

## Three Inquiries about Creation: Interpretation and Construction of Copyright Law

**Abstract:** In copyright law, originality is a fundamental concept including two elements: independent creation and some degree of creativity. Comparing independent creation, creativity is a more obscure element, courts adopted different doctrines to measure it: from aesthetic value of work theory, intent and mind of author theory, process and tool of production theory to trivial/distinguishable variation dichotomy. Based on linguistics and cognitive science, trivial/distinguishable variation dichotomy can be more objective and appropriate, but can't provide an accurate standard, which leaves room for the discretion of judges. The history of human civilization witnessed that imitation is the prerequisite of creation. Legislators try to seek a balance between imitation and creation, for keeping step with the consumer psychology and market demand. Copyright law is inclusive of commons, sponsorship and private property and other institutions protecting and fostering creation. It reflects the general law of economy: with the change of numbers and complexity, different constitutions will alternate unconsciously.

**Keywords:** copyright; trivial/distinguishable variation; creation; institutional economics

### Introduction

Originality is a fundamental concept in copyright law which defines the range of protection for works: regardless of the input, there is no protection without originality. As a matter of fact, however, neither the copyright clause in U.S. Constitution nor the first Copyright Law promulgated in 1909 mentioned the word 'originality'. On the contrary, it is the court that first created and developed the idea of 'originality' through case-law. In the Trade-Mark Cases<sup>1</sup> in 1879, the Supreme Court believed that 'writings' in Constitution should be under protection only if they have originality. While in 1884, the case of Burrow, the Supreme Court defined 'author' in Constitution as 'originator' and considered that 'writings should have, at least, some degree of creativity'. It was not until 1976 that the U.S. Congress absorbed the concept of 'originality' in Copyright Law, without specific definition though. In 1991, the Feist case<sup>2</sup>, the Supreme Court combined the principle of 'independent creation' and the principle of 'some degree of creativity' for the first time. Creativity is a more obscure element compared with 'independent creation' which is easier to judge. Within litigation, the most difficult issue is to draw a line between creativity and non-creativity. Ironically, the court has much to say about the idea of 'creation' yet it is seldom defined. Judges would not browse scientific journals for a trial and consequently, could not analyze and elucidate cases from the perspective of

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<sup>1</sup> 100 U.S. 82 (1879).

<sup>2</sup> Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, (1991)

psychology or cognitive science.

### I. Differences: factual premise of creativity

For centuries, scholars from philosophy, cognitive science, psychology and even neurology tried to define 'creativity'. However, as those scholars have noticed, the concept of 'creativity' can easily get judges stuck in the testimony of expert unless extremely careful. It has to make use of the grey theory defined in neurology and psychology. The dichotomy of 'trivial/distinguishable variation' provides judges with relatively objective analytical path. Judges have to ask themselves: "What has the author changed compared with current expression?" The idea of 'trivial variation' has been adopted by many courts. The concepts of 'recognizable', 'substantial' and 'significant' in 'substantial variation' and 'significant variation' are, nonetheless, all applied to describe variations more than trivial.

It should be admitted that differences do not equal to creation in semantic terms. It remains on objective-level on judging the differences between two works while it is entirely subjective when it comes to the question: if one piece of work is more 'creative' than the other. That is to say, the work is regarded as creative when differences satisfied its demands to a certain degree or in some aspect. As a result, creativity is a concept far too flexible compared to difference. However, it is due to this flexibility that enables it to adjust to different practical issues and thus make the tree of law fruitful.

It does not explore the intention or psychological state of author nor does it consider the process and tools of creation when judging 'creativity'. In 2011, there is a hot issue concerning if some specific fonts in computer character software should be protected under copyright law among Chinese copyright law field. As a matter of fact, the issue has been raised on copyright of photographs. The creativity of one article certainly does not depend on the font author applied nor does it relate to the amount of time spent for readers or audiences do not know and do not care to know the process or tools of creation.

It inevitably involves subjective judgment when considering the creativity of a work. And consequently, the subjectivity and uncertainty leaves room for judges' discretion. The dichotomy of 'trivial/distinguishable variation' is more objective and appropriate than theories of 'artistic value of works', 'intention and psychology of author' and 'creation process and tool', yet it still contains

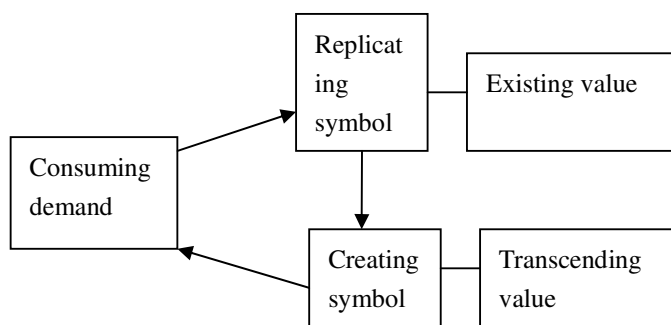
much uncertainty for subjective judgment. Rhetorical expressions such as ‘sweating forehead’, ‘personality of author’ or ‘some degree of creativity’ are then used to hide judges from their own value judgment.

