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## How Much is Enough? The Search for a Standard of Creativity in Works of Authorship under Section 102(a) of the Copyright Act of 1976

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# How Much is Enough? The Search for a Standard of Creativity in Works of Authorship Under Section 102(a) of the Copyright Act of 1976

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### I. INTRODUCTION

Section 102(a) of the Copyright Act<sup>1</sup> (“Act”) provides copyright protection for “original works of authorship.” The requirement that the work be original, which very generally means the work must not have been directly copied from another work but must be the product of some independent effort on the part of the author, has been thoroughly explored by courts<sup>2</sup> and commentators<sup>3</sup> and is beyond the scope of this Comment. What is troublesome about the provision of copyright protection to “original works of authorship” is the nebulous requirement of “creativity” which the courts seek in determining

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1. 17 U.S.C. § 102(a) (1982).  
2. See, e.g., *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).  
3. See, e.g., M. NIMMER, *THE LAW OF COPYRIGHT* § 2.01 (1988).

whether a work qualifies as a work of authorship under section 102(a) and thus is entitled to receive copyright protection.

The need for a standardized amount of creativity to meet the requirement for copyright is not reflected in most applications for copyright protection. A work is usually creative enough to be considered a "work of authorship." The problem due to the lack of a standard becomes apparent, however, in the borderline cases in which the creativity is somewhat trivial, yet does not seem to be entirely lacking. One such situation may be a simple line drawing of an arrow. This piece would probably fall under the category of "pictorial, graphic, and sculptural works" of section 102(a),<sup>4</sup> but it may not embody enough creativity to constitute a copyrightable work of authorship. Likewise, a single sentence on a piece of paper may be considered a literary work,<sup>5</sup> yet it may not contain the amount of creativity required to be considered a work of authorship.

As one court has stated, implicit in the concept of originality is a "minimal element of creativity."<sup>6</sup> This "minimal element," however, is elusive. This Comment will search for this element. It will seek a standard against which authors can judge the creativity of their works. First, it will examine the confusion surrounding the use of the term "creativity." This Comment will then examine the various approaches taken by the courts in cases in which creativity is an issue. Finally, it will attempt to formulate the decisions of the courts into a workable standard which defines both what creativity is and how much of it is required in an "original work of authorship."

## II. THE SEARCH FOR THE STANDARD

The Act provides no assistance in the determination of how much creativity is "enough" to meet the minimal requirement or of what constitutes "creativity." Section 102 does not contain any language indicating that creativity is to be a consideration in extending copyright protection to works.<sup>7</sup> The legislative history of the Act discusses the

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4. 17 U.S.C. § 102(a)(5) (1982).

5. *Id.* at § 102(a)(1).

6. *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976).

7. Section 102 reads:

(a) Copyright protection subsists, in accordance with this title, in 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. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;

requirement of originality,<sup>8</sup> but it also fails to address the idea of creativity. The Copyright Act of 1909 similarly is void of any mention of creativity.<sup>9</sup>

The requirement of creativity does appear in the rules and regulations of the Copyright Office, but only in relation to works of art. The rules state in part: "In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some *creative* authorship in its delineation or form."<sup>10</sup> Though the rule calls for *some* creative authorship, it offers no advice or assistance in determining when a work possesses enough creative authorship or even in determining what constitutes creative authorship.

While the rules of the Copyright Office do not require a creativity element for any of the other categories of works of authorship,<sup>11</sup> the courts have sought this element. Despite a lack of legislative guidance, courts have required works to contain at least a "modicum of creativity"<sup>12</sup> in order to receive copyright protection. The courts have not, however, been able to pinpoint the exact amount of creativity which constitutes a "modicum." One court stated: "There is no simple way to draw the line between 'some creative authorship' and not enough creative authorship . . ."<sup>13</sup>

To formulate a distinguishable line between "some" creative au-

(6) motion pictures and other audiovisual works; and

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102(a)-(b) (1982).

