ELEMENTAL COPYRIGHT: THE COMPLEXITY OF IDEAS AND THE ALCHEMY OF MIND-SHARE

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INTRODUCTION

Once upon a time, in a little case involving whether a phone book could gain copyright protection, the Supreme Court indicated that the distinction between ideas and expression was the "fundamental axiom of copyright law."[1] This could scarcely be said to be an exaggeration, as the federal courts and various legal commentators have spilled much ink discussing the importance of this "idea/expression dichotomy."[2] The dichotomy is at the heart of the various

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[1] Feist Publ'ns, Inc. v. Rural Tel. Serv., 499 U.S. 340, 344-45 (1991).

[2] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (explaining how the idea/expression dichotomy is essential to the balance between First Amendment protections

doctrines created to limit what is copyrightable and what is considered infringement. However, defining the distinction between idea and expression has often proved as difficult as grasping moonlight, and much of the discussion of the dichotomy is about this difficulty.[3] This Note attempts to provide a new way of thinking about which works are protectable and which are not, that sidesteps the poorly defined distinction between ideas and expressions. It also seeks to show how this framework offers a more organic definition for substantial similarity, and in doing so also attempts to explain a phenomenon where popular and novel works are overprotected, to the detriment of other creators and the public domain.

Specifically, Part I of this Note will propose a framework that defines ideas, not as monolithic and indivisible concepts distinct from expression, but on a continuum of complexity, and will show how a definition of infringement arises naturally out of that distinction. Part II further explores how the fame or novelty of a work can affect this framework, explaining how copyright can protect certain uniquely popular or strikingly new works based on elements traditionally identified as ideas due to their strong 'mind-share.'[4] Part III extends the framework to characters in an attempt to offer a unifying theory of character protection, and shows how highly popular characters in these works can be granted overly broad protection.[5] Finally, Part IV explains how the protection granted to once unique and popular works can contract over time as their fame decreases.[6]

and the rights granted by copyright law); Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1223-24 (1993) (discussing the importance of the distinction between ideas and expression).

[3] *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (describing how the boundary between protectable expression and unprotectable idea is very slippery).

[4] *See, e.g.*, Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 & n.9 (9th Cir. 1977) (finding that defendants infringed the concept of a magical land filled with surreal puppet characters); Daly v. Palmer, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3,552) (granting copyright protection to the idea of the dramatic rescue of a character tied to a train track).

[5] *See* Detective Comics v. Bruns Publ'ns, 111 F.2d 432, 433 (2d Cir. 1940) (granting broad protections to the expression of Superman which appear to extend even over the idea of a superhero). *See also* Nat'l Comics Publ'ns v. Fawcett Publ'ns, 191 F.2d 594, 603 (2d Cir. 1951); Nat'l Comics Publ'ns v. Fawcett Publ'ns, 93 F. Supp. 349, 352, 359 (S.D.N.Y. 1950).

[6] Compare *Bruns Publ'ns*, 111 F.2d at 433, which granted broad protection to the character of Superman, with later cases, *Warner Bros. Inc. v. Am. Broad. Cos.* (*Warner Bros. I*), 654 F.2d 204, 209 (2d Cir. 1981), and *Warner Bros. Inc. v. Am. Broad. Cos.* (*Warner Bros. II*), 720 F.2d 231, 243 (2d Cir. 1983), which granted the Superman character much narrower protection.

I. FIRST PRINCIPLES

A. *"Ideas" vs. "Expressions"*

In the simplest formula of the idea/expression dichotomy, expressions are capable of receiving copyright protection, while ideas are not.[7] However, as simple as this formulation is, courts and commentators often have great difficulty explaining where the actual distinction between them lies.[8] *Williams v. Crichton* offers a good example of the ambiguity hidden in a court's analysis of what is protectable expression and what is a mere idea.[9] Geoffrey Williams had written a series of stories involving children who visit a "dinosaur zoo" and have adventures involving the escape of some of the captive monsters.[10] Years later, Michael Crichton published *Jurassic Park*, a story involving characters – including two children – who, while taking a tour of a "dinosaur zoo," must cope with the escape of the dinosaurs.[11] Williams sued, arguing that Crichton's work was an infringement of his copyrights in his *Dinosaur World* stories. However, the district court held that there was no infringement, and on appeal the Second Circuit affirmed, basing its opinion in great part on the difference between ideas and expressions.[12]

While the court enunciated the rule that expressions are copyrightable, but ideas are not,[13] it stressed that any distinction between them is "elusive."[14] However, in spite of such elusiveness, the court forged ahead, stating without analysis and without enunciating an actual test, that a series of adventures based on a dinosaur zoo was merely an unprotectable "idea."[15] Such a finding allowed the court to dismiss the many similarities between the two stories, including their common settings on "lush, tropical" islands, main characters including a dinosaur-loving boy and his less enthusiastic sister, and scenes where the characters must camp out in the park overnight and flee escaping dinosaurs.[16] Because these were "ideas," in the eyes of the court, Williams could not claim protection for them and therefore even if Crichton took these elements directly from a reading of *Dinosaur World*, under copyright law, he was free to do so.

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[7] 17 U.S.C. § 102(a) (2006) ("In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described . . . .").

[8] *See Peter Pan*, 274 F.2d at 489; *Nichols*, 45 F.2d at 121.

[9] Williams v. Crichton, 84 F.3d 581, 587-89 (2d Cir. 1996).

[10] *Id.* at 583-85.

[11] *Id.* at 585-87.

[12] *Id.* at 587-89.

[13] *Id.* at 587 ("It is 'a principle fundamental to copyright law' that 'a copyright does not protect an idea, but only the expression of an idea.'" (quoting Kregos v. Associated Press, 3 F.3d 656, 663 (2d Cir. 1993))).

[14] *Id*.

[15] *Id*. at 589.

[16] *Id*.

This is not to say that the Second Circuit's analysis was incorrect. There are likely many fundamental differences between a series of short children's books and a thriller about the hazards of hubris in science, and thus it is equally likely that the two works were not so similar as to support a finding of copyright infringement. However, the example does show how a finding of infringement can depend greatly on what a court calls an idea and what it considers to be protectable expression. Additionally, it shows how such a crucial determination is left unexplained. Such a lack of explanation in this and similar cases leaves the impression that the results of copyright cases have more to do with gut feelings about what is an "idea" or an "expression" than with any consistent principles, especially when courts themselves state that there is no reliable way to separate them.

However, this Note argues that much of this uncertainty arises from the concept of an idea/expression dichotomy itself, because this dichotomy is deeply misdescriptive. The concept of "a love story" and the entire play *Romeo and Juliet* are both ideas and they both can be rendered as expressions. What separates them is their complexity and how easily each could be used in future works. "A love story" is both a very simple idea and is a part of thousands of creative works, while the series of dialogues and directions comprising *Romeo and Juliet* are both very specific and very complex. In order to find out what is really meant when a court invokes the dichotomy, the focus should not be on finding a magical transformative quality that separates ideas from expressions, but rather on the implicit analysis of the complexity of the ideas in question.

B. *Fundamental Particles*

Because part of the problem of understanding the idea/expression dichotomy arises from poorly defined terms, it is helpful to start at the simplest level and move forward. It is possible to reduce all mental constructs to two fundamental types of "intellectual particles": the idea and the fact. The concept of the "idea" has a long history, but at its simplest it can be defined as a creative mental construct.[17] "Facts," however, describe a realm of constructs that "do not owe their origin to an act of authorship."[18] Such descriptions – discoveries of the world as it is – can include raw historical information, scientific formulae, and statistical data.[19] Facts are uncopyrightable because, by definition, they exist without human agency at all.[20] Therefore, ideas are the main focus of copyright law.

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[17] *See* Gund, Inc. v. Smile Int'l, Inc., 691 F. Supp. 642, 644 (E.D.N.Y. 1988) (defining an idea as "any conception existing in the mind" based upon mental "understanding" or "activity"); Kurtz, *supra* note 2, at 1243 (suggesting that an idea could be defined as "something that exists within a human mind").

[18] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

[19] *Id.* at 347-48.

[20] "This is because facts do not owe their origin to an act of authorship. The distinction

In this framework, ideas include ideal forms of real objects and imaginary mental constructs, both of which fundamentally contain a creative element.[21] The creative nature of imaginary ideas is fairly obvious. Think of a unicorn, a creature that exists only as a mental construct.[22] The creative aspect of ideal forms is somewhat more subtle, yet can be shown through a simple experiment. Ask five people to think of a "shoe" and it is likely that none of them will describe the same shoe, as each imagines a different ideal piece of footwear.[23] The differences between these ideal shoes arise because people each have their own mental constructs of ideal objects.

Even though simple ideas have a creative element, one reason we might not want to grant copyright protection for them is that bare ideas are too generic and thus too broad.[24] Because simple ideas are often either components or descriptors of a large number of more complex ideas, a monopoly over a simple idea would deprive other authors of a wide swath of potential creations. Thus, courts have time and again indicated that the prohibition against granting copyright in ideas is necessary to prevent the rights holders from obtaining too broad a monopoly that would foreclose future use of not only those ideas, but many others that include them.[25]

C. *Complexity Through Bundling*

Thus far, from the perspective of copyright, the two types of elementary intellectual particles, facts and simple ideas, are not particularly interesting. Neither type of particle is deserving of copyright;[26] alone such particles do not confer much information. However, it is possible to imagine bundles of these

is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. . . . [O]ne who discovers a fact is not its 'maker' or 'originator.'" *Id.* at 347 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).

