



**SCHOOL OF LAW**  
TEXAS A&M UNIVERSITY

Texas Wesleyan Law Review

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Volume 4 | Issue 1

Article 3

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10-1-1997

## The Mighty Morphin Ninja Mallard: The Standard for Analysis of Derivative Work Infringement in the Digital Age

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### Recommended Citation

Timothy E. Nielander, *The Mighty Morphin Ninja Mallard: The Standard for Analysis of Derivative Work Infringement in the Digital Age*, 4 Tex. Wesleyan L. Rev. 1 (1997).

Available at: <https://doi.org/10.37419/TWLR.V4.I1.1>

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# THE MIGHTY MORPHIN NINJA MALLARD: THE STANDARD FOR ANALYSIS OF DERIVATIVE WORK INFRINGEMENT IN THE DIGITAL AGE

*Timothy Everett Nielander†*

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## INTRODUCTION

On the continuum between an exact reproduction of protected property, and the creation of an original work, lies a gray zone. This zone is a mixture of protected works—printed art, art on digital media, digital and analog music, and other works recognized as deserving intellectual property protection—that can be mixed and matched with other works to create new works. American law recognizes protection of this form of copying as *derivative rights*.<sup>1</sup> The question becomes, how do courts determine when the character of a work contains enough prior copyrighted material such that it violates a derivative right. Further, with the ease of access afforded by the Internet to protected works,<sup>2</sup> and the concomitant ease of digital manipulation of those works, what standard will courts apply in determining when a work violates derivative law. Digital manipulation raises a fundamental issue with respect to the infringement of an author's exclusive right to prepare derivative works based on preexisting copyrighted materials. Such is the nature of our example in the *Ninja Mallard*.

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1. See 17 U.S.C. § 101 (1997) (Copyright Act of 1976). The definition section of the Copyright Act states:

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

*Id.* Derivative rights protection is found in section 106 of the Act, which states: Subject to sections 107 through 120, the owner of [a] copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare *derivative* works based upon the copyrighted work

*Id.* § 106 (emphasis added). Historical and statutory notes to section 106 in the U.S.C.A. state that, "[t]o be an infringement, the 'derivative work' must be based upon the copyrighted work." 17 U.S.C.A. § 106 (West 1997). The notes further explain that

The exclusive right to prepare derivative works . . . *overlaps* the exclusive right of reproduction to some extent. It is a *broader* right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as [a performance], may be an infringement even though nothing is ever fixed in tangible form.

*Id.* § 106 (emphasis added).

2. For more information on the Internet and its operation, see Kevin M. Faulkner, Comment, *Personal Jurisdiction in Texas and Internet Web-Sites*, 4 TEX. WESLEYAN L. REV. 31 (1998) (this volume) (discussing web-sites on the Internet, how they are accessed by users, and the implications for obtaining personal jurisdiction over the owner/creator of a web-site). Most of the cases discussed in the *Web-Sites* Comment are actions based on trademark violations. See *id.*

### A. *The Duckbill Turtlepus*

Orbiting the globe in cyberspace,<sup>3</sup> an aspiring multi-media mogul cultivates an affection for certain turtles. He dials up a video clip of a movie featuring the “Teenage Mutant Ninja Turtles.”<sup>4</sup> They are known and loved by kids throughout the world. The Turtles are radical “dudes” who battle nefarious criminals, ride skateboards, eat pizza, and live “large” in an underground storm-sewer hideout. Our net-surfing artist downloads the clip onto the hard-drive of his computer, and continues to maneuver his trusty mouse.

Further prowling locates a documentary illustrating the historic development of the Disney empire. One portion features an animated Donald Duck performing a little dance, and soon a digitized image of Donald slips with a hum onto the hard-drive.<sup>5</sup> Momentum is building as the artistic vision begins to crystallize. The young movie producer hopeful loads up a morphing program<sup>6</sup> and grabs a cool, iced espresso.

First, he calls up the image of Donald Duck and “morphs” the image of a Ninja Turtle together with Donald. The result is reminiscent of a duckbill platypus,<sup>7</sup> rather like a duckbill turtlepus. Next, he changes the shape of a skate board, from the “Turtle’s” movie clip, to look like a small surfboard; then he “paints” a nice stripe of feathers down the shell to blend in with Donald’s wagging tail.<sup>8</sup> The *Ninja Mallard* is going to love pizza as well—it is a nice touch, with some advertising possibilities. The artist envisions the turtlepus ordering a

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3. “Cyberspace” is a derivation of the word “cyberkinetics,” which refers to the study of human neural network control systems. The etymological origin for the word is found in the Greek—*kybernetes*—meaning helmsman. Cyberspace refers to the realm of computer networks that are navigated by computer surfers. See WILLIAM GIBSON, *NEUROMANCER* (1984) (creating a new genre of science fiction called cyberpunk). The term “cyberspace” is often used to refer to the Internet (the Net), described below. See *infra* text accompanying notes 18-25.

4. See app. I. The Ninja Turtles are the imaginative expressions of Kevin Eastman and Peter Laird, cartoonists who created a story about four turtles, Raphael, Donatello, Michelangelo, and Leonardo. See *TEENAGE MUTANT NINJA TURTLES: THE SHREDDER IS SPLINTERED* (Mirage Studios, U.S.A. 1987).

5. See app. II.

6. Jeff Prosize, *Morphing: Magic on your PC*, PC MAG., June 14, 1994, at 325, available in 1994 WL 2836885. Morphing software allows distinct images to be digitally merged and manipulated. See *id.*

7. See app. III. The duckbill platypus is an egg laying mammal that lives in burrows along streams in Australia and Tasmania. The platypus feeds at night on crayfish, worms, and insects and resembles a beaver/duck mixture. See *ENCYCLOPEDIA AMERICANA, INTERNATIONAL ED.* (1994), s.v. “platypus.”

