

Illusions Perdues

The Idea/Expression Dichotomy at Crossroads

*by Eleonora Rosati**

Abstract

The idea/expression dichotomy represents a fundamental concept of copyright. It provides for copyright protection to be given to the expression of thought, rather than to the thought itself, in contrast with the patent protection regime, the scope of which covers also ideas.

As it will be seen, the underlying ratio for the dichotomy is the need to ensure the public domain remains freely accessible, in order to support the exchange of ideas; however, the boundaries of such a principle tend to be blurred by its inconsistent application, with regard to both subject matter and case law analysis.

It is not always possible to say that only expressions, and not ideas, are protected by copyright. On the one hand, for certain categories of works, it is objectively difficult per se to draw a clear-cut distinction between ideas and expressions; on the other hand, illustrative of a more general trend in intellectual property law, copyright protection has been granted to new categories of works for which policy consideration override a coherent application of the dichotomy itself.

Furthermore, such a principle does not seem to represent a valid tool for courts to rely upon in assessing controversial cases. On the contrary, reference to the idea/expression dichotomy does not appear to be decisive in the assessment of infringement cases.

In light of such preliminary data, this paper shall explore the nature and boundaries of the idea/expression dichotomy, in particular its capacity to predict possible outcomes in controversial cases.

The analysis will be limited to a comparison of the American and European, in particular British, approaches to copyright, in light of the most recent trends and developments. The internationalisation of copyright has led to a cross-fertilisation of the subject matter of protection, so that the problems faced in somewhere are reflected anywhere else.

The study will be divided into three parts: the first shall provide a brief overview concerning the peculiarities of knowledge as the object of copyright protection and it shall be dedicated to

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the analysis of the preliminary remarks underlying the idea/expression dichotomy; the second part will attempt to highlight the inconsistencies that arise from the application of the idea/expression dichotomy to certain categories of works, also with regards to the assessment of controversial cases; I shall conclude by analysing the idea/expression dichotomy in light of different copyright theories, in order to explore its theoretical rationale.

I. Standing at the roots of the idea/expression dichotomy

I.1. The peculiarities of knowledge as a public intangible good

Modern Europe faced two radical changes brought about by the Industrial Revolution and the Agricultural Revolution. Through these, technological innovations changed both production schemes and the idea of property itself. In England, the Agricultural Revolution originated from the massive enclosure movement, which was the process of fencing off common land and turning it into private property.

Although much criticised¹, the enclosure movement was credited with having increased agricultural productivity enormously, by avoiding what is known as the “tragedy of the commons”, i.e. the overexploitation of public goods due to the limited rationality of economic agents, who tend to best exploit such freely accessible goods.² Thus, the intrinsic value of property lies in the scarcity of goods, as demonstrated by enclosure itself, which, by making the use of the now enclosed land exclusive, made it unnecessary to obtain the agreement of all users of the common land before it could be put to other use.³ It has been argued that what is

¹ See J. BOYLE (2003) *The Second Enclosure Movement and the Construction of the Public Domain*, “Law and Contemporary Problems”, 66(1), Winter/Spring 2003, pp. 34-35.

² See L. GILLE (2005) *La Protezione della Proprietà Intellettuale, Fattore della Divisione Internazionale della Conoscenza*, in A. PILATI – A. PERRUCCI (eds.), *Economia della Conoscenza*, Bologna: Il Mulino, p. 231.

³ See W. M. LANDES – R. POSNER (2003) *The Economic Structure of Intellectual Property Law*, Cambridge (MA.) and London: The Belknap Press of Harvard University Press, pp. 12-13.

valid for tangible public goods should also apply with regard to intangible goods such as knowledge.⁴

Like public goods, knowledge is a commodity that is non-rivalrous and non-excludable.⁵ It differs from public goods due to the fact that the characteristics of any given item of knowledge are disclosed *ex post*, and not *ex ante*. This is because knowledge is an experience good, whose characteristics become accessible only through direct use. In addition, it has a cumulative and interactive nature; knowledge develops in a fractal-like dimension, in which more value is created as more people use the given resource.⁶ These are also called network effects: the more users a network has, the more valuable it becomes to an individual user.⁷

It is then clear that knowledge is a form of good whose peculiarities make it quite distinct from tangible public goods. If most natural commons are finite and exhaustive, knowledge is not; the scarcity of knowledge is merely artificial, due to the existence of a proprietary regime that forces its market value to increase.⁸ As famously explained by Thomas Jefferson: “[h]e who receives an idea from me,

⁴ See below, §III.1.2..

⁵ That means, respectively, that consumption of the good by one individual agent does not reduce availability of the good for consumption by others; and that no one can be effectively excluded from using the good. A classical public good is air: breathing it does reduce neither the air available for consumption by other people, nor people can be excluded from using it. For an analysis of knowledge as a public good, see D. BOLLIER (2007) *The Growth of the Commons Paradigm*, in C. HESS – E. OSTROM (eds.), *Understanding Knowledge as a Commons: From Theory to Practice*, Boston: MIT Press, pp. 27-40.

⁶ As first defined by the mathematician Benoit Mandelbrot, a fractal is a rough or fragmented shape that can be split into parts, each of which is a reduced-size copy of the whole. With regard to knowledge, such principle can be intended as the evidence according to which new sources of knowledge originate and develop from existing ones, due to an interactive process; in other words, it is the medieval principle for which “*ex libris libri fiunt*” (“books arise from books”).

⁷ Network effects are often a problem with some new economy markets as may have anti-competitive effects. Once a network has a certain number of users, competition may be *for* rather than *in* the market: the winner takes *all* the market. For an analysis of competition law concerns with regard to dominant positions in such markets, see A. JONES – B. SUFFRIN (2008) *EC Competition Law*, 3rd ed., Oxford: Oxford University Press, pp. 429-431.

⁸ See T. CIRO (2005) *The Scarcity of Intellectual Property*, “*The Journal of Information, Law and Technology (JILT)*”, 1, 22 August 2005.

receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me".⁹ Moreover, and particularly pertinent in the current digital era, the value of any given item of knowledge lies in its familiarity, rather than its scarcity.¹⁰ Likewise, the immaterial nature of knowledge causes difficulties in the application of provisions which typically apply to tangible goods, such as the concept of "permanently depriving another"¹¹ in the definition of theft.

In light of the foregoing, it seems difficult to justify the treatment of knowledge by making reference to the same rationale which explains ownership in tangible goods.¹² Yet there exists a dilemma of knowledge: its social value and importance calls for a low access price, but the creation and dissemination of knowledge is best stimulated by granting authors incentives.

**I.2. The idea/expression dichotomy:
"can he complain of losing the bird he has himself voluntarily turned out?"¹³**

⁹ Letter from Thomas Jefferson to Isaac McPherson (13 August 1813) in A. A. LIPSCOMB – A. E. BERG (eds.) (1903) *The Writings of Thomas Jefferson*, Vol 6, pp. 330-334, as reported in L. LESSIG (2004) *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York: Penguin Press, p. 84.

¹⁰ J. P. BARLOW (1994) *Selling Wine Without Bottles on the Global Net*, "Wired", March 1994, illustrates the point through a remarkable image: "Sharks are said to die of suffocation if they stop swimming, and the same is nearly true of information"; that is why "the practice of information hoarding, common in bureaucracies, is an especially wrong-headed artefact of physically based value systems".

¹¹ See §1(1) UK Theft Act 1968. As explained by A. P. SIMESTER – G. R. SULLIVAN (2007) *Criminal Law. Theory and Doctrine*, 3rd ed, Oxford and Portland (OR, USA): Hart Publishing, pp. 483-489, in theft the intent to deprive is the *mens rea*, accompanying the *actus reus*: it is not merely that the defendant intends the appropriation *per se*, but that the act of appropriation be done with the further intention the owner be deprived permanently.

¹² For a contrary approach see F. H. EASTERBROOK (1990) *Intellectual Property is Still Property*, "Harvard Journal of Law and Public Policy", 13(1), pp. 108-118, and W. M. LANDES – R. POSNER *The Economic Structure*, op. cit., pp. 11 and following (see also below, §III.1.2.).

¹³ *Per* Yates J., *Millar v. Taylor* (1769) 98 ER 201. For the factual background, see below, note 114.

It is trite to law that there is no copyright in an idea. The principle expressed in Article 9(2) TRIPS¹⁴ appears at first glance to be nothing more than the repetition of something already well-known.

As early as in the I Century A.D., much before the introduction of copyright itself, Seneca stated that the best ideas are common property.¹⁵ The early cases dealing with copyright issues explored the *in nuce* dichotomy between ideas and their expressions. In his dissenting opinion in *Millar v. Taylor*, Yates J. explained that “ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have the right to let fly for, till he thinks proper to emancipate them, they are under his own dominion”¹⁶; but as soon as he frees them they become common and he retains no property rights over them.¹⁷

In Britain the idea/expression dichotomy was well defined since the beginning of the copyright era¹⁸; however, in the United States the most ancient decisions supported the position that ideas and expressions did not fall into mutually

¹⁴ Article 9(2) TRIPS states that “copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such”. As made clear by W. CORNISH – D. LLEWELYN (2007) *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 6th ed, London: Sweet & Maxwell, p. 394, such a proviso represented an important achievement: it was the first time that an international instrument set out the idea/expression dichotomy, so that it became part of international understanding.

¹⁵ SENECA (62-63 A.D.) *Ad Lucilium Epistulae Morales*, Eng. Transl, R. M. GUMMERE (ed.) (1918), Vol. I, London: William Heinemann, 12:11, p. 72: “Quod verum est, meum est [...] qui in verba iurant, nec quid dicatur aestimant, sed a quo, sciunt, quae optima sunt, esse communia” (“Any truth, I maintain, is my own property [...] all persons who swear by the words of another, and put a value upon the speaker and not upon the thing spoken, may understand that the best ideas are common property”).

¹⁶ *Millar v. Taylor* (see above, note 13).

¹⁷ As explained by B. SHERMAN – L. BENTLY (1999) *The Making of Modern Intellectual Property Law. The British Experience, 1760-1911*, Cambridge: Cambridge University Press, p. 20, “a number of reasons were given as to why mental labour could not be treated as a form of property, yet in one way or another all the problems can be traced to its non-physical nature: to the incorporeal or [...] the intangible nature of literary property”.

¹⁸ Apart from *Millar v. Taylor* (see above, note 13) and *Donaldson v. Beckett* (1774) 2 Bro.P.C. 129 (for which see below, §III.1.2.), in *Hollinrake v. Truswell*, 3 Ch. 420 (1894) it is possible to find the terminology later used in legal reasoning to draw a distinction between ideas and expressions: “Copyright [...] does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed”.

exclusive categories.¹⁹ It was through the US Supreme Court's decision in *Burrow-Giles Lithographic Co. v. Sarony*²⁰ that the dichotomy entered the American copyright debate with a well-defined shape.²¹

Still in 1918, Brandeis J confidently claimed that “[t]he general rule of law is that the noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use”.²² The same approach was recently followed by Lord Hoffmann in the *Designers Guild* case²³, in which he reviewed the case law on idea and expression and concluded that it supported two quite distinct propositions: on the one hand, that “a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work”; and on the other hand, that “certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary,

¹⁹ See *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4436) and *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136).

