

CRITICAL ANALYSIS OF IDEA EXPRESSION DICHOTOMY IN THE CONTEXT OF CONCEPTUAL ART

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ABSTRACT

One of the major apprehended road blocks in integration of conceptual art within the strict regime of Copyright law is the doctrine of idea expression dichotomy. My article deals with the historic origins of this axiom, its essential features, problems faced in applying the doctrine and the applicability of the doctrine to conceptual art. The article questions the Copyright law whereby it refuses to protect conceptual art using the doctrine of idea expression dichotomy. There are several inherent shortcomings in this age old doctrine such as: the traditional distinction between idea and expression is misguided and irrelevant; no "expressionless idea" exists and, at least in any meaningful writing, it makes no sense to speak of an "idealess expression"; despite the manner in which cases are framed, the scheme of differentiating idea from expression does not aid courts in their task of determining what is the protectable expression and whether this expression has been infringed.

Ironically the conclusion derived from the discussion is that in fact the doctrine only restricts claiming monopoly over the idea or concept behind the work, but it most definitely does not prohibit works where the concept is a central theme, until it satisfies the golden trinity of authorship, originality and fixation.

Key Words: Axiom, Conceptual Art, Copyright, Fixation

A. Introduction

It is the general rule that "there can be no copyright in an idea, principle, subject matter, themes, plots or historical or legendary facts and violation of the copy right in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work."³ Another may "borrow" an author's or creator's ideas with impunity,⁴ because copyright law does not protect ideas. The common argument against the copyright of ideas is based on the policy that to do so would hinder the free flow of ideas.⁵ The underlying implication of this policy is that society as a whole will benefit when there is an unrestricted market of ideas.

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³See R.G. Anand v. Delux Films & Ors [(1978) 4 SCC 118.

⁴See Mattel v. Jayant Agarwalla [(2008) 153 DLT 548]. The Delhi High Court has quoted federal judgment approvingly to uphold this notion. "The case of Allen v. Academic Games League of Am., 89 F.3d 614 (9th Cir. 1996) is worth noticing at this stage. The plaintiff in that case contended that the rule books published by the defendants to play the games developed by the him, violated his copyright over the tournament rulebooks developed by him. The court rejected the plaintiffs claim and held that: 'A copyright only protects a particular expression of an idea and not the idea itself Mazer v. Stein, 347 U.S. 201, 218 (1954). Thus, ideas contained in a copyrighted work may be freely used so long as the copyrighted expression is not wholly appropriated."

⁵See Chancellor Masters And Scholars Of The University Of Oxford v. Narendera Publishing House [2008 (38) PTC 385]. The Delhi High Court held that "Copyright law is premised on the promotion of creativity through sufficient protection. On the other hand, various exemptions and doctrines in copyright law, whether statutorily embedded or judicially innovated, recognize the equally compelling need to promote creative activity and ensure that the privileges granted by copyright do not stifle dissemination of information. Two doctrines that could be immediately be summoned are the idea-expression dichotomy and the doctrine of 'fair use' or fair dealing. Public interest in the free flow of

Numerous commentators have raised problems with the idea/expression dichotomy,⁶ but none have identified the root of the problem - that an idea cannot exist apart from some expression. One may differentiate the form from the substance of a writing, equating the substance with the writing's idea, but any idea must necessarily have an expression. Thus, drawing a distinction between the terms "idea" and "expression" cannot serve as a fundamental determinant for deciding what is protectable under copyright law. Rather, the sole distinction to be made is between those expressions which are protectable and those which are unprotectable.

This article questions the Copyright law whereby it refuses to protect conceptual art using the doctrine of idea expression dichotomy. There are several inherent shortcomings in this age old doctrine such as: the traditional distinction between idea and expression is misguided and irrelevant; no "expressionless idea" exists and, at least in any meaningful writing, it makes no sense to speak of an "idealess expression"; despite the manner in which cases are framed, the scheme of differentiating idea from expression does not aid courts in their task of determining what is the protectable expression and whether this expression has been infringed.

B. Origin and evolution of the doctrine

When courts first discussed ideas and expressions together, judges did not contrast them. For instance, in 1769 Lord Justice Mansfield described the protection granted by copyright as "an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression."⁷ Thus, the author's right was in both the ideas and expressions - each was treated as the author's intellectual creation.

