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COPYRIGHT—ORIGINALITY—CONFUSING THE STANDARDS FOR GRANTING COPYRIGHTS AND PATENTS*

Copyright protection for authors is provided as an encouragement for creativity.¹ The Copyright Act,² which provides that protection, derives its authority from the Constitution,³ so any constitutional requirements must be met in application of copyright protection. Most scholars and commentators agree that the constitutional *sine qua non* is originality.⁴

Because it is the criterion which determines whether intellectual property is granted legal protection, originality is the foundation on which any other copyright question ultimately rests. It is of some moment, then, that departure from the standards which customarily have been applied in assessing originality was recently made in two cases within the Second Circuit.⁵ That departure is likely to have an impact far beyond the cases involved. It may be that, by confusing copyright tests with patent tests, the courts have put themselves in a position to make value judgments about what is to be granted protection. The question may no longer center around what meets the bare constitutional test, but may focus on individual judicial determinations of what is worthy of copyright protection.

* This article has been submitted to the Nathan Burkan Memorial competition.

¹ *Mazer v. Stein*, 347 U.S. 201 (1954). "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Id.* at 219.

M. NIMMER, *NIMMER ON COPYRIGHT* § 3.1 (1976) [hereinafter referred to as *NIMMER*].

² 17 U.S.C. §§ 1-217 (1976).

³ U.S. CONST. art. I, § 8, cl. 8 empowers Congress "[t]o 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."

⁴ Dworkin, *Originality in the Law of Copyright*, 39 B.U.L. REV. 526 (1959), in *ASCAP*, 11 COPYRIGHT LAW SYMPOSIUM 60 (1962); Whicher, *Originality, Cartography, and Copyright*, 38 N.Y.U.L. REV. 280 (1963); Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 458 (1951); *NIMMER* § 3.2, 6.1.

⁵ *Batlin & Son v. Snyder*, 536 F.2d 486 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976); *Vogue Ring Creations, Inc. v. Hardman*, 410 F. Supp. 609 (D.R.I. 1976).

Traditionally courts have dealt warily with the originality requirement and have applied only minimal standards in trying to find enough originality in a work to satisfy the constitutional basis of statutory protection.⁶ Courts have not been willing to go further than was necessary to meet the constitutional test. This unwillingness can be attributed to the court's awareness of the limited nature of copyright protection, to a sense that the judiciary is not properly trained to make aesthetic judgments, and to a concern with inhibiting free expression.

The protection an author derives from a copyright grant is quite limited in comparison with the protection provided by a patent. Copyright law only protects an author from having anyone else duplicate or directly copy his work;⁷ patent law, on the other hand, gives the holder absolute ownership of the patented domain.⁸ The subject matter appropriate to each is different as well. Copyright protection is restricted to "expressions of ideas," not ideas themselves, the latter being within the province of the patent.⁹ Any

⁶ Chamberlin v. Uris Sales Corp., 150 F.2d 512 (2d Cir. 1945). "Obviously the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. And we must, if possible, so construe the statute as to avoid holding it unconstitutional." *Id.* at 513.

⁷ An author is not protected from someone who might have written or drawn the same work from a similar creative impulse; he is only protected from the direct reproduction of *his* creative impulse. "[I]t is plain beyond peradventure that anticipation as such cannot invalidate a copyright. Borrowed the work must indeed not be, for a plagiarist is not himself *pro tanto* an 'author'; but if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936), *aff'd*, 309 U.S. 390 (1940).

⁸ Bobbs-Merrill Co. v. Strauss, 210 U.S. 339 (1908); Ricker v. General Electric Co., 162 F.2d 141, 142 (2d Cir. 1947); Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275 (2d Cir. 1936).

⁹ Baker v. Selden, 101 U.S. 99, 102 (1879):

"A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or in the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, would be subject to copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright."