²⁰ 111 U.S. 53 (1884). In *Sarony* writings were defined as “all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression”.

²¹ It is well-known that *Baker v. Selden*, 101 U.S. 99 (1880) is often cited as the origin of idea/expression dichotomy. However, as pointed out by R. H. JONES (1990) *The Myth of Idea/Expression Dichotomy in Copyright Law*, “Pace Law Review”, 10(3), Summer 1990, p. 555, “even though the Court in *Baker* referred to unprotected 'art' described in a protected work, it failed to articulate distinct and separate 'idea' and 'expression' categories in discussing the 'language employed by the author to convey his ideas . . . Indeed, the dichotomy of ideas and expressions found in *Baker* [...] is perceived only when viewed from the point of view of later history”. In the same sense P. SAMUELSON (2005) *The Story of Baker v. Selden*, Berkeley Center for Law and Technology. Law and Technology Scholarship (Selected by the Berkeley Center for Law and Technology), Paper 10, 15 July 2005, who highlights how the main objective of the US Supreme Court's decision was to sharpen the difference between authorship and invention, rather than the idea/expression distinction in copyright law.

²² *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis J., dissenting). See A. DRASSINOWER (2008) *Authorship as Public Address: on the Specificity of Copyright Vis-à-Vis Patent and Trade-Mark*, “Michigan State Law Review”, 199(1), p. 205 who, analysing this decision, goes further and says that if the general rule is that ideas are as free as air to common use, “then it would follow as a matter of course that an author's exclusive right to reproduce her work is but an exception to that general rule. Along these lines, the doctrine of originality would be the guardian, as it were, of the sorts of works that copyright law allows into its midst and protects as exceptions to the general rule. On this view, originality, rather than fair dealing, would be the exception; author rights, rather than user rights, would be anomalous”.

²³ *Designers Guild v. Russell Williams* [2000] 1 WLR 2416, 2423.

dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work".²⁴

However, while the 1976 US Copyright Act sets out the dichotomy at §102(b)²⁵, British copyright law does not expressly mention such a rule. Instead the 1988 UK Copyright, Designs and Patents Act stipulates that an original work is protected, and that the owners' right may be infringed by taking any substantial part of it.²⁶

The baseline is that ideas and facts must remain in the public domain. As already stated²⁷, knowledge itself has an interactive nature, characterized by the similitude popularised by Isaac Newton of dwarfs standing on the shoulders of giants ("*nanos gigantum humeris insidentes*"). Such a concept makes it clear that the creative process itself is rooted in a background in which ideas are held in common and are exchanged, discussed, and elaborated upon; it also provides the rationale for the notion that having ownership/property rights in relation to ideas is to be frowned upon and has been rejected by legal regimes across the world.

Ideas are considered to be analogous to what Roman law refers to as *res communes*, namely goods which cannot be owned by anyone, including air, running water, the sea and the sea-shore.²⁸ As Blackstone wrote in his

²⁴ As pointed out by a quite recent decision of the Italian Corte di Cassazione, in infringement cases creativity has to be evaluated in a very subjective way, since it is constituted not only by the idea itself, but also by the way in which it is expressed. So it is clear that the same idea can be used in different works of art, and the difference among them lies on the amount of creativity that the author is able to add (*Raccanelli v. Touring Club Italiano*, Cass. Civ., Sez. I, 27-10-2005, No. 20925, "Diritto Industriale", 2006, 3, 290, n. BONELLI).

²⁵ §102(b) US Copyright Act states that "[i]n 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".

²⁶ §16(3)(a) UK Copyright, Designs and Patent Act 1988.

²⁷ See above, §I.1..

²⁸ A. C. YEN (1990) *Restoring the Natural Law: Copyright as Labor and Possession*, "Ohio State Law

Commentaries, according to *Iustiniana Digesta*, title to property could arise in several manners, but in the case of literary property, which belongs to the category of *res nullius* (things which are owned by nobody), the title of access is *occupatio*, that is to say by taking possession or occupying such things. Since there can be no occupancy over a bare idea of the mind²⁹, ideas could not be considered a form of property. However this approach to property rights was criticised, and eventually rejected in the pamphlets and Courts, in favour of the Lockean identification of possessive individualism, and the value of labour as the bases for property rights.³⁰

As pointed out by several scholars³¹, the idea/expression dichotomy formulation descends from, and is consistent with, the romantic notion of authorship³², which

Journal”, 51(3), pp. 522-524 and 548-554.

²⁹ As made clear by Yates J. in *Millar v. Taylor* (see above, note 13), “All property has its proper limit, extent and bound. Invention or labour (be they ever so great) cannot change the nature of things; or establish a right, where no private right can possibly exist. [...] But how is possession to be taken, or any act of occupancy to be asserted, on mere intellectual ideas? All writers agree, that no act of occupancy can be asserted on a bare idea of the mind”. See also A. SEDGWICK (1879) *International Copyright by Judicial Decision*, “The Atlantic”, February 1879.

³⁰ See B. SHERMAN – L. BENTLY *The Making*, op. cit., pp. 20-24, who analyse the 18th Century debate about the legitimacy of literary property and conclude that, besides labour as a justification for granting property in literary works, there is another way of describing it, by stating that (pp. 23-24) “occupancy was recast so as to be seen as a specific instance of a more general claim. That is, occupancy was subsumed within and became an example of the idea of labour as the basis for legitimising the appropriation of private property”.

³¹ M. WOODMANSEE (1984) *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author*, “Eighteen-Century Studies”, 17(4), Summer 1984, pp. 425-448; J. BOYLE (1996) *Shamans, Software, & Spleens. Law and the Construction of the Information Society*, Cambridge (Ma.) and London: Harvard University Press, p. 56; P. JASZI (1994) *On the Author Effect: Contemporary Copyright and Collective Creativity*, in M. WOODMANSEE – P. JASZI (eds.), *The Construction of Authorship. Textual Appropriation in Law and Literature*, Durham and London: Duke University Press, pp. 33-36; W. M. LANDES – R. A. POSNER *The Economic Structure*, op. cit., pp. 63-66.

³² See L. BENTLY (1994) *Copyright and the Death of the Author in Literature and Law*, “Modern Law Review”, 57(6), November 1994, pp. 973-986, who explores the historical connections between literary authorship and literary property. For a critical approach to the legacy of copyright to the idea of the romantic author, see W. CORNISH - D. LLEWELYN *Intellectual Property*, op. cit., p. 403, who observe that such “cult [...] makes very limited historical sense”, because if it is certainly true that “among campaigners for copyright there have always been those who argue single-mindedly for

emphasised for the first time, the importance of the creative process.³³ As Foucault incisively said, “*the coming into being of the notion of 'author' constitutes the privileged moment of individualization in the history of ideas*”.³⁴ However, it is not always easy to give a satisfactory definition of authorship³⁵, and consequently, it is difficult to evaluate its related attributes of originality and, prior to that, the preliminary concepts of what constitutes an idea and the expression of such an idea.

It is a truth universally acknowledged that the creative process is time-consuming and involves both creative and development costs. Combined, such costs can be referred to as the cost of expression.³⁶ Amongst these costs is also the cost of having a copyright law system which creates the risk of liability for infringing

the adequate recognition of genius”, it is also true that “from the Statute of Anne onwards, all concerned in shaping the law have appreciated that the demand for copyright is also directed towards protecting much more humble and transitory material from the trespass of pirates and other free riders”.

³³ See R. A. POSNER (1998) *Law and Literature. Revised and Enlarged Edition*, Cambridge (MA., USA): Harvard University Press, pp. 401-402, who analyses the consequences brought about by changes in the concept of creativity.

³⁴ M. FOUCAULT (1969) *What is an Author?*, in J. D. FAUBION (ed.) (2000) *Aesthetics, Method, and Epistemology. Essential Works of Foucault 1954-1984*, Vol 2, London: Penguin Books, p. 205. But the French philosopher concludes by saying that (pp. 221-222) “the author [nowadays] is not an indefinite source of significations that fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition and recomposition of fiction. In fact, if we are accustomed to presenting the author as a genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function. When a historically given function is represented in a figure that inverts it, one has an ideological production. The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning”. As summarized by M. WOODMANSEE (1994) *On the Author Effect: Recovering Collectivity*, in M. WOODMANSEE – P. JASZI (eds.), *The Construction of Authorship. Textual Appropriation in Law and Literature*, Durham and London: Duke University Press, p. 15, the position of Foucault is then that the author in the modern sense is a relatively recent invention but that it does not reflect contemporary writing practices.

³⁵ See J. C. GINSBURG (2003) *The Concept of Authorship in Comparative Copyright Law*, Columbia Law School, Public Law & Legal Theory Research Paper No. 03-51, 3 January 2003, p. 5, who advocates the need to refocus discussion on authors in order to restore a proper perspective on copyright as a system designed to advance the public goal of expanding knowledge, by means of stimulating the efforts and imaginations of private creative actors.

³⁶ See W. M. LANDES – R. A. POSNER *The Economic Structure*, op. cit., pp. 50-60.

other authors' rights when drawing upon the cultural heritage handed down through the ages. Thus the presence of a legal regime could be seen both as a benefit as well as a cost to authors. The less originality is valued, the less valuable to authors and the public a system of copyright protection that encourages originality becomes.³⁷

In the British experience the requirement that a literary work be original was given a statutory basis only in 1911, the meaning of which has been read in a narrow sense, namely that the work must originate from the author and not copied by him from another source.³⁸ As pointed out by Cornish and Llewelyn, the low British threshold to the subsistence of originality, has made the idea/expression dichotomy of limited use when addressing questions of whether a work attracts protection at all.³⁹

The rationale for refusing to extend protection to ideas has been explained in several ways; however, a test to distinguish ideas from expression in order to explain why private ownership is inappropriate for one but desirable for the other,

³⁷ *Ibid.*, pp. 52-53.

³⁸ *Per* Peterson J., *University of London Press v. University Tutorial Press* [1916] 2 Ch 601, who made clear that "[t]he word 'original' does not [...] mean that the work must be the expression of original or inventive thought. [...] The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author". A similar approach has been taken also in other jurisdictions, not only of common law: for instance, the Italian Corte di Cassazione has held that creativity, which entitles to copyright protection, cannot be excluded only because the work consists of well-known and simple ideas; to qualify for copyright protection, it is thus sufficient a creative act that not necessarily is absolutely new and original (*Soc. Tecnodid v. Selva*, Cass. Civ., Sez. I, 02-12-1993, No. 11953). In *C.G v. Soc. Videolina*, Cass. Civ., Sez. I, 12-03-2004, No. 5089, the photography of a painting was granted copyright protection because the photography was not a mere reproduction of the painting itself but conveyed a minimum originality (for a similar approach also in lower courts, see *Soc. Rapsel v. Misheff*, App. Milano, 09-05-1986 and *Andreoli v. Servadio Mostyn Owen*, Trib. Milano, 17-05-1984).