8. "The phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute." H.R. REP. NO. 1476, 94th Cong., 2d Sess. § 102, at 51 (1976).
9. The Act does not even mention a requirement of originality. It merely requires that the work be the writing of an author: "[T]he works for which copyright may be secured under this Act shall include all the writings of an author." Copyright Act of 1909, Pub. L. No. 349, § 4, 35 Stat. 1075, 1076.
10. 37 C.F.R. § 202.10(a) (1989) (emphasis added).
11. Works of authorship include the following categories:
  - (1) literary works;
  - (2) musical works, including any accompanying words;
  - (3) dramatic works, including any accompanying music;
  - (4) pantomimes and choreographic works;
  - (5) pictorial, graphic, and sculptural works;
  - (6) motion pictures and other audiovisual works; and
  - (7) sound recordings.
12. Universal Athletic Sales v. Salkeld, 511 F.2d 904, 908 (3d Cir. 1975).
13. John Muller & Co. v. New York Arrows Soccer Team, 802 F.2d 989, 990 (8th Cir. 1986).

thorship and "not enough" creative authorship, one could analyze the different approaches courts have taken in their attempts to find "some creative authorship." The analysis would reveal, however, an almost total lack of ability on the part of the courts to enunciate reasoning for their findings of creativity or lack thereof which would prove useful in formulating an understanding of what creativity is or how much of it is required in addition to originality to render a work eligible for copyright protection.

#### A. Creativity v. Originality

One source of the confusion surrounding creativity may be the lack of understanding which some courts have of the concept. Though originality and creativity are separate and distinct requirements,<sup>14</sup> the courts sometimes are unable to differentiate between the two.

In *Universal Athletic Sales Co. v. Salkeld*,<sup>15</sup> for example, the Third Circuit Court of Appeals incorrectly used the term "creativity" when it meant to use "originality." The court was faced with the issue of potential infringement of a copyrighted work. While focusing on the amount of originality required to render a work not copied from another similar work and thus not an infringement of the previous work, the court described the two opposing extremes of "conceded creativity" and "independent efforts amounting to no more than the trivial."<sup>16</sup>

In this context, the court actually was discussing the requirement of originality when it referred to "conceded creativity." According to Nimmer, "[o]riginality means only that the work owes its origin to the author, *i.e.*, is *independently created*, and not copied from other works."<sup>17</sup> The "conceded creativity" which the court described as being at the other end of the extreme from "trivial independent effort" would thus be originality. The inability of some courts to distinguish between the requirements of originality and creativity results in confusing opinions which offer no assistance in understanding the element of creativity.

#### B. The Relationship Between Creativity and Originality

Despite its initial confusion with the term, the *Salkeld* court did refer to creativity correctly as it provided a slight definition of the amount of creativity required for copyright protection. The court de-

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14. In an attempt to distinguish between originality and creativity, Nimmer notes that while originality refers to the nature of the author's contribution to the work, creativity refers to the nature of the work itself. M. NIMMER, *supra* note 3, § 2.08[B].

15. 511 F.2d 904 (3d Cir. 1975).

16. *Id.* at 908.

17. M. NIMMER, *supra* note 3, § 2.01[A], at 2-8 (emphasis added).

scribed a reciprocal relationship which seems to exist between creativity and independent effort or originality. The smaller the amount of effort involved in a work, the greater the amount of creativity required. Conversely, a work with a large amount of originality will require only a small amount of creativity.<sup>18</sup>

According to this theory, a simple line drawing could qualify as an original work of authorship in two ways: (1) if it were so original that it could reasonably be found not to be a copy of any other work, in which case only a small amount of creativity would be required, or (2) if it were very creative, in which case the required amount of originality, or lack of copying from a previous work, would be minimal. Since simple line drawings are quite common, especially among doodlers, originality would be a hard element to prove, and most of the drawings would have to illustrate a tremendous amount of creativity to qualify for protection. For this reason, very few simple drawings would be found to be "creative enough" to warrant copyright protection.

Similarly, due to the vast amount of writing already in our language, a single sentence would probably lack the amount of originality sufficient to meet the minimum creativity requirement. Thus, to be entitled to copyright protection as an original work of authorship, a sentence would need to reflect such a huge quantity of creativity that only a minimum amount of originality would be required. Since a sentence could probably not contain such a high degree of creativity and still have meaning for the reader, it would not qualify as an original work of authorship for the purposes of copyright protection.