Mazer v. Stein, 347 U.S. 201, 217 (1954); Universal Athletic Sales Co. v. Salkeld,

standard of "newness" or "novelty" therefore, may not be considered in a copyright question since most ideas are not new but are expressed over and over in accents peculiar to each age and generation.¹⁰

Because of the differences in the kinds of subject matter protected and the amount of protection offered, there is understandably a distinction between the requirements of patent and copyright. To be granted letters-patent an inventor's work must be shown to have novelty; that is, it must possess unique qualities which have not been anticipated by any prior work. A copyrightable work, however, need show only the requisite originality in order to obtain its more limited protection.¹¹

When application is made for a copyright, there is little if any assessment of the originality of the work. Issuance of a copyright itself serves little more than a registration function.¹² Only when the validity of the copyright is challenged, usually in an infringement action, must the question of originality be addressed. The question arises in the form of a judicial inquiry, and any standards that must be determined in order to settle the question are, necessarily, judicially created.

511 F.2d 904, 906 (3d Cir.), *cert. denied*, 96 S. Ct. 122 (1975); *Chamberlin v. Uris Sales*, 512, 513 (2d Cir. 1945).

¹⁰ As Justice Story put it:

"In truth, in literature, in science and in art, there are, and can be, few, if any things, which, in an abstract sense, are strictly new and original throughout. . . . If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence."

Emerson v. Davies, 8 F. Cas. 615, 619 (No. 4436) (C.C.D. Mass. 1845); *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945); *Whist Club v. Foster*, 42 F.2d 782 (2d Cir. 1929).

¹¹ *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904 (3d Cir. 1975); *Stein v. Mazer*, 204 F.2d 472, 474 (4th Cir. 1953); *aff'd.*, 347 U.S. 201 (1954); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 53-54 (2d Cir.) *cert. denied*, 298 U.S. 669 (1936).

¹² *Gordon v. Weir*, 111 F. Supp. 117 (E.D. Mich. 1953), *aff'd mem.*, 216 F.2d 508 (6th Cir. 1954). "The Copyright Office, by accepting [an author's] material as copyrightable, does not thereby determine his rights under copyright laws any more than a registrar of documents covering land titles, by accepting a deed for recording, determines title of the grantee therein to the land." *Id.* at 123.

It is here one sees that the reluctance of courts to make qualitative judgments stems in part from the feeling that the judiciary is not trained to determine the value of originality. Justice Holmes felt that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹³ Holmes reflected the court’s concern with trying to avoid any possibility of going beyond the bounds of objectivity in establishing basic standards of originality.¹⁴

The critical problem for courts, then, is to define originality so as to avoid making aesthetic judgments. Courts have endeavored to protect origin:¹⁵ a work is adjudged original in the sense that it owes its origin to the author. They have also protected hard work:¹⁶ rewarding the labor and diligence of the creator of a work. Originality in either of these instances means little more than a prohibition of actual copying; so if a work is not slavishly copied¹⁷ from another, it may find protection even if it duplicates another work.

The ultimate hard work protection seems to arise in directory and compilation cases. So long as the materials are compiled and arranged from scratch and there has been no copying, the compiler

¹³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

¹⁴ *Henderson v. Tompkins*, 60 F. 758 (D. Mass. 1894). “But a multitude of books rest safely under copyright, which show only ordinary skill and diligence in their preparation . . . [T]he courts have not undertaken to assume the functions of critics, or to measure carefully the degree of originality, or literary skill or training involved.” *Id.* at 764.

¹⁵ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970). “In order to be copyrightable, the work must be the original work of the copyright claimant But the originality necessary to support a copyright merely calls for independent creation, not novelty.” *Id.* at 1109.

Withol v. Wells, 231 F.2d 550, 553 (7th Cir. 1956); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839); *Baldwin Cooke Co. v. Keith Clark, Inc.*, 383 F. Supp. 650 (N.D. Ill.), *aff’d*, 505 F.2d 1250 (7th Cir. 1974).

¹⁶ *Jewelers Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir. 1921), *cert. denied*, 259 U.S. 581 (1922). “The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection.” *Id.* at 88.

