THE AUTHOR IN COPYRIGHT: NOTES FOR THE LITERARY CRITIC

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A collection of essays, largely by literary critics and comparativists, is the occasion for asking more about the legal definition of "authorship" than has traditionally been the case. Our task, in a sense, has been to respond, to try to determine how courts and Congress have come to define, or failed to define, this seemingly obvious concept. We have sought to trace authorship in legal analysis, particularly in copyright, and have tried to determine whether the definition of authorship, for purposes of copyright law, turns on anything more than the judge's perception of the nature of the work produced.[1]

Quite fortuitously, while our essay was in gestation, the Supreme Court, for the first time in a century,[2] and the second time in two, uttered its Delphic mysteries on this very question, albeit in the peculiar way that American judges have of answering broad questions from very narrow perches. The Court, on this occasion, spoke to the seemingly banal question of whether the particular "expression" as presented in the hefty volumes we call "telephone books" is the subject of copyright. The Court determined that telephone books have no bard, at least not the common style of pages as we know it. That is the teaching of Justice O'Connor in *Feist Publications v. Rural Telephone Service*,[3] a case that purports to provide an authoritative view of authorship. Justice O'Connor's opinion, grounded in a body of experience and judicial discourse, frames the question of who is an author. This opinion is consistent with the tradition of our courts whereby decisions emerge from a history of prior treatment of the question.[4]

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1 This article is the result of an invitation from Peter Jaszi and Martha Woodmansee to give a paper at Case Western. Our thanks to them for inviting us and to Professor Arthur Jacobson of Cardozo School of Law and Peter Hayward of St. Peter's College, Oxford, for commenting on the essay.

2 For counting purposes, we are conflating the Trade-Mark Cases, 100 U.S. 82 (1879) and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

3 111 S. Ct. 1282, 1286 (1991).

4 Also not surprising is an absence of any reference to the literary debates over the nature of authorship. This omission is apparently by choice, not by mere belief that law lives only in law libraries. *See* Simon & Schuster v. New York State Crime Victims Bd.,

Despite the representation that such a history exists, surprisingly little has been written on the subject in the judicial treatment of copyright. True, the Constitution, which serves as the foundation for copyright legislation, offers Congress the power to protect only the writings of "authors,"[5] and the copyright statute itself only protects "original works of authorship."[6] Perhaps this absence is attributable to the fact, noted by Benjamin Kaplan in his great and wonderfully short history, that the author was only a convenient hook upon which to hang the privileges of the publisher.[7] Still, we should hope to describe and understand so important a hook.

Feist confronted Justice O'Connor with a pattern of facts that could be placed in a familiar context, at least familiar to lawyers. The plaintiff, presumably, had gone to a great deal of trouble to assemble the names, addresses and phone numbers for its phone book.[8] The defendant, who published a regional book incorporating numbers from a group of other books (all of which the defendant was licensed to use, except those of the plaintiff), had reaped where he had not sown; or, to use another frequent judicial metaphor, had benefitted by the sweat of another's brow.[9] One question raised by this case was whether the stuff of phone books constituted non-protected "facts" as opposed to the work of an "author."[10] Justice O'Connor easily dealt with that aspect of authorship, reiterating that facts are not copyrightable, whether they come in molehills or mountains. The amount of work involved in assembling the facts does not enter into the legislated equation.

As to facts, regarding the sweat of a putative author's brow,

112 S. Ct. 501 (1991) (Son of Sam statute case decided by O'Connor in December 1991 mentioning such non-legal sources as Malcom X's autobiography and The Confessions of Saint Augustine). But perhaps it is non-legal *analysis* of the world that is not considered—or considered and rejected as unsure footing. Roe v. Wade, 410 U.S. 113 (1973), used then-current medical knowledge. *Roe* was criticized for reading changing scientific dogma into the Constitution. *See, e.g.*, ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113-14 (1976).

5 U.S. CONST. art. I, § 8, cl. 8.

6 "Copyright protection subsists, in accordance with this title, in original works of authorship . . . ." 17 U.S.C. § 102(a) (1988).

7 *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1968).

8 This may be an inaccurate presumption. The names, addresses and telephone numbers are supplied by would-be subscribers during the normal course of requiring telephone service. As Justice O'Connor notes, "Rural obtains subscriber information quite easily." *Feist*, 111 S. Ct. at 1286. This information would have to be coordinated for billing. With today's computer technology, reassembling it into directory format hardly seems incredibly laborious.

9 The "sweat of the brow" or the "industrious collectivism" doctrine is traced in *Feist* to a misreading of the 1909 Copyright Act. *Id.* at 1291-92.

