem, albeit subconsciously, from Keats.

Examine another variation that is slightly more plausible. Each of our young men has joined the Quality Paperback Book Club. The Club periodically sends them unsolicited books; each glances at them, perhaps reads them through, and shelves them according to his mood. One Quality Paperback selection received by both is a historical novel recounting the lives of a family of black slaves and their descendants. Both of our subjects glance through the novel before consigning it to the bookshelf. As in the prior example, the first fellow banishes it entirely from his mind. The second has no conscious recollection of the book, but portions of it lurk in his subconscious memory. Both men proceed to write and publish historical novels about enslaved families, and the author of the Quality Paperback Book Club selection sues both of them for copyright infringement. The books are undeniably similar to hers in various expressive details. Both defendants testify honestly that they were not aware of copying anybody's prior book. According to settled authority, the second is liable for copyright infringement; the first is not.227

By now it should be obvious that the law purports to draw lines on the basis of "facts" that cannot be ascertained. While our two fictitious authors may call for opposite legal conclusions in the world of black-letter law, we have no way of telling them apart in the real world. The problem is not merely that we must determine the credibility of an author's account of his intentions; rather, the problem is that the author's intentions are irrelevant to the determination of originality versus copying.228 Copyright infringement requires neither bad motive nor guilty mind.

The determination of originality, however, is our benchmark for ascertaining the scope of an author's private property in the contents of her works. The determination of copying is our gauge for ascertaining whether she has trespassed on another author's rights. And only when we can be sure that she has never encountered the similar work of a prior author can we confidently detect the difference between the two. Courts


228 See, e.g., W. PATRY, supra note 51, at 203-04. The author's intentions are relevant in calculating damages, see 17 U.S.C. § 504(c)(2) (1988), but not in determining liability for infringement.
have avoided confronting this paradox through the use of procedural devices and presumptions that allocate the burden of proof. But where an ultimate fact is unknowable, the allocation of the burden of proof is determinative.

Thus, in an infringement action, a plaintiff may prove that the defendant copied her work by introducing evidence that the defendant had access to her work and produced a work that is substantially similar. According to most authorities, the plaintiff's evidence of access and substantial similarity shifts the burden of persuasion to the defendant to disprove copying. The defendant is permitted to rebut the inference by introducing evidence that the accused work was independently created, that is, not even subconsciously copied from the plaintiff's.

If the defendant cannot disprove exposure to the plaintiff's work, however, it is difficult — to say the least — for her to demonstrate that the similarities between the works reflect neither conscious nor unconscious copying. Lacking such evidence, the defendant might try another strategy, realizing that no plaintiff's work could surmount the test of copying to which defendants' works are subjected. If the plaintiff's work is not itself original, then the plaintiff is not entitled to a copyright. Defendant, therefore, tries to introduce evidence impeaching the originality of the plaintiff's work by producing similar works to which plaintiff had access.

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229 See, e.g., ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947). Access is typically defined as a "reasonable opportunity to view." See 3 M. Nimmer & D. Nimmer, supra note 2, § 13.02[A]. Evidence that plaintiff's work has been widely disseminated will suffice. See id. at 13-13 & n.15. The probative value of the combination of access and substantial similarity as circumstantial evidence of copying has eroded significantly in the years since the test developed because of the increasingly broad dissemination of myriad works. A reasonable opportunity to hear a copyrighted song, for example, was a more significant event before the development of nationwide radio and television broadcasting. In today's world, most of us have "access" to any work that has received even slight commercial exploitation. Courts have not, however, altered their definition of access or the access-plus-substantial-similarity equation to take account of the modern explosion in the dissemination of works.


231 See, e.g., Herbert v. Wicklund, 744 F.2d 218 (1st Cir. 1981).

232 See 2 P. Goldstein, supra note 50, § 7.2.2, at 21.

233 See supra notes 52-58 and accompanying text.
and probably subconsciously copied. Plaintiff, however, waves her certificate of copyright registration (a prerequisite to suit), which is prima facie evidence of the validity of her copyright, including the originality of her work. Since defendant cannot produce direct evidence that plaintiff copied the prior similar works and does not receive the benefit of an access-plus-substantial-similarity inference, the attack on the plaintiff's copyright comes to naught. And defendant's own certificate of registration has no probative value as a defensive measure.

Without questioning the value of such presumptions and procedural devices as housekeeping measures to make resolution of copyright infringement suits possible, I should mention that the Copyright Office has granted the certificate of registration for plaintiff's work without making any determination of the work's originality. Indeed, how could it?

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235 See 17 U.S.C. § 411 (1988). Registration prior to suit is optional only for suitors claiming infringement of works that originated or were first published in countries other than the United States. See id.

236 See 3 M. NIMMER & D. NIMMER, supra note 2, §§ 12.11[A], 13.01[A]. The statute provides that a certificate of registration obtained within five years of the first publication of the copyrighted work is "prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c) (1988). The evidentiary weight of less prompt registration certificates is left to the court's discretion. Id.