Emerson v. Davies, 8 F. Cas. 615 (No. 4436) (C.C.D. Mass. 1845).

¹⁷ *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904 (3d Cir.), *cert. denied*, 96 S. Ct. 122 (1975).

will be granted a copyright.¹⁸ Another area where hard work seems to earn copyright protection is editing, so that when Hebrew scholars correct books in the public domain by adding proper accents and cantillation marks, their editorial work is original, therefore copyrightable.¹⁹ Where higher standards for originality than these have been applied—as they have been in map cases—the courts concerned have generally been considered to be inconsistent with other copyright case law.²⁰

The underlying reason that courts have been reluctant to increase the originality standard is that they must constantly balance the protections afforded by the copyright clause with the guarantees against limiting free expression which are inherent in the first amendment, endeavoring to construe the former so as not to infringe upon the latter.²¹

¹⁸ *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir. 1921), cert. denied, 259 U.S. 581 (1922). "The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work." *Id.* at 88.

Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809, 812-13 (7th Cir. 1942).

¹⁹ *Shulsinger v. Grossman*, 119 F. Supp. 691 (S.D.N.Y. 1954). *But see* *Grove Press, Inc. v. Collectors Publication, Inc.*, 264 F. Supp. 603 (C.D. Cal. 1967), where the court held that forty thousand editorial changes in a public domain work did not show skill and originality. The changes were virtually all concerned with punctuation, spelling, and typographical errors.

²⁰ [F]or some inexplicable reason, courts have lost sight of the purpose of the law of copyright as it applies to maps and, at the expense not only of sound reasoning but also of the careful application of precedent, have imposed an inordinately high requirement of originality in this area of intellectual endeavor.

Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1572 (1963); Whicher, *Originality, Cartography, and Copyright*, 38 N.Y.U.L. REV. 280 (1963).

²¹ The tension is created because the First Amendment assures that "no law" shall abridge the freedom of speech (and does not limit that freedom to expressions original with the speaker), while the copyright clause grants authors a monopoly on their expressions or writings. If courts interpreted the constitutional standard for copyright too loosely, virtually all expressions would come within the area protected by copyright. If, on the other hand, the constitutional standard were too strictly interpreted, courts would find themselves imposing discriminatory value judgments on works that otherwise warranted copyright protection. Either extreme offends the First Amendment. A standard which affords copyright protection is essential, however, because the public might be denied the benefit of creative

Everything is not copyrightable, however. There are limits beyond which no court has been willing to go. One such limit was unquestionably reached in *National Telegraph News Co. v. Western Union Telegraph Co.*,²² when Western Union merely collected appropriate information regarding stock quotations, race results, and other "listings," and distributed it through a ticker system. The court refused to cross the line where "authorship ends and mere annals begin."²³ Nor has protection been extended to language embodied in contractual provisions.²⁴ The courts generally reason that any variation in contract language would necessarily be trivial, and the drafter probably meant to rely on judicially approved contractual language.²⁵

Copies of works in the public domain will support a copyright if they can show variation from the original which is not trivial.²⁶ The judicial search for that variation usually revolves around one of three possible concerns: (1) finding that a different medium is involved, requiring, therefore, original skills or an unavoidable variation;²⁷ (2) finding a new, i.e. original, arrangement of public domain sources;²⁸ (3) finding a distinguishable variation. As one

expressions of ideas if authors were not granted economic encouragement. Without public benefit from creativity, the purpose of the copyright clause would be thwarted. See Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. Rev. 1180 (1970); see also *Lee v. Runge*, 404 U.S. 887, 892 (1971) (Douglas, J., dissenting opinion).

²² 119 F. 294 (7th Cir. 1902).

²³ *Id.* at 297.

²⁴ *Dorsey v. Old Surety Life Ins. Co.*, 98 F.2d 872 (10th Cir. 1938). "A copyright upon a form of contractual provision should not be construed so as to impinge upon the natural right of persons to make contracts containing the same contractual provisions and creating like contractual rights and obligations . . ." *Id.* at 874.

