THE IDEA-EXPRESSION DICHOTOMY: DOES THIS DICHOTOMY REALLY EXIST?

*Tanvi Tewari**

Abstract

Copyright law today has been unsuccessful, to say the least, in defining the blurred lines that continue to exist between an idea and the expression of that idea. What forms the very essence of copyright law is this sense of difference between expression that remains protected and ideas that do not.[1] This 'essence' regarding the distinction between an idea and its expression was emphasized upon by Judge Learned Hands in the case of Sheldon v. Metro Goldwyn pictures, wherein it was acknowledged that this line would seem arbitrary regardless of where it was drawn.[2] The idea-expression dichotomy is a widely invoked doctrine that attempts to bridge the gap between what is protected vs. what is unprotected under copyright law. The unprotectable idea is separated from its protectable expression which is what falls within the ambit of law. However, the author, in this article argue that this doctrine does no justice to copyright law and fails to preserve its very essence. The author focussed on the inadequacies of the Idea-expression dichotomy and pondered over whether or not this dichotomy really exists.

Keywords: Dichotomy, Expression, Inadequacies, Challenges, Originality.

1. Background

The idea-expression dichotomy is a fundamental doctrine of copyright law. It limits the range of copyright protection through a differentiation between an idea and the expression of that idea. This essential principle, which courts invoke heavily while establishing what is protected in copyright infringement cases, means that copyright only protects the author's particular expression of an idea and never the idea itself.[3] This sentence may seem simple only on paper, as the dichotomy's true meaning and its complex application are far from it. This paper dives headfirst into the inadequacies of

1 L. Yu-Feng., "Reflection on Idea/Expression Dichotomy in Copyright Law" 2 *Peking University Law Review* 11 (2007).
2 (1940) 309 U.S. 390.
3 (1989) 872 F.2d 907, 910.

the idea-expression dichotomy and aims at answering the question of "Does this dichotomy really exist?".

To answer this question, it is imperative to understand the origin of this doctrine and its finer nuances. This paper starts by delving into the case laws that contributed to the creation of this very doctrine as well as its status before even becoming a widely invoked principle of law. Light is then shed on the manner in which this doctrine was further developed. This paper then goes on to highlight the inherent problems with the idea-expression dichotomy. It covers various issues such as the doctrine's vagueness and arbitrariness and uses the merger doctrine to highlight how little the idea-expression doctrine does to protect ones' copyright, rendering it inadequate. It then establishes that the "dichotomy" of ideas and expressions in copyright law, exists merely on paper. A way out of this black hole of confusion is then offered by citing case laws that view copyright infringement from a holistic perspective, filling in the gaps of any ambiguity this doctrine leaves us with. The research strategy used by the author in this paper to analyze the research questions was a doctrinal one. Case laws were intensively researched to establish that the dichotomy between an "idea" and its "expression" doesn't really exist. Information from secondary sources was used to conduct a qualitative content analysis of legal journal articles and essays.

2. Birth of the idea-expression dichotomy

The idea-expression dichotomy was not what was initially invoked by judges in the legal landscape. In the earlier days, a right was vested in the author with respect to his idea as well as its expressions. Both of these were viewed as a product of the authors intellect.[4] An example of this would be Justice Mansfield referring to copyright protection as a "right to print a set of intellectual ideas, communicated in a set of words, sentences and modes of expression."[5]

Moreover in *Lawrence* v. *Dana*[6], pertaining to non-altered editions of a particular book, the Court affirmed that not only does the author possess a right when it comes to the culmination of his material and its presentation but also when it comes to

[4] *Millar* v. *Taylor* (K.B 1769) 8 Eng. Rep.

[5] *Id. at 201, 242.*

[6] (2003) 539 U.S. 558.

his thoughts, views and the means in which they are expressed. On the other hand, in cases like *Burrow-Giles Lithographic Co.* v. *Sarony,*[7] the dichotomy between an idea and its expression seems evident. In this case wherein a copyrighted photograph of Oscar Wilde was reproduced, the main argument was that a photograph does not fall within the scope of "writing" as contained within the constitutional provisions.[8] However, it was stated by the Court that writings could mean all forms of writing, engraving, etching et cetera through which the ideas of the author are given visible representation and expression.[9] Thus, here, what was considered as rightfully falling within the ambit of protection under copyright law was any visible expression of a particular idea.[10] This sense of a dichotomy between the two was further invoked in cases such as *Stowe* v. *Thomas*,[11] wherein a translation was not considered a copy of the original work and the Court explicitly stated that ideas and other creations of the mind were different from their "outward semblance".