237 See, e.g., Gaste v. Kaiserman, 863 F.2d 1061 (2d Cir. 1988).

238 See 3 M. NIMMER & D. NIMMER, supra note 2, § 12.11[A], at 12-80.1 n.14. My usage of plaintiff and defendant refers to the typical case; in some cases the parties may be realigned. Thus, courts have given evidentiary effect to certificates of registration introduced by nominal parties defendant who assert copyright infringement counterclaims or defend their ownership of registered copyrights against the claims of former employees. See, e.g., Murray v. Gelderman, 566 F.2d 1307 (5th Cir. 1978); Sandwiches, Inc. v. Wendy's Int'l, Inc., 654 F. Supp. 1066 (E.D. Wis. 1987).


240 But see a short story about a Copyright Office that does: S. ROBINSON, supra note 1. In the story, the rate of copyright registration applications decreased significantly. Even so, the Copyright Office rejected two out of every five musical works submitted for registration after a preliminary computer search and refused to register many more musical works after diligent inquiry. Composers' productivity plummeted and the best of them committed suicide. See id. at 16-17.
There are two conclusions I wish to draw from the foregoing discussion. The first is that the concept of originality is a poor substitute for tangible boundaries among parcels of intellectual property because it is inherently unascertainable. The second conclusion is more controversial: The concept of authorship (within the meaning of the copyright law) and the concept of infringement (also within the meaning of the copyright law) are, for practical purposes, synonymous. I will discuss each of these conclusions in turn.

A. The Myth of the Non-Infringing Ode

Originality, it is said, is the means that copyright uses to bound the property that an author may claim under copyright. Prominent commentators discuss originality as if it were an actual legal condition that a court could ascertain. Judicial decisions similarly invoke the concept of originality. They do not, however, essay the task of determining whether and to what extent a plaintiff's work is original. The procedural devices mentioned earlier permit them to avoid that particularly slippery task.

The corollary that copyright tolerates a plurality of similar works so long as none of them is the product of unauthorized copying is also a bedrock concept of the law and is equally chimerical. Learned Hand's author of a second, identical Ode on a Grecian Urn could not successfully rebut Keats' claim of copying with evidence of independent creation be-
cause the finder of fact routinely presumes that close similarity *itself* negates any evidence of independent creation.245

This is not to suggest that every copyright claim succeeds, or even that most succeed. It is merely to suggest that despite the esteem which the concept of originality commands in copyright law, the concept is irrelevant to the resolution of actual cases. Instead, courts have evolved flexible principles that allow the finders of fact to decide infringement cases in accord with their gut impressions.

The first of these principles is the rule that the similarity between a plaintiff's and a defendant's works must be "substantial" to support an inference of copying.246 Substantiality has both qualitative and quantitative elements.247 The determination of substantial similarity is largely subjective, thus permitting the finder of fact to give effect to its intuitive judgment of the perceived equities in a case.248

The second principle allowing resolution of actual cases on subjective grounds is the privilege of fair use.249 Fair use is the darling of the commentators, who routinely nominate it to assuage any danger of overprotection;250 it has received much more limited application by contemporary

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247 See, e.g., Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947). See generally Cohen, Mashing Copyright Decisionmaking: The Meaninglessness of Substantial Similarity, 20 U.C. Davis L. Rev. 719 (1987). There has been longstanding confusion among courts and commentators about the relevance of substantial similarity if there is other evidence of copying in the record. Compare, e.g., Arnstein v. Porter, 154 F.2d at 472 ("Assuming that adequate proof is made of copying, that is not enough; for there can be 'permissible copying' which is not illicit."); *with id.* at 476 n.1 (Clark, J., dissenting) ("If there is actual copying, it is actionable, and there are no degrees; what we are dealing with is the claim of similarities sufficient to justify the inference of copying."). See also, e.g., Illinois Bell Tel. Co. v. Haines & Co., 905 F.2d 1081, 1086 (7th Cir. 1990) ("Establishing substantial similarity is necessary only when direct evidence of copying is unavailable.").
248 See W. Patry, supra note 51, at 193; Cohen, supra note 246, at 741-44.
249 See Cohen, supra note 246, at 735-44.
250 17 U.S.C. § 107 (1988); see Leval, Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture, 36 J. Copyright Soc'y U.S.A. 167, 167 (1989) ("It is now my duty to explain to you what we mean by fair use. And do you know what, ladies and gentlemen of the jury, I can't. No one can. We don't know.").
251 It can operate as a safety valve to rescue worthy defendants from the perceived injustice of an infringement judgment should the substantiality wicket fail to operate. 252

In practice, these two principles are often conflated, 253 but they allow the system to achieve rough justice in actual disputes. The fact that the borders supposedly supplied by the concept of originality are entirely illusory has not much hampered courts in deciding the cases before them. If the concept of originality in copyright cases, however, is indeed as chimerical as I have described, then its status as the sine qua non of copyright 254 raises intriguing questions.

What is it about the concept of originality that so inspires our confidence that we ignore the fact that it fails to perform the tasks we assign to it? In other property contexts, we might find that more disturbing. Imagine, for example, that the land on which my house sits is adjacent to my neighbor's, and that somewhere between our houses is an apple tree. Both of us avail ourselves of its apples, but we do not know to which of us it belongs. Should the issue arise, we believe that somewhere in the bowels of the Office of Deeds is a recorded document that supplies the answer. Believing that to be the case, neither I nor my neighbor bothers about actually visiting the Office of Deeds to determine who owns the tree. If the Office of Deeds is in fact a mere myth, a sign on the door of an

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2 See Leval, supra note 249; Litman, Copyright, Compromise, and Legislative History, 72 CORNELL L. REV. 857, 896-99 (1987); Reichman, supra note 71, at 691; infra note 252.