²⁵ *Donald v. Zack Meyer's T.V. Sales & Service*, 426 F.2d 1027 (5th Cir. 1970).

²⁶ 17 U.S.C. § 7 (1976) ("translations or other versions"); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d (2d Cir. 1951).

²⁷ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). The court held that translating paintings into mezzotints required sufficient skill and judgment to meet the requirement of originality. Variation was virtually assured because the copier had to work within the demands and quirks of a different medium.

²⁸ In *Gray v. Russell*, 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839) the court held that although the author, in compiling notes to accompany a Latin grammar, did not use "new" material, he could copyright his "arrangement" from the multiplicity of public domain materials; and in *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143 (2d Cir.), *cert. denied*, 373 U.S. 913 (1963), the court found that the new arrangement of public domain materials into a series of "flash cards" was sufficient to support a copyright.

court explained it, "[w]hile a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will, even though it present the same theme."²⁹ One may, for example, copyright his improvised version of a folksong heard in his childhood;³⁰ or sufficiently transform information in tabloid articles which derives from other sources;³¹ or make a scale model of a famous sculpture.³² The copy need have only enough variation, or individuality, to warrant being interpreted as a version of another work.³³

If the aim is to reproduce another work, there is one unyielding caveat. "Others are free to copy the original. They are not free to copy the copy."³⁴ Reproductions, of course, cannot involve variation to the degree that original works will. So in assessing whether a reproduction will support a copyright, courts are apt to downplay the search for distinctions and concentrate their attentions on looking for skill and original work on the part of the author.³⁵

It is against this background that the recent decisions from within the Second Circuit must be viewed, and when they are so viewed, they seem clearly to be at odds with the established judicial patterns of expansion of protection.

In *Batlin v. Snyder*,³⁶ for example, Snyder created a plastic

²⁹ *Gerlach-Barklow Co. v. Morris & Bendien*, 23 F.2d 159, 161 (2d Cir. 1927).

³⁰ *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956).

³¹ *Best Medium Pub. Co. v. National Insider, Inc.*, 385 F.2d 384 (7th Cir. 1967).

³² *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 254 (S.D.N.Y. 1959). The court found that skill and originality were required to produce an accurate scale reproduction of Rodin's "Hand of God."

³³ As Justice Holmes put it: "The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright . . ." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

³⁴ *Id.* at 249.

³⁵ *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (S.D.N.Y. 1959); *Peter Pan Fabrics, Inc. v. Dan River Mills Inc.*, 295 F. Supp. 1366 (S.D.N.Y.), *aff'd*, 415 F.2d 1007 (2d Cir. 1969); *Peter Pan Fabrics Inc. v. Kay Windsor Frocks, Inc.*, 32 C.O. Bull. 402 (S.D.N.Y. 1949).

³⁶ 394 F. Supp. 1389 (S.D.N.Y. 1975), *aff'd on rehearing*, 536 F.2d 486 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976), (*hereinafter cited as Batlin*). There are three separate opinions which will be referred to in discussing this case. The District Court opinion filed by Judge Metzner, granting injunction [394 F. Supp. 1389]; the unpublished opinion written by Judge Meskill, reversing

version of a cast-metal antique Uncle Sam bank which had long been in the public domain. He hired a designer and sculptor to make a reduced model of the original. Subsequently a mold was made from the independently created model, and certain changes were made in the design to accommodate the new medium (plastic) in which the Snyder banks were to be made. Snyder's copyright was challenged by Batlin. Initially the United States District Court held that there was insufficient originality to support copyright; then the Court of Appeals, by a divided panel, reversed that decision; but the court, upon rehearing en banc, finally held the copyright invalid for lack of substantial variation from the original public domain bank.