[21] *See* Kurtz, *supra* note 2, at 1242.

[22] According to Augustine: "[T]he mind has the power to add to or subtract from things, to alter the deposits left in the memory by experience. Thus, if we add to or subtract from the form of a raven, we will imagine a creature that does not exist in nature." *Id.* at 1242 n.122 (quoting UMBERTO ECO, ART AND BEAUTY IN THE MIDDLE AGES 108-09 (Hugh Bredin trans., 1986)).

[23] *See* Morgan M. Stoddard, *Mother Nature as Muse: Copyright Protection for Works of Art and Photographs Inspired by, Based on, or Depicting Nature*, 86 N.C. L. REV. 572, 609-10 (2008) (describing a similar thought experiment with the idea of a "jeweled bee pin").

[24] *See, e.g.*, Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971); Detective Comics v. Bruns Publ'ns, 111 F.2d 432, 434 (2d Cir. 1940).

[25] *See* Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 509 F.2d 64, 65 (2d Cir. 1974) (per curiam); *Kalpakian*, 446 F.2d at 742.

[26] "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . ." 17 U.S.C. § 102(b) (2006).

fundamental intellectual units describing greater levels of creative complexity.[27]

First, consider a bundle of facts alone, such as a listing of telephone numbers and addresses of every person in a given region. We could designate such a collection as "data."[28] No matter how large or informative that bundle of data becomes, it would be uncopyrightable because it still completely lacks creativity.[29]

Next, one could imagine a bundle of ideas.[30] It is possible to imagine a random list of ideas which would likely be as unworthy of copyright as the data described above. It is more interesting, however, to consider a grouping of interlocking ideas that modify each other coherently.[31] Such a coherent idea bundle could describe complex mental constructs.[32] The construct of "a lonely reindeer with a red nose" therefore can be seen to consist of many discrete elements such as loneliness or a red nose.[33] Significantly, ideas can be combined synergistically, greatly increasing the creative possibilities.[34] As described below, expressions of those idea bundles with enough original creativity can receive copyright protections.[35]

Finally, consider instead a mixture of the two types of elements, where facts are filtered through a series of ideas. If the ideas were creative enough, the bundle would cease to be pure data, instead becoming a factual compilation.[36] As an example, filtering the above-mentioned address and telephone data through the idea bundle, "What would be useful to Chinese-Americans?" would create an expression whose facts were arranged by a creative and

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[27] *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 163-66 (Peter H. Nidditch ed., Clarendon Press 1975) (1690).

[28] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (defining data as "wholly factual information not accompanied by any original . . . expression").

[29] *See id.* at 345 ("Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place."); *id.* at 347-48.

[30] *See* LOCKE, *supra* note 27, at 163 ("Combining several simple *Ideas* into one compound one, and thus all Complex *Ideas* are made.").

[31] *See id.* at 163-66.

[32] *See id.* at 164.

[33] Each of which could be composed of further idea elements, such as red and nose, or alone and sad.

[34] *See* LOCKE, *supra* note 27, at 164 ("In this faculty of repeating and joining together its *Ideas*, the Mind has great power in varying and multiplying the Objects of its Thoughts, infinitely beyond what *Sensation* or *Reflection* furnished it with . . . .").

[35] *See infra* notes 56-66 and accompanying text.

[36] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) ("[C]hoices as to selection and arrangement [of facts], so long as they . . . entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.").

original organizing principle.[37] Such a factual compilation would be deserving of a copyright, albeit one limited to this creative organizing principle.[38]

D. *Creating Expression*

The above section premised the existence of two types of fundamental intellectual particles and indicated that they can combine to form copyrightable expressions. However, what exactly is required for a bundle of ideas to become eligible for copyright was not explained. The answer to that question requires an understanding of the definitions and requirements of copyright law. Congress has limited copyright protection to "original" creations.[39] This originality requirement is not to be confused with a requirement for novelty;[40] nor does copyright protect only the first version of a work.[41] Instead, originality is a constitutional requirement linking a particular work to a particular creator.[42]

1. Degrees of Choice

The requirement that a particular work must be linked to a particular creator to be eligible for copyright protection informs when a bundle of fixed ideas become copyrightable. As argued above, ideas contain a creative element because they are mental constructs.[43] The same idea will be constructed differently in the minds of different people.[44] This principle offers one explanation for the prohibition on copyrighting ideas. The idea of a "shoe" cannot be linked to a particular author, because the possible mental constructs of a shoe are boundless. By granting a copyright monopoly over the idea of a shoe to one person, a court would in fact be granting a monopoly over the boundless range of all the different types of shoes. Most simple ideas and

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[37] *See* Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc., 945 F.2d 509, 514 (2d Cir. 1991).

[38] *See id.*

[39] 17 U.S.C. § 102(a) (2006) ("Copyright protection subsists . . . in original works of authorship . . . .").

[40] *See Feist*, 499 U.S. at 345 ("Originality does not signify novelty . . . .").

[41] Thus if two individuals create by chance identical works deserving of copyright, both will be granted protection. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (stating that a person who, without knowledge of the original, re-creates a famous poem could copyright that work).

[42] The Copyright Act is empowered by Congress' Constitutional power to grant "[a]uthors . . . the exclusive [r]ight to their respective [w]ritings." U.S. CONST. art. I, § 8, cl. 8. The Supreme Court has consistently held that this grant requires that copyrights may only be granted in works that can be linked directly to their authors, i.e., that are original to them. *See, e.g.*, *Feist*, 499 U.S. at 346-47; Goldstein v. California, 412 U.S. 546, 561 (1973); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

[43] *See supra* notes 21-23 and accompanying text.

[44] *See supra* note 23 and accompanying text.

many bundles of ideas are equally boundless. A monopoly over the idea bundle of a "woman's red shoe" would still foreclose millions of variations.[45] However, as idea bundles become larger – that is, become more complex and detailed – it is possible to show that they arose from a specific mental construct, i.e. that they are original.[46] Additionally, the hazards of granting too broad a monopoly do not apply to highly complex and detailed ideas because such ideas are less likely to be necessary to future creative works. Thus, to be protectable, a bundle of ideas must be complex and detailed enough that it can be reasonably attributed to a particular creator.[47] When analyzing a work, courts will often discuss how many "choices" an author made.[48] This is just another way of discussing the complexity of the idea bundle involved to determine if it is the product of a specific mental construct.

It is important to point out, however, that merely because a bundle of ideas can be attributed to a particular creator, does not necessarily mean that it is copyrightable. For policy reasons, certain linkable bundles are not eligible for

[45] This is at the heart of Judge Learned Hand's discussion of levels of abstraction in *Nichols v. Universal Pictures*:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). Although Judge Learned Hand performs the process in reverse (that is he starts with a complex expression and removes elements), the end result would be the same. The point in his "series of abstractions" where the bundle of ideas is no longer protected is where it can no longer be reasonably attributed to a single mental construction – i.e. to a particular author.

[46] *See* Todd v. Montana Silversmiths, Inc., 379 F. Supp. 2d 1110, 1113 (D. Colo. 2005) (discussing how, although it is possible to see *Hamlet* as a series of letters and the *Starry Night* as a series of brush strokes, it is the way that each series was combined that is unique and original).

[47] This is not a requirement that every work be linkable to only one person, as many people can create a work together as joint authors. Additionally, it is not to say that for a work to be copyrightable, it must be bound to only one creator forever. It is a well established principle that if a work is spontaneously created by multiple authors, each can have a valid copyright. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936). Instead, all that is meant is that for authors to gain protection for their work, they must show evidence of elements linking the work to *them*.

Finally, this is not a call for dissection of an expression, mechanistically slicing it up into its constituent elemental ideas. Indeed, this Note advocates the opposite by suggesting that while an expression may be seen as being composed of many simpler ideas, it is the gestalt of how they interact, often synergistically, that creates a work that is attributable to a particular author.

[48] *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991); Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 36 & n.6 (1st Cir. 2001).

copyright protection. The most important of these are useful items, which are exempt from copyright in an attempt to avoid interference with patent law.[49]

Similarly, it is important to see that not all fundamental mental elements are capable of such limitless mental construction. Facts, by their nature, are constructed in the same way regardless of the person.[50] Additionally, certain ideas can only be constructed in limited ways. The ideas of an image of a particular vodka bottle,[51] or of a map of existing gas pipelines,[52] or of a document icon on a computer desktop,[53] are such that the majority of the mental constructs of them would likely be very similar. Once again it becomes impossible to attach a given work to a creator, here because the work will resemble everyone else's mental construct.[54] Thus, under the merger doctrine, when an idea bundle can only be constructed in a single or limited way, it cannot be copyrighted.[55]

2. Forced Complexity and Fixation Flourishes

So far, only pure mental constructs have been discussed. However, copyright protections only attach to those idea bundles that are "fixed" in a medium of expression.[56] One reason for the fixation requirement is that courts are not in the business of enforcing monopolies on thoughts.[57] Additionally,

[49] "[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101 (2006). *See also* H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668 ("In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design.").