³⁹ W. CORNISH – D. LLEWELYN *Intellectual Property*, op. cit., p. 425. However, the Authors add that the dichotomy plays a necessary role in assessing infringement cases, in particular when what amounts to substantial taking from by a copier has to be assessed.

remains elusive.⁴⁰

Notwithstanding this, the idea/expression dichotomy is said to provide a useful set of tools for examining copyright.⁴¹ On the one hand, it provides a conceptual basis for the grant of limited property rights; on the other hand, it provides a moral and philosophical justification for fencing in the commons, since it grants authors property over subject matter that arises out of ideas in the public domain.⁴² Moreover, it resolves the tension between public and private property, by clarifying the practical connotations of the protection regime.⁴³

A formulation of the current “state of art” can be summarized by stating that ideas, thoughts and facts merely existing in one’s brain are not works and, accordingly, do not receive any manner of protection; however, once reduced to writing or any material form, the result may be a work amenable to protection.⁴⁴

⁴⁰ In such sense, J. LITMAN (1990) *The Public Domain*, “Emory Law Journal”, 39, Fall 1990, pp. 991-992.

⁴¹ See J. BOYLE *Shamans*, op. cit., pp. 56-59.

⁴² As explained by J. BOYLE, *ibid.*, p. 57, by doing so “we reassure ourselves both that the grant to the author is justifiable *and* that it will not have the effect of diminishing the commons for *future* creators”. Where the work amounts to a mere copying of broad or vague principle, there is no infringement: in *Kenrick & Co. v. Lawrence & Co.* (1890) 25 QBD 99, the defendant had copied the idea the claimant had had for instructing illiterate voters, namely a card bearing a drawing of a hand in the act of making a cross with a pencil on the square of a ballot paper. Wills J. said the claimant's claim, if sound, would confer “power greater than it is possible to estimate, and the destinies of the country may be placed in the hands of the fortunate owner of the talisman”.

⁴³ As the US Supreme Court stated in *Harper&Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), “copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression”. As explained by R. H. JONES *The Myth*, op. cit., p. 563, the rationale of US copyright law is to ensure a proper balance between the opposite prerogatives of authors and the public. Granting protection to expressions, and not to ideas as such, meets the need of both. As made clear by L. BENTLY – B. SHERMAN (2008) *Intellectual Property Law*, 3rd ed., Oxford: Oxford University Press, pp. 183-184, “the exclusion of ‘ideas’ from the scope of protection is an important *judicial technique* that is used to reconcile the divergent interests of copyright owners with those of users, creators, and the public more generally” (emphasis added).

⁴⁴ *Per* Lord Denning MR in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1962) [1980] RPC 539 at 546 CA, as reported in H. LADDIE – P. PRESCOTT – M. VITORIA – A. SPECK – L. LANE (2000) *The Modern Law of Copyright and Designs*, 3rd ed., Vol I, London: Butterworths, p. 100.

II. Flaws in the idea/expression dichotomy

II.1. The internationalisation of copyright law: new paradigms of protection

Since the early Nineteenth Century, copyright law has had an international dimension⁴⁵, which has acquired even greater importance in recent years due, in part, to the nature of the goods protected themselves, whose intangibility demands wider boundaries of protection. As the market for copyright works has expanded beyond purely national limits, there has been an increasing urge for the internationalisation and harmonisation of copyright laws. Modern day international influences are the main force in the shaping of copyright regimes, as made clear by the statutory provisions themselves⁴⁶, as well as by the courts.⁴⁷

⁴⁵ The development of international copyright regime is out of the scope of the present work, but it is worth recalling the importance of the internationalisation of copyright in order to highlight the fact that the problems faced in a given place are the same anywhere else. With regard to the early internationalisation of copyright law, see C. SEVILLE (2006) *The Internationalisation of Copyright Law. Books, Buccaneers and the Black Flag in the Nineteenth Century*, Cambridge: Cambridge University Press. See also N. N. FELTES (1994) *International Copyright: Structuring "the Condition of Modernity" in British Publishing*, in M. WOODMANSEE – P. JASZI (eds.), *The Construction of Authorship. Textual Appropriation in Law and Literature*, Durham and London: Duke University Press, pp. 271-280, who analyse the importance of internationalisation in structuring a new world market for British books. See also G. JOSEPH (1994) *Charles Dickens, International Copyright, and the Discretionary Silence of Martin Chuzzlewit*, in M. WOODMANSEE – P. JASZI (eds.), *The Construction of Authorship. Textual Appropriation in Law and Literature*, Durham and London: Duke University Press, pp. 259-270, who report the vain efforts and consequent disappointment of Dickens in obtaining a satisfactory protection for his works also in the United States (a bilateral agreement between the two countries was not concluded until 1891). In its early years, the USA provided no federal protection to works of foreign authors, earning itself the dubious distinction of being termed the Barbary coast of literature. For a brief historical overview of the internationalisation of the American copyright regime see NOTE (2008) *Harmonizing Copyright's Internazionalization with Domestic Constitutional Constraints*, "Harvard Law Review", 121(7), May 2008, pp. 1801-1804.

⁴⁶ See Recital No. 9 of Directive 91/250/EEC (known as the Software Directive) in which it is stated that "the Community is fully committed to the promotion of international standardization"; see also Directive 96/9EC (known as the Database Directive), in which, it is stated that (Recital No. 10) "the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information systems"; but that (Recital No. 11) "there is at present a very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third-countries"; these considerations then called for the Community to adopt a common legal

Such trends have led to a huge extension of the subject matter protected by copyright, which now protects works whose characteristics are increasingly heterogeneous.⁴⁸

The idea/expression dichotomy is recognised by the legal regimes of several countries across the world, by means of provisions which do not go far from making a laconic statement that copyright protection does not extend to ideas⁴⁹, but that do not provide any help in defining the precise terms of such a dichotomy. In particular, the extension of copyright protection to new categories of works has made the idea/expression dichotomy difficult to apply in a satisfactory way. However, this is true not only with respect to the more recent categories of works that have come under copyright protection, such as software and databases, but also with reference to instances of more traditional categories of subject matter,

framework for database protection.

⁴⁷ In the seminal US Supreme Court case *Eldred v. Ashcroft*, concerning the compatibility of the Sonny Bono Copyright Term Extension Act with the Copyright Clause (Art. I Section 8 Clause 8 of the American Constitution) and with the First Amendment, the Court, *inter alia*, also recognized this new internationalisation of copyright: the legislation at issue was upheld as rational, in part because it harmonized US law with EU law, but also because the Court did not want to interfere with Congress in the realm of copyright lest the United States be too constrained to “play a leadership role’ in the [...] evolution of the international copyright system” (537 U.S. 186 (2003) at 206). On *Eldred*, see L. LESSIG *Free Culture*, op. cit., pp. 213-256; see also NOTE *Harmonizing*, op. cit., p. 1800.

⁴⁸ As observed by G. GHIDINI (2001) *Profili Evolutivi del Diritto Industriale*, Milano: Giuffrè, p. 107, there is a lively tendency within contemporary industrial law in choosing copyright in order to grant protection to practical and functional results, while in the past such protection was granted by patents. Such tendency, that in a later work he labelled as “technology copyright” (G. GHIDINI (2006) *Intellectual Property and Competition Law. The Innovation Nexus*, Cheltenham (UK) and Northampton (MA., USA): Edward Elgar, p. 63) has led to a blurring of the classical distinction between copyright and patent law.

⁴⁹ Section 102(b) of US Copyright Act of 1976 states that “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”. Similar provisions exist in numerous countries: see, for instance, §2575 of the Italian Civil Code (but also §1 Legge 22 April 1941 – Italian Copyright Act); §17(3) Irish 2000 Copyright and Related Rights Act; §2(6) Czech 2000 Copyright Act; §8(I) Brazilian Law No. 9.610 of 19 February 1998. Further references are available at http://portal.unesco.org/culture/en/ev.phpURL_ID=14076&URL_DO=DO_TOPIC&URL_SECTION=201.html

such as works of art.⁵⁰ For all these works, it is not easy to draw a clear distinction between ideas and expressions, and it is therefore not surprising that the relevant case law in this area has not been successful in dealing with the dichotomy in a satisfactory way.⁵¹ In other words, it appears that the dichotomy is not able to offer useful guidance in settling controversies related to such categories of works.

II.2. Protection of computer programs: when the basics stagger

Copyright plays an important role in the protection of computer programs⁵²; however, beyond the protection of the program code, which is the specific listing of instructions or commands that the computer is to execute, “*the scope of copyright protection remains a matter of heated debate among commentators and a matter of extreme confusion in the courts*”.⁵³ Article 1(2) of Directive 91/250 (known as the Software Directive) specifies that expression alone is protected, and not “*ideas and principles which underlie any element of a computer program, including those which underlie its interfaces*”. This proposition has not been

⁵⁰ See below, §II.4..

⁵¹ See below, §II.2. and §II.4..

⁵² The debate concerning the legal regime under which software should receive protection, whether copyright or patent, is well known. On the patentability of software, see W. CORNISH - D. LLEWELYN *Intellectual Property*, op. cit., pp. 822 and following; F. MACARIO (2005) *I Diversi Sistemi di Protezione del Software*, in M. BERTANI (ed.), *Open Source - Atti del Convegno Organizzato a Foggia il 2-3 Luglio 2004 dalle Università di Foggia e Pavia*, “Quaderni di AIDA n. 13”, Milano: Giuffrè, p. 171 and following, who analyses the differences in copyright and patent protections; A. M. BUAINAIN – C. I. COSTA MENDES (2005) *Free software, Copyleft and Trends in Intellectual Property*, Annual Congress of the Society for Economic Research on Copyright Issues, Montréal 7-8 July 2005, who stress the importance of the fact that software is protected under copyright for the consolidation of Microsoft as the leading company in the software market; see G. CAPO (2004) *Gli Strumenti di Tutela dei Diritti Inerenti ai Programmi per Elaboratore*, in D. VALENTINO (ed.), *Manuale di Diritto dell'Informatica*, Napoli: Edizioni Scientifiche Italiane, pp. 264-266, in relation to orientations of the European Patent Office (EPO); finally see G. FUMAGALLI (2005) *Brevettabilità del Software: Euroviltà*, “I quaderni di dirittodautore.it”, 25, and G. SCORZA (2003) *Brevetto Software: Una Direttiva Ambigua e Inutile*, 20 November 2003, available at <http://www.interlex.it/copyright/scorza6.htm>, for opposing views of the unsuccessful proposal of European Directive on software patentability.

⁵³ D. S. KARJALA (1998) *Copyright Protection of Computer Program Structure*, “Brooklyn Law Review”, 64(2), p. 519.

reproduced in the British texts implementing the Directive, while other Member States have decided to set out the dichotomy.⁵⁴

So far as the application of copyright laws to computer programs is concerned, the approach taken in the United States differs from that taken in Europe, in particular in the United Kingdom.⁵⁵ As highlighted by Jacob J. in *IBCOS Computers*⁵⁶, different attitudes have emerged in the United States and in the United Kingdom with regard to such issues:

*For myself I do not find the route of going via United States case law particularly helpful. As I have said, United Kingdom copyright cannot prevent the copying of a mere general idea but can protect the copying of a detailed idea. It is a question of degree where a good guide is the notion of over-borrowing of the skill, labour and judgement which went into the copyright work.*⁵⁷

The case concerned an accounting package developed by a computer programmer and then licensed to an agricultural dealership. Soon after, the computer

⁵⁴ As observed by W. CORNISH – D. LLEWELYN *Intellectual Property*, op. cit., p. 812, the reason for which the British implementation of the Software Directive did not set out the dichotomy was because it is already there as a matter of common law principle applicable to the entire field of copyright. A different approach has been followed in other EU Member States: for instance, §2(no. 8) of the Italian Copyright Act (Legge 22 April 1941) makes clear that ideas which underlie any element of a computer program are not protected; by way of further example, similar provisions were provided for in Spanish, French and Belgian laws which implemented the Software Directive into their own national systems.