10 Feist, 111 S. Ct. at 1287.

Justice O'Connor saw no room for debate. On another question, however, analysis was necessary, and it was analysis that yielded insight into the requisites for authorship. Even if facts are not copyrightable, compilations or collections may be, if, but only if, the mode of compiling or collecting is itself "original," or the act of authorship. Perhaps some arrangements in telephone books demonstrate sufficient originality for protection, but not the garden variety book that lamely assembles names in alphabetical order, following them with addresses, and then, after a discreet space, with the number of their telephone device. Surprisingly, Justice O'Connor used the sledgehammer of constitutionality to kill the flea-sized modicum of originality and authorship represented by the plaintiff.[11]

What is important about *Feist*, for our purposes, is the gap that it discloses between the legal and the literary debate over the notion of the author. Elsewhere in this issue, those skilled in the history of criticism reflect upon the evolving treatment of authorship outside of legal analysis. It is fairly clear that the idea of author as romantic, creative hero, as the genius of homo sapiens, the person whose stroke of genius is the basis for civilization—an idea that is reflected, often in legal discourse—has been the subject of intense debate and criticism. Ideas of originality, so central to Justice O'Connor's analysis,[12] are highly suspect among modern literary critics. Indeed, the very idea of authorship is often perceived to be part of the general hierarchy of power that ought to be destroyed in the interest of creating a newer and better society.

For us, this dichotomy between law and literature raises several important questions. Is there something about law and legal analysis that requires a different approach to the notion of authorship than that which persists in literary criticism? The literary critic, awash in movements that deny the nineteenth-century model of author, sees the problem of text and attribution in ways that are fundamental to the nature of society. For the modernist,

[11] *See* Marci A. Hamilton, *Justice O'Connor's Opinion in Feist Publications, Inc. v. Rural Telephone Service Co.: An Uncommon Though Characteristic Approach*, 38 J. OF COPYRIGHT SOC'Y, U.S.A. 83 (1991). Professor Hamilton asserts that the decision was uncharacteristic of Justice O'Connor's jurisprudence, which ordinarily exhausts the possibility of statutory interpretation before resorting to constitutional hermeneutics. As to the lack of illumination, suffice it to say that few are equipped, without poetic tendencies of their own, to summarize the difference between what is "original" and what is not. *See, e.g.*, Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (Learned Hand's formulation of the abstractions test). Indeed, this article exists because of the structural problem of defining authorship itself.

[12] *Feist*, 111 S. Ct. at 1287-89.

perhaps, all work is collaborative, all work is derivative. For those who see the world as representation, who see every account as a construction of events, rather than the event itself, there can be no true distinction between "facts" and the mental creations. For the law-trained judge, the task is different. The subtext for the lawyer is the search for underlying principles of liberty and freedom, not for source, influence and social construct. At the very least, how authorship is defined brings us into intimate contact with notions of freedom—freedom of expression, freedom to publish history and commentary. Congress purports, pursuant to the constitutional mandate, to expand protection in order to encourage creative work. But if we expand protection too broadly or in unproductive ways, creativity may be stymied by constraining the use and interplay of ideas. In a society that deals more and more with the production, bundling and trade in information, how that information is constrained and characterized will determine the structure of competition, the opportunity for entry and the cost of engaging in intellectual and practical advances. The "idea-expression" distinction exemplifies the problem: copyright is said to protect the skin of ideas, not the ideas themselves; but, if anything is clear from history, it is the murkiness of this distinction.[13] Almost every issue now litigated, from fair use to the definition of minimum creativity, has these questions of importance to the shape of an advanced information society as subtext. As is true in virtually any debate about

[13] *See, e.g.*, Richard A. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551 (1990) (the traditional dichotomy is superfluous and misleading since there is no such thing as an unexpressed idea; the correct distinction is between unprotectable and protectable expressions); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393 (1989) (copyright dodges First Amendment problems by limiting only the use of expression; however, this is insufficient because the decisions on the bounds of expression are premised on mere instinct and the resulting uncertainty of outcome creates a chilling effect). Consider the current debate over this basic distinction as applied to computer interfaces. *See, e.g.*, Lotus Dev. v. Paperback Software Int'l, 740 F. Supp. 37 (D. Mass. 1990) (menu command structure is copyrightable as expression even though it is useful); Daniel J. Fetterman, *The Scope of Copyright Protection for Computer Software: Exploring the Idea/Expression Dichotomy*, 36 COPYRIGHT L. SYMP. (ASCAP) 1 (1986 competition, printed 1990) (advocating wide protection of design, structure and organization of computer programs to match that of other literary works); John H. Pilarski, *User Interfaces and the Idea—Expression Dichotomy, or Are the Copyright Laws User Friendly?*, 37 COPYRIGHT L. SYMP. (ASCAP) 45 (1987 competition, printed 1990) (The apparently conflicting decisions on the boundary between idea and expression in computer programs actually follow consistently the traditional balancing policy of encouraging progress by public availability of material while providing incentives through protection of new creations.); Steven R. Englund, Note, *Idea, Process, or Protected Expression?: Determining the Scope of Copyright Protection of the Structure of Computer Programs*, 88 MICH. L. REV. 866 (1990) (calling for more detailed analyses of the programs to limit protection to those elements which are not unprotectable ideas or processes).

the scope of copyright, beneath the doctrinal struggle are profound arguments about democratic theory and the production of ideas. The definition of authorship is no exception.