Several early copyright decisions in the United States and England further supported the position that ideas and expressions do not fall into fundamentally different categories. The term "expression" occurred only rarely, and ideas were considered part of one category encompassing all writings. In *Emerson v. Davies*,⁸ Justice Story, without suggesting any contrast of categories between idea and expression, used the terminology customary at the time to note that "every author of a book has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance."⁹ Later in the century, the court in *Lawrence v. Dana*¹⁰ agreed, stating that "the author of such a book has as much right in his plan, arrangement, and combination of materials collected and presented, as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated."¹¹ Expressions and the ideas they express were not delineated by these courts in terms of what was protected and what was not.

The earliest case regarding the idea-expression dichotomy is the US Supreme Court decision in *Baker v. Selden*¹² which concerned the copyright over an account book. Selden had written a book which described an improved system of book keeping by a particular arrangement of columns and heading which made the ledger book easier to read. Baker accomplished a similar result, but using a different means of arrangement of columns and headings. The Court held that while a copyright may exist over the publishing and sale of a book, it does not extend to the ideas and 'the art' illustrated in the book. The US Supreme Court created a clear distinction between an idea and its expression, the primary

information is ensured through the idea-expression dichotomy, which ensures that no copyright is granted in ideas, facts or information. This creates a public pool of information and idea from which everyone can draw."

⁶ Jones, Richard H. "The myth of the idea/expression dichotomy in copyright law." *Pace L. Rev.* 10 (1990): 551. <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1475&context=plr>. Accessed June 3, 2020.

⁷ *Millar v. Taylor*, 98 Eng. Rep. 201, 242 (K.B. 1769) (Yates, J., dissenting), overruled by *Donaldson v. Beckett*, 1 Eng. Rep. 837 (H.L. 1774).

⁸ 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4436).

⁹ *Ibid*

¹⁰ 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136).

¹¹ *Ibid*

¹² 101 US 99 (1879)

reason being that otherwise, it would result in providing an undue scope of monopoly to the copyright holder and that would amount to anti-competitive practice.

Thereafter in *Kalem Co. v. Harper Brothers*,¹³ Justice Holmes fortified this doctrine by holding that Copyright does not extend to "the ideas as distinguished from the words in which those ideas are clothed."

Again the Court of Appeals for the Second Circuit in *Dymow v. Bolton*¹⁴ provided an important statement regarding the idea/expression dichotomy: "Ideas as such are not protected the copyright law protects the means of expressing an idea"

Although the idea/expression dichotomy arose in cases of verbatim copying, it gained its importance in cases of non-verbatim copying. In 1930, Judge Learned Hand added a major development to the doctrine. In *Nichols v. Universal Pictures Corp.*,¹⁵ he formulated a procedure to distinguish an idea from an expression based on the notion of "abstraction." In a case involving similar plots and character types in a play and a screenplay, he spoke of abstracting levels of increasing generality in a work:

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

C. Legislative provisions

The Berne Convention provides that member countries have been given right to prescribe that, the works shall not be protected unless they have been fixed in some material form.¹⁶

The general view had been that in order to be protected a work must be expressed in print or writing. With the advancement of technology it has come to mean some kind of recording whether on paper or on tape or any other medium such as an electronic one. While the Indian Copyright Act does not explicitly state about the fixation question in the matter of literary works, however the Copyright, Designs and Patents Act 1988 of the United Kingdom defines 'literary work' as "any work, other than a dramatic or musical work, which is written, spoken or sung."¹⁷ For subsistence of copyright in a literary, dramatic or musical work, the UK Act makes recording, in writing or otherwise, a precondition¹⁸ whereas in Indian Act does not have such a qualifying clause for literary or other works for copyright subsistence in them.¹⁹

In the case of musical works, in India, the condition of fixation in a medium has been done away since 1994 as can be deduced from the amended definition of 'musical work' compared to the pre-amended one.²⁰ This was following Justice Krishna Iyer's observation in *Indian Performing Right Society v. Eastern India Motion Picture Associates*²¹ case that the earlier provision was an "un-Indian feature."