It was after the prevalence of such perspectives regarding ideas and their expressions that a more concrete doctrine came into being. What is now known to have set the foundation of the well-known "Idea-expression doctrine" is the 1879 judgment of *Baker* v. *Seldon*[12]. This case dealt with the supposed copying of a few forms from a distinct method of book-keeping. The question that further cropped up was whether or not the "expression", that is, the distinct system of book-keeping, would be subject to copyright.[13] In this case it was held that it is the expressions of the book that are protected as per copyright law but not the ideas and knowledge within it as these fall within the scope of patent law instead.[14] The plaintiff's claims of the alleged copyright infringement of his book-keeping system were dismissed and the defendant was permitted to use the plaintiff's idea to systematize book-keeping as long as he expressed it in a different arrangement.[15] The idea-expression distinction was iterated by the court in this case. The

---

7 (1883) 111 U.S. 53.

8 *Id.* at 56.

9 *Supra* note 7 at 61.

10 *Ibid.*

11 (1853) 23 F. Cas. 201.

12 (1879) 101 U.S. 99.

13 *Ibid.*

14 *Supra* note 12 at 99.

15 *Supra* note 12 at 103.

intention behind such a distinction was not only to protect original work but also to avoid broad protection and monopolization that would limit and disincentivize future creation.[16] Thus, it was this notion of viewing ideas and expressions as separate, with only the expressions being protectable that continued to be used by courts when deciding cases pertaining to copyrights.

Then came the landmark 1930 judgment of *Nichols* v. *Universal Pictures Corp.*,[17] which further enhanced the doctrine. This case dealt with two plays. The plaintiff here believed that the defendant had copied his play in violation of his copyright.[18] This case marks the origin of differentiating between an idea and an expression. Judge Learned Hand rightfully deduced that any work consists of varying patterns of generality and abstractions which copyright law cannot and does not protect.[19] However, at some point these abstractions are no longer sheltered by copyright law and "substantial similarity" between the works may be observable.[20] It was here that he devised an "abstraction analysis" to this effect and was of the opinion that one must remove, from the specifics, the more general parts of the play in order to be able to analyze whatever is protected by the copyright in layers.[21] This in fact, complicates matters by increasing the levels of vagueness that exist when making that classification or rather distinction between an idea and an expression and also it does not help in arriving at a decision regarding copyright infringement. However, it was held here that the defendant had not infringed the plaintiff's copyright as apart from the background theme, everything else was different and that these generalized abstractions of the work did not have protection.[22] Consequently, the idea expression doctrine started to be invoked in cases of non-verbatim copying as well.

---

16 *Id*. at 104.

17 (1930) 45 F.2d 119.

18 *Id*. at 122.

19 *Ibid*.

20 *Supra* note 17 at 122

21 *Ibid*.

22 *Supra* note 17 at 123.

3. The Problems

Almost three decades later, in *Peter Pan Fabrics* v. *Martin Weiner Corp.*,[23] dealing with the infringement of a fabric design copyright, it was stated that the line between an idea and an expression remains vague and no principle may be established to clearly demarcate when an individual crosses the line of simply copying the idea and instead copies the expression.[24] On the face of it, it is the application of this established doctrine which seems to be the source of the problem, however, it is the notion of the idea- expression dichotomy itself.

To break down the problems, let us first consider this sense of "vagueness" with respect to making distinctions between ideas and their expressions. This sense of distinction may be easily invoked when differentiating between say apples and oranges. In this case it is simply a question of differentiating between the physical attributes of these two items with differences on varying levels. However, when it comes to the idea-expression dichotomy, the "what" of "what distinction are we really making here" remains in the dark and goes beyond mere vagueness.[25]

There exist major challenges while differentiating between the two simply because we attempt to understand and identify the "idea" within the context of its very expression.[26] Often, cases may arise wherein the ideas may be expressible only in a specific way. This is where the merger doctrine comes into the picture. Pondering over the idea-expression doctrine without reflecting over the merger doctrine is simply inappropriate. Based on this doctrine, at times, cases come up in which the notions of an idea and its expressions are so entangled or rather, merged, that they cannot be detangled, identified and viewed as separate.[27] It is in such cases that the said idea "merges" with its expression.[28] For instance, in the case of *Herbert Rosenthal Jewellery* v. *Kalpakian*,[29] the

---

[23] (1960) 274 F.2d 487.