8. New graphic software places a skillful electronic paintbrush in the hands of any would be artist. See Arie Moller, *Corel and Xara Team Up to Create a Picture-Perfect Illustrator*, PC MAG., Mar. 12, 1996, at 48, available in 1996 WL 2091874. New graphics software allows computer artists great latitude in morphing, detailing, and manipulating on the scale of 15,000 dots per inch. The Corel/Xara program provides “10,000 clip-art images, 500 photos, 250 textures, and 500 TrueType and Type 1 fonts, as well as digital movies that demonstrate many of the program’s features.” *Id.*

special of crayfish, duckweed and dragonfly crunchies. All food will be washed down with a characteristic "iced espresso."

Background scenery is lifted from an online photograph that advertises vacations in scenic Hawaii, and from digitized images of Gauguin paintings that portray an idyllic Tahitian paradise.<sup>9</sup> Color schemata are altered to create a neon landscape. Gauguin's maidens are dutifully clothed in samples of Jean Paul Gaultier cyberwear,<sup>10</sup> transformed from *Firstview*, an online fashion magazine that displays up-to-the-minute haute couture.<sup>11</sup>

The *Ninja Turtles'* sound track is isolated, streaming through the computer so that the *Ninja Mallard's* voice is slightly modified to blend in characteristics of Hawaiian surfer-speak. The young artist plugs a compact disk ("CD") into his ROM drive,<sup>12</sup> and records "Bouncing 'Round the Room"<sup>13</sup> onto his hard-drive. He then takes a digital sample<sup>14</sup> of the melody from the refrain and adds a Polynesian drum beat. At sundry times, when excitement runs high, the *Ninja Mallard* will splash and shout, "I feel like bouncing 'round the room."

The "turtlepus superhero" will use surfboards to chase copyright pirates across a neon sea. The dialogue will be smart and aimed at technically-minded college students who enjoy travel and island-hopping. One planned episode may star the digitally reanimated Marilyn Monroe.<sup>15</sup> The first *Mighty Morphin Ninja Mallard* multi-media<sup>16</sup> extravaganza is loaded and released onto the Internet, where it creates a

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9. See generally ENCYCLOPEDIA AMERICANA, INTERNATIONAL ED. (1994), s.v. "Gauguin." Paul Eugene Henri Gauguin (1848-1903) French Post-Impressionist painter who spent extensive time in the South Seas. Material is borrowed from various works, including "Where Do We Come From? Who Are We? Where Do We Go?" [sic] (1897). See *id.* A curator of the Kimbell Art Museum, Fort Worth, Texas, indicated that the actual name of the painting is *Where Do We Come From, What Are We, Where Are We Going?*

10. Mark Dery, *Uplist*, VIRTUAL CITY, Fall 1995. The *Virtual City* on-line magazine is now defunct, but the *Uplist* can be obtained from <markdery@well.com>. Gaultier's new line features "instrument-panel breastplates and jackets emblazoned with wiring diagrams." *Id.* The original breastplate design is found on the Internet at <http://www.firstview.com>.

11. See *The Latest Fashion: Runway Designs on the Internet*, WASH. POST, Mar. 22, 1996. *Firstview* has nearly 100,000 connections a day, and features the work of 100 designers. The online magazine is a "counterfeiter's dream come true." *Id.*

12. A "ROM" (Read Only Memory) drive is a device either built into a computer or remotely attached to the computer that can "read" the signals stored on a compact disk but cannot write to the disk.

13. A fine song by a band called Phish. PHISH, *Bouncing 'Round the Room*, on THE LAWN BOY (Electra Records 1996).

14. Digital sampling refers to the isolation of digitized portions of sound recordings that have converted analogue sounds into binary code. When a portion is severed it can be rearranged and recombined with other sounds. See Randy S. Kravis, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and its Copyright Implications*, 43 AM. U. L. REV. 231, 237-38 (1993).

15. Ms. Monroe was recently digitized and put to work in an advertisement for Chanel No. 5 fragrance. See Dery, *supra* note 10. For more analysis on digital advertising and its implications for copyright law, see Joseph J. Beard,  *Casting Call at Forest*

cult following. The publication of a "zine"<sup>17</sup> is planned to pitch potential *Ninja Mallard* accessories like colorful scuba gear, surf-wear, and espresso cups.

### B. Enter the Digital Age

Welcome to the brave new world of digital artistry. In this world every "home is potentially a video conferencing center, every independent film maker is potentially a widespread broadcaster, every business is potentially a global marketer."<sup>18</sup> In the near future, "novelists, musicians, and even film makers will choose to distribute through the Web."<sup>19</sup> These newly created digitized works will consist of sound, text, and visual works converted into numeric code that can be deciphered by a computer. The code is a series of ones and zeroes that can be manipulated and interpreted by software to suit the needs of the user.<sup>20</sup> This format provides for the transformation and retransmission of information.<sup>21</sup>

The "cyberwave" will engulf us. One need not fully understand its mechanics to appreciate its impact. William Gibson's futuristic novel, *Neuromancer*, brought cyberspace conceptually to life.<sup>22</sup> In Gibson's world, the Boston-Atlanta Metro Area is one vast sprawl of commerce and popular culture served by the "Matrix," a global computer network that links everyone, everywhere, to everything.<sup>23</sup> Today, there is a non-fictional computer network called the Internet that now

*Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law*, 41 J. COPYRIGHT SOC'Y U.S.A. 19 (1993).

16. See generally MICHAEL D. SCOTT, MULTIMEDIA: LAW & PRACTICE (1993). Scott defines multimedia as "a form of computer software that combines two or more of the following: video, audio, photographs, text, graphics, animation, and computer programs, stored in digital form on magnetic or optical media which can be displayed on a video display screen and with which the user can interact." *Id.* § 1.01 at 9.

17. Steven Levy, *How the Propeller Heads Stole the Electronic Future*, N.Y. TIMES MAG., Sept. 24, 1995, at 59 (explaining that a "zine" is a self-published magazine available on the Internet).

18. *Id.* Although high-quality, real time, on-line video delivery services may not be available for a couple of years, many tools useful in the manipulation of digitized materials are currently available. See also Lucien Rhodes, *The Race for More Bandwidth*, WIRED 4.01, Jan. 1996, at 140-42.

19. Levy, *supra* note 17. The term "Web" is a frequently used short-hand version of "The World Wide Web," a subset of the Internet. See *infra* note 25.