The lawyer works by analogy, the literary critic from a different context. Take patent law for example. For the critic, patent does not provide a relevant context for constructing an author. But for a law-trained scholar, patent law would be the first place to look for guidance. In the mind of the lawyer, patent is a close relative to copyright. Both derive from the same constitutional phrase,[14] and the Supreme Court has accepted the rationality of

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[14] "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." U.S. CONST. art. I, § 8, cl. 1, 8. The intended relationship between the two subjects of the clause is unknown. The intellectual property clause was submitted on September 5, 1787, by Brearley, for the Committee on Unfinished Business, in response to a suggestion by James Madison "[t]o secure to literary authors their copyrights for a limited time," and to two suggestions by Charles C. Pinckney "[t]o grant patents for useful inventions" and "[t]o secure to authors exclusive rights for a certain time." ARTHUR T. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 529 (1968). No debate is recorded. 1 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & James B. Scott eds., 1987); ALAN LATMAN ET AL., COPYRIGHT FOR THE NINETIES 5 (Robert A. Gorman & Jane C. Ginsburg eds., 3d ed. 1989).

Several rejected alternatives on the same general subject are known.

> MADISON: It should be provided that the government have power to encourage by premiums and provisions the advancement of useful knowledge and discoveries.
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> PINCKNEY: Power should be given the government to establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades and manufactures.
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> PINCKNEY: The government should have power to establish seminaries for the promotion of literature and the arts and sciences.
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> MADISON: Congress should be enabled to establish a university in the place of the general government, and should possess exclusive jurisdiction over the institution. It should be specified that all persons might be admitted to the university and to its honors and emoluments, without any distinction of religion whatever.

JAMES MADISON, CONSTITUTIONAL CHAFF: REJECTED SUGGESTIONS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 64 (Jane Butzner comp., 1941). Madison's later defense of the clause is not very helpful:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. . . . The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

THE FEDERALIST No. 43, at 186 (James Madison) (THE ENDURING FEDERALIST, Charles A. Beard ed., 1948). Elliot's compilation includes no indexed mention of discussions on this clause. *See generally* JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1941).

Besides the lack of information on the framers' intent, we have the additional problem, common to all constitutional discussions, of deciding the importance of that intent. In the words of James Madison, "[a]s a guide in expounding and applying the provisions of the Constitution . . . the debates and incidental decisions of the Convention can have no authoritative character." Letter from James Madison to Thomas Ritchie, Sept. 15,

illuminating copyright problems by looking to previously created patent solutions.[15] Also, a lawyer would note that while the copyright statute breezes by authorship without a careful definition, the patent statute denies protection to anyone except the original inventor.[16] The case law is rich with quarrels over priorities[17] and detailed statements of the minimum in action and understanding needed to qualify for the title "inventor."[18] One must both "conceive" of the invention and "reduce it to practice."[19] Actual reduction to practice is physical operation of the claimed invention for its intended purpose. Constructive reduction to practice is filing a patent application showing the discovery and its use.[20] "Conception" consists of "formation in the mind of the inventor, of a definite and permanent idea of the complete and

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1821, *quoted in* LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 1 (1988). Later writers have expressed widely disparate views. *See, e.g.*, Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 490 (1981) (framers may have intended to delegate power to future population to make decisions); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 94 (1984) (courts should not add restrictions to the Constitution); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (by "framers' intent" the Framers meant the intention of the sovereign parties, not of the writers of the Constitution); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (interpretivism assumes an undemonstrable historical consensus). *See generally* LEVY, *supra* (overview of opposing theories).

[15] *See, e.g.*, Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 439-42 (1984) (using the patent definition of a "staple article of commerce" to decide a copyright issue).

[16] "A person shall be entitled to a patent unless—

. . . .

(f) he did not himself invent the subject matter sought to be patented . . . ." 35 U.S.C. § 102 (1988). One can, of course, assign one's rights to a patent and the statute has a special provision allowing a non-inventor to apply when an inventor exists under certain limited special circumstances.

> Whenever an inventor refuses to execute an application for patent, or cannot be found or reached after diligent effort, a person to whom the inventor has assigned or agreed in writing to assign the invention or who otherwise shows sufficient proprietary interest in the matter justifying such action, may make application for patent on behalf of and as agent for the inventor on proof of the pertinent facts and a showing that such action is necessary to preserve the rights of the parties or to prevent irreparable damage; and the Commissioner may grant a patent to such inventor upon such notice to him as the Commissioner deems sufficient, and on compliance with such regulations as he prescribes.

35 U.S.C. § 118 (1988).

[17] Squibs on "anticipation" (the existence of the invention before the applicant's discovery) and "priority of invention" (who among rival claimants was the first to invent) fill over sixty pages of the United States Code Annotated. 35 U.S.C.A. § 102 (West 1984 & Supp. 1992) (annotations to 35 U.S.C. § 102).

[18] *See, e.g.*, Lutzker v. Plet, 843 F.2d 1364, 1366 (Fed. Cir. 1988) ("Generally, the party who establishes that he is the first to conceive and the first to reduce an invention to practice is entitled to a patent thereon.").