252 Fair use excused a wide variety of uses found technically infringing during the 1960s, 1970s, and early 1980s. See, e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980); Rosemont Enters. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1982); Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968). In two decisions in the mid-1980s, however, the Supreme Court sharply restricted the availability of the fair use privilege for defendants engaged in commercial endeavors by establishing a presumption that any commercial use of a copyrighted work was not fair. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984). Some courts have allowed defendants to rebut the presumption of unfairness with a modest showing, see, e.g., Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986), but most courts have interpreted the presumption to block the availability of the fair use privilege by any defendant in commercial competition with plaintiff. See, e.g., West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987). The decreased availability of the fair use privilege has increased the pressure on the public domain.

253 See, e.g., Cohen, supra note 246, at 745-46; Francione, infra note 71, at 575-79.

untenanted office, neither of us will discover that fact, and neither will worry that the boundaries of our properties cannot be proved.

One day, however, some folks across the street go to court in a dispute over which of them owns a cherry tree. Both confidently expect the evidence from the Office of Deeds to resolve the litigation; instead, however, the court decides the case by awarding the tree to the party who makes the best cherry pie. One would expect such a ruling to cause concern; at the least, one would expect real estate lawyers, realtors, and banks to begin to advise their customers to take up baking with a vengeance. After a series of similar rulings, scholars would write articles bemoaning the failure of courts to consult the Office of Deeds; courts would comment that the system seems unjust. Landowners inept at baking and the banks that hold their mortgages would soon insist on some alternative method for settling title to trees. Newspapers would publish editorials exhorting the city either to put a real Office of Deeds in the room with that sign on the door or to replace it with something equally concrete.

In the alternate universe of copyright law, of course, no analogous commotion has occurred. The continued esteem for the concept of originality as the rule for settling title to copyrights cannot stem from its pragmatic advantages in drawing actual boundaries, so it must be attributable to its other characteristics. Two such characteristics come to mind. The first is that the concept of originality must have enough symbolic power to subdue its vaporous reality. This symbolic power is rooted in its apparent reflection of what we would like to believe about authors and the authorship process. The second characteristic is that it must have a companion, some other force in its universe that dissipates the pressure to draw reliable boundaries. That companion, of course, is the public domain. The two characteristics are not unrelated.

B. About Authorship

Let me return to the conclusion that I labeled controversial earlier: Copyright law defines authorship and infringement so that they are indistinguishable in a concrete world.\footnote{A critic might object that the paradigmatic case of copyright infringement involves intentional piracy, and that I rely too heavily on the fact that copyright imposes liability for unintentional copy-} An author transforms her memories,
experiences, inspirations, and influences into a new work. That work inevitably echoes expressive elements of prior works. Whether it infringes the copyrights in the prior works depends upon the conscious and subconscious processes within the author's mind. We cannot verify them; neither can she. If this author's work lands in a copyright suit, the legal conclusions that will be drawn will depend in the first instance on facts (such as whether she is suing or being sued and whether she is holding a certificate of registration) that have nothing to do with the nature of the authorship process.

Why does this not seem more disturbing? Perhaps because the story seems so hypothetical. It might describe a quandary faced by the author of Terror in Bermuda who confesses to a glancing acquaintance with the earlier Danger in Jamaica, but it is not going to happen to real authors. The idea that subconscious copying occurs rarely and only at the margin springs from a fancy that I term the "romantic model of authorship." According to the romantic model, creative processes are magical and are, therefore, likely to produce unique expression. This mysterious inner being may be the repository of impressions, experiences, and the work of other authors, but the author's individual sensibility recasts that raw material into something distinct and unrecognizable.

Indeed, some would deny that "recast" is an appropriate verb to use in

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See supra notes 7-12 and accompanying text; infra text accompanying note 266.

See, e.g., R. Curtis, Beyond the Bestseller: A Literary Agent Takes You Inside the Book Business 38 (1989). For the proposition that coincidental similarity of expression is so unlikely that we can safely disregard it, see, for example, 2 P. Goldstein, supra note 50, § 7.2.1, at 9; Landes & Posner, supra note 7, at 344-46.

See, e.g., Hersey, Introduction to The Writer's Craft 3, 7-9 (J. Hersey ed. 1974).

See, e.g., Bowen, Notes on Writing a Novel, in The Writer's Craft, supra note 258, at 81.
describing the creative process. An author's artistic sensibility may be affected or shaped by what she experiences, they would argue, but the images of those experiences enter her subconscious on a one-way journey. What the subconscious disgorges is no mere recasting of preexisting material, but something wholly new. Anything less would be theft.  

This romantic model of authorship is implicit in much commentary about copyright, and it underlies our tolerance for the presumptions and procedural devices that seem to make the concept of originality do the work that the law assigns to it. Because this model establishes the distinction between creation and copying as central to our conception of authorship, copyrightability is identified with originality: A work is copyrightable if and to the extent that it is original, or created, rather than copied. We know that real authors create rather than copy, so we are comfortable with a presumption that the works they register for copyright are original. We believe in the idea that expression is created from thin air and the correlative notion that the universe of creative expression is infinite, so we are ready to conclude that similarity of expression must reflect plagiarism. And we worry not a bit that our conclusions are unverifiable because they reflect our intuitive beliefs about reality.