[50] It must be noted that although facts may be *interpreted* differently by different people, those interpretations are facts as filtered by ideas. An example can be seen in *CDN Inc. v. Kapes*, where a coin dealer created a listing of estimated coin prices. 197 F.3d 1256, 1257 (9th Cir. 1999). The court's reasoning that the estimates were not mere facts but contained a creative "spark" could be re-worded thus: there are many potential mental constructions of "future coin prices," and the ones described in this case were sufficiently constrained as to be able to be linked to their creator. *See id.* at 1260.

[51] *See* Ets-Hokin v. Skyy Spirits Inc., 323 F.3d 763, 766 (9th Cir. 2003).

[52] *See* Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1463-64 (5th Cir. 1990).

[53] *See* Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1444 (9th Cir. 1994).

[54] *See id.*

[55] *See Ets-Hokin*, 323 F.3d at 766; *Apple Computer*, 35 F.3d at 1444-45; *Kern River*, 899 F.2d. at 1464

[56] 17 U.S.C. § 102(a) (2006) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .").

[57] *See* Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 830-31 (2009) (explaining how

the problems of proof would be immense, as anyone could claim she had the idea first. Necessary as it is, however, the fixed expression of an idea does not automatically create a copyright.[58] The central requirement has not changed: a work must be original. That is, a given work must be attributable to a particular author.[59] However, fixation can serve an important function in attribution: when ideas, compound or otherwise, are fixed in a medium of expression, the potential that the expression is linkable to a particular author can be increased in two ways.

First, depending upon the medium of expression, a mental construct may require the addition of other ideas to be expressed, increasing its creative complexity. As an example, a person could write the word "man" alone on a sheet of paper. Here we have the fixation of an idea in a medium of expression. However, this construct remains unlinkable to any particular author; likely every person on earth carries a different construct of the word man in his or her head.[60] Yet, note the difference if the idea is fixed as a painting.[61] Prior to fixation, the creator must add many ideas in order to make the idea "fixable." Ideas of color, build, even demeanor, must be added. Is the man clothed or nude, young or old, tall or short?[62] The act of fixation requires a massive agglomeration of ideas to the central idea of a man.[63] Thus,

fixation can bind a work, transforming it from a "contextual, dynamic entity" into a static one).

[58] The leading example of a fixed work that lacked the originality necessary to be copyrighted would be *Baker v. Selden*, where a book-keeping ledger was found to lack the necessary originality. 101 U.S. 99, 107 (1879).

[59] *See supra* notes 39-48 and accompanying text.

[60] Here it is important to note that this *is* still an expression, even though many courts, in an attempt at shorthand, would call it an idea. However, it is the expression of an extremely simple and broad idea. As stated above, granting protection for such an expression could grant too broad a monopoly. *See* Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 509 F.2d 64, 65 (2d Cir. 1974) (per curiam); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).

[61] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) (explaining how the creation of a pictorial work can require far more creativity than a writing).

[62] We take for granted the so-called common object. . . . [M]aybe you want to use an awning in a picture. Awnings can be endlessly different in design and structure. Obviously you shouldn't settle for an image you have in your mind of an awning. Through legwork or professionally motivated curiosity, you will unearth tremendous variations, artistic possibilities, in colors and shapes of awnings.

Stoddard, *supra* note 23, at 605 (quoting MARY ANNE GUITAR, 22 FAMOUS PAINTERS AND ILLUSTRATORS TELL HOW THEY WORK 57 (1964)).

[63] Keats expressed the belief that in painting, there are "innumerable compositions and decompositions which take place between the intellect and its thousand materials before it arrives at that trembling, delicate and snail-horn perception of beauty." *Id.* at 605 n.278 (quoting JOHN DEWEY, ART AS EXPERIENCE 70-71 (Capricorn Books 1958) (1934)).

depending upon the medium of fixation, simple idea bundles may be required to become very complex in order to be expressed.[64]

Second, the fixation process may introduce variations between individuals that are not linked to differences in mental constructs. Two painters tackling the exact same subject may introduce variations and flourishes caused by small mistakes, hand tremors, even unconscious training.[65] The fixation method often acts as a record of the act of fixation itself, retaining both the intended and unintended actions of the artist. Thus, these flourishes, although perhaps unbidden, might allow each work to be reasonably attributed to a particular author and therefore eligible for copyright protection.[66] Accordingly, fixed expression is required not only because it avoids the problems of attempting to compare thoughts, but also because it often functions to link a work to its author.

II. INFRINGEMENT AND MIND-SHARE

Just as the proposition that all works are comprised of fundamental elements can explain how courts decide if a work is capable of copyright, this proposition can also explain how infringement is judged. If Alice creates a work, and later finds a similar work created by Bob, it is not enough that the two works have elements in common for Alice to be able to claim Bob infringed her creation. First, Alice must have a valid copyright.[67] Second, she must show that Bob violated one of her exclusive rights.[68] Because there is no cause of action based on a similar yet independently created work, Alice will need to show that Bob in fact copied her creation without authorization.[69]

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[64] The complexity and artistry of the expression of an idea will separate it from even the most banal idea. Michaelangelo's [sic] David is, as an idea, no more than a statute of a nude male. But no one would question the proposition that if a copyrighted work it would deserve protection even against the poorest of imitations. This is because so much more was added in the expression over the idea.

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

[65] *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 104-05 (2d Cir. 1951) (discussing how even inadvertent variations in an expression, as from "bad eyesight or defective musculature, or a shock caused by a clap of thunder," can be copyrighted).

[66] *See id.*; Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 n.4 (2d Cir. 1945) (comparing copyright for accidental flourishes in expression to patents granted for research accidents).

[67] *See, e.g.*, Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 605 (1st Cir. 1988); Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir. 1987).

[68] 17 U.S.C. § 106 (2006); *see also* Midway Mfg. Co. v. Dirkschneider, 571 F. Supp. 282, 284 (D. Neb. 1983) ("Copyright infringement is established by proving that the defendants engaged in the unauthorized copying (in the form of reproduction, adaptation, public distribution, public performance or public display) of . . . valid copyrights.").

[69] *See* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984).

Finally, Alice will need to show that the two works were substantially similar.[70]

In showing that a work is substantially similar, it is not necessary to show that the two works are identical.[71] Indeed, a finder of fact can find substantial similarity even when only a part of a work is copied, as long as it is "significant."[72] Instead, courts will find substantial similarity if a reasonable person would believe that an infringer "unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value."[73] Judge Learned Hand provided another formulation of this test, indicating that substantial similarity existed if a reasonable observer, when confronted with two works, regarded "their aesthetic appeal as the same."[74]

Approaching the problem of substantial similarity through the viewpoint of mental elements yields the following formulation: As protectable expression is based upon the ability to attribute a given work to a given author, a second work is substantially similar if it contains a combination of enough elements that a reasonable observer would attribute the second work to the first author.

The classic case of *Nichols v. Universal Pictures Corp.* provides an example of this analysis.[75] The plaintiff's play, *Abie's Irish Rose*, presents the story of young lovers, one Jewish, one Irish, whose fathers do not approve of the match.[76] Defendant's play, *The Cohens and The Kellys*, also involves young lovers, Jewish and Irish, and the plot is based upon the conflict their relationship causes between their fathers.[77] However, beyond these simple descriptions, the two plays are quite different.[78] The key characters of the fathers share nothing but their gender, religion, and objection to their children's marriage.[79] As an example: the Jewish father from *The Cohens and The Kellys* is a Shylock stereotype – anti-Semitism writ large – while the Jewish father from *Abie's Irish Rose* is a more realized character – "warm and patriarchal" but devout in his faith.[80] Additionally, essential plot elements differ greatly – the fathers in *Abie* put aside their religious differences because

[70] *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977).

[71] Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706, 713 (S.D.N.Y. 1987) ("'Substantial similarity' does not require identity, and 'duplication or near identity is not necessary to establish infringement.'" (quoting *Krofft*, 562 F.2d at 1167)).

[72] *Baxter*, 812 F.2d at 425.

[73] Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir. 1982) (citing *Krofft*, 562 F.2d at 1164).

[74] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

[75] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930).

[76] *Id.* at 120.

[77] *Id.* at 120-21.

[78] *Id.* at 121-22.

[79] *Id.* at 122-23.

[80] *Id.*

of their mutual love of their shared grandchildren, but in *Cohens*, reconciliation occurs due to a financial windfall.[81] Thus, a reasonable observer could not plausibly attribute the only elements in common – feuding fathers and young lovers – to the plaintiff, or likely any single author, and as such, there is no infringement.[82]

A. *Copyright Mind-Share*

One important point made in *Nichols* is that such stories were common at the time.[83] This may not merely be a suggestion that the defendant may have created his play without copying any of the plaintiff's work. Instead it can be seen as a discussion of the mind-share that this depiction of the "low comedy Jew and Irishman" occupied at this time.

Mind-share is a term used in the marketing and advertising world, defined as the likelihood that a consumer will think of a particular brand when a type of product is mentioned.[84] While market-share is a measure of the actual percentage of market a particular company's product commands, mind-share is a way to measure the popularity and cultural saturation of a brand. Thus, as an example, Coca-Cola and Pepsi own the majority of the cola mind-share, and Band-Aid Brand's mind-share is almost complete.[85] While mind-share would seem more appropriate in a trademark context, this Note suggests that in the realm of copyright, there is a similar form of mind-share that applies to ideas and expressions.