The analysis becomes complicated when the work in question is so original that only a small amount of creativity is required. The drawing might take on more details. Rather than being a simple line drawing, it becomes an oil painting. The single sentence becomes a paragraph or a complete story. Now neither so closely resembles common doodles or familiar phrases. As the works become more original, or less likely to have been copied from a pre-existing work, the amount of creativity required theoretically should reduce in inverse proportion. It is with works in this area that the quantity of creativity required becomes unclear and unsettled.

### C. A Definition

The problem of establishing a standard for creativity is further frustrated by the absence of a useful definition of creativity. Perhaps the only legal guidance in defining creativity as an identifiable concept comes from Nimmer. In discussing the originality requirement for a work of art, he makes the distinction that, "[w]here creativity refers to

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18. *Universal Athletic Sales v. Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975).

the nature of the work itself, originality refers to the nature of the author's contribution to the work."<sup>19</sup> This still leaves creativity as a vague concept as it refers to the "nature of the work," but does not expand to assist in distinguishing the "nature" of the work from the actual work itself. Nimmer's explanation basically says that creativity is *not* what the author contributes. This provides only slight guidance.

#### D. Judicial Decisions

In the search for the amount of creativity required<sup>20</sup> or even for a definition of creativity,<sup>21</sup> one must thus turn to the courts and analyze their decisions on the issue. While the decisions of the courts regarding creativity are not necessarily inconsistent or confusing, they are also not necessarily helpful.

The court in *Magic Marketing v. Mailing Services of Pittsburgh*<sup>22</sup> provided a summary of classes of works which by either judicial or legislative determination have been found not to exhibit even the minimal level of creativity necessary to warrant copyright protection. This summary provided a foundation for an introduction into judicial analysis on the issue of creativity.

The summary began with "fragmentary words or phrases" and "forms of expression dictated solely by functional considerations."<sup>23</sup> The court supported this by citing regulations pursuant to the Act which list works not subject to copyright: "Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents."<sup>24</sup> The court went on to add that clichéd language and expressions communicating an idea which may only be conveyed in a more or less stereotyped manner are not proper subjects for copyright.<sup>25</sup> Unfortunately, the court did not provide examples of works of this type.

Next, the court noted that under copyright regulations the listing of the contents of an envelope or package, like a listing of ingredients, is not protected.<sup>26</sup> Even more colorful descriptions, such as advertising slogans, are not copyrightable.<sup>27</sup> Finally, the court noted that even complex directions on packages are not afforded copyright

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19. M. NIMMER, *supra* note 3, § 2.08[B].

20. *See supra* text accompanying note 16.

21. *See supra* text accompanying note 17.

22. 634 F. Supp. 769 (W.D. Pa. 1986).

23. *Id.* at 771.

24. *Id.* at 772 (quoting 37 C.F.R. § 202.1(a) (1985)).

25. *Id.*

26. *Id.* (citing 37 C.F.R. § 202.1(a) (1985)).

27. *Id.*

protection.<sup>28</sup>

The above listed works are not proper subjects of copyright because they have been found to lack the requisite creativity. The question remains how much creativity would be required in a work to enable it to qualify for copyright protection. Courts have taken several approaches in their attempts to draw the line between "some creative authorship" and "not enough creative authorship."

### 1. *Function as Creativity*

Some courts, when faced with the issue of creativity, have considered the function or utility of the work in their analyses. These courts have generally reached the conclusion that the utility of a work is not an indication of the amount of creativity that went into producing that work. In so doing, the courts have slightly expanded the basis laid by Nimmer in defining creativity<sup>29</sup>—creativity is *not* reflected in the author's contribution to the work, and it is *not* reflected in the function of the work.