Judge Metzner, who wrote the District Court opinion, and Judge Oakes, who wrote the en banc court of appeals opinion, both finding lack of substantial variation, ignored the distinction between patent tests and copyright tests. "A considerably *higher* degree of skill is required, true artistic skill, to make the reproduction copyrightable,"³⁷ according to Judge Oakes. And at the evidentiary hearing below, the court interjected several questions or comments which indicated its concern with the question of novelty, the patent standard.³⁸

In a companion case, *Etna Products Co. v. E. Mishan & Sons*,³⁹ which was heard in challenge of the same Snyder copyright, Judge Metzner continued the confusion of copyright and patent standards. He distinguished an earlier case⁴⁰ from *Etna* by finding that the earlier author had relied on new concepts and original ideas, therefore making that copyright valid. By contrast he refused to uphold the copyright in *Etna* because there was no original idea involved. "This *idea* is clearly in the public domain, and is the *same creative idea* that exists in the antique banks."⁴¹

the lower court and holding that the copyright in question was valid [Civil No. 75-428 (S.D.N.Y., Feb. 13, 1975)]; Judge Oakes's opinion upon rehearing which supported the District Court's holding that the copyright was invalid [536 F.2d 486].

³⁷ 536 F.2d at 491.

³⁸ Reply Brief for Appellant at 10, *Batlin v. Snyder*, Civil No. 75-428 (S.D.N.Y. 1975).

³⁹ Civil No. 75-428 (S.D.N.Y., Feb. 13, 1975) (hereinafter cited as *Etna*).

⁴⁰ *Doran v. Sunset House Distribut. Corp.*, 197 F. Supp. 940 (S.D. Cal. 1961), *aff'd*, 304 F.2d 251 (9th Cir. 1962).

⁴¹ Brief for Appellants at 21-23, *Batlin v. Snyder* Civil No. 75-428 (S.D.N.Y. 1975) (Emphasis added). Expert testimony indicated that only a trained sculptor

The court of appeals also ignored the original and independent work done by Snyder. Snyder's expert witness testified that reproducing the bank required an original drawing by a designer, a carved model by a sculptor, and newly constructed dies. All of the work was drawn from or based on the original public domain work. In addition, the model was reduced in size from the original bank. There were, as well, variations imposed by the choice of plastic as a medium, and variations imposed by choice of medium are generally considered within the artistic ambit and qualify as independent, artistic achievement.⁴²

The test reflected in *Alfred Bell v. Catalda Fine Arts, Inc.*⁴³ is the standard used to assess variation and requires more than a merely trivial variation⁴⁴ in the item or that the author supply "something recognizably 'his own'."⁴⁵ While the courts used precisely that language in *Batlin*, the test itself was not applied to the facts before the court. The test regarding skill is given in *Alva Studios, Inc. v. Winninger*;⁴⁶ it requires that "work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying."⁴⁷ While the court in *Batlin* gave lip service to the test espoused in *Alva*, it did not apply the test itself.

Further confusion follows a commingling by the *Batlin* court of copyright and infringement tests and standards.⁴⁸ The standards which have traditionally been used to determine whether one work infringed upon another have been necessarily higher than those standards applied to questions concerning validity of copyright.⁴⁹

or artist would be able to make the kind of model required to reproduce an item in changed dimensions.

⁴² *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104-05 & n.22 (2d Cir. 1951).

⁴³ 191 F.2d 99 (2d Cir. 1951).

⁴⁴ *Id.* at 103.

⁴⁵ *Id.*

⁴⁶ 177 F. Supp. 265 (S.D.N.Y. 1959) (hereinafter cited as *Alva*).

⁴⁷ *Id.* at 267.

⁴⁸ See Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1573 (1963).