## II. Imitation and creation: Opposition and Unification

All creations are in fact development based on replication and imitation of existed intellectual works. The word replicate means copying and repeating yet it also implies creation and re-emergence. Imitation is the precondition of creation which is an undeniable fact. Any creation is unimaginable if we do not learn from wisdom of our forefathers. Civilization is then passed on from generations to generations through the process of ‘creation-replication-recreation’. As a result, it would extinguish creation if imitation is prohibited.

In ancient China, it is believed to ‘narrate instead of create, trust and admire the past experiences’. It does not mean that ancient Chinese were not creating, rather, it implies that ancient people tend to repeat exist skills to reduce cost for they were confined with the shortage of resources and production scale. Whereas the development of technology and upcoming of Industrial Revolution brought in abundant resources and much leisure time for human beings, they were no longer satisfied with current knowledge and thus stimulated the thriving cultural market. The transformation of this demand left an impression: ancient people repeat old stuff while modern men love novelty.

The production of symbols is to satisfy preference of human demands. During the process of learning, applying and recognizing symbols, it is easy to form a habit or dependency. On the other hand, curiosity would lead to aesthetic fatigue of one symbol. It is this kind of seemingly contradicted but unifying human nature that drives the advancement of culture, technology and commerce. In a nutshell, creation should be slightly ahead of common appreciation as shown in the graph below:



If certain computer software can comply with more software, it certainly is for the convenience of consumers and reduces its operating cost. Low-cost but high-efficiency products are no doubt attractive which ‘compel’ others to build their work based on previous products and apply the creation and ‘standardized’ elements of their predecessors. However, it would be pointless to use existing technology entirely without any creation for consumers would always have an appetite for new things and curiosity. It is the change of ‘convergence-curiosity’ that lead to the circular flow of ‘replication-creation’ in competitive market.

### III. Protection of privatized creation: a public choice

There is another key issue on copyright law: Why is creation stimulated by the mode of private property? Is this the only pattern? Before answering these questions, it is necessary to clarify one thing: what is privatized is not intellectual creative works rather; it is the way these works are utilized. This is quite often confusing. It is proved by the long and extraordinary history of creation that privatization is not the only way of stimulating creation. Although symbols are created by individuals, they have more important social functions. Then why is there a set of copyright rules to regulate the use of symbols rather than put them in public sphere accessible to everybody? That is also to ask a fundamental question on legitimacy of copyright law.

We learnt from economics that all decisive factors in trading are interested relations and cost. Coase mentioned that when trading cost is zero, formal managerial system or law is insignificant to a large extent. Everything is operated spontaneously, smoothly and without any cost.<sup>3</sup> Nevertheless, this is an ideal status. Coase’s deduction is that when trading cost is very low, there is not much difference between commons (public mode) or centralization (sponsorship) and property right system (private mode). The issue brought by public mode or sponsorship, however, emerged with the

<sup>3</sup> See Coase, The Problem of Social Cost, Journal of Law and Economics, Vol 3, (Oct., 1960).

increase of population and complexity as well as the expansion of trading and managerial cost that came along. Private property system, therefore, becomes the most efficient way to utilize resources. It is because private mode provides the largest possibility to internalize cost and profit and thus prevent issues such as ‘tragedy of commons’ that involve overuse and severe insufficient investment. Private property system can be brought out the best in a populous and complicated world. However, it should be mentioned that when population and complexity keep growing, all protective modes including private property will gradually decline. Cost is increasing while efficiency is decreasing which leads to more and more invalid operations. They began to notice that advantages brought by protection are lessened and vice versa. Subsequently, private mode gradually tends to public mode. With the increase of population and complexity, sponsorship and public mode generally constitute an active role and political procedure takes the place of judicial practice. In a word, population and complexity are the basic elements in different systems.

### Conclusion

It goes without saying that copyright law or even the how intellectual property system is centered on ‘creation’. Then what is creation? Why should we protect creation? How is creation best stimulated? This does not only depend on factual analysis and scientific argument but also relates to ethic values and emotional preference. Creativity, just as a scholar believed, is an inherent subjective statement deeply rooted in the field of common value.<sup>4</sup> It can be revealed from knowledge and principles in linguistics, cognitive science, communication and information science that difference is the factual condition for creation and also the objective basis for the establishment of intellectual property from real property. As a result, it is more objective and appropriate to judge the creativity of work by differences it presents rather than theories of ‘artistic value’, ‘intention of author ’and ‘creation process’, although it still fails to provide a standardized measurement. It is to keep up with the constant-changing consumer psychology and social demand that law is set out to encourage differences and protect creation. As a matter of fact, there have been modes of common, sponsorship and privatization developed to protect and stimulate creation to a large extent. These systems vicissitude along the change of population and complexity.

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<sup>4</sup> Julia Reytblat, Is Originality in Copyright Law a “Question of Law” or a “Question of Fact?”: the Fact Solution, 17 *Cardozo Arts & Ent. L.J.* 181, 181( 1999).