In *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*,<sup>30</sup> the court was faced with the issue of whether plastic corsages demonstrated the requisite creativity and originality to qualify as copyrightable works of art. Finding that they did not, the court focused on the addition of utilitarian features to the corsages in its attempt to identify creativity: "That degree of creativity necessary to define objects as works of art is not supplied through innovations which are solely utilitarian or mechanical."<sup>31</sup> The court stated that adding practical features to the component parts of the flower arrangements which simplified their manufacture did not overcome the "absence of creativity inherent in the arrangements."<sup>32</sup> Similarly, the plaintiff's use of plastic materials for the fabrication of the flowers may have added utilitarian advantages over natural or cloth flowers, but this did not constitute the creativity required for copyright protection.<sup>33</sup>

In *Magic Marketing v. Mailing Services of Pittsburgh*,<sup>34</sup> a different court examined the relationship between function and creativity in a work and drew essentially the same conclusion. An issue in the case was whether envelopes describing their contents with such phrases as "TELEGRAM," "GIFT CHECK," and "PRIORITY MESSAGE" contained the minimal degree of creativity necessary for copyright protection. After providing a summary of works found not to be

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28. *Id.*

29. *See supra* text accompanying note 17.

30. 280 F. Supp. 776 (S.D.N.Y. 1968).

31. *Id.* at 781.

32. *Id.*

33. *Id.*

34. 634 F. Supp. 769 (W.D. Pa. 1986).

copyrightable,<sup>35</sup> the court held the phrases on the envelopes not to exhibit the amount of creativity necessary for a work to be subject to copyright protection. In explaining why a certain phrase was denied copyright protection, the court reasoned, "The phrase 'CONTENTS REQUIRE IMMEDIATE ATTENTION' merely exhorts the recipient to open the envelope immediately upon delivery. It is nothing more than a direction or instruction for use. As such, it is unprotected."<sup>36</sup> Though the phrase served a function which made the envelope more useful, it did not exhibit enough creativity to render the envelope a work of authorship. The decision in this case thus reaffirms the idea that adding function or utility to a work will not add creativity to that work.

## 2. *Decisions Without Analysis*

Another approach which courts have used in determining the minimal amount of creativity necessary for copyright protection is to render a decision without providing any reasoning for that decision. This approach tends to create more questions than it answers. Unfortunately, even a study of the facts of each case does not offer much guidance.

The court in *Tennessee Fabricating Co. v. Moultrie Manufacturing Co.*<sup>37</sup> was faced with the question of whether a decorative screen intended to be used as part of a room divider possessed the minimal degree of creativity required for copyright protection. The design for the screen was original and consisted of a filigree pattern formed by intercepting straight lines and arc lines.<sup>38</sup>

The court found the screen with this design to possess at least the minimal degree of creativity required.<sup>39</sup> In explaining its decision, the court first discussed the requirement of originality. It quoted from different sources which discussed the need for originality, and then it noted that the originality of the work in question was conceded by the party opposing the copyright. The court then quoted a long passage from Justice Holmes on the danger of a court passing on the artistic merits of a work of art.<sup>40</sup> Directly after the quote, the court an-

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35. See *supra* text accompanying notes 22-28.

36. *Magic Marketing v. Mailing Services of Pittsburgh*, 634 F. Supp. 769, 772 (W.D. Pa. 1986).

37. 421 F.2d 279 (5th Cir. 1970).

38. *Id.* at 281.

39. *Id.* at 282.

40. 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. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than

nounced that the screens possessed the requisite amount of creativity.

While the court's opinion presents a solid basis for the determination of originality, it cites to no commentary and offers no discussion on the idea of creativity. It merely concludes that the works in question possess "at least the minimal degree of creativity required"<sup>41</sup> without any further explanation. It does not offer guidance as to when a work possesses the "minimal degree" or as to what constitutes creativity.

The facts of the case similarly are of little use. The court noted that the design in question consisted of a "filigree pattern . . . formed entirely of intercepting straight lines and arc lines."<sup>42</sup> The court did not describe the amount of complexity of the design; it did not indicate whether the pattern was made up of two straight lines or twelve straight lines. It did not describe the pattern of the filigree or indicate whether the straight lines were parallel or randomly placed or whether the arcs were concentric or random. The description of a filigree pattern made up of straight lines and arc lines brings to mind a myriad of images, some intricate and complex and some simple. The court provided no guidelines for determining which of these images would contain the "minimal degree of creativity" and which would not.