⁴⁹ *Puddu v. Buonamici Statutory, Inc.*, 450 F.2d 401, 402 (2d Cir. 1971):

"The tests for eligibility for copyright and avoidance of infringement are not the same. Originality sufficient for copyright protection exists if the 'author' has introduced any element of novelty as contrasted with the material previously known to him. Introduction of a similar element by

In an infringement inquiry the courts use the ordinary observer test—whether the ordinary observer comparing the works can readily see that one has been copied from the other.⁵⁰ The analysis used to determine whether the test has been met generally involves a balancing or parallel comparison of the details of each work.⁵¹ If enough similarity is found in those details, so that the overall impression of both items is the same, then there is infringement. Where an infringement analysis looks for substantial similarity, however, a copyright analysis seeks a distinguishable variation.⁵²

While these distinctly different approaches have been used in most of the copyright cases heard in the Second Circuit and elsewhere, the *Batlin* court failed to make the distinction and proceeded with its inquiry using the terms of copyright but the analysis of infringement. Numerous details of the plastic version were directly compared to corresponding details of the iron bank: umbrella, carpetbag shape, the object held by the eagle, shape of Uncle Sam's face, texture of the clothing.⁵³ Despite "primary variations between the two banks involv[ing] height; medium; anatomical proportions of the Uncle Sam figure,"⁵⁴ the court looked only to the substantial similarity of the banks. Under the normal copyright criteria any one of these variations might well suffice to grant Snyder copyright protection. After all, the only protection he would receive is assurance that anyone else wishing to make a version of the public domain bank would have to copy the original and could not slavishly copy this particular version.

The second case of particular interest is *Vogue Ring Creations, Inc. v. Hardman*.⁵⁵ Vogue created and marketed a version of a public domain finger ring design, for which it claimed the copyright. Hardman challenged the validity of that copyright on the basis that there was insufficient originality in Vogue's version. The

the copier of a copyrighted design will not avoid liability for infringement."

Millworth Converting Corp. v. Slifka, 287 F.2d 443 (2d Cir. 1960).

⁵⁰ Hebert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 509 F.2d 64, 65 (2d Cir. 1974).

⁵¹ *E.g.*, Morse v. Fields, 127 F. Supp. 63 (S.D.N.Y. 1954).

⁵² Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092, 1093 (2d Cir.) *cert. denied*, 416 U.S. 986 (1974).

⁵³ 536 F.2d at 489.

⁵⁴ *Id.* at 493 (dissenting opinion).

⁵⁵ 410 F. Supp. 609 (D.R.I. 1976) (hereinafter cited as *Vogue*).

district court upheld Hardman's challenge, again using the approach used in *Batlin*. Vogue's brief posited differences between its version and the public domain design in the setting, width, height, shank, color, and bottom edge of the ring.⁵⁶ The court weighed each of those differences, comparing the public domain design detail by detail with Vogue's design and found that the overall impression failed to reveal sufficient variations in the copy to warrant copyright protection. Judge Pettine discussed the matters of "sufficiently distinguishable variation," "not merely trivial originality," and asserted his sensitivity to the minimal originality standards, but he relied finally on *Couleur International Ltd. v. Opulent Fabrics*⁵⁷ as fully controlling. That reliance is indicative of the confusion in the Second Circuit because *Couleur* is solely an infringement action and does not deal with copyright validity at all. The test Judge Pettine took from *Couleur* is the standard infringement test: "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."⁵⁸ Therefore the court decided that while the variations were admittedly present they did not sufficiently add to or detract from the public domain design—in effect applying a standard of artistic judgment rather than one of minimal originality.⁵⁹

The courts in both *Batlin* and *Vogue* ignored or mistook the purpose of the minimal originality standards. The courts in both instances looked for an artistic or aesthetic achievement sufficient to deserve a copyright. The protections discussed earlier for origin or independent creation of an author did not come into the formula at all. The courts mostly adhered to the customary language of minimal originality standards but did not use the corresponding analysis. Since more was required to meet the standards than ever had been before, the definition of what would support a copyright necessarily changed even though the language remained the same. One might wonder if there were some confusion regarding the scope of copyright protection itself. There is no indication in either case that the court recognized how little protection is involved when a

⁵⁶ Brief for Plaintiff at 4, 5, *Vogue Ring Creations, Inc. v. Hardman*, 410 F. Supp. 609 (D.R.I. 1976).

⁵⁷ 330 F. Supp. 152 (S.D.N.Y. 1971) (hereinafter cited as *Couleur*).