⁵⁵ For an analysis of the evolution of British case law concerning computer programs, see S. STOKES (2005) *The Development of UK Software Copyright Law: From John Richardson Computers to Navitaire*, "Computer and Telecommunications Law Review", 11(4), pp. 129-133.

⁵⁶ *IBCOS Computers Ltd. v. Barclays Mercantile Highland Finance Ltd.* [1994] F.S.R. 275.

⁵⁷ *Ibid.*, at 302.

programmer worked as a consultant and in his spare time he wrote a suite of programs, known as Unicorn, designed to compete directly with the package developed for the agricultural dealership. It was claimed that Unicorn had been developed from the first suite and accordingly infringed its copyright. Jacob J. held that British law did not demand a search for a core protectable expression and he rejected the very concept of a merger of expression into idea. This is because, in assessing whether copyright has been infringed, analysis is on whether the defendant has taken a substantial part of the claimant's copyright-protected work. Furthermore, Jacob J. stressed the need to rely on tests taken directly from the statute, “because by doing so, one can avoid aphorisms such as 'there is no copyright in an idea' or 'prima facie what is worth copying is worth protecting'. The courts have used these in the past but they can only serve as a guide” (emphasis added).⁵⁸ Accordingly, the claim in copyright calls to be tested in the following order: (1) What are the work or works in which the plaintiff claims copyright? (2) Is each such work “original”? (3) Was there copying from that work? (4) If there was copying, has a substantial part of that work been reproduced?

Thus, the Court examined the structure of the computer program as a whole, in order to assess whether its copyright had been infringed; the plaintiff's copyright was found to be infringed by “over-borrowing”.⁵⁹ As was made clear from the structure of the judgement itself, in assessing whether the plaintiff's copyright work had been copied, the court relied on a qualitative scrutiny of the works at issue, shying away from a direct reference to the dichotomy as a decisive test.

⁵⁸ *IBCOS Computers* case, at 17 (see above, note 56).

⁵⁹ As explained by W. CORNISH – D. LLEWELYN *Intellectual Property*, op. cit., p. 814, the over-borrowing “was demonstrated partly by identifying copying of specific lines of code (the judge refusing to believe the programmer's protestations that he had not started from the plaintiff's program) and partly by transferring structures from the plaintiff's program”.

The seminal case in the US concerning the idea/expression dichotomy in relation to computer programs is *Computer Associated International Inc. v. Altai Inc.*⁶⁰, in which the US Court for the 2nd Circuit relied upon a three-step test called the abstraction, filtration and comparison test, in order to determine the scope of the idea/expression dichotomy in the case.⁶¹

The defendant had hired a former employee of the claimant; in the course of his work at Altai, the employee had used code owned by Computer Associates. After finding that 30% of code written by the employee had been taken from his previous employer, Altai provided for a clean room rewrite of the program; however, Computer Associates sued Altai for infringement of the copyright on the original code. Through the development of this new test for substantial similarity, the Court held that there was no infringement of the second version of the program.

While the British approach to copyright protection for computer programs has been less rigorous, by granting protection even in borderline cases, American paths have been consistent with the principles expressed in *Baker v. Selden*⁶².

⁶⁰ 982 F.2d 693 (2d Cir. 1992).

⁶¹ The test consists of breaking down the allegedly infringed program into its constituent structural parts and examining each of these parts for such things as incorporated ideas, expression that is necessarily incidental to those ideas, and elements that are taken from the public domain, thereby sifting out all non-protectable material. So the first step (abstraction) is to dismantle the allegedly copied program's structure and isolate each level of abstraction contained within it; the second (filtration), is to examine the structural components at each level of abstraction in order to determine whether their particular inclusion at that level was necessarily incidental to an idea (the so called "merger doctrine"); and, finally (comparison), after all the elements of the allegedly infringed program are sifted out, what will remain are the copyrightable parts.

⁶² 101 U.S. 99 (1879). The facts behind the case are well known: the defendant had published a book describing a book keeping system that he had invented, and he illustrated the book with blank book keeping forms. Baker copied the forms, rearranging columns and using different

Furthermore, the “levels of abstraction test”, developed by Learned Hand J. in *Nichols*⁶³, represents an important point of reference.⁶⁴ According to this test, the movement from the expression of the idea, wherein copyright may vest, to the idea itself, where copyright protection does not subsist, is expressed in terms of levels of abstraction, with the expression being less abstract and the idea being more abstract. The approach to distilling idea from expression entails a comparison of the works at issue. Moving from the expression to the idea, one reaches a point where the copyright can no longer vest, and therefore where there is no possibility the claimant’s copyright be infringed. However, as pointed out by Learned Hand J. himself, the idea/expression dichotomy is a distinction with an ill-defined boundary, and that nobody has, of yet, been able to fix that boundary, and nobody ever can.

In *Navitaire v. EasyJet Airline*⁶⁵, the differences in the approach of the British and American copyright laws concerning computer programs are particularly clear.

Navitaire brought an action against EasyJet and BulletProof software developers for infringement of the copyright in its computer software. Previously, EasyJet had taken a licence from Navitaire's predecessor in title for an airline booking system, OpenRes, for use in ticketless flight reservations transactions. In its claim for

headings, and sold them to people who wanted to use Selden's system. This was held not to be an infringement, since otherwise Selden would have had a monopoly over his book keeping system.

⁶³ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). The plaintiff was the author of a play (*Abie's Irish Rose*) which had been made into a film about the contrasted love of a young Jewish man that eventually marries an Irish catholic girl against the wishes of both their families. The defendant had later produced a film (*The Cohens and the Kellys*) whose plot was very similar to the play written by the plaintiff. In developing his opinion, even if Learned Hand J. noted that protection of literature cannot be limited to textual copying, he found no copyright infringement: the ideas that had been copied were universal concepts and stock characters.

⁶⁴ For a general overview of the US development in case law concerning the protection of computer programs, see K. TUMBRAEGEL – R. DE VILLIERS (2004) *Copyright Protection for the Non Literal Elements of a Computer Program*, “Computer and Telecommunications Law Review”, 10(2), pp. 34-42.

⁶⁵ [2006] R.P.C. 213.

copyright infringement, Navitaire maintained that the business logic of the OpenRes system had been appropriated by the defendants, by means of non-textual copying. Pumfrey J. acknowledged that there could be infringement in taking an idea that was sufficiently detailed but was reluctant to find infringement in the adoption of the business logic of the program. The Court held that the mere envisaging of an idea similar to the object sought to be achieved by the computer program does not amount to the appropriation of the skill and labour necessary to constitute infringement.⁶⁶ The part of the judgement concerning the alleged infringement of copyright on the OpenRes system serves as a demonstration of the difficulties arising from the use of the dichotomy as a reliable tool. Pumfrey J. carried out his analysis away from the dichotomy itself (or at least not in a manner consistent with it). Rather than referring to the idea/expression dichotomy, he argued that “*the question in the present case are both a lack of substantiality and the nature of the skill and labour to be protected*”.⁶⁷ Drawing a clear-cut distinction between ideas and expressions as non-protectable/protectable elements seems unhelpful, since the boundaries of such categories are ill-defined.

The British approach to the idea/expression dichotomy in computer programs has been recently confirmed in *Nova Productions v. Mazooma Games*.⁶⁸ The claimant brought two sets of proceedings for copyright infringement concerning

⁶⁶ Such approach has been taken also by the Italian Corte di Cassazione, which has held that copyright protection is granted according to the individual efforts spent in the creative process. So, ideas may be abstractly protected, but not when they are well-known. In order to be granted protection, ideas should be related to a process of subjective creation, that is the benchmark of copyright protection (*Iannelli v. INPS*, Cass. Civ., Sez I, 11-08-2004, No. 15496, “Mass. Giur. It.”, 2004).

⁶⁷ *Navitaire v. EasyJet Airline*, at 129.

⁶⁸ [2006] R.P.C. (14) 379. On first instance, Kitchin J. dismissed both the claims but Nova appealed, contending that there was a further kind of artistic work embodied in its game, something beyond individual freeze-frame graphics which involved extra skill and labour beyond just that involved in creating the individual frames.

coin-operated games based upon the theme of pool. On first instance, Kitchin J. held that “*ideas of a literary, dramatic or artistic nature might be discounted as being not original, or so commonplace as to be insubstantial. Regarding artistic copyright, the more abstract and simple the copied idea, the less likely is to constitute a substantial part*”.

Jacob LJ. dismissed the appeal by the claimant and held that “*what was found to have inspired some aspects of the defendants' game is just too general to amount to a substantial part of the claimant's game*”.⁶⁹ From the construction of the judgement, it seems possible to infer that the reliance on the idea/expression dichotomy was merely aimed at supporting the finding that no substantial part had been taken and thus holding that no copyright had been infringed. Firstly, Jacob LJ. identified the nature of the copyright work at stake; he then dealt with the matter of whether a substantial part of it has been reproduced in the defendants' works, and finally dealt with the idea/expression dichotomy, in a sense that can be correctly defined as an *ex post* characterization.⁷⁰ After saying that it is necessary to distinguish between general ideas, the mere taking of that would not amount to infringement, and detailed ideas, whose taking could constitute infringement, Jacob LJ. analysed whether a substantial part of the claimant's work had been copied by the defendant and “*what was found to have inspired some aspects of the defendant's game is just too general to amount to a substantial part of the claimant's game*”.⁷¹

⁶⁹ [2007] EWCA Civ 219, para. 44.

⁷⁰ See below, p. 43. A wholly different approach has been taken in relation to the look and feel of web page designs, also due to the possible arising of unfair competition issues. In *Dreamnex v. Kaligona*, the Court of Appeal of Paris held that the copying of the features of the claimant's web page (two-colour structure and presentation of the navigation bar) constituted an infringement of copyright which would confuse web-surfers as to the origin of the page which had been visited, since both the parties provided sex aids, pornographic materials and the like (Cour d'appel de Paris, Fourth Chamber, Sec. A, *Dreamnex v. Kaligona*, 12-01-2005, [2006] E.C.D.R. 2).

⁷¹ *Per* Jacob LJ., at 44.

From the structure of the judgement, it is clear that the final gloss regarding the idea/expression dichotomy is but a seal of a reasoning which has followed a different path to reach a conclusion of non-infringement.

II.3. Facts and Expressions: copyright protection for databases

Copyright is said not to protect facts, and still copyright laws grant protection to compilations of mere facts. The requirement that a literary work ought to be original in order to be protected has always been accorded a narrow meaning, namely that the work must originate from the author. As made clear by Cornish and Llewelyn⁷², the small amount of originality required in order to qualify for copyright protection, can be explained in two ways: firstly, it reduces to a minimum the influence of subjective judgement in determining what qualifies for protection; secondly, it allows protection for any investment of labour and capital that, in some way, produces a literary result.

Due to the implementation of Directive 96/9/EC (known as the Database Directive), the British copyright system now has a new limitation in the scope of copyright protection, since copyright on a database is allowed only on the basis of authorship involving personal intellectual creativity.⁷³ This marks a departure from the traditional common law standard, as envisaged in *William Hill*⁷⁴ The

⁷² W. CORNISH – D. LLEWELYN *Intellectual Property*, op. cit., p. 423.