Another example of a court finding creativity while raising questions for those seeking a standard for guidance is *Sebastian International, Inc. v. Consumer Contact (PTY) Ltd.*<sup>43</sup> In this case, the court found copyrightability in the following example of text from a hair product package:

Hair stays wet-looking as long as you like. Brushes out to full-bodied dry look. WET 4 is one step-four choice (finishing) in Sebastian's four step program for a healthy scalp and head of hair. WET is not oily, won't flake and keeps hair wet-looking for hours, allowing you to sculpture, contour, wave or curl. It stays looking wet until it's brushed out. When brushed, hair looks and feels thicker, extra full. Try brushing partly, leaving some parts wet for a different look.<sup>44</sup>

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doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.

*Id.* (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903)).

41. *Id.*

42. *Id.* at 281.

43. 664 F. Supp. 909 (D.N.J. 1987).

44. *Id.* at 913.

In explaining its decision, the court cited cases indicating that labels are subject to copyright protection providing they manifest the necessary "modicum of creativity."<sup>45</sup> Further, while catch phrases, mottos, slogans, and short advertising expressions are not copyrightable, a complete sentence could be subject to protection notwithstanding its length.<sup>46</sup> With this foundation for evaluating the presence or absence of a "modicum of creativity," the court held the text to be "more than simply a list of ingredients, directions, or a catchy phrase."<sup>47</sup> Thus, "[w]hile the text tries the limits of the modicum of creativity necessary for a work to be copyrightable,"<sup>48</sup> the court found that the text as a whole came within the purview of the Act.

This "analysis" by the court is troublesome. The court held the text in question to be "more" than simply a list of ingredients, directions, or a catchy phrase, none of which are proper subjects of copyright protection, but it did not describe exactly what it was about the text which rendered it "more" than the ineligible works. The court also noted that the text "tries the limits" of the amount of creativity necessary for copyright protection, but it did not point to the factor which pushed it beyond the limit. The length of the text could be a factor, as could the conversational tone. The different hair styles suggested could render the text "more" than simply directions or could be the factor which pushed the text over the limit. Thus, in making its decision as to creativity without providing clear reasoning, the court confused rather than clarified the requirement of creativity.

### 3. Deference

A third and quite common approach used by courts faced with the issue of creativity is to defer to the judgment of the Register of Copyright in granting or denying copyright protection based on creativity. This method, while convenient for the courts, also provides very little assistance in the determination of how much creativity is enough or what constitutes creativity.

The court in *Atari Games Corp. v. Oman*<sup>49</sup> discussed the rationale for deferring to the judgment of the Register in cases in which creativity is an issue. The court had to decide whether the Register had abused his discretion in denying the plaintiff's application for copyright of a video game entitled "BREAKOUT." In deciding the Register had not abused his discretion, the court noted: "The question of whether a particular work reflects a sufficient quantum of creativity to satisfy the copyright laws is not susceptible to bright line rules or

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. 693 F. Supp. 1204 (D.D.C. 1988).

broad principles."<sup>50</sup> For this reason, and to avoid inconsistent results among the various courts, the Register is entrusted with determining whether a work is copyrightable in the first place. In addition, because the Register must make such informed decisions on a daily basis, the court's reasoning continued, he is generally recognized to possess considerable expertise on the matter.<sup>51</sup> This leads courts in general to accord deference to the Register's decisions to refuse or to accept copyright registration.

This rationale may be sound, but it does not provide a foundation upon which to base a determination of the creativity of other works subject to copyright protection. The facts of the cases also provide little guidance in formulating this foundation.

In *John Muller & Co. v. N.Y. Arrows Soccer Team*,<sup>52</sup> the court's deference to and analysis of the Register's decision provides little if any assistance in determining creativity. The work in question in this case was a soccer team logo which consisted of four angled lines forming an arrow and the word "Arrows" in cursive script below the arrow.<sup>53</sup> The Register found the work lacked the minimal creativity necessary to support a copyright.<sup>54</sup> The court of appeals affirmed the decision of the district court to uphold the Register's denial of the copyright and stated the district court opinion was well reasoned.<sup>55</sup> It did not, however, cite to or quote from the district court's unpublished opinion or make any attempt to justify its conclusion.