⁵⁸ *Id.* at 154

⁵⁹ Discussion of *Vogue* cannot here take into account any response by the court of appeals since no appeal was filed in this case.

version of a public domain work receives a copyright.⁶⁰ Nor did the courts make the expected, and logical, response of upholding the copyright of the first copier and of requiring the second copier to go back to the public domain sources for his version.⁶¹

The effect of the *Batlin* and *Vogue* decisions would not warrant inordinate concern were it not for the influence of the Second Circuit in this field. Because a disproportionately large number of copyright decisions come from the Second Circuit, these recent cases are apt to have great weight as precedent.

The burden of determining and applying standards seems destined to remain with the judiciary; not even the Revised Copyright Act will help since it does nothing further to define "originality"⁶²—so there can be no question of the need for a clear understanding of the different standards and when they should be applied. Certainly in the court that has the greatest impact on American copyright law, confusion of tests and requirements can only proliferate more confusion.

Even more serious is the likelihood that the court will gradually engraft onto cases dealing with original works of art the reasoning used in cases involving versions or reproductions of works in the public domain. If the court obscures distinctions among the standards discussed above, is it likely to perceive which situations call for which standards? Many works, including Snyder's bank, could qualify both as reproductions of works in the public domain and as original works of art.

Once the confused standards have been shifted from versions

⁶⁰ *Batlin v. Snyder*, Docket No. 75-7308, 6372-73 (2d Cir., Oct. 24, 1975).

⁶¹ In *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 150 (S.D.N.Y. 1924), Judge Learned Hand stated:

⁷¹ Any subsequent person is, of course, free to use all works in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice of law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed. If he claims the rights of the public, let him use them; he picks the brains of the copyright owner as much, whether his original composition be old or new. The defendant's concern lest the public should be shut off from the use of works in the public domain is therefore illusory; no one suggests it. That domain is open to all who tread it; not to those who invade the closes of others, however similar."

⁶² H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. (1976).

of public domain works to original works of art, there would be a real possibility of having judicial standards of what constitutes art. If the court can determine the relative values of works that otherwise fall into copyright classification, there may well be infringement of first amendment rights of free speech.⁶³ At present, an article need only fall into the proper category in order to be copyrightable. Once that automatic qualification is met, there can be no further distinguishing tests. Additional standards, beyond those required by the Constitution, would be discriminatory and, as such, in violation of first amendment protection.⁶⁴

Perhaps the most insidious danger arises from the nature of the cases involved. Few originality cases are major and few present matters of broad interest. The copyrightability of a costume jewelry design or a novelty item geared for the bicentennial trade is unlikely to generate great concern, so the confusion of standards is likely to go unchecked. It is the extent or the eventual effect of that confusion which is disturbing. Will the courts, through a series of minor but incremental decisions, establish judicial control over artists?

Imposition of the judicial will on the copyright statute is no more desirable now than it was when Justice Holmes descried the dangers.⁶⁵ Justice Douglas echoed the same concerns: "What may be trash to me may be prized by others. Moreover, by what right under the Constitution do five of us . . . impose our set of values on the literature of the day?"⁶⁶ The Second Circuit treads dangerously close to the constitutional edge these gentlemen give warning of; and as long as the current state of confusion continues, the warning becomes more cogent with each case that is decided.

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⁶³ See note 21 *supra*.

⁶⁴ *Id.*

⁶⁵ See note 13 *supra*.

⁶⁶ *United States v. 12 200-ft Reels*, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting opinion).

Similar constitutional questions regarding judicially-imposed standards vis a vis copyright protection are more familiarly raised in obscenity cases. Questionable decisions or confused applications of obscenity standards can result in the withholding of copyright protection (i.e. censorship) of a work of art. For a discussion of that aspect of the Copyright Act-first amendment tension, see Forkosch, *Obscenity, Copyright, and The Arts*, 10 *NEW ENG. L. REV.* 1 (1974-75).