⁷³ See §3A(2) Copyright, Designs and Patent Act 1988. For a criticism concerning the grant of copyright protection to databases see P. MARZANO – M. VENEZIA (2000) *Internet e Copyright*, "Working Paper 2000 dell'Osservatorio di Proprietà Intellettuale, Concorrenza e Comunicazioni, CERADI – Luiss Guido Carli", Rome, p. 26.

⁷⁴ See above, note 44. It is well known that copyright protection is granted according to the *provisio de minimis* of sufficient skill, judgement and labour. In *Ladbroke (Football) Ltd. v. William Hill* football pools coupons were deemed to be worth copyright protection; as pointed out by Lord Devlin (at 290), "an anthology of saleable poems is much entitled to protection as an anthology of

implementation of the Directive has also introduced a separate *sui generis* right against extraction or re-utilisation of the contents of the database. Such a right applies to databases (whether or not their arrangement calls for copyright protection) which are the product of substantial investment.⁷⁵

A different path has been taken in the United States. In *Feist Publications, Inc. v. Rural Telephone Service Co.*⁷⁶, the U.S. Supreme Court held that facts do not owe their origin to an act of authorship and, therefore, they will always fail the minimum creativity requirement for copyright protection. The Court unanimously ruled that copyright does not secure the "sweat of the brow" or the investment of resources in the composition of a work of information. It also held that a minimum threshold of creative originality is constitutionally mandated.⁷⁷ However, the approach taken in *Feist* has been criticised, because there are facts that are merely

beautiful poems". For an overview of the changed approach to copyright infringement for this category of works see the recent Australian case *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, 22-04-2009, concerning the alleged infringement of copyright in weekly schedules containing the time and title of programs to be broadcast on television stations within Nine Network.

⁷⁵ In *British Horseracing Board Ltd. v. William Hill Organisation Ltd.* (C203/02), [2004] E.C.R. I-10415, the European Court of Justice drew a distinction between investment in creating the information and investment in storing and processing it in the database. Accordingly, the *sui generis* right covers only the latter and the substantial investment is considered in both qualitative and quantitative terms. See W. CORNISH – D. LLEWELYN *Intellectual Property*, op. cit., pp. 832-836.

⁷⁶ 499 U.S. 340 (1991). Here, the US Supreme Court held that a telephone book did not satisfy the minimum originality required by the Constitution of the United States to be eligible for copyright protection.

⁷⁷ As made clear by J. C. GINSBURG (1992) *No Sweat Copyright and Other Protection of Works of Information after Feist v Rural Telephone*, "Columbia Law Review", 92, pp. 339-340, "the *Feist* Court's sweeping declarations of constitutional limitations on Congress' copyright power put in issue the respective roles of the Court and Congress in defining not only the contours and key terms of copyright law, but also the scope of Congress' authority to provide for intellectual property protection under other constitutional sources of legislative power". Thus, *Feist* is said to have provided a more robust textual Constitutional basis for the idea/expression dichotomy, since it emphasized the US Copyright Clause's focus on 'Authors' and 'Writings' (see C. T. NGUYEN (2006) *Expansive Copyright Protection for All Time? Avoiding Article I Horizontal Limitations Through the Treaty Power*, "Columbia Law Review", 106(5), June 2006, p. 1087). Moreover, as pointed out by L. BENTLY *Copyright*, op. cit., p. 976, the Supreme Court's decision in *Feist* has been treated as a demonstration of "the power of romantic preconceptions which continue to inform judicial interpretation of the copyright statute".

discovered and facts that are created and in which original expression from private individuals is adopted by social convention.⁷⁸ Thus, it is possible to infer that there are facts that deserve a certain degree of protection and facts that do not.

The approach adopted in the United States is far more restrictive than that envisaged by the European Database Directive, which was prompted by inconsistencies in the originality requirement amongst Member States.⁷⁹ On the one hand, one may agree with the concerns highlighted in the Database Directive and concord that database creators should be granted a certain degree of protection; on the other hand, even if the traditional British threshold to protection has always been low, it seems out of proportion to grant to the creators a protection as strong as that provided under the copyright regime (or even the *sui generis* right).

Furthermore, one might wonder whether it is true that facts and pieces of information *per se* are still held in public domain and no appropriation can be exerted on them.

II.4. Problematic paradigms of protection: traditional works of art

⁷⁸ See P. JASZI *On the Author Effect*, op. cit., pp. 39-40 and J. HUGHES (2007) *Created Facts and the Flawed Ontology of Copyright Law*, "Notre Dame Law Review", 83(1), pp. 101-163, who states that (p. 103): "the problem with the *Feist* analysis is that it is wrong - and that error has produced a decade of distortion in copyright doctrine. *Feist* is wrong because many facts clearly owe their origin to discrete acts of human originality. These human-created facts function in the social discourse no differently than the temperature in downtown Chicago on a particular date or the frequency with which "Old Faithful" erupts in Yellowstone Park. Indeed, the facts most unimpeachably *discovered* - ice core depths in Antarctica, planets orbiting distant stars, new species of animals - are often less important to your daily life than many facts that are human created - such as the credit rating that Equifax gives you or the valuation your insurer gives your car after an accident".

⁷⁹ According to such principle, a work is protectable under copyright regime if it is the product of personal intellectual creativity. As far as the *sui generis* right is concerned, its underlying ratio is the lack of a European harmonised law of unfair competition.

Problems of consistency with the idea/expression dichotomy arise not only with regard to new categories of works protected, but also in relation to traditional ones, such as art, literature and music.

The scrutiny pursued by Landes and Posner with regard to legal protection of postmodern art is well-known.⁸⁰ Analysis of abstract expressionism, pop art and appropriation art, highlights how difficult it is to draw a convincing distinction between non-protectable ideas and protectable expressions. Either because these works of art are expressive of an idea (as abstract expressionism), or because they turn everyday life objects into objects of art (as Andy Warhol loved to do), or either because they borrow images from popular culture and mass media (as Jeff Koons did with his famous sculpture of puppies⁸¹), in all these cases copyright assessment is difficult to carry out. In particular, regarding the first two, separating ideas from expressions is troublesome. In the very moment on which Andy Warhol took some boxes of Brillo and made them into art, how does one distinguish the idea and the subsequent expression of that idea?

Copyright assessment is not easy and that is why the threshold for granting protection has always been low:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations,

⁸⁰ W. M. LANDES – R. A. POSNER *The Economic Structure*, op. cit., pp. 254-269. See also B. SHERMAN (1995) *Appropriating the Postmodern: Copyright and the Challenge of the New*, “Social and Legal Sciences”, 4(1), pp. 31-54, who analyses the problems related to the borrowing of images from other sources and the consequent assimilation in works of art (appropriation art), and S. STOKES (2001) *Categorising Art in Copyright Law*, “Entertainment Law Review”, 12(6), pp. 179-189, who explores how UK copyright law treats modern art.

⁸¹ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

*outside of the narrowest and most obvious limits. At 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 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.*⁸²

Furthermore, with reference to particular categories, such as dramatic works and films, the courts have shown a peculiar approach in assessing infringement cases. Certain types of works have been treated as having a particular value: that is why sometimes copyright protection has been granted even in borderline cases, in which the mere borrowing of the plot of a story was held to be infringing.⁸³ In fact, where a substantial amount of a plot or scenario are copied, and the misappropriated material being original, there will be infringement even though the original author's language is not taken.⁸⁴ Conversely, in the *Da Vinci Code* case⁸⁵ the defendant's book was held as not having infringed the plaintiffs' copyright in their book *The Holy Blood and the Holy Grail*. Peter Smith J., after having pointed out that "*the themes and the ideas cannot be protected but how those facts, themes and ideas are put together [...] can be*"⁸⁶, and in doing so,

⁸² Per Holmes J., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. (1903) at 81.

⁸³ See Maugham J., *Kelly v. Cinema Houses* [1928-1935] Mac. CC 362; *Dagnall v. British Film* [1928-1935] Mac. CC 391; *Fernald v. Jay Lewis* (1953) [1975] F.S.R. 499 in which it was held that it is not necessary to copy the actual words used to work out the plot to be anyway liable of copyright infringement. As explained by W. CORNISH – D. LEWELYN *Intellectual Property*, op. cit., p. 459, "this approach shows the concept of mere ideas being confined to 'starting point' conceptions".

⁸⁴ For instance, in *Holland v. Vivian van Damm Productions Ltd* [1936-45] MCC 69, a ballet (without words) was held to infringe the copyright in *The Nightingale and the Rose* by Oscar Wilde.

⁸⁵ *Baigent v. Random House Group Ltd*. [2006] EWHC 719; [2006] M.L.R. 16; [2006] F.S.R. 44 Ch D.

⁸⁶ At 176.

exerting a qualitative assessment, found that the general architecture of the claimants' book had not been copied. The decision was confirmed on appeal and Mummery LJ. emphasised that literary copyright does not give rights that enable persons to monopolise historical research or knowledge. From the structure of the judgement, it seems that the reliance on the dichotomy is but a seal of a scrutiny carried out mainly through other tools:

*the judge had to consider: (i) what relevant material was to be found in both works; (ii) how much, if any, of that had been copied [...]; (iii) whether what was so copied was on the copyright side of the line between ideas and expression; and (iv) whether any of the material that was copied and did qualify as expression, rather than as ideas, amounted to a substantial part [...].*⁸⁷

Furthermore, contemporary music has given rise to some problematic issues. Such an example would be “the infamous *4 minutes, 33 seconds*”⁸⁸ by the composer John Cage, whose silent composition requires the performer to remain silent at his instrument for 4 minutes and 33 seconds. The music will then comprise the natural sounds of the environment and man-made sounds from the audience. Some problems arose in 2002, when a classical group released an album which comprised a track containing one minute silence score. The publishers of John Cage in the United Kingdom alleged that such composition infringed John Cage's copyright in *4 minutes, 33 seconds*. The case, however, was settled out of court. The

⁸⁷ Per Lloyd LJ. at 7.

⁸⁸ C. L. SAW (2005) *Protecting the Sound of Silence in 4'33"*. *A Timely Revisit of Basic Principles in Copyright Law*, European Intellectual Property Review, 27(12), pp. 467-476.

question, as far as it is concerned here, is whether we can deem any copyright to exist with respect to a composition where no expression is conveyed. Cage had intended to communicate the value and meaning of silence as the absence of intended sounds. From a copyright prospective, this represents a mere discovery of a pre-existing fact/idea: being devoid of expressive content, it should therefore be non-protectable.

The truth is that “*the assessment of each case turns a good deal on its own circumstances*”.⁸⁹ That is because judges who favour the view that “*what is worth copying is prima facie worth protecting*”⁹⁰ tend to stretch the notion of expression and grant protection even in borderline cases.⁹¹ Furthermore, sometimes this principle is not even mentioned, or instantly ignored.⁹²

III. Theoretical frameworks: a room of the dichotomy’s own

III.1. Copyright theories

The origins and evolution of copyright are complicated and lie along several

⁸⁹ W. CORNISH – D. LLEWELYN *Intellectual Property*, op. cit., p. 456.