[19] *Id.*

[20] Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1376 (Fed. Cir. 1986), *cert. denied*, 480 U.S. 947 (1987).

operative invention, as it is hereafter to be applied in practice."[21] Conception is an understanding of what you have created; an understanding present in a mind. One must bring to the Patent Office not just an operative machine, but an understanding of how that machine will be useful. "[P]eople conceive, not companies . . . ."[22] This centrality of inventorship in patent law is in severe contrast to the marginality of authorship in copyright. Why is this reasoning persuasive to the lawyer or judge, but worth nothing to the literary critic? One answer might be that the critic's task is different from the judge's. The role of the legal institutions may be reduced to providing a set of traffic rules for commercial transactions. The test of the rules is whether traffic moves, whether transactions are completed, whether investments are made and whether innovations take place with adequate frequency. If the rules perform these tasks, then the lawmaker feels vindicated, whether or not the rules embody principles that are philosophically or morally be defensible. A rule that prohibits scholars from publishing the contents of the letters of the famous may be criticized because the rule limits scholarship and the growth of knowledge. That is the important question, not the abstract issue of whether a letter is subject to copyright or not. We ask whether patents can be held in living organisms, but the answer turns on the encouragement of science, not on issues of abstract truth.[23] For the lawyer, the experience in patent law involves mental gymnastics that are similar to those in the copyright sphere. As a matter of efficiency, the patent field is thought to produce precedents.

The Sisyphean task of the lawyer is to fit the messiness of life into categories of legal rule. Doctoral candidates may spend years studying the relationship between one painter and another, in terms of iconography, or color or placement of verticals and horizontals on the canvas. But the aesthetician's range of influence has to be reduced, in the legal process, to the category of plagiarism *vel non*. For the critic judging the work of Sherrie Levine, the artist, whose work consists of the reinterpretative ap-

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[21] *Id.*

[22] New Idea Farm Equip. v. Sperry Corp., 916 F.2d 1561, 1566 n.4 (Fed. Cir. 1990). We have been unable to locate any cases crediting conception, or invention, to non-humans—including computers or monkeys.

[23] *See* Monroe E. Price, *Reexamining Intellectual Property Concepts: A Glimpse Into the Future Through the Prism of Chakrabarty*, 6 CARDOZO ARTS & ENT. L.J. 19 (1988). *See also* Edward L. Andrews, *U.S. Patent on Genetic Codes, Setting Off Furor*, N.Y. TIMES, Oct. 21, 1991, at A1, A12 (U.S. Government decided to patent genes without waiting to discover their functions).

propriation of other artists, the standard for judging stretches into realms of intention, of context, of the power of the artist to use the work of others in her own process of critical commentary. For the lawyer, categories are often reduced to merely two: this is an act permitted, or this is an act forbidden.

In any act of writing or creation, there are various levels of purpose or intention. The physical act of placing marks on paper, as an example, may be involuntary or accidental. At the time the mark is made, the intention to create may be absent. For some artists, the purposeful selection of accidental transactions constitute their work. Other artists and poets have sought intentionally to incorporate and capture chance in their work. Here there is intention, even though it is sometimes the intention to appear unintentional. Sometimes intentionality follows the act, as opposed to being contemporaneous with it. An artist, by characterizing a thing as art, joins his or her intention to an otherwise finished object. In some part, the intention is to change the object from the mundane, the utilitarian, to the domain of art. Consider Duchamp's *Fountain*, the artistic selection of a mass-manufactured urinal. Sometimes, we believe that because the artist is an artist, what he or she calls art becomes art.[24] Judge Leval, in his Brace Lecture on fair use, sought to differentiate the homely note tacked on a refrigerator door.[25] These may be scribbles done under the impulse of communication, with no thought of their entry into the system of art; yet, at a later point, because of the identity of the scribe, they may become art.

But this Article is about law and by authors trained primarily in law. We have turned not to the literary critics, but to the history of copyright decisions, to determine how legal analysis has approached the question of authorship. We intend to deal with these questions in far greater detail elsewhere, but our own narrative of that history—our authored construction, as it may be put—suggests several paradigms for thinking about the author. The easiest construction of authorship is any mark[26] on a piece of paper, or some other medium, by a person.[27] This is the interpre-

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[24] *See infra* note 35 (Dickie's Definitions).

[25] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1119 (1990).

[26] There's trouble right here, since the definition requires some objective manifestation. An argument could be made for a copyright law that protected ideas as well as expression, or for a copyright law that was based on the principle that there is no meaningful distinction between ideas and their physical, or close to physical, expression.

[27] "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ." 17 U.S.C. § 102(a) (1988). Whether authorship should be limited to human beings, we leave aside and assume that only human beings are authors. But computers are coming up fast, *see, e.g.*, Pearson, *Copyright in Computer*

tation which is most at odds with Justice O'Connor's view in the *Feist* decision, since it requires hardly any originality. A second construction of authorship would require that the author manifest, through some objective notion of intent, that he or she wishes to be considered an author for purposes of copyright and that the particular work is related to that conception of authorship. The third construction would have the law turn on a social definition of who constitutes an artist, a version of the law that would rely on an external determination of the protected class and then reward that class for its membership, not necessarily for its individual product. We have called these tests, respectively: the objective, intentional and aesthetic tests.