262 This intuitive endorsement of the concept of originality may be in part responsible for the unease over copyright in works that are interpretations of preexisting works. See, e.g., Gracen v. Bradford Exchange, 698 F.2d 300 (7th Cir. 1983). Conductors' interpretations of the musical works that their orchestras perform surely reflect authorship. Actors' portrayals of the roles that they act, directors' productions of the scripts that they mount, and violinists' renditions of the sonatas that they play cannot be distinguished convincingly from the other sorts of authorship that secure copyright protection. See, e.g., Note, Copyright in the Stage Direction of a Broadway Musical, 8 Colum.-VLA J. Art & L. 309 (1982). The copyrightability of such authorship nonetheless remains controversial. See id.; U.S. Copyright Office, Technological Alterations to Motion Pictures and Other Audiovisual Works 161 (1989). The statute does grant copyright to sound recordings of preexisting musical works, see 17 U.S.C. § 102(a)(7) (1988), but gives them fewer and more conditional rights than it accords to other works of authorship. See 17 U.S.C. § 114. Because it is difficult to isolate the contribution of an author interpreting a preexisting work from the expression already embodied in or dictated by that work, copyright protection for conductors, actors, directors, or violinists may seem inappropriate to some adherents of the romantic model of authorship.

263 See, e.g., T. Mallon, supra note 260, at 111, 120.
Let me offer, however, a competing metaphor for the authorship process, drawn from the case of *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* In discussing the copyrightability of mezzotint engravings that reproduced public domain paintings, Judge Jerome Frank observed: "A copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the ‘author’ may adopt it as his and copyright it." This formulation depicts authorship as a more modest achievement. Of course, Judge Frank was addressing the specific situation of the author who imperfectly reproduces a preexisting work, but this image of the individual whose apparent creativity is the product of imperfect eyesight, flawed execution, or unrelated circumstances can serve as a metaphor for authorship in general. The metaphor suggests that transformation is the essence of the authorship process. Some of this transformation is purposeful; some of it is inadvertent; much of it is the product of an author's peculiar astigmatic vision.

An author, be she writer, composer, or sculptor, seeks to communicate her own expression of the world. Her views of the world are shaped by her experiences, by the other works of authorship she has absorbed (which are also her experiences), and by the interaction between the two. Her brain has not organized all of this into neat, separable piles entitled "things that happened to me," "things I read once," and "things I thought up in a vacuum" to enable her to draw the elements of her works of authorship from the correct pile. She did not, after all, experience them so discretely. A snatch of a tune she heard was infected by the shape of the place where she was sitting when she heard it; her sense of a pattern she saw was colored by that day's weather; a conversation she overheard was tainted by the book that she was reading at the time. Her memories of the song, the pattern, the conversation, filtered through her experience, may in fact seem quite unlike the objects she believes they represent. The counterpoint between a sound from one memory and a smell from another may express something quite different from what either seems to say alone. But when the author mines the raw material for her next work, significant portions of it will be the stuff of the outside world mediated by her experience. It is unsurprising, then, that parts of her work will echo

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264 191 F.2d 99 (2d Cir. 1951).
265 Id. at 105 (footnotes omitted).
the works of others.286

To the author engaged in finding concrete form for immaterial impulses, each phrase, tone, or configuration of expression may seem new at the moment it takes shape. The author will often not recognize the antecedents that she has absorbed in the past and recasts and recombines as she works. Such amnesia about the sources of one’s diction is a blessing that enables the work to proceed without the paralysis that would follow from examining each accretion for echoes of prior works.

My characterization of authorship as a combination of absorption, astigmatism, and amnesia is not intended to diminish its merit. Indeed, my position is that this mixture is precisely the process that yields the works of authorship we wish to encourage through the copyright law. The strong form of this argument is that all authorship is the product of astigmatic repackaging of others’ expression, but this strong form is unnecessary for our purposes. We can rely instead on a milder and hardly controversial variation: All works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else’s works.287 If this description is accurate, it implies that the romantic model of authorship, taken seriously, would do grave disservice to the authors it seeks to describe.

Were we to take the legal concept of originality seriously, we would need to ensure that authors’ copyrights encompassed only those aspects of their works that were actually original. We could not draw the boundaries of an author’s property in the contents of her work until we had dissected


her authorship process to pare the preexisting elements from her astigmatic recasting of them. I argued earlier that such a dissection would be impossible in practical terms. If it were possible, I am confident that authors would not welcome it.

Absent such dissection, however, we risk granting broad and overlapping property rights in the subject matter of copyright. If each author's claim to own everything embodied in her work were enforceable in court, almost every work could be enjoined by the owner of the copyright in another. That prospect is at least as repellent as the specter of merciless dissection raised above.

To avoid choosing between the two, we rely on the public domain. Because we have a public domain, we can permit authors to avoid the harsh light of a genuine search for provenance, and thus maintain the illusion that their works are indeed their own creations. We can tolerate the grant of overbroad and overlapping deeds through the expedient assumption that each author took her raw material from the commons, rather than from the property named in prior deeds.

V. EXPLORING THE COMMONS

The historical development of the public domain began as a straightforward problem in statutory construction and proceeded through ad hoc articulation in series of cases decided under successive statutes. Traditional explanations of the public domain have failed to justify the cases on principled grounds. When the public domain is viewed as a commons that rescues us from our choice to grant fuzzy and overlapping property rights in unascertainable material, however, some of the apparent contradictions in lines of cases become more transparent.