⁹⁰ *Per* Peterson J., *University of London Press* case (see above, note 38).

⁹¹ See W. CORNISH – D. LLEWELYN *Intellectual Property*, op. cit., p. 456, who explain: “once convinced that the defendant unfairly cut a competitive corner by setting out to revamp the plaintiff’s completed work, they will not easily be dissuaded that the alterations have been sufficient. In this approach the taking of ideas alone is confined to cases where the defendant does not start from the completed work at all, save in the sense that he goes through a similar process of creation [...]”.

⁹² Even if the Italian Copyright Act (see above, note 49) sets the dichotomy, it did not seem that the Corte di Cassazione relied on it while assessing whether the claimant held copyright in some photographs and ideas for advertising sketches. Yet, the Court delivered its judgement without even mentioning the dichotomy: it held that the copyright in those works belonged to the claimant and not to the defendant, since an advertisement sketch has to be considered as a work of mind, and so as protectable under copyright law (Cass. Civ., *Butti ed Assicurati SAS v. Gigli e Meglio Srl*, 11-11-2003, No. 16919, [2004] E.C.D.R. 26).

different evolutionary paths. Still today, remain faint traces of a once lively and heated debate between a view of copyright as a vindication of authors' natural rights to the products of their labour, and a view of copyright as a statutory construction designed to balance the need to grant incentives to authors for their creative efforts, with the public interest in having access to works. Even if the justifications given for granting copyright protection are numerous⁹³, a possible distinction can be drawn between a rights-based view, which recognises the inherent dignity of authorial right, and a public-interest view of copyright, which posits that the author's legal entitlement is but a function of the public interest.⁹⁴ Within those views, there are, *ça va sans dire*, different streams and philosophical positions.

In relation to the rights-based view of copyright, the different approaches taken by Georg Wilhelm Friedrich Hegel, Immanuel Kant, John Locke and Johann Gottlieb Fichte will be briefly analysed; then I shall proceed to the public-interest view of copyright, which is rooted within the Enlightenment movement and nowadays owes much to the tools borrowed from economic analysis.

III.1.1. A rights-based view of copyright

According to natural rights theorists, copyright protection is granted because it is

⁹³ See L. BENTLY – B. SHERMAN *Intellectual Property Law*, op. cit., pp. 34-39.

⁹⁴ See A. DRASSINOWER (2001) *Labour and Intersubjectivity: Notes on the Natural Law of Copyright*, Stanford/Yale Junior Faculty Forum Research Paper 2001-06, p. 2. Some criticism may be raised against such *summa divisio*: “I find one temptation easy to resist, and that is to sum up copyright with just the word 'property' or 'personality' or any one of the other essences to which scholars, foreign and domestic, have been trying to reduce the subject [...] To say that copyright is 'property', although a fundamentally unhistorical statement, would not be baldly misrepresentative if one were prepared to acknowledge that there is property *and* property, with few if any legal consequences extending uniformly to all species and that in practice the lively questions are likely to be whether certain consequences ought to attach to a given piece of so-called property in given circumstances. In the same way we might make do with 'personality' or some other general characterization of copyright” (B. KAPLAN (1967) *An Unhurried View of Copyright*, New York and London: Columbia University Press, p. 74).

inconceivable not to do so. However, the reasons for such a belief have different philosophical foundations.

According to Kant's view⁹⁵, creative works are an extension of their authors' personalities, so that authors have a moral claim to receive authorship credit and to determine the timing, manner, and form in which their works are communicated to the public. It follows that authors have both moral and economic rights in their works, which are perceived as the true expression of their personality.⁹⁶ Kant's view emphasises the direct and moral link existing between an author and their work and differs from Hegel's view of copyright as a mark of the free man.

Hegel's theoretical construction is based upon the individual will as the core of human beings' existence, constantly seeking actuality (*Wirklichkeit*) and effectiveness in the world.⁹⁷ According to Hegel, copyright protection (and intellectual property protection in general) is explained and advocated within its speculative system of property, in which any person has the right to place his/her will in any thing (*Sache*); the thing thereby becomes his/hers and acquires his/her will and its substantial end, its determination and its soul, namely the absolute right of appropriation which human beings have over all things (*Sachen*).

Creative products are different from mere objects because of their inward and

⁹⁵ See I. KANT (1785) *Von der Unrechtmässigkeit des Büchernachdruckes*, It. Transl., *Dell'Illegittimità dell'Editoria Pirata*, in R. POZZO (ed.) (2005) *L'Autore e i suoi Diritti. Scritti Polemici sulla Proprietà Intellettuale*, Milano: Biblioteca di Via Senato Edizioni, pp. 39-48; some passages are also available at www.copyrighthistory.org.

⁹⁶ On Kant's justification to the existence of copyright see N. NETANEL (2008) *Why Has Copyright Expanded? Analysis and Critique*, in F. MACMILLAN (ed.), *New Directions in Copyright Law*, Vol. 6, Cheltenham (UK) and Northampton (MA., USA): Edward Elgar, pp. 29-33.

⁹⁷ Hegel derives the notion of *person* from the analysis of the general concept of *will*, which he defines as free and for itself, and so universal: see G. W. F. HEGEL (1820) *Grundlinien der Philosophie des Rechts*, Eng. Transl. A. W. WOOD (ed.) (1991) *Elements of the Philosophy of Right*, Cambridge: Cambridge University Press, pp. 67-68.

spiritual nature; that is why some doubts may arise with regard to whether it is possible to comprise them among the things that can be owned. However, the conclusion is that:

Knowledge, sciences, talents, etc. are of course attributes of the free spirit, and are internal rather than external to it; but the spirit is equally capable, through expressing them, of giving them an external existence [Dasein] and disposing of them [...], so that they come under the definition [Bestimmung] of things. Thus they are not primarily immediate in character, but become so only through the mediation of spirit, which reduces its inner attributes to immediacy and externality.⁹⁸

From the above excerpt, one can infer that Hegel does not justify literary property by analogy to physical property. In addition, it has been highlighted that Hegel does not utilise natural law arguments to support his vision of copyright as property.⁹⁹ As distinct from Locke, Hegel makes the point that property has an inter-subjective dimension (it is not a given) and that is why property cannot precede society.

A third version of rights-based views of copyright is traced to the theorisation of property as enunciated in Chapter V of the *Second Treatise of Government* by John

⁹⁸ *Ibid.*, pp. 74-75.

⁹⁹ If Jeremy Bentham, the founder of Utilitarianism, thought that the very concept of natural rights was “nonsense on stilts”, Hegel goes further and considers the expression “natural rights” to be an oxymoron. To Hegel, nature is unfree and legal rights are artificial constructs created as a means to actualize freedom by escaping the causal chains of nature. Consequently, rights are not merely *not* natural, they are *unnatural*. On this, see J. SCHROEDER (2004) *Unnatural Rights: Hegel and Intellectual Property*, Cardozo Law, Legal Studies Research Paper No. 80, 1 March 2004, p. 2.

Locke¹⁰⁰. His view is that in the state of nature, goods are held in common, through a grant by God that gives such bounty for the enjoyment of humanity. However, no goods can be enjoyed in their natural state.¹⁰¹ Such goods have to be converted into private property by exerting labour over them. Labour is then the triggering engine of property because it removes goods from their common state; however,

*[f]or this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joynd to, at least where there is enough, and as good left in common for others.*¹⁰²

Locke restricts the concept of what can be the object of property, although the “enough and as good” condition is not the only boundary of property; Locke goes further and adds the “non-waste condition”, which prohibits the accumulation of so much property that some is destroyed without being used. It follows that copyright is justified as a consequence of an author's labour.¹⁰³ Locke's theory of property could be interpreted either from a normative point of view, according to which

¹⁰⁰ Such a limited analysis of the Lockean approach to intellectual property has been criticised: “[t]he problem in basing copyright justifications solely on Chapter V is that it presents Locke as the undisputed champion of exclusive private property, legitimising inequalities at the expenses of public good” (L. ZEMER (2007) *The Idea of Authorship in Copyright*, Farnham: Ashgate, 149. The Author extends his analysis to other works by Locke, such as his letter *Liberty on the Press* and his *Essay Concerning Human Understanding*).

¹⁰¹ “The Earth and all that is herein, is given to Men for the Support and Comfort of their being. And though all the Fruits it naturally produces, and Beasts it feeds, belong to Mankind in common, as they are produced by the spontaneous hand of Nature; and no body has originally a private Dominion, exclusive of the rest of Mankind, in any of them, as they are thus in their natural state; yet being given for the use of Men, there must be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular Man.” (J. LOCKE (1698) *Two Treatises of Government* (P. LASLETT ed.) (2008), Cambridge: Cambridge University Press, p. 286).

¹⁰² *Ibid.*, p. 288.

¹⁰³ See A. C. YEN (1990) *Restoring*, op. cit., p. 524, who observes that, if a person is entitled to rightfully claim ownership in his/her works to the extent that his/her labour resulted in their existence, it is also true that property so conceived exists regardless of any need for the economic stimulation of creative activity.

labour should be rewarded *per se*, or under a form of incentive-based justification, for which rewards should be granted in order to obtain labour.¹⁰⁴

The point is trying to understand what may happen in case of a conflict between the labourer's claim and the public's entitlement in the common; Locke solves the dilemma by favouring the latter, since he recognises that the first law of nature is that no harm be done: that is why no man can acquire to himself a property to the prejudice of his neighbour.¹⁰⁵

To complete the philosophical debate over the justifications of copyright, it is necessary to examine Fichte's position in his *Proof of the Illegality of Reprinting: A Reasoning and a Parable*. Fichte takes position against the then well-spread practice of unauthorized reprinting, arguing for the existence of an enduring property right for authors, due to the very nature of a book. A book is composed of a material part, which can be acquired through the purchase of the book itself, and an ideational part, which can be further divided into the thoughts that are conveyed by the book and the form in which such thoughts are expressed. By acquiring a book one becomes the proprietor of both the material and ideational elements, but in a different sense. The tangible copy of the book can be completely transferred from hand to hand, whereas the ideational elements can be transferred only partially and under certain conditions. Therefore, authors are entitled to forbid others from both contesting their moral and property rights on such form¹⁰⁶, but they are not entitled to control how subsequent authors could rethink

¹⁰⁴ See J. HUGHES (1988) *The Philosophy of Intellectual Property*, "Georgetown Law Journal", 77, p. 296.

¹⁰⁵ See J. LOCKE *Two Treatises*, op. cit., p. 292. See also W. J. GORDON (1993) *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, "Yale Law Journal", 102(7), May 1993, pp. 1562-1572.

¹⁰⁶ See J. G. FICHTE (1791) *Beweis der Unrechtmäßigkeit der Büchernachdrucks: Ein Räsonnement und eine Parabel*, It. Trans. *Dimostrazione dell'Illegittimità dell'Editoria Pirata: Un Ragionamento e*

and disseminate the content of prior works.¹⁰⁷

The property right deduced by Fichte is not merely a right to remuneration for the author's work. It is rooted in the dynamic of learning as such and it is thus consistent with Kant's approach to copyright.¹⁰⁸ For Kant and Fichte, copyright is a matter concerning more everyone's freedom of thought rather than mere rewarding; a position which differs from that of those who believe that a certain amount of legal protection should be granted to authors in order to encourage the production and dissemination of works.