From our review of the literature, it seems that something like an objective test has had great appeal. It seems most suitable in a community thoroughly suspicious of line-drawing based on the nature of the work produced or the intention of those creating it. Any stroke of work, no matter how created or by whom, would be the subject of protection. The objective test is agnostic as to the nature of the work, agnostic as to the nature of the creator, and agnostic as to the purpose, if any, behind the work's creation. To be sure, the infringement of some works may be more important than the infringement of others, but that is an issue for determining damages, or whether to issue an injunction.[28] Refinements on the objective test could require, at a minimum, that the stroke be by a human conscious of making the mark, or that it have some minimum level of creativity, or otherwise begin to import small qualitative distinctions. American copyright law has often had objective impulses, particularly because of a fundamental distrust of aesthetic determinations by judges.[29] While the copyright law nominally requires originality and something which differentiates the work from the mundane and the useful, the objective tendency in American law has deemphasized these defining qualities. Because Americans tend to distrust judicially

Generated Programs, 1987 ABA Sec. Patent, Trademark & Copyright Law Rep. 181 (authorship of program created by a master program), and we anticipate claims from the champions of animal rights. *See, e.g.*, D. MORRIS, THE BIOLOGY OF ART: A STUDY OF THE PICTURE-MAKING BEHAVIOR OF THE GREAT APES AND ITS RELATIONSHIP TO HUMAN ART (1962).

28 On the importance of separating rights from remedies in copyright see Honorable James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 992-97 (1990) (existence of infringement should not automatically settle issue of whether injunction should be issued).

29 *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . .").

determined definitions of art, they are more comfortable with eligibility standards based on more formal criteria, such as: is the work reduced, in some way, to paper—or "fixed," to use the more technical term.[30]

One can explain the objective test as an extension of the oxymoron of objective intent familiar from contract law. We do not deal with what the author subjectively (*i.e.*, actually) intended.[31] Rather, we deal instead with what a person observing the author's actions would have thought he intended. This paradigm only makes sense if the observer needs protection, as he does in contract where one relies on what he observed. This copyright paradigm establishes the constitutional clause as a contract between the public and the author. This analogy, however, is seriously flawed. The public acted to set up copyright *before* the author wrote;[32] the public did not act in reliance on its observation of the author's production. The only actor who responded to the author's creation was his competitor, a later author or publisher. This competitor must decide if the earlier author had created a protected work or one he could safely mine for additions to his own creation. This reliance, however, rests more on the interpretation of court actions than on those of the original author. The more logical outcome of copyright as contract is the economic paradigm.

The test of economic intentionality also prevailed in American history. Until 1978, copyright law turned, to a remarkable extent, on the expressed intention of the author to make use of the system of copyright. Generations of lawyers were taught to ask whether the work carried the necessary signal of intention to seek the umbrella of statutory protection (the now-disestablished "c" in a circle).[33] The most charming aspect of the economic test is its democratic access to copyright and its joinder to the simple manifestation of intention incorporated in the notice requirement. No one had to be certified to be entitled to copyright; any

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[30] To be copyrightable a work must be "fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1988).

[31] *See, e.g.*, Armstrong v. M'Ghee, 1795 Add. 261 (County Ct., Westmoreland, Pa., 1795) (contract for sale of horse enforced though intended as a joke).

[32] Motivation of the individual author seeking protection is also not clearly required. *See infra* note 38 and accompanying text.

[33] "Cure," the saving of a work which otherwise fell into the public domain by publication without notice, was allowed by the 1976 Revision which controlled works created from January 1, 1978. 1976 Copyright Act, Pub. L. No. 94-553 § 405, 90 Stat. 2541, 2578 (codified as amended at 17 U.S.C. § 405 (1988)). The need for notice on new works was eliminated in 1988. Berne Convention Implementation Act of 1988, Pub. L. 100-568 § 7(e), 102 Stat. 2853, 2858 (codified at 17 U.S.C. § 405 (1988)).

idea of subjective intention was fulfilled by the objective formalities that clearly demonstrated a desire to accept society's offer of a monopoly over the work for a limited term in exchange for the work's publication. One might argue that it is not only irrelevant, but almost impossible to define the specific intent to be "an author," rather than the general intent physically to record an idea, or otherwise take the simple actions required to move a pencil across a paper, a brush across a canvas or fingers across a machine. We shall assume that a person (leaving aside corporations or other artificial entities) can entertain a specific intent to be something which we call "author." The notion of being an author embraces and celebrates such an intent. Indeed, the concept of copyright is enriched and rationalized by an approach that provides some legal substance to the concept of authorship. But note that the intention central here is the intention to profit from the system—not the intention to create masterpieces.[34]

The aesthetic test, seemingly so different from the general history of copyright, has a logic that might bring it closer to the work of the literary critic, though with opposite conclusions. At least it looks to the world of the arts as the standard for determining who should be entitled to protection. Only "artists and authors," perhaps self-defined,[35] but more likely defined by the National Academy of Arts and Sciences, would be entitled to the incentives provided by copyright protection or some other device. This group, "authors," would be identified as the group professionally devoted to making a livelihood from writing and painting, and they should be honored, protected and supported. Think of the Japanese experience of protecting human "national treasures" in the way that America protects landmarks. Copyright is not the most efficient or credible way of doing that: supporting the authors and artists by providing protection for their

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[34] Few things were below the originality level of copyrightability if they complied with the formalities. *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (uninspired circus posters are copyrightable); Magic Mktg. v. Mailing Servs., 634 F. Supp. 769, 771-72 (W.D. Pa. 1986) (phrases and bold lines on envelopes are not copyrightable). True genius would forfeit copyright protection if statutory formal requirements were not met. Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n, 320 F. Supp. 1303, 1311 (N.D. Ill. 1970) (Chicago Picasso not protected due to publication without proper notice).