20. See BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 186 (1995) [hereinafter TASK FORCE REPORT].

21. See Michael D. McCoy & Needham J. Boddie, II, *Cybertheft: Will Copyright Law Prevent Digital Tyranny on the Superhighway?*, 30 WAKE FOREST L. REV. 169, 174-75 (1995) (explaining that there is very little loss of quality in mass reproduction of digital works, therefore, nearly perfect copies of a work can be delivered to millions of users around the globe).

22. See generally GIBSON, *supra* note 3 (coining for the first time the word "cyberspace" to capture the concept of the virtual universe alive inside computer networks).

23. See *id.*

spans the globe.<sup>24</sup> The number of people connected to the Internet, and its subset, the World Wide Web,<sup>25</sup> is growing exponentially.

Although the Internet seems daunting, it turns out that it is considered to be only a building block for a future Global Information Infrastructure ("GII").<sup>26</sup> The GII will consist of an "integrated broad band digital communications system" that will link computers, televisions, telephone lines, fax machines and radios.<sup>27</sup> A prominent feature of the GII will be the communicator's capacity to interact with and manipulate transmissions of information originating in every medium.<sup>28</sup> Digitalization makes this possible.<sup>29</sup>

In 1993, President Clinton organized an Information Infrastructure Task Force to analyze the intellectual property issues brewing on the Internet.<sup>30</sup> The scope of protection for copyrighted materials is an issue of major debate.<sup>31</sup> Digital manipulation raises a fundamental is-

24. See generally RICHARD J. SMITH & MARK GIBBS, *NAVIGATING THE INTERNET* (1994). The Internet connects hundreds of smaller networks that are operated throughout the world. It grew out of a department of defense experiment called ARPANET, which was designed to create a flexible network for military communication purposes, thus circumventing interruptions in the event of electronic failure. See *id.* at 4-5.

25. See *id.* at 11-12. The World Wide Web is an information storage system that links resource centers around the world. Programs which browse the World Wide Web allow highlighted words or icons, called hyperlinks, to display text, video, graphics and sound on a local computer screen, no matter where the resource is located. See *id.*

26. See Levy, *supra* note 17, at 59 (stating that standard communications protocols used on the Internet make it a foundational key to building a global communications system). See also Donald Marchand, *Mastering Management—Part 9: The Information Infrastructure—Promises and Realities*, *THE FIN. TIMES*, Jan. 5, 1996, at VIII, available in 1996 WL 6135498. The author notes that the

GII is increasingly seen as a "network of networks" where it is important to be able to operate seamlessly between networks and among diverse media such as digital voice, data, text, images and sound. This capability is critical in seeking industry standards for interconnection and the transfer of content over diverse networks.

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It will emerge differently in various countries and regions of the world and will be strongly influenced by trading cultures and local opportunities for business and economic development.

*Id.*

27. See TASK FORCE REPORT, *supra* note 20, at 8. See also Rhodes, *supra* note 18, at 142 (discussing research and development currently underway to use coaxial cable, the kind used to deliver cable television, to provide Internet access—for "head-snapping delivery of graphics, animations, sound files, even movies").

28. See Levy, *supra* note 17, at 58 (noting that the Internet is "based on unlimited channels of communication, community building, electronic commerce and a full-blown version of interactivity that blurs the line between provider and consumer").

29. See *infra* Part IV.B. (discussing digitization).

30. See TASK FORCE REPORT, *supra* note 20, at 1.

31. See *id.* at 14-15. The National Information Infrastructure will be a driving force in dissemination of information and cultural works. See *id.* at 7-8. Some have suggested that "cyberspace" is a "sovereignty unto itself" not subjected to law; how-

sue with respect to the infringement of an author's exclusive right to prepare derivative works based on preexisting copyrighted materials.<sup>32</sup> For example, a digitized image can be manipulated so that it bears little resemblance to the original work.<sup>33</sup> Already, owners of works are complaining that "binary buccaneers" are snapping up "texts of novels, poems, song lyrics," and everything from *Playboy* centerfolds to pictures of Winnie the Pooh.<sup>34</sup> The exclusive right to reproduce the work may be violated when a copyrighted item is originally copied into a computer memory; but the standard for protection of the author's right to create derivative works in the digital context has not yet been articulated.<sup>35</sup>

The Internet will provide a rich culture primed for explosive growth in creation of derivative works.<sup>36</sup> Distinct aspects of a work can be severed, manipulated, recombined, and shipped globally through the Internet.<sup>37</sup> A workable test for finding infringement of an author's exclusive right to create derivative work in digitized materials is essential for solving problems that will arise on the Internet.<sup>38</sup>

The hypothetical *Ninja Mallard* work provides a framework for applying a proposed standard of infringement to various types of digitized works. Part II of this Article outlines the historic development of derivative rights jurisprudence. Part III frames the current standard for establishing infringement of the exclusive right to prepare derivative works. Part IV submits a new standard for finding infringement of the exclusive right to prepare derivative works. Part V applies this standard to the *Ninja Mallard* work and reflects on recent cases that implicate the need for a refined standard. Part VI contemplates the utility of the proposed standard in light of the balance of

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ever, the Report notes that "computer network transmissions" possess no qualities which exempt compliance with copyright law. *Id.* at 11.

32. See 17 U.S.C. § 106(2) (1994) (providing for an author's exclusive right to prepare derivative works based upon the copyrighted work).

33. See TASK FORCE REPORT, *supra* note 20, at 106-07.

34. James Coates, *On Internet, Copyrights are Easy Prey for a Thief's Hungry Mouse: Digital Revolution Outpaces the Law*, CHI. TRIB., Jan. 21, 1996, (Business), at 1.

35. See TASK FORCE REPORT, *supra* note 20, at 107. The report notes that "courts traditionally rely on a 'substantial similarity' test to determine infringement [of] derivative right[s]." *Id.*

36. See Melinda Wittstock, *New Tunes from Old Copyrights*, TIMES OF LONDON, Jan. 4, 1990, (Business) (explaining that entrepreneurs during the next decade will re-exploit dormant copyright creations like cartoons, plays, films, music and books by the application of digital manipulation technology).