To clarify, each work can be understood to exist in a space containing the common background culture of an observer. However, each work can have

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[81] *Id.* at 121-22.

[82] *Id.* at 121 ("We found the plot of the second play was too different to infringe, because the most detailed pattern, common to both, eliminated so much from each that its content went into the public domain . . . .").

[83] *Id.* at 122.

[84] Jed C. Jones, *What is Mindshare?*, EZINEARTICLES (Aug. 27, 2007), http://ezinearticles.com/?What-is-Mind-share?&id=706088.

> *Mindshare* relates to the extent to which a brand holds the collective attention of a given populace. The more a brand has, the stronger and deeper are the associations that people form between that brand and a particular product or service. High mindshare for a brand means that the said brand comes to mind, on average, more quickly or at a higher rank than do other brands.

Id.

[85] Thus, mind-share can be very distinct from market-share. For example, while many people are familiar with Apple computers, signifying a high mind-share, Apple's actual computer market-share is much more modest. In fact, Apple's mind-share may be responsible for a common overestimation of Apple's market-share. Dan Costa, *Apple's Mind Share Matters Most*, PC MAGAZINE (Aug. 27, 2009), http://www.pcmag.com/article2/0,2817,2352103,00.asp (stating that Apple's computer market-share is only 7.6 percent in the United States, which puts it behind four other major computer manufacturers).

varying prevalence within that space, just as the consumer knowledge of Coke can be very different from that of a smaller local brand. Specifically, works that are either highly popular or very novel in a community may be quickly called to mind by the average member of that community.

In the case of *Nichols*, the statement that farces and comedies featuring Jews and Irishmen were common can be seen to mean that the plaintiff's work had very small mind-share – that it was one play of many of this type. That is, if a person of this time period were asked to name such a Judeo-Hibernian comedy, the chances that this person would indicate *Abie's Irish Rose* are low. This ability for the common man, and thus by extension, the common finder of fact, to quickly and definitively associate a given work with its description can have profound effects on what is considered infringement.

B. *Mind-Share and Novel Works*

Assuming that works that are highly popular or that are strikingly novel will, with respect to many of the elements comprising them, control something akin to a mind-share monopoly, a reasonable observer would likely require fewer elements in common to attribute a new work to that original work's author.[86] Newness and fame both cause a creation to be strongly associated with its author, and therefore allow easier attribution, even if the creation lacks the level of complexity and detail normally required. As described above, the requirement for complexity exists specifically to reduce the hazard of granting broad monopolies over simple ideas. However, popularity or novelty may serve, improperly, as surrogates for complexity, and authors of such works may get monopolies over simple ideas in direct conflict with the usual goals of copyright, and to the detriment of other creators and the public domain.

As examples of such overprotection, the following two cases both involve works that were considered novel and very popular at the time of the infringement, and both prevailed in copyright suits against works with substantial differences. The mind-share effect may help explain their remarkable results.

[86] A mind-share monopoly in copyright could be created by a series of elements that are so novel and so popular that they could only call to mind one work. These elements could be related to a new genre such as the stream-of-consciousness style associated with Joyce, a new technology such as computer generated animation, even a revolutionary new take on a standard work, such as *Memento's* interpretation of the crime thriller.

As a more concrete example, while there have been many audio-visual works that involve space ships, the idea of the laser sword is much more rare. Thus it is likely that the high popularity of the *Star Wars* series along with the novelty of the lightsaber might give Lucasfilm a monopoly on the reasonably simple idea of laser-sword battles even though it would likely have a harder time claiming a monopoly on the equally simple idea of spaceship battles.

1. The Great Train Rescue

In 1867, Augustin Daly created an early version of the special effects blockbuster, *Under the Gaslight*.[87] The play's main selling point was the dramatic fourth act rescue of an incapacitated hero from the path of an oncoming train.[88] While the last minute rescue of a bound character from an oncoming train is quite cliché today, at the time the sequence became a sensation.[89] Soon one of the leading producers of theatrical melodramas, Dion Boucicault, produced *After Dark*, a play which also contained a daring last minute train rescue.[90] In Boucicault's version, however, the rescuer was male as opposed to Daly's heroine.[91] Additionally, while Daly's scene contained extensive dialogue, Boucicault's contained a simple soliloquy.[92] Finally, the setting – Daly's above-ground, Boucicault's subterranean[93] – and the plots leading up to the dramatic rescue were highly different.[94] However, regardless of the differences between the scenes, when Daly sued to enjoin Boucicault's play, the court found that what was important was that in each there was a hero who escaped confinement and with seconds to spare, rescued a victim from an oncoming train.[95] Thus, for all its differences, the court found Boucicault's railway scene to be substantially similar to the one found in *Under the Gaslight*, and Daly prevailed.[96]

While the court engaged in a lengthy defense of the principles of partial infringement and of derivative rights,[97] the holding may still seem too strongly weighted towards the plaintiff. The court's holding seems to indicate that what was infringed was the scenario of rescuing someone from a train. While

[87] Daly v. Palmer, 6 F. Cas. 1132, 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

[88] *Id.* at 1333.

[89] *See* Jamie Lund, *Copyright Genericide*, 42 CREIGHTON L. REV. 131, 149 (2009); *see also* NICHOLAS DALY, *Sensation Drama, the Railway, and Modernity*, *in* LITERATURE, TECHNOLOGY, AND MODERNITY 10, 10-11 (2004) (describing how popular the train rescue scenario became).

[90] *Palmer*, 6 F. Cas. at 1133; DALY, *supra* note 89, at 10.

[91] *Palmer*, 6 F. Cas. at 1136.

[92] *Id.* at 1136.

[93] *Id.*

[94] *Id.* at 1134-35.

[95] *Id.* at 1136.

[96] *Id.* at 1138.

[97] Indeed, much of the discussion the court gives could be seen as an early argument for derivative rights, in that taking a work and modifying it would not prevent a finding of infringement. *See id.* at 1136-37 (discussing how the plagiarism of sections of an opera is still infringement, even if whole arias are not lifted). For a more in-depth discussion of *Palmer's* role in the evolution towards derivative rights, see Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, 213 (1983) (discussing the role of *Palmer* in "copyright's break from the confines of 'copies,' and the eventual statutory expansion of derivative rights . . . .").

traditional copyright analysis suggests that this might be merely an uncopyrightable idea, under an elemental framework, only those idea compilations that are not attributable to a particular author fail to gain protection. Here, the concept of mind-share helps explain the court's result. As Daly's play was new and highly successful, it was quite likely that it had a near mind-share monopoly, meaning that the description of a dramatic railway rescue would be very likely to call to mind *Under the Gaslight* in the average person.[98] Attribution was easy, even if the level of complexity was low. Therefore, it is possible for a court to grant protections for the expression of seemingly simple idea complexes because one creator's work is so prominent that it forecloses alternative mental concepts.

2. Living Island vs. McDonaldland

Another example of the possible effect of mind-share in a finding of infringement can be seen in the strange tale of *Sid & Marty Krofft Television Productions v. McDonald's Corp.*[99] In the late 1960s, the Krofft brothers created *H.R. Pufnstuf*, a children's show set in a fantasyland called "Living Island," which was mainly populated by surreal puppet characters such as talking books.[100] The program was a quick success and soon became "the most popular children's show on Saturday morning television."[101] Due to the success of the show, the Kroffts were approached by advertising firm representatives hoping to pitch a series of *H.R. Pufnstuf*-based commercials to McDonald's.[102] Although the Kroffts indicated interest in the deal, the advertising firm ended negotiations and instead began hiring Krofft employees to create similar puppets, unaffiliated with the show, for the McDonald's campaign.[103] When the new McDonaldland commercials began airing, the Kroffts sued for infringement. [104]

At trial, the defendants, McDonald's Corporation and the advertising agency, acknowledged that they intended to copy the basic idea of *H.R. Pufnstuf*, that of a "fantasyland filled with diverse and fanciful characters," for their commercials.[105] Nonetheless, the defendants argued that this was an

[98] The analysis in *Palmer* specifically states that substantial similarity can be found where a second work is "is *recognized* by the spectator . . . as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order." *Palmer*, 6 F. Cas. at 1138 (emphasis added). Key here is the principle that a finder of fact is more likely to recognize similarity between two works when the original is well known.

[99] 562 F.2d 1157 (9th Cir. 1977).

[100] *Id.* at 1161.

[101] *Id.* at 1166.

[102] *Id.* at 1161.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 1165.

unprotectable idea, and that their commercials were too dissimilar in character and plot to be infringements of the show.[106] In order to establish this, the defendants sought to offer evidence that would point out differences between the characters.[107] The Ninth Circuit, however, upheld the lower court's rejection of such evidence.[108] Removing the characters from context and focusing on differences in the "clothing, colors, features and mannerisms of each character" would ignore the potential total "intrinsic" similarity between the works.[109] Instead, the court required that the "total concept and feel" of the works be compared.[110]

Here again, the court's ruling can be analyzed under the attributable elements test, which dictates that for a work to be protectable, it must be viewed as a combination of factors that can be linked to a particular author. The defendants in *Krofft*, however, wanted in effect to increase the resolution of the analysis – in effect dissecting the two works and then comparing only the simplest of expressions.[111] By ignoring the work as a whole, or at least the work as a larger combination of elements, the defendants were cleverly attempting to reduce the likelihood that any of their work could be attributable to anyone.