Since the court did not elaborate on the reasoning of the district court in upholding the decision of the Register, the opinion provides no guidance in determining the requisite amount of creativity required for copyright, and must be limited to the plain facts of the case. According to the Register as affirmed by the court, a work consisting of four angled lines which form a recognizable shape under which is a word in a cursive script does not contain the required amount of creativity.

The court did not indicate, however, how far short of the requirement the work fell. Perhaps the addition of a single color would have been sufficient; perhaps it was so void of creativity it would have required the addition of many artistic details. The lack of reasoning in the opinion limits the court's decision to the facts of the case.

The court's analysis in *Atari Games Corp. v. Oman*<sup>56</sup> provides a little assistance in formulating a standard. While deferring to the de-

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50. *Id.* at 1205.

51. *Id.*

52. 802 F.2d 989 (8th Cir. 1986).

53. *Id.* at 990.

54. *Id.*

55. *Id.*

56. 693 F. Supp. 1204 (D.D.C. 1988).

cision of the Register, the court examined the Register's analysis of the facts in determining creativity. The work in question was a video game entitled "BREAKOUT." The video display consisted of a rectangular "paddle" directing a "circular ball" into colored rectangular "bricks." Audio signals indicated when the ball collided with the other characters.<sup>57</sup> The Register found the audiovisual work presented by Atari did not contain "at least a minimum amount of original pictorial or graphic authorship, or authorship in sounds," and thus did not warrant copyright status.<sup>58</sup> The Register concluded that the features of the work—common geometric shapes, four bands of colored rectangles, and three tones heard when the "ball" struck various objects on the screen—whether viewed independently or in terms of the "arrangement of these few items on the screen," did not establish a basis on which to premise copyright registration.<sup>59</sup>

The court, after stating that this conclusion reflected a reasonable application of controlling law and copyright regulations,<sup>60</sup> tried to provide a basis for the Register's decision. This basis, however, consisted mainly of quotations from previous cases and commentators without application of the ideas to the facts of the case. The court's opinion did not answer the critical question of how much creativity would have been necessary to have entitled this work to copyright protection.

The court began its analysis by acknowledging the rare instances in which independent efforts are too trivial or insignificant to support copyright protection.<sup>61</sup> It holds true in the context of video games that a "sequence of images . . . might contain so little in the way of particularized form or expression as to be only an abstract idea portrayed in noncopyrightable form."<sup>62</sup> According to the court, the Register apparently concluded that BREAKOUT was one of the cases in which any expressive value it contained was *de minimis* and not sufficient for copyright purposes.

The court noted the Register might reasonably have found the only ostensibly creative aspect of the game to be the actual idea of the paddle-and-ball game which BREAKOUT represented in video form rather than its components or their arrangement.<sup>63</sup> Because copyright protection does not extend to ideas but to the expression of the ideas,<sup>64</sup> the game was thus unprotectable. The game apparently was understood by the Register to be little more than a stock description of a paddle-and-ball game, inseparable in any principled manner from the

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57. *Id.* at 1207.

58. *Id.* at 1206.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1206-07.

63. *Id.* at 1207.

64. 17 U.S.C. § 102(b) (1982).

idea which it embodied.<sup>65</sup>

In discussing the creativity necessary in the expression of an idea in order to merit copyright protection, the court contrasted the BREAKOUT game with three video games featuring "expressive and artistically creative renditions of an idea."<sup>66</sup> The PAC-MAN video display received copyright status because "the expression of the central figure as a 'gobbler' and the pursuit figures as 'ghost monsters'" distinguished the video from conceptually similar video games.<sup>67</sup> Similarly, the interaction of the characters, obstacles, background, and music in DONKEY KONG were "arbitrary, fanciful, and sufficiently distinctive" to warrant copyright protection for that video game.<sup>68</sup> Finally, the creative expression portrayed in ASTEROIDS distinguished it from the generic idea of a space attack game.<sup>69</sup> With this analysis the court held the Register could reasonably have concluded BREAKOUT lacked the creativity necessary to render the design and configuration of the video game display copyrightable.<sup>70</sup>