37. See Mathew Horsman & Mike Holdness, *Copyright Crashes on the Superhighway*, THE INDEPENDENT, July 11, 1995, at 16-17. Content "whizzes across political boundaries, digitized, manipulable, [and] ephemeral." *Id.*

38. This Article focuses on the copyright holder's right to create derivative work. There is a distinction between the author's right to create derivative works, and the extent of the rights possessed by the lawful creator of a derivative work. For discussion of the latter issue see Ralph Brown, *The Widening Gyre: Are Derivative Works Getting Out of Hand?*, 3 CARDOZO ARTS & ENT. L.J. 1 (1984).



interests inherent in copyright law. The Article concludes that broad protection of the distinct expressive characteristics in works of authorship will promote the creation of new original work.

## I. HISTORIC DEVELOPMENT OF PROTECTION FOR DERIVATIVE WORKS

### A. *Competing Copyright Theories and Derivative Rights*

The United States Constitution enshrines copyrights in order “[t]o promote the Progress of Science and the useful Arts.”<sup>39</sup> The law of copyright provides an incentive that is designed to promote creative expression, while at the same time making works available for the “public good.”<sup>40</sup> This balance of interests exemplifies the tension between the natural rights theory of copyright and a utilitarian theory of copyright.<sup>41</sup>

One school of thought advances the theory that copyrights are natural rights that provide extensive authorial control over creative expressions; while the opposing view contends that copyright protection is only justified as policy, designed to make works available to the public.<sup>42</sup> Although the Supreme Court has consistently referred to copyrights in utilitarian terms,<sup>43</sup> a natural rights premise has arguably been the primary basis for the legislative expansion of authorial rights in American law from 1790 to the present.<sup>44</sup>

The expansion of derivative rights protection in American law illustrates the balance of interests that exemplify the competing theories. One way to contrast the competing normative premises follows: An author should have broad control over subsequent transformation of original creative expression; society ought to have less restricted ac-

39. U.S. CONST. art. I, § 8, cl. 8.

40. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994).

41. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993) (arguing that public values are seen as a “fundamental human entitlement” which limits authorial rights).

42. See, e.g., Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 *CHIKENT L. REV.* 609 (1992); Barbara Friedman, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 *CARDOZO ARTS & ENT. L.J.* 157 (1994); Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 *COLUM. L. REV.* 1865 (1990); Gordon, *supra* note 41; Pierre N. Leval, *Fair Use or Foul?*, The Nineteenth Donald C. Brace Memorial Lecture, Delivered at New York University Law Center (April 25, 1989), in 36 *J. COPYRIGHT SOC’Y U.S.A.* 167 (1989).

43. See *Feist Publication, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating that the primary purpose of copyright law is to promote progress, not to benefit authors); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (stating that the public benefit is the purpose for extending the monopoly); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating that the public good is advanced by rewarding authors).

44. See Gillian K. Hadfield, *The Economics of Copyright: A Historical Perspective*, *COPYRIGHT L. SYMP. (ASCAP)*, No. 38, 1, 11 (1988).

cess to original expression for use in subsequent works. Over time, as technology enlarged the benefit to the public through greater access to works of authorship, a corresponding fortification of legal protection for transformed works has followed.

### B. *Development of Statutory Protection for Derivative Rights*

Common law analysis of infringement claims strictly construed the purpose of copyright as protection against mechanical “copies”<sup>45</sup> and, as a result, piracy<sup>46</sup> was found only in works that were verbatim copies. English courts concluded that the “law’s proper concern was with literal copies rendered in the same medium.”<sup>47</sup> Derivative rights were non-existent, as the focus was on the publisher’s existing market rather than on the author’s potential markets.<sup>48</sup>

Early American jurisprudence followed this approach. In *Stowe v. Thomas*,<sup>49</sup> the Pennsylvania Circuit court denied Harriet Beecher Stowe relief against a publisher who printed a German translation of her novel, *Uncle Tom’s Cabin*.<sup>50</sup> The court’s conclusion followed from the premise that strict protection of mechanical copies was the aim of a copyright. This conclusion was reached without regard for the fact that Stowe had previously commissioned a separate German translation of the novel.<sup>51</sup>

The pivotal case that presaged the statutory inclusion of derivative rights was *Daly v. Palmer*,<sup>52</sup> in which the plaintiff alleged infringement of his dramatic play.<sup>53</sup> The court examined two plays, “Under the Gaslight” and “After Dark,” and found that each play featured scenes which depicted the rescue of a hapless victim from an approaching

45. See Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 212 (1982) (surveying early copyright cases); Gyles v. Wilcox, 26 Eng. Rep. 489 (Ch. 1740) (finding “real and fair” abridgements were excluded from infringement since they required some skill and the exercise of judgment); Burnett v. Chetwood, 35 Eng. Rep. 1008 (Ch. 1720) (finding an English translation of a Latin work not to establish infringement).

46. See MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 885 (10th ed. 1994). Defining piracy as “[T]he unauthorized use of another’s production, invention, or conception[,] esp. in infringement of a copyright.” *Id.*

47. Goldstein, *supra* note 45, at 210-11.

48. The Statute of Anne protected the right to “print, reprint, or import” books. Act for the Encouragement of Learning 1710, 8 Anne, ch. 19 (Eng.). Authorial rights were often assigned to the publisher. See Hadfield, *supra* note 44, at 8-9.

49. 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).

50. See *id.* *Uncle Tom’s Cabin* was originally published serially in the NATIONAL ERA, an antislavery paper. In 1852 it was published as a book. The following year Stowe travelled to England to speak out against slavery and discovered a European market for her work. See ENCYCLOPEDIA AMERICANA, INTERNATIONAL ED. (1994), s.v. “Stowe, Harriet Beecher and Uncle Tom’s Cabin.”

51. See Goldstein, *supra* note 45, at 213.

52. 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552).

53. See *id.* at 1132.

train.<sup>54</sup> Rather than strict analysis for a possible reproduction violation of the plaintiff's written text, the court analyzed this claim in terms of the plaintiff's right to authorize performance of the play and found that this right had been infringed by the performance of the defendant's play.<sup>55</sup> Since the defendant's play conveyed the same *characteristic impressions* and excited the *same emotions*, the market for the plaintiff's work was diminished.<sup>56</sup> This was an early recognition of the creator's right to recast an expressive creation in a different medium.