Additionally, once the comparison must be based upon "total concept and feel" of a work, the mind-share of a plaintiff's work can theoretically have a greater effect on whether a finder of fact decides that a defendant's work is substantially similar. If McDonaldland had been created when surreal puppet shows were as common as low comedies based on ethnic stereotypes were at the time of *Nichols*, McDonald's commercials might not have been found to be infringing. However, given the great popularity of the Kroffts' programs and the novelty of what was considered their overall "style," the average person would likely attribute many of the fantastical elements of McDonaldland to the Kroffts.

The mind-share effect can explain the easy attribution of popular or novel works to their originators. However, popularity and novelty are harmful

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[106] *Id.*

[107] *Id.* (categorizing the type of evidence the defendants tried to submit as falling under an "extrinsic test").

[108] *Id.*

[109] *Id.* at 1166-67.

[110] *Id.* at 1167 (quoting Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970)).

[111] As an example of this attempt, the court offers the following example of the defendant's dissection analysis:

> 'Pufnstuf' wears what can only be described as a yellow and green dragon suit with a blue cummerband from which hangs a medal which says 'mayor'. 'McCheese' wears a version of pink formal dress 'tails' with knicker trousers. He has a typical diplomat's sash on which is written 'mayor', the 'M' consisting of the McDonald's trademark of an 'M' made of golden arches.

Id. at 1166.

substitutes for complexity, because they allow simple creations to gain broad protection. Thus, ideas needed by many other creators, such as the idea of a surreal puppet fantasyland, get locked up by the first creators to enunciate them. While the requirement for complexity exists to prevent such overprotection, popularity and novelty do not. However, the traditional formulation of the idea/expression dichotomy obscures this implicit unfair benefit gained by new and famous works, allowing finders of fact to unconsciously and improperly reward authors for their novelty rather than their creativity.

III. CHARACTERS – HEROES AND SPIES

The copyright status of characters has a somewhat tangled and confused history. Some courts indicate that differential protection is given based upon whether a character is solely literary or if the character has a visual component.[112] Other courts have indicated that protection is to be given only if the character is central to the action rather than merely "the chessman in the game of telling the story."[113] Indeed, some court rulings have been interpreted to imply that characters are generally not protectable at all.[114]

However, the various character tests can be collapsed into the standard elemental attribution analysis. A character can be seen as a combination of simpler ideas, just like any other complex mental construct.[115] Thus, for the expression of a character to be protectable, it must, like any other expression, be complex enough to be attributable to a single author. Under such an analysis, the greater likelihood of protection for visual characters is obvious, because, as described above, the fixation of a graphic work often requires a greater density of idea elements than the fixation of a literary work.[116]

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[112] *See, e.g.*, Olson v. Nat'l Broad. Co., 855 F.2d 1446, 1452 (9th Cir. 1988) (indicating that a character with a visual component, such as those "visually depicted in a television series or in a movie," are more likely to gain protection); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978) ("[W]hile many literary characters may embody little more than an unprotected idea . . . , a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.").

[113] *See, e.g.*, Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954) (explaining that the character of Sam Spade is not enough of the "story being told" to count as copyrightable); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.").

[114] *See* 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.12 (2009) ("[F]or most practical purposes, [the holding in *Warner Bros. Pictures*,] if followed would effectively exclude characters from the orbit of copyright protection.").

[115] *See* Warner Bros. Inc. v. Am. Broad. Cos. (*Warner Bros. II*), 720 F.2d 231, 243 (2d Cir. 1983) ("A character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of the combination.").

[116] *See supra* notes 60-66 and accompanying text; *see also* Judge Posner's discussion of

Characters "central" to the story would perforce be more complex, and thus more protectable, than incidental ones. Additionally, the same mind-share concerns can lead to easier protections of famous characters under copyright than might be expected.

A. *Superman vs. Wonderman & Captain Marvel*

The less than heroic battles between Superman and the later characters of Wonderman[117] and Captain Marvel[118] provide a classic example of how mind-share can affect the outcome of a character infringement suit. In both instances, a rival company to what would become DC Comics, owner of Superman, created a superhero similar in some ways to the Man of Steel. Wonderman could "[crush] a gun in his powerful hands" and tear open steel doors, wore tights under his normal clothing, and fought "against 'evil and injustice.'"[119] Captain Marvel had an alter ego who was a reporter of sorts, exhibited great strength and speed, and was impervious to most physical hazards.[120] Likewise, Captain Marvel often fought similar antagonists and faced many scenarios similar to those in the Superman comics.[121] Based upon such straightforward descriptions, it does not seem surprising that Superman prevailed in each conflict.[122]

However, the similarities found by the courts may not be as clear cut. Although many of the Wonderman scenes described by Judge August Hand sound similar, a side by side comparison of the images shows that they are similar only in the simplest ways. For example, while Superman can be seen

this effect with regard to characters using Dashiell Hammett's depiction of Sam Spade in *The Maltese Falcon*:

> "Samuel Spade's jaw was long and bony, his chin a jutting v under the more flexible v of his mouth. His nostrils curved back to make another, smaller, v. His yellow-grey eyes were horizontal. The v motif as picked up again by thickish brows rising outward from twin creases above a hooked nose, and his pale brown hair grew down-from high flat temples-in a point on his forehead. He looked rather pleasantly like a blond satan." Even after all this, one hardly knows what Sam Spade looked like. But everyone knows what Humphrey Bogart looked like. A reader of unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive.

Gaiman v. McFarlane, 360 F.3d 644, 660-61 (7th Cir. 2004) (citations omitted).

[117] Detective Comics v. Bruns Publ'ns, 111 F.2d 432, 433 (2d Cir. 1940).

[118] National Comics Publ'ns v. Fawcett Publ'ns, 93 F. Supp. 349 (S.D.N.Y. 1950), *rev'd*, 191 F.2d 594 (2d Cir. 1951).

[119] *Bruns*, 111 F.2d at 433.

[120] *National Comics*, 93 F. Supp. at 355.

[121] *Id.* (describing the similarities between the Superman and Captain Marvel comics, including villains such as "mad scientists who resemble each other in appearance" and the fact that "[i]dentical phrases, expressions and dialogues are frequently found in the panels").

[122] *See National Comics*, 191 F.2d at 597 ("[I]t takes scarcely more than a glance at corresponding 'strips' of 'Superman' and 'Captain Marvel' to assure the observer that the plagiarism was deliberate and unabashed."); *Bruns*, 111 F.2d at 434; *National Comics*, 93 F. Supp. at 355.

stoically taking a bullet, Wonderman is shown acrobatically grabbing and hurling back what appears to be an artillery shell.[123] Further comparisons of the comic panels, described as similar, show the same high level of variation.[124]

The differences between Captain Marvel and Superman may be even greater. For example, while Judge Coxe was correct that both have alter egos working in the field of journalism, he failed to note that Captain Marvel's alter ego, Billy Batson, was a twelve-year-old boy working at a small town radio station.[125] Additionally, many of the traits associated with Superman in the court's opinion arose first in Captain Marvel, including the idea of a bald, mad-scientist nemesis,[126] and, perhaps most strikingly, the ability to fly.[127] Finally, the source of Captain Marvel's powers and his relationship to these powers were quite different from those of Superman.[128]

This discussion of the differences between the characters is not an attempt to argue for an analysis based upon breaking a work into simple idea elements and comparing them to see how many the works have in common. Indeed, such an extrinsic analysis based on dissecting character traits into simpler elements would ignore the importance of viewing how the elements interact.[129] However, finding these differences is important, as extensive differences in the

[123] *See* Britton Payne, *Superman v. Wonderman, Judge Hand's Side-By-Side Comparison for Superhero Infringement*, BRITTONPAYNE.COM, http://www.brittonpayne.com/Marvel/SupermanWonderman.htm (Nov. 17, 2005, 1:08 PM), *cited in* Britton Payne, *Super-Grokster, Untangling Secondary Liability, Comic Book Heroes and the DMCA, and a Filtering Solution for Infringing Digital Creations*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939, 972 n.193 (2006). Even more striking is that the early versions of Superman were not completely invulnerable and could be harmed by an artillery shell. *See* LES DANIELS, DC COMICS: SIXTY YEARS OF THE WORLD'S FAVORITE COMIC BOOK HEROES 80 (1995).

[124] For example, while Judge Hand indicates that both have the power to rip open a steel door, Superman is depicted tearing a door off its hinges, and Wonderman is shown exploding through huge double steel doors. *See* Payne, *Superman v. Wonderman*, *supra* note 123.

[125] *See* SCOTT BEATTY ET AL., THE DC COMICS ENCYCLOPEDIA: THE DEFINITIVE GUIDE TO THE CHARACTERS OF THE DC UNIVERSE 71 (Alastair Dougall, ed. 2008).

[126] *Id.* at 106, 214.