D. Problems in applying the doctrine

¹³ 222 U.S. 55 (1911).

¹⁴ 11 F.2d 690 (2d Cir. 1926).

¹⁵ 45 F.2d 119

¹⁶ Article 2(2), Berne Convention

¹⁷ Section 3 (1) of Copyright, Designs and Patents Act, 1988 (CDP Act)

¹⁸ Section 3 (2) of CDP Act *ibid*

¹⁹ S. 13 of the Indian Copyright Act, 1957 provides that Copyright shall subsist in original literary, dramatic, musical and artistic works; cinematograph films and sound recordings. Whereas the definition of work under S. 2(y) or corresponding definitions of various works also does expressly state the requirement of fixation.

²⁰ *See* Section 2 (p) of the Copyright Act, 1957 as amended in 1994 which reads as "musical work" means a work consisting of music and includes any graphical notation of such work but does not include any works or any action intended to be sung, spoken or performed with the music. Before the amendment it read, "musical work" means any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced.

²¹ AIR 1977 SC 1443

A central difficulty with the dichotomy is that courts and commentators, while relating ideas to expressions, never define or clarify what exactly they mean by the terms "idea" and "expression." When we say ideas *per se* are not protectable whether we mean general concepts that are not protectable or abstract ideas or we actually mean unprotectable abstractions because as is already discussed above, ideas cannot exist without an expression.

Because both "idea" and "expression" are used in different senses, the idea/expression dichotomy may have any of four different meanings²²: (1) It may mean the important distinction between the subject matter of a work and protectable expressions in the work; (2) It may mean the distinction between unprotectable and protectable expressions; (3) It may mean a distinction between the subject matter of a work and unprotected expressions; or (4) It may mean a distinction from earlier times between disembodied ideas and any embodiment of them.

The idea/expression dichotomy conflates these possible distinctions - two of which are important to copyright law and two of which are irrelevant - under the guise of an insupportable distinction between ideas and expressions. As discussed earlier, there are no such things as unexpressed ideas or idealess expressions. Some illustrations will demonstrate that, at the least the doctrine of dichotomy that uses each key term in different leaves a lot of room for clarification.

(i) **General problems:** Although courts have not consistently defined the basic terms "idea" or "expression," they apply the idea/expression dichotomy to all areas of works in determining what is protectable. Ordinary phrases such as titles, names, slogans, mottos, brief labels, catch phrases, and short advertising expressions are ordinarily held to be unprotectable. In the realm of entertainment, general theme and plot of literary works, ideas for games, 'Scène à faire', literary fictional characters are all unprotectable even though they definitely have an expression. Hence it's not true that all ideas which are expressed in a tangible medium are protectable. Similarly narration of facts is not protected in an expression however compilation of facts is considered protectable even if the labor expended is the only original contribution of author.

(ii) **Problems with Merged Ideas:** In cases, the idea and its expression are said to 'merged', the work cannot be copyrightable. In such instances of merger, the expression is no longer copyrightable because granting copyright over the expression will effectively confer the owner with a monopoly over the idea itself²³, prohibiting which was the avowed objective of creating the idea-expression dichotomy in the first place. Thus this doctrine holds that when an idea can only be expressed in a certain way, the expression is not protectable.

For example rules of a game²⁴ cannot be copyrighted as they can be expressed in only one way. Granting copyright over this will allow such right owners to restrict anyone from 'reproducing' or even 'translating' the work into another form of expression, in order to perform basic operations. Grant of such broad monopoly will be against public interest and therefore the law does not grant copyright in cases where the doctrine of merger applies.