III.1.2. Incentive-based theories of copyright

A different approach to the justification of intellectual property rights rejects any natural rights claims and it thus assumes as its starting point the need to take into consideration social interests and welfare.

This approach posits that, as creative works are *per se* fundamental for the general well-being of society, authors should receive appropriate incentives that offset the time and efforts involved in such creative activities, in order to optimise production and dissemination. The reason is that, while works demand high costs of production, once they are placed on the market it is straightforward to copy them.¹⁰⁹

una Parabola, in R. Pozzo (ed.) (2005) *L'Autore e i suoi Diritti. Scritti Polemici sulla Proprietà Intellettuale*, Milano: Biblioteca di Via Senato Edizioni, pp. 73-77, also available at www.copyrighthistory.org (Eng. Transl. by M. WOODMANSEE).

¹⁰⁷ See P. E. GELLER (1994) *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?*, in B. SHERMAN – A. STROWEL (eds.) *Of Authors and Origins. Essays on Copyright Law*, Oxford: Oxford University Press, p. 169.

¹⁰⁸ In this sense M. BORGHI (2006) *Owning Form, Sharing Content: Natural-Right Copyright and Digital Environment*, in F. MACMILLAN (ed.), *New Directions in Copyright Law*, Vol. 5., London: Edward Elgar, p. 202.

¹⁰⁹ See L. BENTLY – B. SHERMAN *Intellectual Property Law*, op. cit., p. 37.

From an historical point of view, such a position can be traced to the cultural streams of the Enlightenment, concerned with ensuring a proper balance between authors' rights to receive protection and the public's enjoyment of cultural products.

At the beginning of the 18th Century, a lively debate regarding the shape of the protection that should be granted to authors arose. In Great Britain, the 1710 Statute of Anne is deemed to be the first copyright act of the modern age. With an approach that was later adopted in drafting the Copyright Clause of the Constitution of the United States of America¹¹⁰, the Act created three policies: the encouragement of learning; public access, since copyright was limited to printed books; and the creation and enhancement of the public domain, because copyright was to exist only for a limited time.

Concerning this last point, it is worth recalling the great debate that arose in Great Britain concerning the issue of whether the time-limited rights granted by the Statute of Anne¹¹¹ merely supplemented the pre-existing, perpetual rights of authors which existed at common law. *Millar v. Taylor*¹¹² and *Donaldson v. Beckett*¹¹³ are the high watermark of this debate¹¹⁴; demonstrating implicitly the

¹¹⁰ Article I, Section 8, Clause 8 of the U.S. Constitution states that “The Congress shall have the power [...] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writing and discoveries”.

¹¹¹ Such rights lasted for a limited period of time after registration: fourteen years if the book was new; a further fourteen years if the author was alive at the end of the first period; and twenty-eight years for old books.

¹¹² See above, note 13.

¹¹³ See above, note 18.

¹¹⁴ As explained in B. SHERMAN – L. BENTLY (1999) *The Making*, op. cit., pp. 11-15, the litigation in the first case arose from the fact that in 1729 Millar had bought the rights to Thompson's *The Seasons*, but in 1763 Taylor published copies of such work. Given that by this time the statutory rights on *The Seasons* had elapsed, in order for Millar to sustain his action it was necessary for him to establish that he had a common right in the work. The Court of King's Bench ruled in favour of

fragility of the balance amongst the different forces involved in copyright analysis.¹¹⁵

In the light of this brief historical overview, it is clear that the roots of copyright can be traced back to democratic concerns, within which copyright is interpreted as a state measure that uses market institutions to enhance the democratic character of a civil society.¹¹⁶

Nowadays, those who advocate an incentive-based justification for the existence of copyright often base their assumptions on the tragedy of the commons argument; they believe that the basic elements of the economics of property rights in physical property, provide the tools for understanding the essential economic characters of property in intangible goods.¹¹⁷ One such view is that:

[w]ith intellectual property scholarship becoming more and more specialized, there is a danger of losing sight of the continuity between rights in physical

Millar and of common law property. However, a few years later, in *Donaldson v. Beckett*, the House of Lords overruled *Millar* and voted twenty-two to eleven against the right of common law perpetual copyright.

¹¹⁵ In *Jeffreys v. Boosey* (1854) 4 H.L.C. 815, the House of Lords took the view that copyright is an artificially right, “not naturally and necessarily arising out of the social rules that ought to prevail among mankind” (*per* Lord Chief Baron Pollock, at 935-936).

¹¹⁶ An influential explanation and development of the democratic patterns of copyright is given by N. W. NETANEL (1996) *Copyright and a Democratic Civil Society*, “Yale Law Journal”, 106(2), November 1996, pp. 283-387, according to whom copyright serves two democracy-enhancing functions. On one hand, it provides for an incentive for creative expression (production function); on the other hand, it supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage and cultural hierarchy (structural function). Through economic incentives and a careful balance between exclusivity and access, copyright seeks to foster widespread citizen participation in a broad sense.

¹¹⁷ See above, §I.1.. Of course, such assumption is neither obvious nor immediately clear. As highlighted by J. LITMAN *The Public Domain*, *op. cit.*, p. 970, it is difficult to apply to intangible property the same analysis tools which can be used with tangible goods in order to justify proprietary regimes: “to ascertain who owns a parcel of real property, we look to possession and to the chain of record title. [...] A parcel of intellectual property, however, is neither tangible nor unique. Possession and temporal priority are therefore less than helpful concepts”.

*and in intellectual property and thus the utility of using what economics has learned about the former to assist analysis of the latter.*¹¹⁸

A property right entitles the owner both to exclude others and to transfer the property to another. However, as highlighted by economic analysis of law, proprietary regimes involve numerous costs.¹¹⁹ Firstly, the cost of transferring the rights involved; such an operation can be particularly expensive in the case of intellectual property rights, due to the fact that the goods concerned are *per se* intangible and difficult to identify and encapsulate in their precise boundaries. Secondly, rent-seeking.¹²⁰ Finally, the cost of protection: intellectual property is said to be particularly expensive to protect, also because the cost of enforcement is high. In spite of that, a proprietary regime is said to be the only possible solution:

Unless there is power to exclude, the incentive to create intellectual property in the first place may be impaired. Socially desirable investments (investments that yield social benefits in excess of their social costs) may be deterred if the creators of intellectual property cannot recoup their sunk costs. That is the dynamic benefit of property rights, and the “access versus incentives” tradeoff: charging a price for a public good reduces access to it (a social

¹¹⁸W. M. LANDES – R. A. POSNER *The Economic Structure*, op. cit., p. 11.

¹¹⁹ *Ibid.*, pp. 16-21.

¹²⁰ The legal protection granted over intellectual goods often exceeds the optimal investment, minus any social benefit produced by the additional investment. Such a difference is the waste produced by rent-seeking. As observed by W. M. LANDES – R. A. POSNER, *ibid.*, p. 221, “rent-seeking activities are a natural consequence of any fixed copyright term [...] There will always be copyright holders whose incomes are diminished when their works fall into the public domain, and they have an incentive to expend resources on seeking retroactive extensions as the end of copyright term draws near”.

*cost), making it artificially scarce [...], but increases the incentive to create it in the first place, which is a possibly offsetting social benefit.*¹²¹

It follows that the primary problem is identifying and defining the preferable incentive system. From this last point of view, it is worth recalling the position which is rooted within neoclassical economics and which advocates a very strong copyright regime, since private ownership of resources is the only way to guarantee an optimal exploitation; accordingly, copyright protection should be limited only under exceptional circumstances.¹²²

Having drawn a general and rough framework of copyright justifications, it is necessary to examine the different explanations given for the idea/expression dichotomy and why copyright protection cover only the latter.

III.2. The place of the idea/expression dichotomy

According to rights-based theories, copyright protection is granted because it is right to do so. Copyright protection then can be justified as a set of rights that are either 'natural' or that arise directly from the creative labour of authors.

Within the Hegelian system, authors are recognised as such within a community in which all the parties enjoy equal dignity, because of their status of free men:

¹²¹ *Ibid.*, pp. 20-21.

¹²² The neoclassical approach has roots in the late 19th Century marginal utility theory, which represented a shift from the classical conception of property as the embodiment of previously committed investment and labour, to an identification of property with the ability to capture future profits. For an overview of the neoclassical approach to copyright, see N. W. NETANEL *Copyright*, op. cit., pp. 311-336. Against such position it is possible to argue that it is difficult to see how intangible goods can be overexploited, since their features are different from the ones of physical goods (see above, §I.1.).

such freedom is then the mark of property and that is the reason for which authors are entitled to have property rights in their works. Thus copyright protection is *per se* an inter-subjective relationship. It is then clear that the dichotomy is rooted within this equality of the parties as authors. Ideas cannot be copied; they may simply be re-expressed. Since copyright itself exists as a recognition that persons have a right to their expression, nobody can complain of a violation of his/her rights over an idea as its author. To protect an idea would be to deny another's entitlement to his/her original expression and that would contradict the starting point, namely the equality of the parties as authors.¹²³ Moreover, Hegel justifies copyright by saying that it is the spirit that, through expressing ideas, is capable of giving them an external existence.

Kant's and Fichte's justifications for copyright protection also rely on a similar argument to explain why only expressions are worth legal protection, while bare ideas are not. Both Kant and Fichte derive their theories from a moral consideration of man; therefore although their theories start from different premises, their justifications for not extending protection to mere ideas are similar.

Following the Lockean approach to copyright, property arises as a result of the specific labour exerted over things which are otherwise held in common. It is then clear that only expressions are the result of such labour and give title to a property right, since ideas are and have to be held in common, coherently with the "enough

¹²³ See A. DRASSINOWER *Labour*, op. cit., pp. 38-40, who illustrates the point by using such example (38): "Say, for example, that you wanted to copy Shakespeare's idea of 'star-crossed lovers'. But say also that, *ex-hypothesi*, you set about doing that without copying Shakespeare's text, Shakespeare's expression of that idea. In order to do that, you would necessarily have to express the idea anew, in a new way, your own way. That is, where one copies ideas, but not expression, one necessarily exercises one's own capacities of expression in order to express the idea anew. Ideas are irrelevant to copyright because ideas cannot be copied. They can only be re-expressed anew".

and as good condition". The Lockean proviso prohibits the ownership of abstract ideas because such ownership would harm later creators¹²⁴ and because of the limitations Locke puts into property, as a result of labour. Moreover, if a conflict between owners and the public should arise, then the latter should be favoured.

According to an incentive-based view of copyright, since copyright protection confers upon authors a monopoly power¹²⁵, it is wise not to extend such a monopoly to ideas, because ideas are the starting point of any creative process; therefore, ideas are not protected for *practical* reasons.

As highlighted by Landes and Posner, ideas tend to be different in non-fictional and fictional works and the rationale for not granting them protection varies according to the categories to which they pertain.¹²⁶ In non-fiction, that is because they are ideas in the conventional sense (they are linked to imagination and creation according to a true romantic meaning) in which theoreticians refer to ideas. In fiction, ideas can be divided into two categories: the first consists of standard ideas (the ones that are also known as *scenes a faire*¹²⁷), which do not receive any

¹²⁴ As pointed out by W. J. GORDON *A Property Right*, op. cit., p. 1581, the more general an idea is, the more capable it would be of discovery by others; that is why giving ownership in such fundamentals would deprive future creators of a meaningful opportunity otherwise open to them. And even if a particular abstract idea would not be quickly rediscovered, ideas are so important to rational faculty that allowing ownership in them would violate the equality of creative liberty which the Lockean proviso also embodies.

