

Intellectual Property Scholars Conference 2019

Personality as a Condition for Copyright Protection

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Overview

Law of copyrightable subject matter has evolved to an “everything but” formulation.

Why the test of excluding functional aspects from copyright is meaningless.

How maintaining this exclusionary formulation of copyrightability will affect copyright in new technology areas, particularly DNA.

Description of an alternative positively articulated test of copyrightability.

The “Everything But” Articulation of Copyrightability

From:

“books, maps and charts”

Copyright Act of May 31, 1790, ch. 15, § 1

To:

“original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

17 U.S.C. § 102(a)

Case Law Buttressing the “Everything But” Formulation of Copyrightability

Everything:

“It 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.”

Bleistein v. Donald Lithographing Co., 188 U.S. 239, 251 (1903)
)

But:

“The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.”

Baker v. Selden, 101 U.S. 99 (1880)

Current Test of Copyrightability Requires Separating the Functional from Nonfunctional Aspects of an Author's Work

“Everything But” Formulation:

“In no case does copyright protection . . . extend to any idea, *procedure, process, system, method of operation*, concept, principle, or discovery. . . .”

17 U.S.C. § 102(b)

Problem of Pan-functionalism:

Related to the idea of panaestheticism defined as “anything can pass for art”

Barton Beebe, *Star Athletica and the Problem of Panaestheticism*,

9 U.C. Irvine L. R. 275, 278 (2019)

Separation of the Functional from Nonfunctional Aspects of an Author's Work Depends Entirely on the Arbitrary Identification of the Function

Abstraction-Filtration-Comparison Cases:

Is the function 1) a programming language or 2) a programming language that programmers trained in JAVA can easily use?”

Oracle America, Inc. v. Google Inc., 750 F.3d 1339 (Fed. Cir. 2014)

Is the function 1) a “common system interface component” or 2) an efficient “common system interface component” that complied with “the demands of [a specific] operating system and of the [specific] applications program to which it was to be linked?”

Computer Assocs. Int'l v. Altai, 982 F.2d 693, 715 (2nd Cir. 1992)

Separation of the Functional from Nonfunctional Aspects of an Author's Work Depends Entirely on the Arbitrary Identification of Function

Merger Case:

Is the function 1) “translat[ing] source code to object code,” or 2) “achiev[ing] total compatibility with independently developed application programs written for the Apple II?”

Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253 (3rd Cir. 1983)

Scenes a Faire Case:

Is the function 1) accessing a call controller with a “command code,” or 2) ensuring “compatibility with equipment already installed in the central offices of Mitel’s customers?”

Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366, 1375 (10th Cir. 1997)

Separation of the Functional from Nonfunctional Aspects of an Author's Work Depends Entirely on the Arbitrary Identification of the Function

Other Cases:

Is the function 1) a computer spreadsheet or 2) a computer spreadsheet that users of Lotus 1-2-3 can use without additional training?

Lotus Devel. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995)

Is the function of the garment 1) to clothe the wearer, 2) identify the wearer as a cheerleader or 3) identify the wearer as a cheerleader for a specific team?

Star Athletica LLC v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017)

The Extension of Copyright Protection to Computer Programs

The legislative history to the 1976 Copyright Act states “‘literary works’ . . . includes . . . computer programs.”

H. R. Rep. No. 1476, 94th Cong., 2d Sess. 54, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5667

CONTU report recommended amendment “to make it explicit that computer programs, to the extent that they embody an author’s original creation, are proper subject matter of copyright.”

Nat’l Commission on New Technological Uses of Copyrighted Works, Final Report 1 (1979)