[127] *See* Warner Bros. Inc. v. Am. Broad. Cos. (*Warner Bros. I*), 654 F.2d 204, 206 (2nd Cir. 1981) (describing how Superman originally was "only capable of leaping in the position of a hurdler over tall buildings"); LES DANIELS, SUPERMAN, THE COMPLETE HISTORY: THE LIFE AND TIMES OF THE MAN OF STEEL 54 (1998) (discussing how Superman's ability to fly rather than just "leap tall buildings in a single bound" arose in the 1940s radio shows).

[128] While Superman is an alien who initially had powers based upon his homeworld's higher gravity, Billy Batson was granted the powers of Captain Marvel by a wizard and his powers always maintained a magical dimension. *See* BEATTY ET AL., *supra* note 125, at 71, 340; DANIELS, *supra* note 127, at 41; CHRISTOPHER KNOWLES & JOSEPH MICHAEL LINSNER, OUR GODS WEAR SPANDEX: THE SECRET HISTORY OF COMIC BOOK HEROES, 124 (2007).

[129] *See Warner Bros. I*, 654 F.2d at 206-07.

idea elements comprising two expressions "tend to undercut substantial similarity."[130] Given such a wide difference in idea elements between Superman and both Wonderman and Captain Marvel, it seems strange for a court to offer such broad and stifling protection for "the feats of strength or powers performed by 'Superman.'"[131] Therefore, it seems likely that the high degree of mind-share held by the early Superman, the first and most prevalent superhero, lowered the threshold required for attribution. That is, the court may have substituted Superman's popularity and novelty for actual similarity between the two works. At the time of the case, the description of a hero who wore a "skintight acrobatic costume" to fight crime with great strength and nigh invulnerability would likely have a brought to mind only Superman. Today there are hundreds of characters that fit those criteria, but in the early 1940s, Superman would be one of the only such characters of note.[132]

B. *James Bond – Great Spy vs. Great Car Salesman*

In 1953, at his Goldeneye estate, former spy Ian Fleming picked up a tropical bird watching book by James Bond, and used that name to create a series of fictional stories based in part on his own personality and exploits.[133] While these books were moderately successful, true fame would come ten years later with the first of the MGM Bond films starring Sean Connery. Connery is often considered to be the quintessential Bond, even by the author himself.[134] By 1994, however, the Bond character had been played by at least four different actors in the official MGM films,[135] and due to a tangled copyright licensing history, had appeared in "unofficial" films played by even more actors.[136] In that year, Honda Motors premiered an advertisement for their Honda del Sol convertible that included a suave man in a tuxedo with a beautiful woman at his side, agilely avoiding a villain while displaying the attributes of the car.[137] MGM's subsequent suit against Honda Motors offers both an example of how elements analysis can distinguish a character played

[130] Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 913 (2d Cir. 1980).

[131] Detective Comics v. Bruns Publ'ns, 111 F.2d 432, 434 (2d Cir. 1940).

[132] *See infra* notes 175-182 and accompanying text.

[133] Keith Poliakoff, *License to Copyright: The Ongoing Dispute over the Ownership of James Bond*, 18 CARDOZO ARTS & ENT. L.J. 387, 387 (2000).

[134] *Id.* at 392.

[135] Specifically: Sean Connery, George Lazenby, Roger Moore and Timothy Dalton. Additionally, by 1994, Pierce Brosnan had been named the fifth "official Bond," but his first film, *Goldeneye*, would not premiere until 1995.

[136] The most famous of the unofficial films would likely be *Never Say Never Again*, where Sean Connery played the character again at the same time that Roger Moore was playing it in *Octopussy*. *See* Poliakoff, *supra* note 133, at 392-93.

[137] *See* Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287, 1291-92 (C.D. Cal. 1995).

by multiple actors, and how the mind-share effect can lead to a finding that a small complex of common ideas is a protectable character.[138]

As one of its defenses, Honda argued that the character of James Bond could not be copyrighted but was instead merely "an unprotected dramatic character."[139] Specifically, they claimed that because so many different actors had played the character in so many different films and in so many different ways, there was no unified James Bond.[140] Honda argued that each iteration of the Bond films stars a character that shifts greatly both in characterization and physical appearance.[141] Thus, under an elements analysis, Honda's argument was that there were too few elements in common across all portrayals and too few elements designated by MGM as the quintessential Bond to form a protectable expression. Under such an argument, as in *Nichols*, there cannot be infringement, because that which was copied could not be attributed to a particular author.

However, the court in *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.* found that this core, quintessential Bond is a protectable character.[142] It agreed with MGM's assertion that Bond's "cold-bloodedness; his overt sexuality; his love of martinis 'shaken, not stirred;' his marksmanship; his 'license to kill' and use of guns; his physical strength; his sophistication" were enough to define a copyrightable character.[143] Even broader was the court's substantial similarity analysis, which used a "handsome hero" and a "beautiful woman" involved in a car chase with a "grotesque villain" as evidence of infringement.[144] The court also observed that both the commercial and the Bond films star "young, tuxedo-clad, British-looking men" who "exude uncanny calm under pressure, exhibit a dry sense of humor and wit, and are attracted to, and are attractive to, their female companions."[145]

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[138] *See id.*

[139] *Id.* at 1294.

[140] *Id.* at 1296 ("James Bond is not the 'story being told,' but instead 'has changed enormously from film to film, from actor to actor, and from year to year.'").

[141] The differences in characterization, from Connery's suave sexuality to Lazenby's serious emotional portrayal to Moore's charm and skill at light comedy to Dalton's cold-blooded ruthlessness are often discussed by film critics and Bond writers. *See, e.g.*, JAMES CHAPMAN, LICENSE TO THRILL: A CULTURAL HISTORY OF THE JAMES BOND FILMS 144-45, 150-52, 231-32 (2000); Roger Ebert, *Goldfinger*, CHICAGO SUN TIMES, Jan. 31, 1999, http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19990131/REVIEWS08/401010322/1023; Roger Ebert, *Moonraker*, CHICAGO SUN TIMES, Jan. 1, 1979, http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19790101/REVIEWS/41008002/1023 (describing how Moore lacks Connery's sexiness).

[142] *Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1296-97.

[143] *Id.* at 1296.

[144] *Id.* at 1298.

[145] *Id.*

Under straightforward elements analysis, such a listing of factors would be barely enough to distinguish the character as coming from the action-adventure genre, where the heroes are almost always witty, handsome, and "attracted to" and "attractive to" the opposite sex.[146] These factors certainly would not suffice to distinguish the character as a being attributable to a particular creator. Nevertheless, MGM prevailed in the suit, and the "similarity" of the characters was a crucial part of the decision. The court suggested that a scene such as a high-speed car chase with a beautiful woman would be too generic to protect without the character of James Bond.[147] Granting MGM ownership of any instance of a suave, tuxedoed man involved in a car chase seems a shocking expansion of copyright protection.[148] But once again, the mind-share effect offers an explanation. The character of James Bond, although not the first spy character,[149] maintains a powerful amount of mind-share.[150] Thus, one would expect an ordinary observer to attribute any suave, tuxedoed Brit to MGM's James Bond, because Bond's enduring popularity – as well as his enduring singularity – substitutes for the proper analysis of similarity between works. Indeed, as in the Superman cases discussed above, the court found that, even with the paucity of the elements described, "the average viewer would immediately think of James Bond when viewing the Honda commercial."[151]

Both the Superman and James Bond examples show how a character can be defined by elements analysis in the same way as any other protectable work. A character, like a painting or a story, is merely a collection of idea elements. What makes a character protectable, therefore, is the same as what makes any other work protectable: a level of complexity – caused by the interaction of a sufficient number of simple ideas – that allows a reasonable person to attribute the character to a particular author.

Thus, Superman, although he has evolved greatly over the years, contains such a large quantity of consistent idea elements – his look and abilities, his back-story and Kansas upbringing, his romances and friendships, and perhaps most importantly, his constant characterization as the Big Blue Boy Scout – that he is easily attributable to DC Comics. James Bond however, offers a more interesting example of a protectable character. In *Metro-Goldwyn-Mayer, Inc.*, Honda argued that because James Bond had been portrayed in so many different ways, from brutal killer to pun-loving ladies' man, there was

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[146] *See* Jonathan S. Katz, Note, *Expanded Notions Of Copyright Protection: Idea Protection Within The Copyright Act*, 77 B.U. L. REV. 873, 888 (1997).

[147] *Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1295 n.8.

[148] See Katz, *supra* note 146, at 888.

[149] Indeed, Honda actually attempted to argue that *The Avengers*, *The Saint* (played by Rodger Moore himself in the later TV series), and *Danger Man* all predated the Bond films, to no avail. *Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1295 n.7.

[150] *See* CHAPMAN, *supra* note 141, at 22-24 (discussing the extent of the popularity of James Bond as similar to that of Sherlock Holmes).

[151] *Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1299.

not enough consistency to describe a single, protectable person.[152] The depiction of the same persona by different actors, with different characterizations, and in widely different scenarios, diminishes the number of idea elements that consistently describe the character as a whole. What is left, a suave British spy with a penchant for ladies and vodka, should not normally be attributable to anyone.