The first congressional grant of protection for derivative rights was issued in the 1870 Copyright Act, providing that "authors may reserve the right to dramatize or to translate their own works."<sup>57</sup> This amendment was influenced in part by the decision in *Stowe*.<sup>58</sup> The Act of 1870 also extended the right of derivative works to include arrangements and adaptations of musical works.<sup>59</sup>

The 1909 Copyright Act added the right to translate a copyrighted work into other "languages and dialects."<sup>60</sup> Protection extended to adaptations of literary works and for works produced to exploit new technologies.<sup>61</sup> The 1976 Copyright Act extended the protection of derivative rights to all forms of copyrighted works, including technological works.<sup>62</sup> The 1976 Act contains flexible terms designed to endure technological change.<sup>63</sup>

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54. *See id.* at 1133.

55. *See* Goldstein, *supra* note 45, at 213. The right to publicly perform dramatic compositions had been added to copyright statutes in the Act of August 18, 1856. This allowed the court to consider the market effect of the competing play, in contrast to the more rigid analysis of infringement that focused on slavish reproductions. *See id.* at 214.

56. *See id.* at 214.

57. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (1870).

58. *See generally* *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that a book written in English and translated into German was not an infringement of the copyright, stating that "[a] mere or bare translation [of a book], even though spirited, if it be so, calls for no creation on the part of the translator."). *Stowe* and its impact on the congressional decision to extend derivative rights is discussed further in L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS RIGHTS* 77 (1991).

59. *See supra* note 57.

60. Copyright Act of 1909, Pub. L. No. 349, § 1(b), 35 Stat. 1075 (1909) (amended 1976).

61. *See id.* In spite of expanding protection, certain types of works generated by new technology were occasionally excluded from copyright protection by the Court. After the 1891 Berne Convention, the Act of March 3, 1891 was passed by Congress. *See White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908). The United States Supreme Court found that a piano roll could not infringe on a copyrighted song, since the piano roll was "read" by a machine, it was excluded from the 1891 Act. *See id.*

62. *See* 17 U.S.C. § 106(2) (1994) (establishing an exclusive right to "prepare derivative works based upon the copyrighted work"). *See also supra* note 1.

63. *See* H.R. REP. NO. 94-1476, at 53 (1976) (stating that copyright law is to be flexible and broad in light of new technologies).

### C. *Historic Distinction Between Reproduction Rights and Derivative Rights*

The incremental addition of derivative rights to copyright law illustrates an important historical distinction between the reproduction right and the right to create derivative works. The original purpose of the reproduction right was to prevent illicit verbatim copies of complete works.<sup>64</sup> When a work was pirated and copied in the same medium and subsequently placed on the market to compete with the original, the reproduction right was violated.<sup>65</sup> In contrast, the purpose for the historic expansion of derivative rights was driven by the need for prospective protection of the right to incorporate expressive content from a *preexisting* work into a *transformed* work, that was created for use in a different medium or market.<sup>66</sup> The distinction between the exclusive right of reproduction and the right to prepare derivative works has been assailed as of late, by commentators and courts alike.<sup>67</sup>

### D. *Eroding Value of Derivative Rights Protection*

An important commentator on the subject of intellectual property rights suggests that derivative rights are nearly identical to reproduction rights. The comprehensive *Nimmer on Copyright*<sup>68</sup> treatise proposes that the derivative right “may be thought to be *completely superfluous* because under the section 101 definition of a derivative work, it must be ‘based upon one or more pre-existing works.’”<sup>69</sup> It is posited that, since material is used from a preexisting work, the reproduction right must be infringed before the author’s derivative rights are transgressed.<sup>70</sup> In other words, the individual parts must, standing alone, be enough of a copy to infringe the reproduction right, thus melding the concepts of *derivative* rights and *reproduction* rights. This conclusion is based on the premise that a “work is not derivative un-

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64. See Goldstein, *supra* note 45, at 212 (explaining that copyright protection was applied to prohibit the sale of pirated copies of entire works so that early English common law contained an aversion for finding a violation of the right to reproduce copies when the work was slightly altered, as in the case of an abridgement).

65. See *id.*

66. See *id.* at 217 (positing that a derivative work is created when “the contribution of independent expression to an existing work effectively creates a new work for a different market”).

67. See *infra* Part I.D.

68. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (1995) [hereinafter NIMMER ON COPYRIGHT].

69. 2 NIMMER ON COPYRIGHT, *supra* note 68, § 8.09[A], at 8-127 to 128.4 (emphasis added) (citing *Twin Peaks Prods., Inc. v. Publications Int’l*, 996 F.2d 1366, 1373 (2d Cir. 1993)).

70. See *id.* (finding that the limited exception to this is a performance where no copy is made in a tangible medium of expression).

less it is *substantially* copied from a prior work.”<sup>71</sup> This inadvertent fallacy assumes the conclusion in its premise: A derivative work will necessarily be substantially similar to the preexisting work, and will thus violate the exclusive right of *reproduction*. This concept has been echoed in leading cases determining the scope of derivative rights protection.<sup>72</sup>

However, there is no statutory requirement that a derivative work be considered a “copy” of the original work;<sup>73</sup> nor is there a requirement that it be substantially similar to an original work.<sup>74</sup> In fact, a derivative work must only be “based upon one or more preexisting works.”<sup>75</sup> Furthermore, a derivative work can be based on expressive elements that originate in several different preexisting works.<sup>76</sup> Discrete elements of the preexisting work may be used as building blocks for a “recast, transformed or adapted” work.<sup>77</sup> This follows from the historical distinction between reproduction rights and derivative rights, because a derivation would not necessarily incorporate the entire original work, or even a substantial part thereof.<sup>78</sup> Thus, under Nimmer’s characterization, derivative rights find little protection. Works that can be found on the Internet, an easily accessible medium, will find little protection unless a standard is adopted that comports with the plain language of the Copyright Act of 1976.