[24] *Id.* at 81.

[25] Allen Rosen, "Reconsidering the Idea/Expression Dichotomy" 26 *University of British Columbia Law Review* 263 (1992).

[26] Edward Samuels, "The idea-expression dichotomy in copyright law" 56 *Tennessee Law Review* 321 (1988-1989).

[27] Pamela Samuelson, "Re-conceptualizing copyright's merger doctrine" 63 *Journal of the Copyright Society of the U.S.A.* 417 (2016).

[28] *Id.* at 8.

[29] 446 F. 2d 738 (9th Cir. 1977).

issue before the Court was the alleged infringement of the plaintiff's copyright over a "jeweled bee pin."[30] In this case, the Court found that when it came to an idea like that of a jeweled bee pin, its expression seems to be indistinguishable from the idea itself.[31] An idea of a jeweled bee pin, would of course, be expressed as a jeweled bee pin as well. Thus, when the idea and the expression are inextricable, replicating the expression may not be barred.[32] This bar was deemed essential by the Court, as it would otherwise result in a monopolization of the copyright holder over his idea.[33] However, the premise on which the merger doctrine is based implies that only a handful of ways to express certain ideas merged with their expressions is thought-provoking.[34] This may seem to be the case when a particular idea is construed in a narrower sense. For instance, the idea of a jeweled bee pin with specificities regarding the types and placement of jewels, is bound to merge with its expression as the idea contains the specifics regarding its expression itself.[35]

Let us consider another case, that of *Joshua Et-Hokin* v. *Skyy Spirits Inc.*,[36] which pertains to a sequence of photographs taken by the plaintiff of *Skyy's* famous vodka bottle.[37] Here, the plaintiff filed for copyright infringement as *Skyy* hired different photographers and utilized the photos taken by them for the purposes of advertising.[38] The court in this case held that as there were only a few ways in which a bottle of vodka can be photographed, the photos taken by the plaintiff are not protected under copyright law.[39] However, what must be considered here is the originality behind the creation of these photos by the plaintiff which is demoralized. Had the Court pondered over this case less narrowly, the many ways of expressing would be observable. The merger doctrine remains widely criticized for putting forth the idea that there exist works expressible in only one particular form.[40] While it is true that no two photographs can ever be the same, even the slightest difference in lighting, angle, concept et cetera, go a long way in

[30] *Id*. at 739.
[31] *Ibid.*
[32] *Id*. at 741.
[33] *Ibid.*
[34] *Supra* note 26 at 277.
[35] *Supra* note 26 at 278.
[36] (9th Cir. 2000) 225 F.3d 1068
[37] *Id.* at *1083.*
[38] *Ibid.*
[39] *Ibid.*
[40] *Supra* note 26 at 462.

determining copyright infringement.[41] Thus, in cases of this nature, the idea-expression dichotomy does little to protect one's copyright and seems insufficient.

4. The "dichotomy"

However, the problems are not simply with respect to the application of this doctrine, differentiating the idea from the expression or even with cases wherein the idea may appear merged with the expression. Even if one were to assume that there are two elements (an idea and its expression) to isolate and observe in a particular work, the idea-expression doctrine would have no use in the case of an exact replica of the work, encompassing both the idea and its expression.[42]

Yes, in some cases the challenges of invoking this doctrine may seem more conspicuous and measurable wherein, it is evident that the problem lies in the detangling of the idea with the expression and creating a boundary, but on the other hand, the author argues that the challenges in fact, exist in every case where the idea- expression dichotomy is invoked because there is no dichotomy. There are no two elements to detangle. The doctrine may contain in its name the words "idea" and expression" but this dichotomy does not really exist at all. The truth is, that it is not because of the aforementioned sense of vagueness due to which it is becoming progressively challenging to distinguish between the two, but rather it is due to the similarities or connections between the two. Both the idea and the expression are essentially the expression. Every idea will indeed have an expression as without one, it is not an idea.[43]

What strengthens this position even further is that there is no clarity on what exactly constitutes an idea or even an expression. They are both usually referred to as general concepts[44] or abstract ideas[45] and thus, the notion that this distinction between an idea and its expression exists and the invocation of this notion by Courts when deciding cases, does little to assist them in truly ascertaining the extent of protection under copyright law.