As characters are merely a type of complex idea, however, they can become beneficiaries of the mind-share effect in similar ways. Thus, Superman, a protectable character without the bolstering of mind-share, gained in the 1930s a wide penumbra of protection, and DC Comics gained a monopoly not just upon the Man of Steel but also upon a sizable part of the public domain idea of the superhero itself. Mind-share granted an even more striking benefit to James Bond: by allowing popularity and novelty to act as secret stand-ins for complexity, the mind-share effect alchemically transformed what should have been an unprotectable idea into a broad copyright monopoly. Thus, like the train rescue in *Under the Gaslight*, James Bond is an example of a work that occupies such a large share of the contemporary cultural consciousness that it gets an unfair leg up – in effect cheating the traditional test of attribution, and improperly giving authors stifling control over simple ideas. The immense mind-share held by 'Bond, James Bond,' allowed the very simple combination of tuxedos, martinis and dry wit to be given the same protection as a complex and fully realized character – short-circuiting copyright law's central prohibition of monopolies over simple ideas.

IV. LOSS OF MIND-SHARE, LOSS OF PROTECTIONS

A recent article argues for a dynamic form of copyright that in certain instances mirrors trademark.[153] This theory of "Copyright Genericide" suggests that over time certain protected works will see a diminishment of that protection.[154] The article suggests that this decrease in protection is caused by the transformation of what was once protectable expression into an

[152] The idea that "James Bond" as portrayed in the movies is not a singular character, but a code name that goes along with the number 007, has been popular with fans and has even been argued by directors of the series. *See, e.g.*, *The Casino Royale Interview: HMSS Interviews Neal Purvis & Robert Wade*, HER MAJESTY'S SECRET SERVANT (2007), http://www.hmss.com/films/CasinoRoyale/interview/ (asking the present writers of the MGM Bond film series if they knew of the fan theory that "James Bond" was merely a code name, explaining the various portrayals); *Lee Tamahori Talks* Die Another Day, ABOUT.COM (Apr. 16, 2003), http://web.archive.org/web/20040815180945/actionadventure.about.com/library/weekly/2002/aa111202a.htm (reporting Bond Director Lee Tamahori's belief that Bond was a "code name" that went along with the 007 as it was the only explanation for the differences between the characters as played by different actors).

[153] Lund, *supra* note 89, at 131-32.

[154] *Id.*

unprotectable idea.[155] The article does not, however, explain the mechanism by which this alchemy occurs.

It seems that element attribution analysis and the mind-share effect offer such an explanation. As argued above, a finding of infringement will be more likely when the original work has a near monopoly over mind-share.[156] However, mind-share fluctuates, and it is difficult for even a novel work to maintain such a hold on the common psyche over time. If the original is popular, some new works will likely be made in the same vein. Even diligent original creators may not be able to stop all these copies through the courts, and may themselves introduce similar new works.[157] As these new works are created, many elements that once could only refer to the original work in the popular consciousness would possibly refer to many works. The benefit originally derived from popularity and novelty fades, and the standard requirement that a work be complex enough to be attributable to an author remains. As a popular work's mind-share monopoly fades, the reasonable observer will need to find more elements in common before finding infringement, and the protection given to that work would appear to diminish. Therefore, the mind-share effect may be at the heart of at least some of these "genericide" effects.

The effects of a work's diminishing mind-share can be seen when discussing how a work can shift from being protected by copyright to being a *scene a faire*. A *scene a faire* is an expression that is "indispensible, or at least standard, in the treatment of a given topic."[158] Described through elements, a *scene a faire* is a bundle of elements that is common across many works in the same genre or style. The common elements that make up a *scene a faire* often arise from real life, such as Germans saying "Heil Hitler" in a 1930s drama,[159] prostitutes and alcoholics as characters in a gritty New York police tale,[160] or scenes of slaves attempting escape or singing spirituals in a novel depicting the

[155] *Id.* at 139-40.

[156] *See supra* Part II.B.

[157] There are many scenarios where a unique and singular work under copyright can be joined by new similar works. The owner of the original work could license derivative works or create them herself. An example of a copyright owner diluting her own creation's mind-share is the fact that DC Comics, after suing the creators of *Captain Marvel* into bankruptcy, bought the character of Captain Marvel and began publishing comics with him as a main character.

Additionally, although elements analysis suggests that a work with a near mind-share monopoly will get broad protections, it is possible that a new greatly dissimilar work will contain a few elements associated with the original. Thus, to keep with the superhero analogies, new characters widely distinct from Superman arose from rival publishing companies, such as Captain America, that were still recognizable as superheroes.

[158] Hoehling v. Universal City Studios, 618 F.2d 972, 979 (2d Cir. 1980) (quoting Alexander v. Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)).

[159] *Id.*

[160] Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986).

Antebellum South.[161] Some *scenes a faire*, however, arise instead from a creative work, and such transitions from protected work to stock scene offer an intriguing look into the role of mind-share.

A. *Superman II*

One of the later Superman infringement cases exemplifies the shift that can happen when a work no longer controls the majority of the copyright mind-share. Long after Superman's combat against Captain Marvel and Wonderman, a new foe arose, in the form of a TV show called the *Greatest American Hero*.[162] The show featured the comedic adventures of Ralph Hinkley, a young man who attempted to be a hero after being granted superpowers by an alien device.[163] Hinkley bears many similarities to the Man of Steel: Hinkley can fly, has great strength and invulnerability, wears a skin-tight uniform with a cape and a symbol on his chest, and shares a number of other abilities with Superman.[164] While Hinkley's powers are from an external source, as opposed to Superman's inherent abilities, and while Hinkley's alter ego is youthful and inexperienced, these traits also applied to Captain Marvel.[165] Thus, based upon the results in the Captain Marvel and Wonderman cases, one would expect a similar victory for Superman. However, the unlikely hero of Ralph Hinkley prevailed, based on a finding that he was not substantially similar to the character of Superman.[166]

The explanation of Hinkley's victory offers a clear example of how a loss in mind-share can increase the number of similar idea elements necessary to find infringement. In the previous cases, deeply similar powers and costume were

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[161] *Alexander*, 460 F. Supp. at 45.

[162] *See* Warner Bros. Inc. v. Am. Broad. Cos. (*Warner Bros. I*), 654 F.2d 204, 206-07 (2d. Cir. 1981).

[163] *Id.*

[164] Specifically, Warner Brothers, the plaintiff, offered the following list of similarities:

> [F]or example, both superheroes are shown performing feats of miraculous strength; both wear tight acrobatic costumes; both do battle with villains; both fly with their arms extended in front of them and cape billowing behind; both are impervious to bullets; both have X-ray type vision; both have fantastic hearing and sight; both fly gracefully in the night sky past a city's lit skyscrapers; both lift a car with one hand; both lead a double life; both heroes' power emanates from another planet; and both are drawn to a mysterious spot to meet an extraterrestrial being.

Id. at 209.

[165] *Compare id.* at 207, 210 (describing Hinkley's youth and inexperience, and how Hinkley's powers come from an external source), *with* BEATTY ET AL., *supra* note 125, at 70-71 (discussing how Billy Batson remains "innocent in heart and mind" and how his abilities were external and mysterious), *and* KNOWLES & LINSNER, *supra* note 128, at 124-26 (discussing Billy Batson's youth and the fact that his powers were external).

[166] *See* Warner Bros. Inc. v. Am. Broad. Cos. (*Warner Bros. II*), 720 F.2d 231, 243 (2d Cir. 1983); *Warner Bros. I*, 654 F.2d at 209.

discussed as being enough to call to mind only Superman.[167] However, in the over forty years between the introduction of Captain Marvel and the debut of Ralph Hinkley, the superhero genre exploded, ushering in hundreds of characters.[168] Many of these characters had at least a few traits in common with Superman, including a skin tight costume or cape, the ability to fly, or great strength.[169] Thus, although Superman may have remained one of the most popular comic book heroes, his mind-share was no longer the almost 100 percent it was in the early 1940s.

Therefore, it is not surprising when the court in *Warner Brothers I* deftly tossed out those similarities that were given as examples of infringement forty years before. With regards to the unitard and cape worn by both characters, the court observed that "such garb is common in the superhero genre rather than unique to Superman."[170] The similarity between the two characters' strength is dismissed as being "too common and general a characteristic or theme" to be a basis for substantial similarity.[171] Many comic book characters fly, and many of them even fly in the fashion of Superman, with arms outstretched, cape billowing in the wind.[172] Even the fact that both Hinkley and Superman fight "wealthy megalomaniacal villains" is described as a common variation on the "classic theme of good versus evil."[173] Many of the distinctive powers or traits of Superman identified in previous cases are stated to be common to the genre, merely *scenes a faire*.[174]

Instead, in the court's analysis it was not the characters' supernatural powers that were important but how they were used.[175] The characterization of

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[167] *See* National Comics Publ'ns v. Fawcett Publ'ns, 93 F. Supp. 349, 355 (S.D.N.Y. 1950); Detective Comics v. Bruns Publ'ns, 111 F.2d 432, 434 (2d Cir. 1940) (focusing on the similarity of skin-tight costume wearing characters with great strength who fight crime and prohibiting the sale of any book or comic "portraying any of the feats of *strength* or *powers* performed by 'Superman' or closely imitating his *costume* or *appearance* in any feat whatever") (emphasis added).