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71. 1 NIMMER ON COPYRIGHT § 3.01, at 3- 2 to 4. The authors go on to explain that derivative rights are superfluous in light of the existence of reproduction rights, since you must have the latter to have the former. *See id.* “Put another way, a work will be considered a derivative work only if it would be considered an infringing work [and] if the material that [is] derived from a pre-existing work had been taken without the consent of a copyright proprietor of such pre-existing work.” *Id.*

72. *See Lee v. A.R.T.*, No. 96-2522, 1997 WL 577727, at \*2 (7th Cir. Sept. 18, 1997) (citing Nimmer in support of the proposition that “originality” is essential to a derivative work); *Litchfield v. Speilberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (citing Nimmer in support of the proposition that “substantial similarity” must be shown in order to state a claim for copyright infringement under 17 U.S.C. § 106(2) (1982)); *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976) (distinguishing the copying of a sound recording as a copyright infringement, as opposed to “production of a ‘substantially similar’ work without any actual sound duplication,” and stating that Nimmer would find the latter a “mere imitation,” and not violative of copyright law).

73. *See* 17 U.S.C. § 101 (1994) (defining a derivative work); *supra* note 1.

74. *See* TASK FORCE REPORT, *supra* note 20, at 107.

75. 17 U.S.C. § 101.

76. *See id.* A sequel may build on distinct characteristics of several preexisting works. *See id.*

77. *Id.*

78. *See* H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5657, 5675 (revealing that the historic distinction is maintained, with some overlap, in the 1976 Copyright Act between an infringing derivative work which will incorporate a “portion” of a preexisting work, and an infringing reproduction which exists when a work is copied “in whole or in any substantial part”).

## II. CURRENT STANDARD FOR PROTECTION OF DERIVATIVE WORKS

### A. *Substantial Similarity as Applied to Reproduction Violations*

Historically, before derivative rights were recognized, the reproduction right was interpreted broadly enough to discern infringement when a similar version of a subsequent work had essentially reproduced the whole, original work. This has become known as the “substantial similarity” test.<sup>79</sup> Various tests for establishing “substantial similarity” to reproduction rights have been applied in the circuit courts.<sup>80</sup>

The evolution of this standard in the Ninth Circuit, where several leading cases on substantial similarity have originated, grew from *Roth Greeting Cards v. United Card Co.*<sup>81</sup> In that case, the court looked for “substantial similarity” in the “total concept” and “feel” of competing greeting cards.<sup>82</sup> The standard was further elucidated in *Sid & Marty Krofft Television Productions v. McDonald’s Corp.*,<sup>83</sup> when the court examined an advertising campaign that borrowed extensive characteristics from a popular children’s television production.<sup>84</sup> The court relied on the “total concept and feel” standard in *Roth* to develop an “extrinsic-intrinsic” test to establish substantial similarity in underlying ideas and in expressive characteristics.<sup>85</sup>

Since the reproduction right has been interpreted as coextensive with the right to prepare derivative works, courts have wrestled with cases that arise in the context of transformed works.<sup>86</sup> Some courts simply avoid the issue of whether an infringing work violates reproduction rights or derivative rights, in favor of a more generalized analysis of “infringement.”<sup>87</sup> However, when the issue is directly

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79. See generally 4 NIMMER ON COPYRIGHT, *supra* note 68, § 13.03[A], at 13 -27 to 29 (discussing fully the variations on the substantial similarity test).

80. See *id.* Tests include the following: (1) the “abstractions test,” (2) the “pattern test,” and (3) the “total concept and feel” standard. *Id.*

81. 429 F.2d 1106, 1110 (9th Cir. 1970).

82. See *id.*

83. 562 F.2d 1157 (9th Cir. 1977).

84. See *id.* at 1161-62.

85. See *id.* at 1167. But see *Shaw v. Lindheim*, 908 F.2d 531 (9th Cir. 1990) (modifying the extrinsic-intrinsic test to focus only on the expressive qualities in a work).

86. See *Twin Peaks Prods. v. Publications Int’l*, 996 F.2d 1366, 1373 (2d Cir. 1993) (finding that it was “unnecessary” for the district court to establish a derivative rights violation since it was “superfluous” in light of the reproduction right); *Vault v. Quaid Software Ltd.*, 847 F.2d 233, 267 (5th Cir. 1988) (finding that even though 30 critical characters of source code had been copied from a total of 50 pages of code, this was quantitatively too small to establish substantial similarity). See also *Schmidt v. Holy Cross Cemetery, Inc.*, 840 F. Supp. 829 (D. Kan. 1993) (confusing derivative rights with reproduction rights when examining a slavish copy of a cemetery plat plan).

87. See *Bèrkic v. Crichton*, 761 F.2d 1289 (9th Cir. 1985) (analyzing a claim that a movie infringed a preexisting screenplay through generalized discussion without reaching the question of whether derivative rights were involved); *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1980) (finding that a book containing text and photo-

addressed, the trend is to look for substantial similarity between the preexisting work and the alleged infringing derivative work.<sup>88</sup>

### B. Substantial Similarity Applied to Derivative Works

A leading case on the application of the "substantial similarity" test to derivative works is *Litchfield v. Speilberg*.<sup>89</sup> The Ninth Circuit relied on *Krofft* and the Nimmer Treatise,<sup>90</sup> and concluded that the standard for infringement of the reproduction right applied equally to infringement of derivative works.<sup>91</sup> The court examined similarities between a one-act musical play, *Lokey From Maldemar*, and the movie, *E.T. The Extra-Terrestrial* ("E.T.").<sup>92</sup> The plaintiff, a playwright, claimed that E.T. was a derivative work as defined in section 106(2) of the 1976 Copyright Act.<sup>93</sup> The court noted that the limited amount of authority on the issue of derivative works suggested that a work will not be considered derivative "unless it has been substantially copied from the prior work."<sup>94</sup> The court moves from this premise to the conclusion that infringement of the right to prepare

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graphs describing a choreographed New York Ballet Production of "The Nutcracker" is infringing, without discussing which exclusive right was implicated); *Elsmere Music, Inc. v. N.B.C.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (without discussing whether the reproduction right or derivative right was potentially infringed, the court found that four notes and two words lifted from the advertising jingle "I Love New York" was fair use).