[35] At least one modern aesthetic philosopher makes the creator's self-identification central to the artistic nature of a piece. To George Dickie "[a]n artist is a person who participates with understanding in the making of a work of art," and a "work of art is an artifact of a kind created to be presented to an artworld public." GEORGE DICKIE, THE ART CIRCLE: A THEORY OF ART 80 (1984). A person's own decision to enter his creation into the public forum of works criticized as art by interested observers is the central act which transmutes an artifact into an art object.

works. A society could—and many do—go further, and directly support the artists. Those classified as artists should be supported whether or not they produce physical works of art in any particular year. The person, not the work, should be the fulcrum for incentive.[36] In the United States, the closest analogy we have, from the perspective of the federal government, is the National Endowment for the Arts, and "peer review" is the mechanism used here for definition and determination of eligibility.[37] Our most recent expansions of protection shy away from the aesthetic test—even though both were prompted by The Berne Convention. We added an indirect subsidy by supplying European-style extra rights, moral rights, to a limited number of works of special characteristics.[38] This new federal legislation, however, carefully refrained from tying this added protection to judgments of artistic merit about specific works—the act instead deals in special categories of works.[39] Similarly, the recent expansion of protection to architectural works deals with quality only indirectly by excluding from coverage "individual standard features" of protected entities.[40]

For a very long time, the economic intentionality test most nearly characterized American attitudes. In a society that relies

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[36] For a discussion of such a system, see MIKLOS HARASZTI, THE VELVET PRISON: ARTISTS UNDER STATE SOCIALISM (G. Konrad trans., 1987). Of course, changes in government can strand artists who have become dependant on such a system of subsidies. *See, e.g.*, Henry Kramm, *Freed From Censorship, Culture in Hungary Now Suffers Lack of Security*, N.Y. TIMES, Dec. 11, 1991, at A20.

[37] 20 U.S.C. § 954 (1988). The Chairperson of the National Endowment for the Arts acts upon recommendations made by the National Council for the Arts, whose members are "private citizens . . . widely recognized for their broad knowledge of, or expertise in, or for their profound interest in, the arts." *Id.* § 955.

[38] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (to be codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (1988)). This act grants the rights of attribution and integrity, *id.* § 603 (to be codified at 17 U.S.C. § 106A), to works of visual art. A "work of visual art" is defined as

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, with certain listed exceptions.

Id. § 602 (to be codified at 17 U.S.C. § 101 (1988)).

[39] Some states' moral rights statutes do incorporate quality distinctions, Louisiana and New Mexico, for example. LA. REV. STAT. ANN. § 51: 2152 (West 1987); N.M. STAT. ANN. § 13-4B-2 (Michie 1989).

[40] Architectural Works Copyright Protection Act, Pub. L. No. 101-695, § 702(a), 104 Stat. 5133 (1990) (to be codified at 17 U.S.C. § 101 (1988 & Supp. 1990)).

on the economic test, the status of the creator (an approved artist or author) is not the determinant of protection, but more fundamentally the relationship of works of art to the marketplace. Copyright law exists as an exception to the First Amendment prohibition on laws limiting speech, but it does so for a specific reason.[41] The Constitution, taken as a whole, recognizes that protection of works of art is necessary in order to encourage their production. A fundamental reading of the copyright clause suggests that we would be a poorer society and world without patents and copyrights because the incentives for creativity would be wanting. Clearly our patent law follows this paradigm: only the premier inventor can obtain a patent;[42] he must do so by timely approaching the Patent Office with proofs of his entitlement;[43] his failure to make this bargain dedicates the invention to the public despite the work of later reinventors.[44] This economic

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[41] Congress is not forced by the First Amendment to grant copyright monopoly to all works. "The first amendment does not protect the right to copyright," according to Ladd v. Law & Technology Press, 762 F.2d 809, 815 (9th Cir. 1985). More fully, this case held that the deposit requirement is neither a taking prohibited by the Fifth Amendment, nor a tax on expression barred by the First Amendment. Presumably any formality that is rationally related to the constitutional purpose of "promoting the public interest in the arts and sciences," *id.* at 814, can be congressionally imposed as the price of copyrightability.

[42] *See* 35 U.S.C. § 102(f) (1988); text quoted *supra* note 16.

[43] *See* 2 PETER D. ROSENBERG, PATENT LAW FUNDAMENTALS §§ 13.01-.08 (2d ed. 1991) (contents of patent applications).

[44] This statement is a generalization; certain types of old work do not destroy "novelty" for the patent statute which has a very detailed list of statutory bars to protection.