1980 Amendment: “A ‘computer program’ is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”

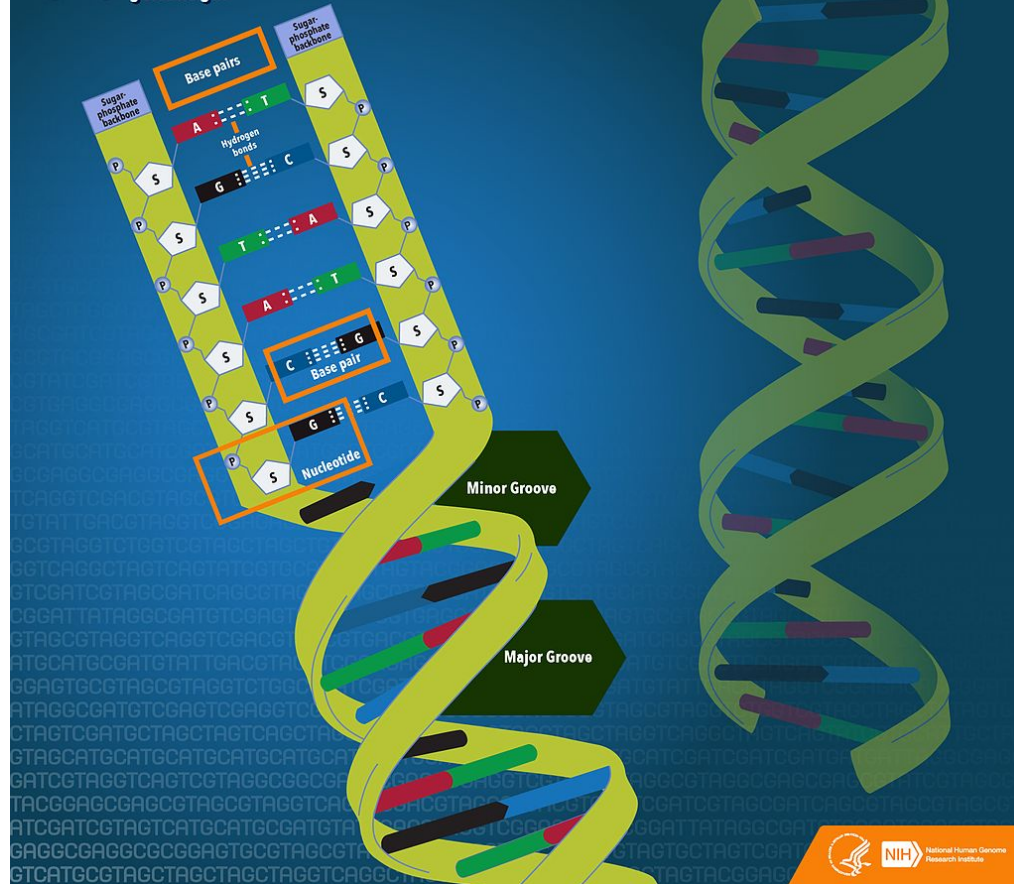
17 U.S.C. § 101



DNA - Deoxyribonucleic Acid

NHGRI FACT SHEETS

genome.gov



DNA is Analogous to Software: Original work of authorship

DNA

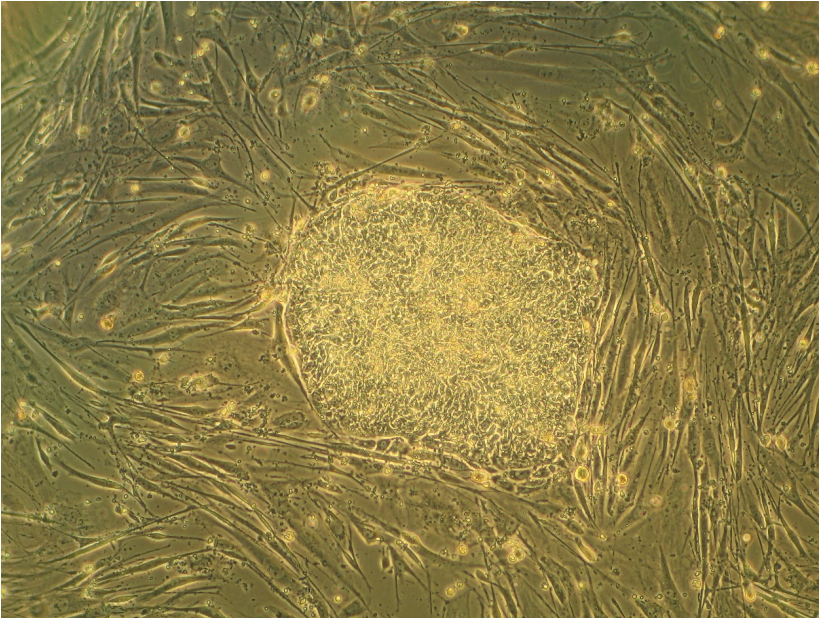
accggtgggtcccatgcttgaaacctgtgccc

Software

10101011001101001100010

The Work for Which Protection is Sought

DNA



Software



What Does a Positively Articulated Copyrightability Test Look Like

Personality:

“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 unless there is a restriction in the words of the act.”

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903)

Human Subjectivity:

Works that contain human subjectivity that are the “fruits of intellectual labor” and “of intellectual production, of thought, and conception” are entitled to copyright protection.”

Feist Publications, Inc. v. Rural Telephone Services Co., Inc., 499 U.S. 340, 346-7 (1991)

In separating functional aspects, the appropriate question is whether the “design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences.”

Brandir Int’l, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1987)

Court Statements Show that Originality Means More than Merely “Owing Its Origin To”

“taste”

Baker v. Selden, 99 U.S. 101, 105(1880)

“artistic creativity”

Computer Assocs. Int’l v. Altai, 982 F.2d 693, 711 (2nd Cir. 1992))

“creative spark”

Feist Publications, Inc. v. Rural Telephone Services Co., Inc., 499 U.S. 340, 358
(1991)

“personality”

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903)

Any Test of Personality Must Be Ongoing

The Problem in Oracle v. Google:

There is no copyright violation of the method specification when at the time the alleged infringer designed its program, “the method specification . . . *must be identical* under Java rules”

Oracle America, Inc. v. Google, Inc., 872 F. Supp. 2d 974, 998 (N.D. Cal. 2012)

“[C]opyrightability is focused on the choices available to the plaintiff at the time the computer program was created”

Oracle America, Inc. v. Google, Inc., 750 F.3d 1339, 1370 (Fed. Cir. 2014)

Any Test of Personality Must Be Ongoing

Separability of Functional Aspects Must be Determined from the Perspective of the One Who Perceives:

“The [copyright] statute’s text makes clear, however, that our inquiry is limited to how the article and feature are perceived, not how or why they were designed.”

Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1011 (2017)

Copyrightability Depends on Circumstances:

Court held an expression that would have been copyrightable as a model building code became a fact and uncopyrightable when the code was enacted into law.

Veeck v. Southern Building Code Cong. Int’l, Inc. 293 F.3d 791 (5th Cir. 2002)

Analogy to Genericism in Trademark Law