The analysis in this case does not provide a bright line for determining when a work contains enough creativity, nor does it offer a definition for the element. Though it states prior court holdings without applying them directly to the facts of the case, the court in *Oman* did add a little more foundation to the element of creativity which courts seek. Though the expression rather than the idea is the proper subject of copyright, the court stressed,<sup>71</sup> the mere presence of expression without more is not enough to warrant copyright protection. The expression must be creative, fanciful, arbitrary, and sufficiently distinctive. The expression of the idea in BREAKOUT did not possess a sufficient amount of these qualities to be considered eligible for copyright protection.

Examples of artistically creative expression as described by the court include otherwise generic characters with definite personas and the fanciful interaction between the elements of the work. The color and sounds added to the paddle-and-ball idea in BREAKOUT were not creative enough to render the expression copyrightable. Thus, though the court did not define artful expression or offer advice on the amount required, it indicated that the expression of an idea must contain something more than a basic idea with a few colors and a sound added.

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65. Atari Games Corp. v. Oman, 693 F. Supp. 1204, 1207 (D.D.C 1988).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See supra* text accompanying note 59.

This idea is supported by *Jon Woods Fashions, Inc. v. Curran*,<sup>72</sup> a case affirming the Register's decision to deny copyright protection to a fabric design consisting of striped cloth over which was superimposed a grid of 3/16-inch squares.<sup>73</sup> The Register explained that familiar symbols or designs, even if distinctively arranged or printed, are not copyrightable because they lack "at least a certain minimum amount of original artistic material."<sup>74</sup> Works lacking the minimal amount of creative authorship are not proper subjects for copyright protection. The court noted that such works include those which consist of "familiar symbols or designs" or of "a simple combination of two or three standard symbols such as a circle, a star, and a triangle with minor linear variations."<sup>75</sup>

The Register explained that: "[T]he authorship involved in combining the two inch stripes, with the small grid squares superimposed upon the stripes, is nothing more than formatting type authorship . . . which . . . represents nothing more than the product of an uncopyrightable idea for making this combination."<sup>76</sup> The fabric design lacked the creativity necessary for copyright protection since artistic expression was not found in the arrangement or combination of the stripes and grid patterns in the fabric.

Neither the Register nor the court offered any ideas as to what would have been required to render the work more than the product of "formatting type authorship." This lack of analysis creates questions. Perhaps a complex color scheme would have added sufficient artistic expression to the work; perhaps the design needed to be represented in various sizes. On the other hand, perhaps the design as envisioned by the artist could never be modified to achieve creativity without altering the underlying idea to the extent that it no longer reflected the artist's intent. The court's decision does not provide an answer to any of these concerns. It only states that familiar symbols cannot be the subject of copyright, even if uniquely arranged.

The finding of insufficient creativity in the fabric pattern in *Jon Woods*, when contrasted with the creativity of the fabric pattern in *Spectravest, Inc. v. Mervyn's, Inc.*,<sup>77</sup> subtly points to the basis of a line between insufficient creative expression and sufficient creative expression. The copyrighted fabric pattern of *Spectravest* resembled a jigsaw puzzle using flattened teddy bear shapes as puzzle pieces connected randomly by interlocking lines.<sup>78</sup> Though teddy bear shapes

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72. 1988 Copyright L. Dec. (CCH) 26,264 (S.D.N.Y. 1988).

73. *Id.*

74. *Id.*

75. *Id.* at 26,265.

76. *Id.* at 26,264.

77. 673 F. Supp. 1486 (N.D. Cal. 1987).

78. *Id.* at 1488.

could be considered "familiar symbols or designs," the arrangement of which is not subject to copyright protection, the creativity was probably found in the transformation of the teddy bear shape into puzzle piece shapes. It would take more artistic thought and ability to design the "Puzzle Teddy"<sup>79</sup> pattern than it would take to superimpose a grid over a stripe.