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268 See supra notes 228-29, 255-67, and accompanying texts.
269 See infra notes 293-94 and accompanying text.
270 See, e.g., Reichman, supra note 71, at 683-87.
271 Accord Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 Ohio St. L.J. 517, 556 & n.232 (1990). Landes and Posner pose this problem differently, as imposing licensing and other transaction costs on authors seeking to obtain permission to copy prior works. See Landes & Posner, supra note 7, at 332. Their formulation requires that such authors be aware, or at least capable of discovering, from whom they are copying. I argue that in most cases they are not.
272 See supra notes 75-186 and accompanying text.
One traditional justification for the public domain is that the public domain is the public's price for the grant of a copyright. The public is said to grant the copyright as an incentive to persuade the author to create and publish original works that will enrich the public domain.\textsuperscript{273} Thus, copyright endures only for limited times. Some aspects of copyrighted works are thought to be so important to the public that society demands unrestricted access to them immediately, without waiting for the copyright to expire. Ideas and works of the federal government are said to possess these qualities.\textsuperscript{274}

This reasoning explains the systems cases well. Systems are important — so important that the public is reluctant to grant a fuzzy property right in systems to anyone claiming an interest. Instead, we have the patent statute under which a claimant can obtain a firmer property right, but only after making a significantly more specific showing of the basis for her claim.\textsuperscript{275} In the absence of such a showing, the public claims even original systems as its own.

Neologisms furnish another straightforward example. Coined words are not copyrightable\textsuperscript{276} despite the fact that some of them are demonstrably original.\textsuperscript{277} I am unaware of any who would dispute that neologisms belong in the public domain, but one could not plausibly argue that they originated there. Granting copyright protection to an invented word would seem at first blush to be utterly harmless, for it would remove nothing from the commons that was there before the word's author created it. Individual words, however, tend to seep into the language. We hear them, absorb them, and use them; we think in them whether they are old, familiar words or new, familiar words. Language is sufficiently crucial that we insist on unrestricted access to words, even new words. We do have a trademark system for establishing property rights in words, but again we

\textsuperscript{273} See, e.g., Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984); Patterson & Joyce, supra note 71, at 790-91; sources cited supra note 13.
\textsuperscript{274} See, e.g., 1 P. Goldstein, supra note 50, §§ 2.3.1.1, 2.5.2; 1 M. Nimmer & D. Nimmer, supra note 2, § 2.03[D]; W. Patry, supra note 51, at 30-35, 51-55; Denicola, supra note 14, at 523-24.
\textsuperscript{275} See supra notes 41-43 and accompanying text.
\textsuperscript{277} See G. Brandreth, The Joy of Lex: How to Have Fun With 860,341,500 Words 9 (1980) (aerosol; automation); W. Safire, On Language 9 (2d ed. 1981) (deplane); id. at 282 (uptight); id. at 289 (pseudoevent). Consider also "palimony," "yuppie," "significant other," and "Ms."
require a stronger and more specific showing to support the claimant’s title.\textsuperscript{778} The trademark statute permits a word to be withdrawn from the public domain only if, and only to the extent that, it has acquired a proprietary meaning.

The current dispute over copyright protection for computer software user interfaces\textsuperscript{779} raises analogous issues. User interfaces are themselves languages — the languages people use to operate their computers.\textsuperscript{880} Because user interfaces have the attributes of languages, users learn them as if they were languages.\textsuperscript{881} To the extent that individual commands or keystrokes\textsuperscript{882} in popular user interfaces are understood by users as individual words, they must belong to the public domain simply because they are elements of language.\textsuperscript{883} The public’s demand for unrestricted use of language will not tolerate private ownership of words or word-analogues under the rubric of copyright.

This quid pro quo justification, however, cannot explain the cases denying protection to \textit{scènes à faire}.\textsuperscript{884} Moreover, it cannot account for the line of cases granting protection to facts in directories and catalogs while denying protection to facts in other sorts of works. Indeed, under traditional justifications for the public domain, the directory case law makes no sense. If we decline to protect information because the law assimilates facts to ideas and systems,\textsuperscript{885} then the cases should rigorously dissect the information in directories and catalogs from the form in which the information is expressed. If protection is denied to information because facts are not original,\textsuperscript{886} then works conveying information in unoriginal form (alphabetical, for example) should receive little or no protection under the copyright law.

\textsuperscript{778} See supra notes 44-46 and accompanying text.
\textsuperscript{880} Indeed, in common parlance, user interfaces are the means by which users “communicate with” their computers.
\textsuperscript{882} E.g., pressing the function key “F7” to exit the program.
\textsuperscript{883} See Menell, supra note 181, at 1098-1102.
\textsuperscript{884} See supra notes 128-33, 213-18, and accompanying texts.
\textsuperscript{885} See, e.g., 1 P. Goldstein, \textit{supra} note 50, § 2.14; Denicola, \textit{supra} note 14, at 525-26.
\textsuperscript{886} See, e.g., 1 M. Nimmer & D. Nimmer, \textit{supra} note 2, § 2.11[A]; Denicola, \textit{supra} note 14, at 525; Gorman, \textit{supra} note 13, at 571 n.29.
Had the cases denying copyright protection for facts begun from a firm consensus that facts belonged to the public domain, they would likely have developed along precisely those lines. Most of the cases defining the public domain, however, involved courts carving out exceptions to authors’ claimed property rights in order to alleviate pressure exerted by the breadth of plaintiffs’ claims. That pressure, which strained the integrity of copyright law, was imposed not by plaintiffs’ greed but by the inherent limits of the concept of originality. To illustrate how originality generates this pressure and how the courts’ resort to the public domain helps to dissipate it, I propose to look again at the public domain case law from the viewpoints of potential defendants, potential plaintiffs, and the system of copyright law as a whole.

