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 exclusionary formulation.

Why excluding functional aspects from copyright is meaningless for functional expression.

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

Proposal of an alternative positively articulated standard for copyrightability.

The Historical Expansion of Copyrightable Subject Matter

"books, maps and charts"

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

"all the writings of an author"

Copyright Act of 1909, 35 Stat. 1075, , § 4

"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)

Current Exclusionary Formulation of Copyrightable Subject Matter

Broad scope of copyrightable works:

"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 a machine or device."

17 U.S.C. § 102(a)

Exclusionary 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)

Separating the Functional from Nonfunctional Aspects of an Author's Work

Problem of Pan-functionalism:

Related to the idea of panaestheticism: "What is there in the world that, viewed through an esthetic lens, cannot be seen as a good, bad, or indifferent work of art?

Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1033-4 (2017)(Breyer, J. dissenting)

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

Oracle v. Google

Is the function 1) a programming language API or 2) a programming language API that complied with the rules of JAVA?"

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

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

Abstraction-Filtration-Comparison Cases:

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

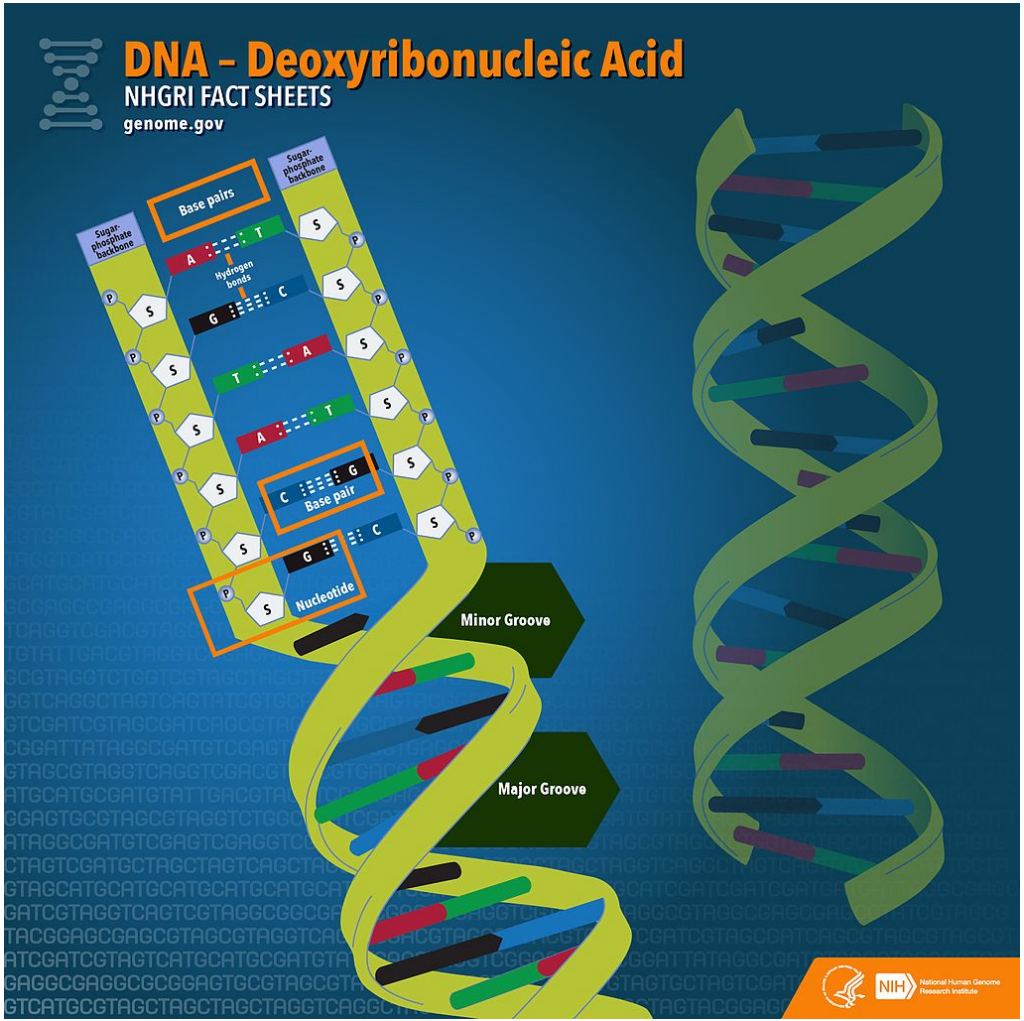
Other Cases:

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)


DNA – Deoxyribonucleic Acid
NHGRI FACT SHEETS
genome.gov
Base pairs
Sugar-phosphate backbone
Sugar-phosphate backbone
Hydrogen bonds
Base pair
Nucleotide
Minor Groove
Major Groove
NIH
National Human Genome Research Institute

DNA is Analogous to Software: Original work of authorship

DNA

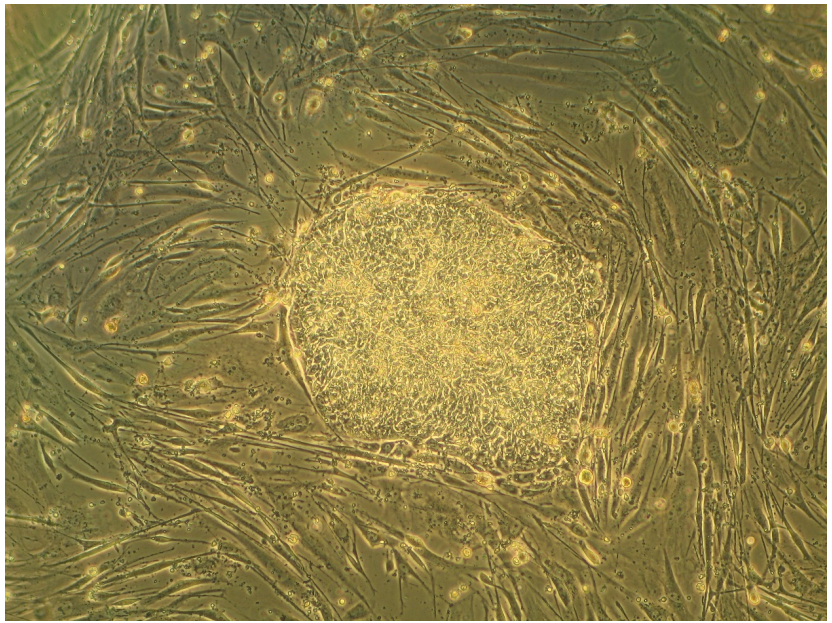
acccggggtcccatgcttgaacctgtgccc

Software

10101011001101001100010

The Work for Which Protection is Sought

DNA



Software

Human Subjectivity or Personality as a Component of Originality

"[O]riginality is a constitutionally mandated prerequisite for copyright protection."

"Originality requires . . . that the [author's choices] display some minimal level of creativity."

Works "in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent . . . are incapable of sustaining a valid copyright."

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

Statements Describing a Positively Articulated Standard of Personality for Copyrightability

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:

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)

Taste:

Methods and diagrams for the purpose of practical application are distinguished from "ornamental designs, or pictorial illustrations addressed to the taste."

Baker v. Selden, 101 U.S. 99, 103 (1880)

A Personality Measure Must Be Continuing

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)

A Personality Measure Must Be Continuing

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 as enacted law.

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

Analogy to Genericism in Trademark Law