

~~Idea/Exp~~ - Article idea

~~But P Concentration~~

Idea expression dichotomy

Dear Bob,

This is to recap our discussion, to make sure we're on the same page, and carry this a bit further. I'm very excited.

My idea had been to write an article that took the reader through the experience of a poem or other literary work, and to show how the experience couldn't be duplicated by cognitive statements of the 'ideas' in the work. This builds on some of my work in rhetoric, and some readings of, e.g., Lanham, on the nature of communication.

You added this wonderful point: That the difference between "ideas" and "expression" may best be seen not as a matter of 'levels of abstraction,' but rather as a matter of perspective. When it comes to art, "ideas" describe the work from the "outside" while "expression" brings the audience "inside" an experience.

Now let me apply these two observations to the current legal rule that purports to keep ideas free from copyright.

As I see it, one of the main reasons for keeping ideas free is to facilitate their use. That tracks your distinction quite well. All the different 'inside' experiences of an idea can be separately communicated—and without the writer worrying about getting consent from the originator of the ideas he's actually living.

A second function of the idea/expression dichotomy in the law is to reduce the costs of locking up expression: that is, there's a notion that "ideas" can convey what's essential in "expression", so that people who can't afford a copy of the expression can nevertheless obtain what's essential from restatement of the ideas.

Let me stay with that second function for a minute.

My initial instinct for the project had been to challenge whether the idea/expression dichotomy really accomplished the second function. That is, I was interested in showing how much is lost if a second author can only recap the ideas that have affected him, and cannot freely 'recreate' any of the expression. My goal was to push for a broadening of what counts as a non-ownable idea. And, as a supplemental goal, to use the argument to increase the reader's consciousness of how socially costly copyright can be.

Your distinction between inside/outside seems to capture a lot of what the courts are groping toward when they try to divide expression from idea — and I love it. It captures an intuition I hadn't been able to articulate, and allows me to see more deeply into (descriptive) reality. I'm not sure, though, how it fits with analyzing the dichotomy's second function.

What I hope is that you think this: that ‘outside’ perspectives should constitute a core of what’s a non-ownable idea, but that this doesn’t exhaust the set-- that to keep the costs of copyright law, some “inside” views also should count as non-ownable ideas.

Is this right?

Some allied issues:

How does the idea/expression dichotomy work on the ground? The idea/expression dichotomy helps second authors who want to capture something of what they’ve been exposed to, and want to transmit it with commentary/alteration. When courts say that the dichotomy serves free speech functions, and that it serves the function of keeping the cost of copyright low enough to be bearable, the second author is probably the image they have in mind. It may be worth distinguishing entities and uses that are more passive than follow-on authorship, and pursue how the dichotomy works on the ground as to them.

For example, the idea/expression dichotomy is less helpful for consumers. (The issue of non-creative consumer use has been broached in the fair use context by Rebecca Tushnet). If a non-author consumer can’t afford the (copyrighted) expression, there may be no way for the consumer to get access. He still needs to purchase SOME expression. Nevertheless, the lack of copyright in the ‘idea’ can help the consumer in these ways: there can be competition in the production of resulting expressions, and that could drive down the price of some of the expressions. Many pure ‘idea’ versions are very low cost (e.g., newspaper restatements). Also, communication of ideas is often done for free (education, blogs, and so on.)

Of course, many of these are both symptoms and causes.

2. What I am looking to do is systematize intellectual property.

3. To do that I am looking down to the fundamentals, trying to find an axiom, something that is true in all cases, or that at least can give us a uniform manner of communicating, either a universal maxim or a universal convention.

4. I think the first step was to recognize that there is no such thing as expression that is not driven by idea, both big and small.

5. From that point I came up with the formula to represent the conceptual separation between the idea and the material in which the idea is embedded. It basically allowed me to recognize that all matter in the universe has meaning to us. It all has impressions upon us because human beings, by nature, try to understand what they perceive, trying to find whatever meaning there is. (This is how the baby looking at the contrast relates). Basically, nothing in the world is devoid of meaning.

6. The absolute separation of idea from material represented by the formula helped me to identify the pure form of Trademark as being the purpose of trademark itself, source identification and nothing else.

7. Realizing that the pure form could never be expressed perfectly in the world of material, I began thinking of material that could best approximate pure source identification while excluding all other ideas. That is where I realized that of all the things on earth, numbers have the greatest capacity to represent themselves and nothing else. Sequentially distributed numbers would have meaning because they represent a ranking. But random strings of numbers, when understood to be random, represent themselves and nothing more. There are exceptions of course (666, 3.14) but I can't remember the last time that I looked at the last four digits of a telephone number for meaning (area code and the first three digits do have meaning which I have eventually extracted some of because they are not random).

8. I set the random string of numbers as the baseline purest form of trademark and began comparing it to what I know about the current state of the law. My purpose was to gauge how far away the current status of TM law had come from the purest form. In comparing I realize that the trademark law at its best is protecting elements that express ideas other than source. At its worst, trademark is protecting entire works of authorship.

9. The result of the analysis is not that we should adopt a random string of numbers as Trademarks because it is impractical. At the same time however, each variance from the pure form must be analyzed and justified on practical grounds including transaction cost analysis. In my opinion, protecting things that could amount to works of authorship or justifications that allow the TM owner to collect on the value of the mark have stepped into the shadow of the constitution's IP clause, and thereby violate the limited times provision. Additionally, they may pose dangers to society (e.g. Michael Jordan, or even the endless attempts to associate marks with

sex -- all moral judgements once you get beyond the problem of locking up information.

10. Beyond that lies an abyss: the subject matters of patent and copyright. Even though there is a strong statement of purpose coming from the top ("to promote the progress of science and useful arts"), proper expression of the pure form is much more subject to opinion. I'll tell you up front that I tend to believe that much shorter but stronger protection would better effectuate the goals, but that is just an uneducated opinion. Of course I will continue to think about it.

11. At this point, it may just be more important to make sure that everyone is speaking the same language so that we can communicate with one another about information. With a guiding principles that nothing is devoid of meaning or function, and that nothing is to be taken for granted and categorically excluded at the door because of what we label it, and that the ultimate purpose continues to be "the promotion of science and the useful arts" maybe I or someone else can continue to plug at this to find some answers.

12. As far as this line of thought goes, I'm a little stuck at the moment. Happily stuck however because every moment seems to bring me a little closer to something. Speaking with my sister, the artist at RISD, tonight planted a lot of seeds which began to blossom as I was writing this e-mail. One of the projects she had to do was to associate two totally disparate things. Her things were alcoholism and an oyster. In the process she had to study each and deconstruct them until she found similarities. She found them, and the result is quite amazing. The discussion gave me a clearer view of what artists are doing, or trying to do. The discussion also gives me a clearer notion of what discoveries are, and as far as I can see it, not very far from the creative process. Knowing where to look seems to be half of the creative process. I need to develop this thought more, so I will not let it hold up this e-mail.

13. My next avenue will be looking at how the framers may have understood what they were writing. I have photocopied most of the relevant pages from Samuel Johnson's 1755 Dictionary. It is a goldmine.

14. Then comes the energy part which I will spare you this time.