A. Protecting Potential Defendants

The dangers of overbroad and overlapping property rights in works of authorship seem most obvious when considering the plight of inadvertent infringers. Ideas, systems, themes, and plots are not easily traced. It is difficult to ascertain the source of an idea and impossible to prove its provenance in any meaningful sense. A court cannot unzip an author’s head in order to trace the genealogy of her motifs; indeed, the author herself usually cannot pin down the root of her inspiration. Giving an author a copyright in something that is a basic building block of her art thus risks denying that basic building block to all other authors who come into even fleeting contact with the first author’s work. It is our inability to trace or verify the lineage of ideas that makes it essential that they be preserved in the public domain.

Facts seem more verifiable. To the extent that they are drawn from preexisting sources, the sources may be checked. The question “Where is that fact from?” is a question that often seems to have an answer. Nonetheless, protecting facts can pose a separate problem. We often learn the facts we encounter and incorporate them into our views of the world in which we live. Once they have taken residence, they will color the things we believe that we see, and we are helpless to pry them out again in order to sit down and create works of authorship. A rule requiring authors effectively to forget the facts learned from other authors would be destructive and impossible to enforce.
Courts nonetheless imposed just such a rule in the directory cases. The current prevailing rule requires the author of a second directory first to go out and duplicate the original research and only then to consult the pre-existing directory for verification. This is a wasteful rule, certainly, but perhaps it is a comprehensible one. Courts may have responded to an intuitive sense that it would be unlikely for an author to make inadvertent use of directory listings because we do not normally learn the contents of directories. When courts in the directory cases, then, protected the facts in plaintiffs' directories, they did not prohibit defendants from consulting the same preexisting sources that plaintiffs had consulted. As a result, plaintiff's copyright did not remove facts from the public domain; it simply prohibited a single, albeit more efficient, route to unearthing them.

From the viewpoint of analytical order, it seems indefensible to protect the facts in directories with a zealosity unparalleled in other cases of factual works. If, however, one is in the business of defining exceptions in cases in which asserted property rights would cripple the enterprise of authorship, the distinctions that courts drew have some intuitive appeal. If the chief threat of defining the borders of property in works of authorship is that it will penalize defendants for inadvertent or inevitable use of common building blocks, then the directory cases seem to pose no danger.

Thus, the fact cases can be reconciled if we understand the principle of seepage: Some aspects of works of authorship are easily absorbed, and once we have absorbed them, we are likely to make them our own and lose sight of their origins. Ideas, information, short phrases, simple plots, themes, stock scenes, and utilitarian solutions to concrete problems all


288 Plaintiffs recovered for copyright infringement only when they succeeded in proving, typically by showing common errors, that defendants had copied their directories from plaintiffs rather than independently collecting their facts. See, e.g., List Publishing Co. v. Keller, 30 F. 772 (G.C.S.D.N.Y. 1887). See generally Lurvey, supra note 137.

289 See Denicola, supra note 14, at 541. The distinction is, of course, a largely illusory one in the real world. Requiring a second author to obtain facts from independent sources before consulting plaintiff's work is functionally indistinguishable from granting copyright protection to the facts in plaintiff's work.
share this characteristic. It makes them difficult to trace. That difficulty
should make us leery of granting exclusive property rights in such things
without requiring the claimant to offer significant proof in support of her
claim of ownership. We have, however, elected to adopt a system that
confers property rights without requiring any concrete proof of owner-
ship, because we value the property rights and recognize that in many
cases such proof would be impossible to obtain. To keep such a system
from defeating its ends, we leave the elements subject to such absorption
free from private claims, even in cases in which we could determine their
initial source. But we do not concern ourselves with this problem in situa-
tions in which the works in question seem unlikely to be absorbed. In
such cases, there seems to be no imperative reason for separating pro-
tectible from unprotectible elements.

Despite its intuitive appeal, however, the picture of the public domain
that emerges from the distinctions among the fact cases is too limited. It
emphasizes defendants' motives, supporting a vision of the public domain
as a commons that exists chiefly for the benefit of the defendant copying
unintentionally and in good faith. The danger of such a view is that it
tempts us to abandon the commons whenever proof of copying seems less
circumstantial. But here it is useful to recall that many of the cases defin-
ing the borders of the public domain involve no such ambiguous situation.

Indeed, if we look only at the interest of potential defendants in avoid-
ing liability for copying that they would be powerless to prevent, then the
film cases make no sense at all. In some of the film cases, defendants had
 provisionally admitted copying for the purpose of a motion to dismiss. In
others, the evidence of intentional copying was compelling. Yet
courts carved out a commons that immediately benefited parties who had
apparently made deliberate use of others' works. The solution to this ap-
parent paradox is the realization that the public domain is not merely a
haven for well-meaning potential defendants. It benefits potential plain-
tiffs as well.