---

41 *Supra* note 27 at 46.

42 *Supra* note 26.

43 *Id*. at 462.

44 (1987) 814 F.2d 290, 294.

45 (1985) 604 F. Supp. 943, 949.

5. A way out

As is widely known, based on the idea-expression 'dichotomy' Courts first ascertain the extent of similarity between expressions that are protected under copyright law and the work that allegedly infringes this copyright.[46] Thus, from this the understanding follows, that courts engage in a comparison of sorts between the original expression and the alleged copyright infringing one to ascertain whether or not infringement has taken place. However, as established above, this approach may not be fit to determine infringement due to the mammoth task of making a distinction between the two elements in the "idea- expression dichotomy" that are actually just one.

A way out of this, or rather an alternative approach when dealing with copyright infringement cases is the one invoked by the Court of Appeals in *Arnstein* v. *Porter*[47] which established a precedent for ascertaining similarity for copyright infringement.[48] In this case pertaining to allegedly copied composed works, it was established that not only must substantial similarity be present in the works allegedly infringing copyright, but also if copying is proved, then "unlawful appropriation" of the expression must also be proven.[49] Here, the court looked for similarities between the works while viewing the situation as a whole instead of creating a distinction between the idea and its expressions.[50]

Additionally, in the case of *Sid & Marty Krofft Television Productions* v. *McDonald's Corp*., the "creativity in expression" was looked at as a whole.[51] In this case, the defendants were accused of copying certain copyright protected cartoon characters used in commercials.[52] When evaluating this case, the work was looked at as a whole by the Court as opposed to secluded elements within the work and the "total concept and feel" of the creative expression was said to fall within the scope of the said copyright.[53]

---

[46] *Supra* note 26 at 325.
[47] 154 F.2d 464 (2d Cir.).
[48] *Id*. at 469.
[49] *Ibid*.
[50] *Id.* at 478.
[51] 562 F.2d 1157 (1977).
[52] *Id.* at 1164.
[53] *Ibid.*

Therefore, a more holistic approach may rectify the challenges of the invocation of the idea-expression dichotomy when determining copyright infringement [54]

6. Conclusion

Thus in the conclusion it needs to be seen that where the Courts must draw the line between an idea and an expression? The answer is we simply do not know. The author argues that the idea-expression only seemingly offers a distinction between an idea and its expression. Reality is far from it and has more to do with only the "expression" part of the phrase. This doctrine, though helpful, remains inadequate and puts forward the dire need for another approach, with more clarity and less confusion, when deciding copyright infringement. The fine line that seemingly exists between an expression and an idea will forever remain blurry as all ideas are ultimately expressions. An idea that is expressionless is simply a figment of one's imagination, lacking the necessary substance needed to translate into something, well, real.[55]

The idea-expression "dichotomy" does not clearly define itself and additionally, complicates matters by invoking approaches such as the abstraction analysis. The dichotomy itself seems simply unnecessary and pushes courts to decide cases by asking the wrong questions.[56] Substantial similarity between the original creative expression and the copied expression is the point at which copyright is infringed.[57]

It is not a question of an idea versus an expression like the idea-expression dichotomy compels us to believe, but rather it is a question of an "unprotectible expression" versus a "protectable expression"[58] which may be achievable if the matter is viewed from a more general, holistic lens. Thus, apart from perplexity, this doctrine offers little assistance in accurately establishing the extent of copyright protection and works only on paper.

---

[54] *Id.* at 1165.

[55] *Supra* note 25 at 279.

[56] Richard H. Jones, "The Myth of the Idea/Expression Dichotomy in Copyright Law" 10 *Pace Law Review* 551 (1990).

[57] *Warner Bros.* v. *American Broadcasting Cos.*, 654 F.2d 204, 208 (2d Cir. 1981).

[58] *Id.* at 204.