Yet, the line is fine between the two patterns. Again, it is unclear what else would have been necessary to render the stripe design creative enough. Similarly, it is unclear where the necessary degree of creativity exists in the teddy bear pattern. Perhaps the idea itself is so creative that its expression necessarily possesses sufficient artistic expression. Perhaps the interlocking lines creating the puzzle effect are quite intricately drawn and reflect painstaking effort. The pattern as described by the court exhibits creativity, but the degree of creativity is unclear.

### III. THE STANDARD

The few guidelines given by the courts can be combined to create a basic, though not overly enlightening, standard for the amount of creativity required for a work to be copyrightable and for what constitutes creativity. The guidelines can be more easily understood by first formulating a definition of creativity based on what the courts have decided.

As previously noted,<sup>80</sup> Nimmer defines creativity as "the nature of the work itself." He then further distinguishes it from originality, which refers to the author's contribution to the work. This nebulous idea of the "nature of the work" was clarified somewhat by the court in *Atari Games Corp. v. Oman*,<sup>81</sup> which discussed the "minimal artistic expression" necessary to render a work copyrightable.<sup>82</sup> Creativity is thus reflected in the artistic expression of an idea in a tangible form.

The amount of artistic expression required is more difficult to define. Courts frequently use terms such as "a modicum"<sup>83</sup> and "a minimal degree"<sup>84</sup> in stating how much creativity is required before a work is copyrightable. These terms are essentially of no use to someone looking for a line which can be drawn between enough and not enough. Yet, a study of the facts of cases in which creativity is an issue provides a little guidance.

The courts' guidelines can be briefly summarized. A common idea

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79. *Id.*

80. *See supra* text accompanying note 19.

81. 693 F. Supp. 1204 (D.D.C. 1988). *See supra* text accompanying note 56.

82. *Id.* at 1207.

83. *See, e.g.,* *Universal Athletic Sales v. Salkeld*, 511 F.2d 904 (3d Cir. 1975).

84. *See, e.g.,* *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970).

must be expressed in an artistic manner which distinguishes it from other similar works. Merely adding color and sound to a common game idea is not enough to render a work copyrightable.<sup>85</sup> Similarly, a common symbol or design lacks sufficient creativity to be copyrightable and must be represented in a highly artistic manner to be granted copyright protection.<sup>86</sup> These guidelines illustrate the notion that originality and creativity enjoy a reciprocal relationship.<sup>87</sup>

#### IV. CONCLUSION

The requirement of creativity in a copyrightable work of authorship is a cloudy concept which raises many concerns. Though it is essentially a judicially created requirement,<sup>88</sup> the courts are unclear as to what it is or how much is needed. A person seeking a standard by which to gauge the creativity of a work of authorship is hard-pressed to find definite guidelines which actually assist in the determination.

The guidelines which can be gleaned from the cases can be briefly stated. Basically, courts view creativity as artistic expression. A work which embodies a common idea, symbol, or design must reflect a minimum level of artistic expression or creativity in order to be subject to copyright protection.

This is as far as the courts go, though. They offer no principled means by which to determine if the minimum level has been met and no sound reasoning for their decisions. In fact, they prefer to defer to the decisions of the Register of Copyrights in cases where his refusal to grant copyright protection due to lack of creativity in a work is an issue.

The search for a standard will continue until the court decisions can be formalized into useful guidelines or until someone enunciates a valid test for the required minimum amount of creativity. Until that time, however, the creativity level of works of authorship will remain undefined and nebulous, creating confusion for authors seeking copyright protection for their works.

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85. *Atari Games Corp. v. Oman*, 693 F. Supp. 1204 (D.D.C. 1988). *See supra* text accompanying note 56.

86. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989 (8th Cir. 1986); *Atari Games Corp. v. Oman*, 693 F. Supp. 1204 (D.D.C. 1988); *Jon Woods Fashions, Inc. v. Curran*, 1988 Copyright L. Dec. (CCH) 26,264 (S.D.N.Y. 1988); *Spectravest, Inc. v. Mervyn's, Inc.*, 673 F. Supp. 1486 (N.D. Cal. 1987).

87. *See supra* text accompanying note 18.

88. *See supra* notes 7-10 and accompanying text. The only reference to creativity in the legislative history of the Act is found in relation to works of art.