B. Protecting Potential Plaintiffs

The commons provides significant advantages for parties plaintiff. Because we can rely on the commons, we do not require plaintiffs to prove the originality of their works. We could take another approach, of course: We could insist that plaintiffs bear the burden of demonstrating their works' originality before enforcing their claims. As we currently define originality, however, most plaintiffs would be unable to muster the evidence required, and few would recover.

The principle of seepage is not limited to such material as will inevitably seep from the works of potential plaintiffs into the works of potential defendants. It is equally likely that such material seeped into the works of the potential plaintiffs themselves. To the extent that such elements seeped into plaintiffs' works from other prior works, any property rights in these elements will overlap the claims of others significantly. To resolve the overlap, it would be necessary to require plaintiffs to prove the bases for their claims. If we permit them to do so, we invite the introduction of evidence purporting to prove — or disprove — actual originality. Even raising the possibility that such elements could be protected if plaintiff could only prove their provenance would effectively impose that test on all such cases. A plaintiff required to prove originality of all aspects of her work in order to recover for copyright infringement would be well advised to decline to bring suit.

The absence of a public domain would make copyright meaningless for most plaintiffs if we were to require them to bear the burden of proof on the originality of their works, at least as long as proving originality remained impossible as a practical matter. A second implication is more subtle: Even if proving originality were not impossible, it would be exceedingly unpleasant. It would take the magic away. Authors could no longer safely give free rein to their subconscious minds, and their muses would need to be available for deposition. Many would discover that creations they believed were their own were, at least in the eyes of the law, mere copies of the works of others.

292 See supra notes 267-71 and accompanying text.
293 Others have argued that facts, ideas, or scènes à faire are by their nature unoriginal. See sources cited supra notes 192-94. My point is a little different: It is not that these elements are necessarily unoriginal, but rather that they may be.
Such a system would probably not endure for long. Forced to face the flaws of a system based on actual proof of originality, we would undoubtedly abandon the concept. But, to the extent that the idea of originality embodies things that we would like to believe, the presence of the public domain has made it possible for us to do so.

The essence of my argument is this: Originality is a conceit, but we like it. To the extent that we are tempted to forget that originality is a conceit, it can be a dangerous principle on which to base a system of property. Most authors would agree in the abstract that the raw material that authors use in their work must be left free for all authors to use. Individual authors can nonetheless dispute the applicability of this abstract principle to a situation in which they see something that they think of as their own in a later author's work. We could force each copyright owner to demonstrate her right to claim such aspects of her work by requiring her to prove their originality, but we would have to accept that she would often be unable to do so in any meaningful way. We could instead tolerate a world in which all authors must seek permission from each of their predecessors, but few new works of authorship would be likely to appear in such a system. Instead, we rely on a commons, and we draw the boundaries of that commons by recalling the fact that the concept of originality, we purport to rely on is a mere apparition that we cannot afford to test.

C. Rescuing the System

There is a third set of interests threatened by the phantasm of originality: the copyright system's interests in preserving its own integrity. The problem of overlapping claims, alluded to above, invites gridlock in the courts as parties request judicial resolution of insoluble disputes. This set of interests, I think, best explains the recent impulses of some courts to expand the borders of the commons. To illustrate this problem, I offer a final parable.

Imagine the familiar plot of a novel for children. You remember this book: Our heroine (hero) is an unpopular, bookish sort, small for her age and, typically, bullied by her more popular classmates. One day in the

294 See, e.g., Yen, supra note 271, at 556.
295 See cases cited supra note 184.
public library she finds a book she has never seen before: worn, plump, and red. (For some reason, the book always seems to be red.) It is a magic book. Indeed, it seems to be written especially for our heroine (hero). She reads the book, certain at first that it is some sort of joke, but then discovers that the magic in the book really works. It takes her to strange alternate universes, where she meets alien creatures and ultimately performs brave deeds that save at least a small part of the world.\textsuperscript{286} The class bullies no longer trouble her.

Imagine as well a contemporary author of books for children who has just finished a manuscript along these lines. Her lawyer remarks in passing that she recalls reading something of this ilk to her son. (The son was entranced.) Indeed, now that she thinks of it, she has a vague recollection of enjoying a similar book borrowed from the library some thirty years ago. Our author becomes concerned.

A dedicated paralegal spends two days in the municipal public library and turns up twelve versions of this plot. In each, the book is red. The author, who cannot recall having read any of them, but is unable to rule out the possibility, asks her lawyer to explore the question whether any of these twelve authors would object to publication of her book. When contacted, the first of them assures the lawyer that he has no objection, as long as the novel’s hero is a young fellow, with a large dog, getting over his parent’s recent divorce. The second author is similarly obliging, on the condition that the book’s central character be a young Hispanic woman with a part-time job in a diner. The third demands a Native American, the fourth a Jew, the fifth a WASP.

