

The Sine Qua Non Of Copyright Is Uniqueness, Not Originality

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The Supreme Court tells us that the sine qua non of copyright is originality. The Court also tells us that originality has two components: independent creation by the author (as opposed to copying from prior work) and a minimal degree of creativity. I argue that uniqueness is the sine qua non of copyright and that the two components are merely rough heuristics for uniqueness.

The first heuristic, independent creation, is over-inclusive. The second heuristic, creativity, is both over- and under-inclusive. The over- and under-inclusiveness do not offset each other. Courts plug most of the remaining gaps with the limiting doctrines and the substantial similarity standard. To put it imprecisely: (independent creation) + (creativity) + (limiting doctrines) + (substantial similarity) \approx uniqueness. Thus courts eventually get to the right outcome in the vast majority of cases – but not without making a hash of copyright doctrine.

We can straighten out doctrine by focusing directly on uniqueness. Uniqueness explains why copyright protects a careless snapshot of drunken revelry more than a database of important scientific data, and a cartoon character more than a literary character. Uniqueness also defines the boundary between copyright and utility patent, and illuminates the apparently persistent but varied influence of the sweat of the brow doctrine. Finally, uniqueness largely unifies copyright's many limiting doctrines, including the useful article doctrine, idea-expression dichotomy, fact-expression dichotomy, merger doctrine, and others.

To explain all of the limiting doctrine cases, however, we must supplement uniqueness with a "dominance principle," which is akin to antitrust and which limits protection for a unique work if it is dominant. Examples of works that are both unique and dominant include the QWERTY keyboard layout, the Lotus 1-2-3 spreadsheet menu, highly fanciful names, sets of arbitrary codes that serve the same designating function as names, and plaintiff's phonebook listings in *Feist*.

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