

A la recherche du sens perdu: Deconstructing the Creativity Standard in Copyright

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“Longtemps, je me suis couché de bonne heure” - Even in this first sentence in *A la recherche du temps perdu*, before Proust tells of the madeleine and Swann, he has already distilled tremendous creativity into a single sentence. While it can be shown that this choice was highly creative, there is no question that if Proust were writing in the U.S. today, this sentence taken alone would not be copyrightable due to the merger doctrine. That is, the idea that the sentence articulates is only susceptible to very few expressive forms, none of which may be protected by copyright. Yet the obverse case, where an idea’s susceptibility to many forms of expression, grants copyright to all manner of marginally creative works, from pitching stat tables to menu layouts. At the heart of this seemingly inconsistent result is the Supreme Court’s edict in *Feist* that copyrightable works evidence a “modicum of creativity” in order to qualify for protection. Courts often ferret out the presence of such creativity by reviewing whether a creator selected among one of sufficiently numerous alternatives to express a given idea. It can be shown, through examples like those above and a closer examination of the deficiencies of Learned Hand’s “abstractions” methodology, that the alternatives-based test to determine the presence of “creativity” often has absolutely nothing to do with creativity in any typical sense of the word. This paper proposes to plumb the substantial divergence between creativity as an everyday concept and creativity as a legal, policy-based term. After demonstrating the insufficiency of the creativity standard as judicially conceived, this Paper closes by proposing an alternative conception of the standard – that embodied in the philosophy of Nobel laureate Henri Bergson.