¹²⁵ See R. BOYLE *The Second Enclosure*, op. cit., pp. 53-58.

¹²⁶ W. M. LANDES – R. A. POSNER *The Economic Structure*, op. cit., pp. 91-97. The Authors provide for an economic explanation of the reason for which ideas are not protected, also highlighting the troubles arising from the protection of ideas. They argue that apart from the traditional argument of the welfare losses associated with monopolies, copyrighting of ideas would also encourage rent seeking and be problematic because of the administrative costs involved in enforcing rights in ideas. This because (p. 93) "courts would have to define each idea, set its boundaries, determine its overlap with other ideas, and, most difficult of all, identify the original idea in the work of the alleged infringer".

¹²⁷ See J. L. CHUNG (2007) *Drawing Idea From Expression: Creating a Legal Space For Culturally Appropriated Literary Characters*, "William and Mary Law Review", 49(3), pp. 919-921, discussing the *Nichols* test (for which see above, §II.2.) for fictional characters, and K. P. A. SANKAR – N. L. R.

protection because they are commonplace, so inextricably connected to a certain genre that their appearance in the work cannot be considered to be unique or original; the second consists of ideas in a broad sense, that are not freely available in the public domain, but instead are the invention of the creator of the original copyrighted work¹²⁸: such creative ideas are not protected because conferring a monopoly is not necessary either to elicit an optimal supply of such innovations, nor to prevent congestion externalities as a consequence of their being free.

Even by using democratic arguments, the reason for not extending protection to ideas is essentially a practical one.¹²⁹

In such a theoretical framework, the rationale for the dichotomy is to prevent the creation of a 'cultural embargo' on creative sources; however, as we have seen, the reference to the abstract concepts of ideas and expressions create two main difficulties in the practical application of the idea/expression dichotomy. Firstly, difficulties can arise in drawing a clear-cut distinction between the idea and the expression in some categories of works; and secondly, the actual reasoning employed in case law, especially in United Kingdom and in the United States (which, given the globalisation of copyright, are followed in several jurisdictions across the world), does not satisfactorily rely on the dichotomy as a valid tool in assessing controversial cases.

CHARY (2008) *The Idea-Expression Dichotomy: Indianizing an International Debate*, "Journal of International Commercial Law and Technology", 3(2), pp. 129-138, analysing the approach followed in American, British and Indian courts with regard to cases where ideas and expressions seemed merged into each other.

¹²⁸ W. M. LANDES – R. A. POSNER *The Economic Structure*, op. cit., p. 92 explains this concept by referring to some examples, like "Cubism, stream of consciousness narration, the hard-boiled-detective story, and twelve-tone music".

¹²⁹ One of the basic assumptions of democratic theories is still the need to stimulate the production of cultural products within the ideal horizon of fostering the progress of democratic dialogue and participation.

Put in other words, one can question whether the dichotomy means anything more than that a certain amount of balance should be maintained between the prerogatives of authors and public at large. Rather than an incontrovertible principle, the reference to the dichotomy might serve as a guideline that fixes preliminary and rough boundaries to the scope of protection. If that is true, then the dichotomy is a category which does not have deep roots, and indeed deceptively suggests quite a different analysis than that which is actually used.

Conclusion

The aim of this work was to explore the rationale and the effectiveness of the idea/expression dichotomy within copyright regimes. Two conclusions seem to emerge.

On the one hand, the choice to protect expressions, and not also ideas, is due to practical concerns; the place of the dichotomy is not theoretical and therefore it seems a rather mundane concept of little philosophical depth.

On the other hand, there are several examples which highlight the difficulties that arise from the use of the dichotomy. There are categories of works protected by copyright, both 'traditional' (such as art) and 'new' (such as computer programs and databases), for which it is difficult to apply the idea/expression dichotomy without reading too much into statutory provisions allowing for copyright protection.

[The idea/expression dichotomy] is not a doctrine that could be used

*predictably to put a particular work either into the public domain or within the author's exclusive rights; instead, it seems to be an ex post characterization that justifies an outcome based upon other, more concrete, factors. Thus, if the outcome in a particular case is to be infringement, the work is deemed to be protectable expression; if the outcome is to be noninfringement, then the work is described as an "idea" (emphasis added).*¹³⁰

Similar conclusions have led to the dichotomy being redefined as the "idea/expression fallacy".¹³¹ The contention that copyright law protects form but never substantive content cannot withstand serious critical analysis:

[...] lip-service continues to be paid to what has been called the 'idea/expression dichotomy'. Sometimes courts content themselves with stating the proposition and then proceeding to ignore it if convenient. At other times while they say it is 'trite' law there is no copyright in ideas, they proceed to explain that this refers to mere general ideas, and treat the ideas-pattern as part of the 'expression'. This is not useful. Unless by 'expression' one means the actual form of expression employed, which is not law, then philosophically speaking there is no such dichotomy. There is merely a series of conceivable gradations ranging from the very abstract to the utterly

¹³⁰ E. SAMUELS (1989) *The Idea-Expression Dichotomy in Copyright Law*, "Tennessee Law Review", 56(2), p. 324. Such conclusions seem to find confirmation in the words of Lloyd LJ. in the appeal stage of the *Baigent v. Random House Group Ltd.*, who set the steps to be followed in assessing infringement cases (see above, §II.4.).

¹³¹ H. LADDIE – P. PRESCOTT – M. VITORIA – A. SPECK – L. LANE *The Modern Law*, op. cit., pp. 97 and following.

*concrete all of which fit equally well on any given work.*¹³²

One can argue that the problems in the use of the dichotomy derive from the very fact that expressionless ideas do not exist: an idea can exist only if it can be expressed.¹³³ As incisively stated by Richard Jones, “*the dichotomy is a needless introduction of metaphysics of abstract entities into the law*”.¹³⁴ That is why the use of the dichotomy is misleading, since it draws attention to a tenuous distinction between the form and substance of writing, when the proper focus of attention for copyright law is between protectable and non-protectable expressions. The real architecture then develops in horizontal way (protectable/non protectable expressions) rather than in a vertical way (ideas/expressions).

In light of the foregoing, one can wonder whether it is worth maintaining such legacy to the romantic idea of authorship and copyright. By way of further metaphor, it is well-known Nietzsche's fable of the Madman who announces that God is dead.¹³⁵ The Madman's listeners are silent and look at him disconcertedly, because they cannot understand the urgency of the Madman's words, “*this deed is still more remote to them than the remotest stars – and yet they have done it themselves*”.¹³⁶ Nietzsche identifies the murder of God with the virtual end of the

¹³² *Ibid.*, p. 98.

¹³³ See P. MASIYAKURIMA (2007) *The Futility of the Idea/Expression Dichotomy in UK Copyright Law*, “International Review of Intellectual Property and Competition Law”, 38(5), p. 550 in criticising the approach taken in *William Hill* (see above, notes 44 and 74) and *Donoghue v. Allied Newspapers Ltd* [1938] Ch. 106, Ch. D., where it was first held that ideas that are not reduced into writing or into some other tangible form are not protected by copyright.

¹³⁴ R. H. JONES *The Myth*, op. cit., p. 607.

¹³⁵ F. W. NIETZSCHE (1882) *Die Fröhliche Wissenschaft*, Eng. Transl. B. WILLIAMS (ed.) (2001) *The Gay Science*, Cambridge: Cambridge University Press, pp. 119-120.

¹³⁶ *Ibid.*, p. 120.

morality of good and evil, and of all forms of idealism¹³⁷: to “*those whose eyes is strong and subtle enough for this spectacle [...] the world must appear more autumnal, more mistruthful, stranger, 'older'*”.¹³⁸ Yet, the consequences of such event, the death of God, are “*much more like a new and barely describable type of light, happiness, relief, amusement, encouragement, dawn [...] [F]inally the horizon seems clear again, even if not bright; [...] the sea, our sea, lies open again*”.¹³⁹

The point is then whether one can argue that the dichotomy or, better, the romantic idea of copyright, is lost. If one decides to discard such legacies, the point will be deciding how to deal with copyright issues, assuming that the traditional basics of copyright do not apply satisfactorily. In particular, if the dichotomy is deemed to accomplish substantial tasks¹⁴⁰, as well as defining the boundaries of liability in infringement cases¹⁴¹, then one can wonder whether such tasks could be accomplished through other tools. By way of mere intuition to be further developed, it could be possible to argue that providing for an *ex ante* assessment, or at least a clear codification, of what is protectable and what is not under the vague label of the idea/expression dichotomy would contribute to reduce uncertainty in relation to the outcomes of possible future litigation. Instead of referring to the unspecified boundaries of the dichotomy, it could be possible to

¹³⁷ See G. P. STERN (1979) *A Study of Nietzsche*, Cambridge: Cambridge University Press, pp. 139-170 and J. SALAQUARDA (1996) *Nietzsche and the Judaeo-Christian Tradition*, in B. MAGNUS – K. M. HIGGINS (eds.) *The Cambridge Companion to Nietzsche*, Cambridge: Cambridge University Press, pp. 90-118.

¹³⁸ F. W. Nietzsche, *Die Fröhliche*, op. cit., p. 199.

¹³⁹ *Ibid.*, p. 199.

¹⁴⁰ See P. MASIYAKURIMA *The Futility*, op. cit., who says the dichotomy pursuing the following goals: the promotion of product competition, the enhancement of the development of knowledge, a determination of copyright fixation, the promotion of free speech advantages of copyright exploitation.

¹⁴¹ See W. CORNISH – D. LLEWELYN *Intellectual Property*, op. cit., p. 456.

provide a more detailed codification of principles which make clear what, for each relevant category of works, would be protected and what would not. That could help courts in assessing controversial cases, since judges could rely on some pre-determined and detailed guidelines, which would not merely depend on factual background. Such legislative guidance could be rooted to the different categories of works which fall under copyright protection; by way of analogy and teleological interpretation, creators and practitioners would have an *ex ante* tool to assess whether a given work is likely to be protected or it is not. Such codification could help in reducing the uncertainties and the time and cost expenditures due to litigation. A more precise indication of the boundaries of copyright protection could offer a reliable tool to assess controversial cases, particularly in jurisdictions in which lengthy proceedings are commonplace.¹⁴²

If *the empty space is breathing at us*, then copyright itself should be radically and critically analysed and, perhaps, rebuilt from its very foundations.

“The question whether truth is necessary must get an answer in advance, the answer ‘yes’¹⁴³: the idea/expression dichotomy, if ever existed, does not offer any help, any more.

¹⁴² The right to a fair and public hearing within a reasonable time, as envisaged by Article 6 of the 1950 European Convention of Human Rights has been infringed several times by some European countries like Italy, in which an ordinary trial may last till ten years. As far as cases dealing with intellectual property issues are concerned, the introduction of Specialized Sections within Court of Appeal districts (Legislative Decree 27 June 2003, No. 168) should reduce the length of trials , as made clear by §16 Legge 12 December 2002, No. 273.

¹⁴³ F. W. NIETZSCHE, *Die Fröhliche*, op. cit., p. 200.

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