[168] *See* STEPHEN KRENSKY, COMIC BOOK CENTURY: THE HISTORY OF AMERICAN COMIC BOOKS 55-69 (2008).

[169] *See, e.g.*, BEATTY ET AL., *supra* note 125 *passim* (showcasing the many characters with such attributes in merely one comic book company's "stable" of characters).

[170] *See Warner Bros. I*, 654 F.2d at 210.

[171] *Id.* at 209.

[172] *Id.* at 210.

[173] *Id.*

[174] The court specifically suggests that lifting a car is "a stereotypical means of demonstrating great strength, within the *scenes a faire* doctrine." *Id.* What makes this pronouncement even more striking is that one of the most iconic images of Superman is the cover of his debut in Action Comics #1, which shows him lifting a car. *See* Jerome Siegel & Joe Shuster, Picture of Superman, 1 ACTION COMICS, at inside cover page (Detective Comics, Inc. June 1938), *reprinted in* BEATTY ET AL., *supra* note 125, at 340.

[175] *See* Warner Bros. Inc. v. Am. Broad. Cos. (*Warner Bros. II*), 720 F.2d 231, 243 (2d Cir. 1983).

Hinkley as an inexperienced and a somewhat unwilling and goofy superhero was compared with Superman's control and more traditionally heroic bearing.[176] In other words, although they had some superficial elements in common, the most important elements, those related to their characterization, were almost totally different.[177]

Here then we have an example of a character who once commanded an almost total control of the mind-share of a specific mental construct – the construct of the comic book superhero – but who lost this cultural monopoly over time. This loss of popularity and novelty did not even require the owners of this character to sit upon their hands, as DC Comics itself created many characters that began to match the elements that once mainly characterized Superman.[178] However, as Superman's mind-share monopoly disappeared, the average person would not be as likely to see a work involving an individual with a costume and a certain power-set and be able to say that it likely was copied from Superman. Instead, more elements would have to be similar to find infringement, such as examples of Superman's personality,[179] back-story, [180] and interactions with others,[181] in order to attribute the new work to the owners of the Man of Steel. In other words, DC Comics had lost their unfair mind-share advantage and Superman was treated like any other work.

Although this reduction in Superman's mind-share – a reduction in the chances that any other hero would cause a too strong association with Superman – may seem to signify the conversion of a protected expression into an idea,[182] it is merely a natural effect of the requirement of attributing works to an author. Superman remains a protectable expression; he merely has to play by the same rules as mere copyright mortals. It was no surprise that DC Comics could not maintain Superman's high level of popularity and novelty from the 1930s to the 1980s. Instead, without the secret thumb on the scale provided by the mind-share effect, the number of corresponding elements

[176] *Id.* ("In the genre of superheros, Hinkley follows Superman as, in the genre of detectives, Inspector Clouseau follows Sherlock Holmes.").

[177] *Id.*.

[178] *See* BEATTY ET AL. *supra* note 125 *passim* (showing the wide range of superheroes that the DC Comics company owned, including Captain Marvel himself).

[179] *Warner Bros. II*, 720 F.2d at 243 ("Hinkley looks and acts like a timid, reluctant hero, who accepts his missions grudgingly and prefers to get on with his normal life. Superman performs his superhuman feats with skill, verve, and dash, clearly the master of his own destiny."); *Warner Bros. I*, 654 F.2d at 211 (describing how Superman is a "benevolent superhuman" who nobly seeks to improve the world while Hinkley is a regular kid seeking to deal with the major changes acquiring superpowers brings).

[180] *Warner Bros. I*, 654 F.2d at 209-10 ("In Hero, Ralph Hinkley derives his power exclusively from his magic suit, whereas in Superman, the hero's strength is a natural attribute of his extraterrestrial physical makeup.").

[181] *Id.* at 210 ("In Superman, Clark Kent never reveals his true identity, whereas in Hero, Ralph Hinkley voluntarily discloses his part-time superhero status to his girlfriend.").

[182] *See* Lund, *supra* note 89, at 141-43.

needed to show substantial similarity between Superman and another character increased. Therefore, as the ease of attribution diminished with Superman's lessening role as the only superhero in the collective culture, so too did the penumbra of protection that extended over the idea of the superhero.

B. *James Bond – Enduring Popularity*

While a popular property's mind-share will likely fade and decrease over time as a famous work becomes a genre,[183] there are some works that remain almost as powerful as when they were created. The result of *Metro-Goldwyn-Mayer, Inc.*, suggests that perhaps James Bond is one of them.

One of the arguments that Honda advanced was that the elements in their advertisement were merely stock characters and *scenes a faire*.[184] In effect, Honda argued that the idea of a suave British hero was common in the action-thriller genre,[185] and that attractive women, grotesque villains, and high speed chases were equally stock.[186] These arguments feel very similar to those that prevailed in *Warner Brothers I* and *II*. However, here it is not the arguments' failure that is so intriguing, but the way they fail. Neither the plaintiffs nor the court addresses the possibility that the elements indicated were or were not *scenes a faire*. Instead, the court simply notes that the James Bond films were "the source of a genre rather than imitators of a broad 'action/spy film' genre."[187] Thus, unlike in *Warner Brothers I* and *II*, where the analysis looked at the present state of the genre instead of the elements first attributed to Superman when he was created, here the court suggests that because MGM created a stock trait, they get to keep copyright interest in it.[188]

The court offers no reason for dodging the question of whether the elements in contention – a high speed chase involving a handsome hero, a sexy companion and a grotesque villain – were common to the action thriller genre. However, the mind-share effect may again be the reason. Strikingly, it appears that the mind-share effect transformed a collection of elements considered to be stock into a protectable expression in one specific context. The court indicates that without the character of James Bond, the elements referenced would in fact be stock.[189] Accordingly, the Bond films' popularity and known position as an originator of a genre allows them to benefit from broader identifiability and to play by special rules.

What, then, is the difference between James Bond and Superman with regard to the expansion of stock elements? A possible explanation is that

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[183] *See supra* notes 157-161 and accompanying text.

[184] *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1293-94 (C.D. Cal. 1995).

[185] *Id.* at 1295 n.7.

[186] *Id.* at 1293-94.

[187] *Id.* at 1294.

[188] *Id.*

[189] *Id.* at 1295 n.8.

while the superhero genre is filled with thousands of heroes distinct from Superman, the spy-based action movie genre was much more sparsely populated in 1994. Additionally, the commercial aired during the filming of *Goldeneye*,[190] the first of the Bond films starring Pierce Brosnan, where Hollywood buzz would likely have increased the mind-share of James Bond. Finally, while there are many heroes totally unaffiliated with Superman, many of the depictions of suave spies who fight grotesque villains are parodies of or direct references to James Bond himself.[191] While there is no definite answer to what distinguishes James Bond from Superman in this context, these factors could explain James Bond's high degree of popularity and, most importantly, Bond's singularity over forty years.

CONCLUSION

The distinction between ideas and expressions is one of the fundamental components of American copyright law.[192] However, this dichotomy can be confusing and murky, in part because the terms are not well defined.[193] This Note suggests a framework for understanding this dichotomy. Instead of discussing ideas as a monolithic and indivisible class of constructs, each of which could be as simple as Boy meets Girl or as complex as *Romeo and Juliet*, it suggests thinking of idea complexes, each made up of multiple, simpler elements.[194] This not only avoids the confusion of determining the mysterious alchemy that transforms an idea into a protected expression, but also provides a description of substantial similarity: infringement is found when two works contain enough elements in common that a reasonable observer would attribute the second work to the author of the first.

This Note also indicates that the elemental attribution model can potentially explain both the overprotection of novel and popular works and how the protection of such popular works appears to narrow over time. Based upon the idea that popular and unique works will control a high level of cultural mind-share – that they will be easily identified by the average member of the culture – it is likely that such an average observer would require fewer elements in common to attribute a second work to the popular work's author. In this way, popularity and novelty can improperly usurp the role meant for complexity, leading to an overprotection of simpler works and the diminishment of the

[190] *Id.* at 1292*; See Brosnan Bonding With New 007 Role*, THE TORONTO SUN, June 9, 1994, at 8; Nigel Dempster, *Judi on the M(1)*, DAILY MAIL (LONDON), January 25, 1995, at 25.

[191] *See, e.g.*, *Parodies of James Bond*, WIKIPEDIA (Mar. 1, 2010), http://en.wikipedia.org/wiki/Parodies_of_James_Bond.

[192] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-45 (1991); Kurtz, *supra* note 2, at 1222.

[193] *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[194] *See* LOCKE, *supra* note 27, at 163-164; Kurtz, *supra* note 2, at 1254.

public domain. Unfortunately, because courts obscure complexity analysis under the elusive – and in the end meaningless – distinction between "ideas" and "expressions," it is more likely that the public domain will be harmfully diminished and certain authors over-rewarded in this fashion.

Thankfully for the public domain and future creators, maintaining a mind-share monopoly seems to be a difficult endeavor. In many instances, as new works are created in the vein of an original work, many of the elements that could only be attributed to one source due to popularity and novelty become attributable to many. Thus while the implicit use of popularity and novelty to attribute a work to an author is detrimental to the balance at the heart of copyright law, and thus detrimental to future creation and the public domain as a whole, in many cases, as a popular work's mind-share monopoly fades, so will its overprotection.