> A person shall be entitled to a patent unless—
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> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or
>
> (c) he has abandoned the invention, or
>
> (d) the invention was first patented or caused to be patented, or was the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States, or
>
> (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent, or
>
> (f) he did not himself invent the subject matter sought to be patented, or
>
> (g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the

test, however, raises important questions about the relevance of intention and its presumptions. Must the author be personally motivated by the incentive or should all authors receive protection because the copyright system motivates them as a group?[45] Here, again, the complexity of copyright in a free society presents itself: how does one calibrate a legal structure so as to provide adequate incentives for creativity without, at the same time, discouraging the inventive scholarship that comes from the exploitation of existing ideas?[46]

Where is the *Feist* decision in this continuum? Recall that Justice O'Connor finds that the plaintiff has no claim, that the telephone book has no author for the purpose of invoking copyright law. More than an objective test is clearly required, though how much more is not certain. Justice O'Connor conflates the two meanings of "originality." On the one hand, originality relates to origins, and an author is the origin of the work. On the other hand, originality has come to mean more, and this additional meaning is important to the Court: originality implies a modicum of creativity, something thought of, the product of some element, however modest, of human genius.[47] Nor is the *Feist* Court adopting the economic intentionality test. Indeed, there is no question that the plaintiff sought to be part of the copyright system by manifesting its intention to publish a work

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> respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

35 U.S.C. § 102 (1988).

45 The group approach was endorsed in Hutchinson Tel. Co. v. Fronteer Directory Co., 770 F.2d 128 (8th Cir. 1985) (holding specific telephone directory copyrightable even though it was clearly not motivated by the copyright monopoly, but rather by the desire to maintain its telephone service monopoly), *overruled on other grounds by* Feist Publications, Inc. v. Rural Tel. Serv., 111 S. Ct. 1282 (1991) (holding white page telephone directories not copyrightable because of lack of originality). The group approach is also suggested by the cases on "usefulness." The Constitution speaks of the "useful Arts," U.S. CONST. art. I, § 8, cl. 8. Copyright has been upheld for specific "useless" items because the system of copyright is itself useful. *See, e.g.*, Pacific and S. Co. v. Duncan, 744 F.2d 1490, 1498-99 (11th Cir. 1984) (upholding copyright for broadcasts which could not be repeated because the tapes were destroyed), *cert. denied*, 471 U.S. 1004 (1985); Jartech, Inc. v. Clancy, 666 F.2d 403, 405-06 (9th Cir.) (upholding copyright for obscene materials), *cert. denied*, 459 U.S. 826 (1982).

46 Jessica Litman has suggested (1) that the American copyright system is based on an inaccurate myth that authors create *ex nihilo* and (2) that a large public domain is the safety valve needed to prevent this myth from overstressing the reality of authorship. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1023 (1990).

47 The third meaning of originality particular to copyright requires that the work be conceived without copying, as to its creative margin, a pre-existing work. To use a well-worn example, if an author were to write the same words in the same order as they appear in one of Shakespeare's plays, but did so without any reference to Shakespeare, they would be "original."

that would have the maximum protection possible. These were not accidental writings, like letters or off-hand notes. Oddly, the decision is closest to the aesthetic test: the *Feist* Court wants a living, breathing author;[48] without one, there cannot be the "originality" demanded. The most striking element of *Feist* is that it places the judge, once again, in the position of judging the quality of the work.

What should the law of authorship look like? As important as the question of who an author is to the literary critic, the absence of legal analysis may suggest its relative unimportance in copyright law. The image of the author, however, can be fashioned from other doctrines. Doctrines such as work for hire, fair use, joint authorship and originality all inform us more readily about what the law thinks of authors than the interpretation of the word itself. All of these questions deal with the outer husk of authorship. They presume there is an author and debate only its identity. It has taken *Feist*[49] to suggest again that the inner husk of authorship can be dealt with directly.

Why focus on the author as opposed to the writing or the fair use? The arguments against are clear. Trying to determine who is an author has the general tendency to implicate the aesthetic test, one that has been so strongly eschewed by American law. There are fundamental difficulties in defining authorship by examining the intention of the creator of the work. To be sure, a definition of authorship that rests on an intent to have one's writing protected is a definition that springs from the very purposes of the constitutional copyright clause. This protection serves as an incentive for engaging in the process of producing a protected writing. But intention is also problematic, for it implicates the judge too much in a search that has little relationship to the creative process. Perhaps a person who writes and sends a letter with the recognition that the recipient can give it to a library and make it available to researchers should not be considered an "author" under the copyright law unless there is strong evidence to the contrary. Perhaps this is the reason men and women acting in their official capacity for the government are not authors under the copyright law.[50] Under this view, authorship would erect a standard independent of the nature of the writing. Only a work by an author could be considered a protected writing.

48 One can also read *Feist* as merely requiring a *work* of a certain level of "originality" and assume such a work implies such an author.

49 *Feist*, 111 S. Ct. at 1282.

50 17 U.S.C. § 105 (1988).

It would be tempting to argue that a tougher definition of authorship is better because it confines the scope of copyright and expands the zone of material available to be copied and used in a free society. But that argument would prove too much. We might favor an independent definition of authorship because of some collective feeling that the zone of protection is too broad, or that accession to the Berne Convention by eliminating the need for formalities raises questions of additional constraint. Our own impulses for finding a definition of authorship arise from concerns about the pressure on the fair use doctrine. Our belief is that the tremulousness among publishers, particularly regarding critical biographies, stems from too broad a definition of copyrightable material and too narrow a definition of what constitutes fair use. The strains within the Second Circuit stem from its overuse of the fair use doctrine. One solution, and one that has almost been accomplished, is to obtain a broader definition of what constitutes fair use, either through the courts[51] or through Congress.[52] Another approach is to reduce the zone of copyright itself. Since the Supreme Court has just strongly reiterated the primacy of originality, courts are justified in rechanneling the American legal discussion of copyright from the centrality of the object to that of the author.

