

Levels of Expression

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The threshold for copyright protection is famously low, ostensibly because courts are not appropriate judges of aesthetic value. But there is a line, and while it is a rare work that is denied copyrightability entirely, the line-drawing problem often arises in the context of infringement claims. The current method courts use to determine the copyrightability of many works focuses almost exclusively on choices, perhaps as few as one or two. Courts have thus found infringement of nine pitching matchup headings, five-digit dental procedure reimbursement codes, the price of last week's coins, the price of next month's cars, the part number for a screw, four-digit telephone system command codes, football scout ratings, and five-digit hard drive error thresholds. What all these cases and more have in common is conflation between the copyright in the assembled compilation and the copyrightability of a particular component part, with the part inheriting properties from the whole. This calls for a "levels of expression" analysis focusing on the creativity invested in the allegedly copied material, and not the creativity that might have been invested in the entire package. Distinguishing levels of expression will be key for determining the copyrightability of AI-generated works going forward.