88. See *Litchfield v. Speilberg*, 736 F.2d 1352 (9th Cir. 1984) (holding that substantial similarity is the standard for infringement of derivative rights); *SAS Inst., Inc. v. S&H Computer Sys.*, 605 F. Supp. 816 (M.D. Tenn. 1985) (infringing work was "substantially and pervasively based" on the SAS product).

In the software context, some courts have been forced to examine progressively smaller similarities and have found trouble giving meaning to "substantial similarity." See *Computer Assocs. Int'l, v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) ("abstraction-filtration-comparison test"); *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204 (9th Cir. 1988) (using "analytic dissection of similarities"). In at least one situation the court has taken a closer look at the effect on the market of an infringing work, rather than focusing exclusively on substantial similarity for a complementary computer program. See *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1014 (7th Cir. 1983) (infringing program worked in conjunction with the "Galaxian" computer game to allow the user to speed up the rate of play). *But see Lewis Galoob Toys, Inc. v. Nintendo of Am. Inc.*, 780 F. Supp. 1283 (N.D. Cal. 1991), *aff'd*, 964 F.2d 965 (9th Cir. 1992) (stating that a computer "add-on" program which allowed user to modify performance of a game was not a derivative work, because modified game did not have an independent "fixation").

89. 736 F.2d 1352 (9th Cir. 1984).

90. See 2 NIMMER ON COPYRIGHT, *supra* note 68.

91. See *Litchfield*, 736 F.2d at 1357.

92. See *id.* at 1354-55. The movie E.T. is one of the largest grossing movies to date. See *E.T. THE EXTRA-TERRESTRIAL* (Universal City Studios, Inc. 1982).

93. See *id.* at 1357.

94. *Id.* (citing *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844, 849 (S.D.N.Y. 1982), *rev'd on other grounds*, 720 F.2d 733 (2d Cir. 1983), *cert. granted sub nom. Mills Music, Inc. v. Snyder*, 466 U.S. 903 (1984); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976); 2 NIMMER ON COPYRIGHT, *supra* note 68).

derivative works is the same as infringement of the reproduction right, and applied the “substantial similarity” test.<sup>95</sup>

The plaintiff’s play featured “Lokey” and “Fudinkle,” two adult aliens with psychokinetic powers whose spaceship lands at the North Pole. The aliens befriend a little girl, and then travel to Japan where they capsize a boat full of fishermen who kill porpoises. Finally, they meet up with a prophetic witch named “Tollie Marx” in the Andes mountains and depart earth for home.<sup>96</sup>

In contrast, E.T. is a young alien who is accidentally left behind when his scouting spacecraft leaves earth without him. The story explores the travails of E.T. as he tries to adapt to suburban Californian home life, while scientific investigators search for him. His glowing finger, and quirky behavior make him popular with the kids in the neighborhood. He ultimately eludes the investigators and returns home in his spacecraft.<sup>97</sup>

The plaintiff argued that there were “too many similarities, especially in the sequence of events and incidents leading to the climax” of the two works.<sup>98</sup> However, the court found there were no similarities to be found in the expressive characterization in the stories, and thus the “total concept and feel” of the works was completely different.<sup>99</sup>

This was a simple application of the substantial similarity standard since there were virtually no similar expressive elements in the works as compared. However, in the digital context, a test that asks whether the work is substantially similar based on the “total concept and feel” of two works may be too broad to encompass the artist’s derivative rights.

### III. PROPOSED STANDARD FOR FINDING INFRINGEMENT OF THE EXCLUSIVE RIGHT TO PREPARE DERIVATIVE WORKS

The availability of new markets driven by new technologies was a central factor in the statutory extension of derivative rights.<sup>100</sup> Distinctive aspects of a work may have potential value in a variety of markets. Professor Goldstein notes that the choice to invest money in the development of certain elements of a work is effected by the possible derivative uses for the finished product.<sup>101</sup>

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95. See *id.* (citing *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983); *Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)).

96. See *id.* at 1354-55.

97. See *id.*

98. See *id.*

99. *Id.* at 1357 (citing *Sid & Marty Krofft*, 562 F.2d at 1164). The “total concept and feel” standard was originally enunciated in *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970).

100. See *supra* INTRODUCTION.

101. See Goldstein, *supra* note 45, at 227. Professor Goldstein notes that derivative rights “also affect the *direction* of investment in copyrighted works. By spreading the



This is especially so in a digital world, because specific aspects of the expression are more easily “downloaded, altered, hyperlinked, excerpted, and combined.”<sup>102</sup> The result is that it is possible to incorporate a *portion* of a preexisting work as a building block for a later work by the use of adaptive means that renders the original work difficult to discern.<sup>103</sup> Derivative rights analysis must carefully protect the individual, distinct, expressive qualities inherent in a work.

Copyright protection extends to the original expression in a work.<sup>104</sup> The expressive characterization in a work of authorship has distinct elements<sup>105</sup> and protection should extend to cover these expressive qualities *individually*. Therefore, the legal test for finding infringement in transformed material that has allegedly incorporated material from a preexisting work should be: If a *distinct expressive characteristic* is cognizable, and if it generates the identity of the original work in the mind of the observer, there has been infringement of the author’s exclusive right to create derivative works. This distinct characteristics test would be consistent with the current analysis that courts follow. Courts regularly divide a work into ideas and expressive qualities.<sup>106</sup> For instance, a few notes can be enough to trigger the memory of an entire song.<sup>107</sup> Distinct aspects inherent in creative expression can be distinguished and protected in the same way.

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duty to pay over different markets, Section 106(2) tends to perfect the information available to the copyright owner respecting the value of its works to different groups of users.” *Id.*

102. Jiri Weiss, *Digital Copyright. Who Owns What?*, NEW MEDIA, Sept. 1995, at 38.

103. See TASK FORCE REPORT, *supra* note 20, at 107.

104. See 17 U.S.C. § 102(b) (1994) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”).

105. Aristotle is instructive on this point. In the treatise on *Metaphysics*, Aristotle notes that the substance or essence of a natural object is distinguishable from the accidental qualities which are descriptive of the object’s characteristics. Each object consists of a changeless underlying substance and the accidental attributes which are subject to change. In an analogy to the idea/expression distinction—the “idea” is something which is so basic to the world as we experience it, that it cannot be the proper subject of copyright. In contrast, the expressive characteristics of a work of authorship give it particularity. Such characteristics include quantity, quality, relation, place, chronology, time, position, state, action, mood, temperament, color, pace, and the like. The use of characteristics in the portrayal of an “idea” provide the originality required for copyright protection. See HARVARD CLASSIC COLLECTION, BOOK VII, ARISTOTLE: ON MAN IN THE UNIVERSE 24-29 (John Henry MacMahon trans., Louise Ropes Loomis ed., 1943) [hereinafter ARISTOTLE].