In other words, the expression should not be such that it is the idea itself which is resulting in an 'inseparable merger' of the two. Applying this doctrine, Courts have refused to protect the expression of an idea, which can be expressed only in a very limited manner. The decision in *Herbert Rosenthal Jewelry Corporation v. Kalpakian*,²⁵ is illustrative in this regard. The plaintiffs there sued the defendants asking them to refrain from manufacturing bee shaped jewel, the Court held that the jewel

²² *Supra* Note 4

²³ See *Syndicate of Press of University of Cambridge on behalf of Chancellor, Masters and School v. B. D. Bhandari & Anr.* [2011 (47) PTC 244]. "Copyright law is premised on the promotion of creativity through sufficient protection. On the other hand, various exemptions and doctrines in copyright law, whether statutorily embedded or judicially innovated, recognize the equally compelling need to promote creative activity and ensure that the privileges granted by copyright do not stifle dissemination of information. Two doctrines that could be immediately be summoned are the idea-expression dichotomy and the doctrine of 'fair use' or fair dealing. Public interest in the free flow of information is ensured through the idea-expression dichotomy, which ensures that no copyright is granted in ideas, facts or information. This creates a public pool of information and idea from which everyone can draw."

²⁴ See *Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296, 300 n.1. (9th Cir. 1979)

²⁵ 446 F.2d 738(1971)

shaped bee pin was an idea that anyone was free to copy, the expression of which could be possible only in a few ways; therefore, no copyright could subsist in it.

The case of *Allen v. Academic Games League of Am.*²⁶, is worth noticing at this stage. The plaintiff in that case contended that the rule books published by the defendants to play the games developed by the him, violated his copyright over the tournament rulebooks developed by him. The court rejected the plaintiffs claim and held that:

"A copyright only protects a particular expression of an idea and not the idea itself Mazer v. Stein, 347 U.S. 201, 218 (1954). Thus, ideas contained in a copyrighted work may be freely used so long as the copyrighted expression is not wholly appropriated. This is often the case with factual works where an idea contained in an expression cannot be communicated in a wide variety of ways. Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984), cert. denied, 469 U.S. 103 7 (1984). Consequently, the notions of idea and expression may merge from such "stock"

This doctrine of merger is particularly applicable with respect to games "since they consist of abstract rules and play ideas." Midway Mfg. Co. v. Bandai-America, Inc., 546 F.Supp. 125, 148 (D.N.J. 1982); see also Anti-Monopoly, Inc. v. General Mills Fun Group, 611 F.2d 296, 300 n.1. (9th Cir. 1979). A similar logic has been applied to rules of a contest where most subsequent expressions of an idea of a rule are likely to appear similar to the words of a related rule. See Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967); Affiliated Hospital Products, Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 1188-89 (2nd Cir. 1975). Here, Allen has not shown that it is possible to distinguish the expression of the rules of his game manuals from the idea of the rules themselves. Thus, the doctrine of merger applies and although Allen may be entitled to copyright protection for the physical form of his games, he is not afforded protection for the premises or ideas underlying those games. To hold otherwise would give Allen a monopoly on such commonplace ideas as a simple rule on how youngsters should play their games.' (emphasis supplied)

Although there has been considerable difficulty in defining and applying the idea-expression dichotomy in general, there has been even more than the usual difficulty in applying it where idea and expression are said to merge. Whereas the focus of the idea-expression dichotomy is upon whether the work constitutes idea or expression, the merger doctrine focuses upon whether the work is capable of alternative expressions. Thus, the doctrine requires reference not only to a given work, or to two given works, but to a whole range of works that might use the idea of the original work. The doctrine seems to impose upon the copyright claimant the task of demonstrating that the idea of the work is capable of other non-infringing expressions, which will then presumably be compared to the defendant's work in determining whether the particular taking will be allowed.

Although ideas should not be *per se* protected under copyright law, copyrightability need not be forfeited just because the expression incidentally tends to create a potential monopoly in the use of an idea. The merger theory is said to balance the interests of the copyright owner in controlling or profiting from the work against the interests of society in gaining access to the work.²⁷ But the forfeiture of otherwise valid expressions that merge with ideas seems to suppose that the interest of the public in free access is more important than the interest of the author, so that if the two cannot be accommodated by separating idea from expression, the author's interest must yield. This presumed hierarchy of interests, however, is not reflected in the law of copyright generally. Aside from the merger of idea and expression, copyright law does not provide that an author's rights must yield in order to protect society's freedom of access to works that incidentally may be impeded by the author's rights.²⁸

²⁶ 89 F.3d 614 (9th Cir. 1996)

²⁷ See Cf. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971). The court in *Kalpakian* identified the goal of the idea-expression dichotomy as "the preservation of the balance between competition and protection reflected in the patent and copyright laws."