American copyright law before the Berne Convention was open to criticism for its mediation among the three paradigms mentioned—the objective, the intentional and the aesthetic. Within them, however, a long-time balance existed in which the concept of authorship could have been situated, even implicitly. What is increasingly clear, however, is that the traditional formalities of American law are declining and serving less and less as a meaningful line between what should be protected and what should not be protected. Notice is no longer required.[53] Without notice, or the expression of intent to opt into a system of

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[51] Several recent cases can be seen as judicial attempts to widen the narrow reading of the fair use provisions in Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) and New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1168 (1990). *See* New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152 (2d Cir.) (using published/unpublished distinction), *cert. denied*, 111 S.Ct. 297 (1990); Wright v. Warner Books, Inc., 748 F. Supp. 105 (S.D.N.Y. 1990) (using, *inter alia*, loopholes of paraphrase, banality, factuality, failure to show economic harm and unclean hands).

[52] S. 1035, 102d Cong., 1st Sess. (1991), a pending revision of 17 U.S.C. § 107 (1988) introduced by Senator Simon, would make the unpublished nature of a work less central in the fair use analysis. 137 CONG. REC. S5649 (daily ed. May 9, 1991); 137 CONG. REC. E. 1821 (daily ed. May 16, 1991) (House version).

[53] 17 U.S.C. § 405 (1988).

copyright,[54] the objective approach, unalloyed, may yield too wide a swath of protection. Publication is not a dividing line between what is protected and what is not.[55] Even the concept of fixation is soft around the edges.[56] The concept of originality, once a source for separating the sheep from the goats, no longer usefully performs that function.[57] In addition, decisions that fail to distinguish between copyrightable works of art and objects of mere utility have blurred the precincts of art.[58]

The Berne Convention tradition may mean, in important respects, more of a tendency toward the aesthetic standard. The very essence of American copyright law differs from the romantic Europeans with their exotic neighboring rights, personal rights, and moral rights. For them, the act of creation is central to the very notion of protection; to us, with a perspective that integrates copyright with property rights rather than with human rights, the source of the property seems far less relevant.[59]

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54 Registration certainly does not fulfill this function. Copyright exists before registration. 17 U.S.C. § 408(a) (1988). Furthermore, while useful, registration is merely voluntary in most cases. *See* M. LEAFER, UNDERSTANDING COPYRIGHT § 7.4 (1989) (providing an overview of registration).

55 All "fixed" works are protected. 17 U.S.C. § 102(a) (1988). Gone is the 1909 Act's outcast category of unpublished works that were relegated to common law protection. 17 U.S.C. § 102 (repealed 1976; eff. Jan. 1, 1978).

56 Courts protect video games despite their wide variations and user input. *See, e.g.*, Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982) (holding play mode of video game copyrightable). *See* MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 2.18[H][3][b](1991) (providing an overview of video game cases).

57 Few items are below the level of originality. Plebeian topical songs are protectable. Henderson v. Tompkins, 60 F. 758, 763-64 (C.C.D. Mass. 1894) (protecting the song "I Wonder If Dreams Come True" over a charge of triviality). *But see* Magic Marketing v. Mailing Serv. of Pittsburgh, 634 F. Supp. 769 (W.D. Pa. 1986) (denying copyright protection for envelopes with a solid black stripe and the phrases "telegram," "gift check," "priority message," and "contents require immediate attention"). White page telephone directories with listings in standard alphabetical order were only recently placed outside the pale. Feist Publications, Inc. v. Rural Tel. Serv., 111 S. Ct. 1282 (1991). Perhaps this is an indication of the revival of the originality requirement as a meaningful barrier to protection.

58 *See, e.g.*, Kieselstein-Cord v. Accessories by Pearl, 632 F.2d 989 (2d Cir. 1980) (holding decorative belt buckle is copyrightable); National Theme Prods. v. Jerry B. Beck, Inc., 696 F. Supp. 1348, 1353 (S.D. Cal. 1988) (holding designs for masquerade costumes copyrightable, even though the items are useful articles, because their details result from artistic—not function driven—decisions. *But see* Esquire, Inc. v. Ringer, 591 F.2d 796, 805 (D.C. Cir. 1978) (holding overall shape of lighting fixture is not copyrightable), *cert. denied*, 440 U.S. 908 (1979). The usefulness limitation may be applicable only to "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5)(1988). Computer programs are, however, useful and protected. *See* Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, Or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477, 1487-89 (1991).

59 American law, therefore, protects publishers to encourage the marketing of works created by others. *See, e.g.*, Zechariah Chafee Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 509-11 (1945) (need for publishers' business expertise in distributing works necessitates protection for others than the Constitution's named beneficiaries: authors.)

Copyright law in the United States is shifting toward the European model, but it is still entrapped in the ideology of its American past. If this is the case, as we believe it is, then strains in judicial decision-making should become increasingly clear, strains that follow from applying a familiar ideology to a changed legal landscape. The shift, in the world of The Berne Convention, is toward attention to the privileges of being an author. Our objective model of copyright is dissolving and a struggle is under way for another body of jurisprudence to take its place. The saga of the telephone book is merely one aspect of that process.