At this point, our author and her lawyer would like to file an action to determine with whose conditions she must comply. Imagine now that they file an interpleader suit, depositing the plot of the novel with the court and joining the dozen prior authors as defendants. Each of the dozen files a counterclaim to quiet title in the plot; five other authors of similar stories seek to intervene.\textsuperscript{297}


\textsuperscript{297} For other variations on the magic book story with books in different hues, see, for example, L.F. Baum, Glinda of Oz (1920); R. Graves, The Big Green Book (1962); E. Nesbit, The Book of Beasts, in The Last of the Dragons and Some Others (1975); P. O’Shea, The
The court before which this suit is brought faces a quandary. There is no rule of decision that can resolve the issues in dispute. Theoretically, each of the authors before the court may be entitled to claim ownership of the plot on the ground that she originated it; it is, after all, the sort of plot that any bookish child with a taste for fantasy might have thought up on her own. On the other hand, any or all of the authors may have consciously or subconsciously copied the plot from some prior source. The question cannot be determined directly, and the presumptions and procedural devices that usually make this determination unnecessary are of no assistance here, because the court has no basis on which to apportion the benefits and burdens of the procedural devices among the parties before it.

When we are confronted with an insoluble problem in overlapping deeds, pragmatic concerns may outweigh doctrinal ones. It ceases to matter why this plot is claimed by so many authors; the important thing is that it is. The court could dismiss the case on procedural grounds — the plot of a novel is after all an unfamiliar res. This rescues the court from the spectre of having to make any decision, but it leaves the children’s book industry in disarray. Next week, some composers are sure to show up with a dispute over chord progressions. The court could instead award exclusive rights in the plot to one particular author — perhaps the one who bakes the best cherry pie. This solution would seriously inconvenience the other authors, who would presumably incur liability for their use of the plot unless they could disprove access to that author’s book. The court could avoid that particular difficulty by awarding the plot to all of the authors before it. This answer would, of course, hinder the authors of the future, but perhaps the world has enough literature about magic books already. Finally, the court could decide that without some principle on which to base a decision, the plot must belong to the commons. This decision relieves the parties of having to produce inconclusive evidence of originality, relieves the court of having to reach a decision with no basis for doing so, and relieves the law of having a predicament posed by overlapping deeds.

My parable is about plots, of course, but it is also a metaphor for scènes à faire. Scènes à faire are common; they are the property shared

among the overlapping deeds. Some scènes à faire are common because they are trite; some become trite because they are common; for others it is hard to figure out why they appear so frequently.288 There is no particular reason why a magic book should be red; if the book is always red or even often red, however, that is a scène à faire. When we grant deeds without doing title searches, we risk significant overlap. We can often fashion rules to permit us to decide between two or three competing claimants, if not necessarily on strictly doctrinal grounds.289 At some point, however, the frequency of overlapping claims to something in particular will itself become the problem. Assigning that something to the commons is the copyright law's most practical defense.

This leads me to an observation about some recent cases. Some courts have been increasing their resort to the scènes à faire doctrine during the last decade.300 These courts have been responding to a real and troubling trend. If access to a prior work is the basis for presuming that similarities represent actionable copying,301 then one would expect a marked increase in everybody's access to everything to carry with it increasing inferences of infringement. The copyright law has defined access as "reasonable opportunity to view" since before the development of modern methods of mass dissemination.302 Disproving access is, in most cases, no longer possible.303 It is not surprising, then, that the pressure of overlapping claims to common material has increased and that the courts have felt it necessary to rely on the public domain in ever more sorts of cases. We may be approaching an era in which familiar solutions to the chimera of originality become insufficient; there may soon come a day when we have to give the notion up.

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288 Thus, four theatrical motion pictures based on nearly identical age-switching premises were released in the U.S. during the 1987-88 season. Compare Big (Fox 1988) with 18 Again (New World 1988), Vice Versa (Columbia 1988), and Like Father, Like Son (TriStar 1987). Producers and critics attributed the similarities among the films to "something in the air." See, e.g., Maslin, Today's Alter Has a Smaller Ego, N.Y. Times, June 12, 1988, § 2 (Arts & Leisure), at 29, col. 1; Sterritt, A Plot Gimmick That May be Ready to Retire, Christian Sci. Monitor, Apr. 29, 1988, at 33, col. 1; Kempley, The Vices of "Versa," Wash. Post, Mar. 11, 1988, at D7, col. 1.

289 See supra notes 246-52 and accompanying text.

300 See supra note 184 and accompanying text.

301 See supra notes 229-31 and accompanying text.

302 See supra note 229.

303 See, e.g., T. Mallon, supra note 260, at 221.
Copyright law purports to define the nature and scope of the property rights that it confers by relying on the concept of originality. In fact, originality is an apparition; it does not, and cannot, provide a basis for deciding copyright cases. The vision of authorship on which it is based — portraying authorship as ineffable creation from nothing — is both flawed and misleading, disserving the authors it seeks to extol. If we took that vision seriously, we could not grant authors copyright rights without first dissecting their creative process to pare elements adapted from the works of others from the later authors' recasting of them. That dissection would be both impossible and unwelcome. If we eschewed that vision but nonetheless adhered unswervingly to the concept of originality, we would oblige each author to solicit the permission of her predecessors. In such a world, most works of authorship would find themselves enjoined by the owners of other copyrights.

The public domain rescues us from this dilemma. It permits us to continue to exalt originality without acknowledging that our claims to take originality seriously are mostly pretense. It furnishes a crucial device to an otherwise unworkable system by reserving the raw material of authorship to the commons, thus leaving that raw material available for other authors to use. The public domain thus permits the law of copyright to avoid a confrontation with the poverty of some of the assumptions on which it is based.