²⁸ Samuels, Edward. "The idea-expression dichotomy in copyright law." *Tenn. L. Rev.* 56 (1988): 321. <http://www.edwardamuels.com/copyright/beyond/articles/ideapt1-20.htm#:~:text=Under%20the%20approach%20adopted%20by,only%20exact%20takings%20were%20prohibited.> Accessed June 2, 2020.

(iii) *Problems with Infringement Cases*: While determining whether there is an infringement the Courts would consider the impression²⁹ made or the 'effect produced on the mind'.³⁰ Yet the doctrine and the judicial pronouncements hold that ideas or themes or concepts are not protectable. As the axiom is that, copyright protection extends only to the protected expression in any writing, it implies copyright protects against the unauthorized copying of an author's expression, while allowing anyone to exploit the ideas in that author's work.

E. Is the axiom really a roadblock?

Post-modernism rebels against the traditional norms of originality, ownership, and expression that define copyright protection. The post-modern artist challenges notions of originality by lifting images from pre-existing works to present novel ideas about society, politics, and consumerism. Ownership is questioned by appropriation artists who take the work of another and claim it as their own. Artistic expression, once the essence of art, is now subservient to the artistic idea.

It is the nature of post-modern art to stretch the limits on what is considered art. If the Copyright Act were to accommodate post-modernism, it would have to be continually re-written as artists redefine and rewrite the rules of creativity, originality, and authorship. We are at a time where everything can be art. If art has no limits, should copyright have no limits? Clearly, this is an unworkable proposition. The original incentives of the Copyright Act to encourage unique and original works would be seriously undermined. The current Copyright Act fails to protect most works of post-modern art. Yet, this is not the result of an intentional bias. Conceptual art and appropriation art expand the definition of art in a manner that is almost limitless. A workable statute, on the other hand, needs limits. Art needs to be limited by definition for administrative purposes. Art also needs to be limited by definition so protection has some meaning. If the Copyright Act were extended to the outer limits of post-modern art, it could lead to everything being protected art, as in the case of the copyrightability of ideas.

Alternatively, it could lead to nothing being protected, as in the case of allowing appropriation artists to steal the work of others so long as there is some artistic purpose. The Copyright Act imposes limits that are broad, unbiased, and workable. Post-modern art, by definition, undermines original expression. Any laws that would accommodate this type of art would, therefore, undermine the essence of the Copyright Act. One of the limits is that of expression of art. Idea expression dichotomy doctrine, in this sense, presents a road block to flourishing of creativity.

Whether the doctrine can be said to be 'diluted' considering the above problems is a tough question to answer. With all its shortcomings, the axiom still holds the central role in deciding the copyrightability of any work. Though the doctrine restricts claiming monopoly over the idea or concept behind the work, it most definitely does not prohibit works where the concept is a central theme, until it satisfies the golden trinity of authorship, originality and fixation.

Therefore from this standpoint, the axiom may be a roadblock to flourishing creativity but it is not the roadblock for the integration of the conceptual art into the copyright regime. Even though conceptual art places significant importance on the concept or the idea behind the work, as discussed above, no idea can exist without an expression and conceptualism is no exception. For instance, in the case of installation art, the focus is on how the viewer experiences the work and the desire to provide an intense experience for them is a dominant theme, but nevertheless it has an expression. What evolves from this discussion is that dichotomy doctrine is not a barrier in the way of integration of conceptualism in the strict regime of copyright law in India.

²⁹ The Hon'ble Supreme Court of India in *R.G Anand vs M/S. Delux Films & Ors* [AIR 1978 SC 1613] held "One of the surest and the safest test to determine whether or not there has been a violation of copyright is to seeing the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original".

³⁰ The Hon'ble Madras High Court in *The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern* [ATR 1967 Mad 38] held that "What is essential is to see whether there is a reproduction of substantial part of the picture. There can be no test to decide what a substantial part of a picture is. One useful test, which has been followed in several decisions of Courts, is the one laid down by Lord Herschel, L.C. in *Hanjastaengl v. Bains & Co. (1)* "..... it depends really, on the effect produced upon the mind by a study of the picture and of that which is alleged to be a copy of it, or at least of its design".