

Personality as a Condition for Copyright Protection

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Through both legislation and court decisions, the articulation of the aspects of a work entitled to copyright protection has evolved from an enumeration of categories of subject matter to a broad formulation limited only by the Constitution plus a list of what is excluded. Once copyrightable subject matter was released from the bounds of certain proscribed categories of subject matter, courts devised various tests for excluding an aspect of a work from copyright protection: no protection for ideas, no protection for expression that has merged with the idea, no protection for expression when the expression is limited by external circumstances, no protection for functional aspects, no protection for facts simply presented. However, underlying all of these exclusionary formulations is a fundamental feeling that the work lacks something. Despite the attempts at doctrinal consistency in such decisions, it would be more accurate to say that they have served to expose the lack of guidance in the law. Whether the work is not entitled to copyright protection because choices were limited or because it was not original enough, what the work lacks is a sense of the personality of the author, of human subjectivity. A positively formulated test of “personality” is constitutionally justified and practically necessary to put any effective limit on what copyright protects and insure that copyright protection for functional aspects of functional works, particularly in areas of new technology such as computer software and biotechnology, does not stifle competition.