106. See 4 NIMMER ON COPYRIGHT, *supra* note 68, § 13.03[B][2][a], at 13-59 n.140.

107. See Andrew E. Serwer, *Name that Tune for \$125,000, Jeffrey*, FORTUNE, May 29, 1995, at 20. Disney paid \$125,000 for a ten-second piece of “Hawaiian War Chant.” Disney’s Jeffrey Katzenberg tried to bargain for \$40,000 on the theory that it was an obscure piece unknown to EMI personnel. Martin Bandier of Thorn EMI proposed a deal; if he could hum a few notes of the tune, Katzenberg would pay the full fee. He hummed, they paid. See *id.*

If the force of a preexisting work is excited in an observer,<sup>108</sup> this should be sufficient to establish infringement. The focus in this context would be on the *qualitative* aspects of a work rather than the quantitative tally of expressive elements in search of substantial similarity. Characteristics should obtain a fine degree of protection where they constitute compelling copyrightable expression.

It has been asserted that a basis for infringement would be too trivial if infringement were predicated on “anything recognizable” from the author’s work that is perceived by a lay observer.<sup>109</sup> It may require a combination of elements in a work to generate its identity in the memory of an observer. The requirement that a substantial number of the aspects of the characterization be present in order to establish derivative rights infringement denies the reality that a work may have strong and independently distinct qualities.<sup>110</sup>

#### IV. APPLICATION OF THE TEST TO PROVE INFRINGEMENT

Application of a distinct characteristic test should resolve issues that arise when an artist “creates” a new work that incorporates discrete portions of underlying works, where the “total concept and feel” of the compared works do not rise to the level of “substantial similarity.”<sup>111</sup> If we accept that the *Ninja Mallard* work borrows material

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108. The “observer” issue should probably focus on an “objective observer.” However, there are problems with this approach. Different aspects of a work may have a particularized market appeal. In a movie, some may prefer one character over another. When the author showed app. III to various test subjects, those with children tended to “see” the *Ninja Turtles* as underlying the expression of the *Mallard*. Others were not familiar with the *Ninja Turtles*, but commented that the face reminded them of Donald Duck.

If we analyze a work in terms of its intended market, we assume that all the people in that market are attracted to the work for the same characteristic reasons, and we fail to consider that a transformed work may find a different market. If we focus only on what is considered by the Court to be the “heart of the work,” protection may not be adequate. It may put the fact finder in the position of predicting which elements of a work will be popular in the future.

In a world of changing cultural tastes and increasing globalization, it would be faulty to assess a work only in terms of its most currently “valuable” elements. It may be that an artist would have a difficult time establishing damages for some aspects of a work which are not “valuable” at the moment. However, if expressive characteristics appear in a subsequent work it is likely that the infringing artist found the distinctive characteristic to be of some value: perhaps a question of time or labor savings.

109. Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 192 (1994). This assertion is made in the context of the substantial similarity test as applied to traditional copyright violation cases. *See id.* If any recognizable feature of a copyrighted work could be the basis for a lay observer to find substantial similarity in the works as a whole—then it is true that the word “substantial” loses meaning. *See id.* In the context of derivative works, a single frame from a video clip could be sufficient to bring recognition and appreciation of an original work.

110. *See* ARISTOTLE, *supra* note 105.

111. *See supra* Part II.B (discussing *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984)).

from many works and meets the standard of originality for a derivative work, the question becomes whether distinctive expressive elements are cognizable in the *Ninja Mallard* production.

The purpose of the *Ninja Mallard* hypothetical is to illustrate the strengths and weaknesses of the proposed standard. Its purpose is not to set forth a "Platonic dialogue" in which the proposed problem has been so unfairly situated that it is easily defeated in all its aspects.<sup>112</sup> In order to illustrate the utility of the distinct characteristics test, the *Ninja Mallard* work will be examined against the issue of digital sampling in sound recordings, photographs, fine works of art, and video works.

### A. *Digital Sampling of Sound Recordings*

Improvements in digital compression technology will soon deliver musical works with quality as good as that currently available on CD over the Internet.<sup>113</sup> In 1993, a *Depeche Mode* CD was "e-mailed" by a disc-jockey in England to fans in the United States, before the CD was available for sale in the United States.<sup>114</sup> Many authors of musical compositions are concerned "that their music is being illegally used on line."<sup>115</sup> Music sites on the Internet are "growing rapidly, at about 38% a year."<sup>116</sup> In November of 1995, President Clinton signed the Digital Performance Right in Sound Recordings Act<sup>117</sup> into law in order to grant "copyright owners of sound recordings the right to authorize digital transmission of their works."<sup>118</sup>

The knottier problem in the realm of digitally distributed works is digital sampling. Since "[d]igital technology allows for the perfect separation of musical tracks,"<sup>119</sup> an Internet user can write a new song around portions of preexisting works. Interactive music as a form of entertainment is under development at research facilities around the

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112. See I.F. STONE, *THE TRIAL OF SOCRATES* 48-49 (1988) (explaining that Platonic dialogues are often set up in an unsporting manner to show that Plato's postulates uniformly defeat knotty problems).

113. See Robert Rice, *Business and the Law: Gunning for Pirates—The Film Industry Faces New Concerns over Copyright*, *THE FIN. TIMES*, Feb. 6, 1996, at 12, available in 1996 WL 6141912. "At the moment, the quality of images or sound taken from the Internet, the time it takes, and the cost[,] make mass reproduction un-viable. . . . [However,] the technology will develop to make illegal mass reproduction a commercial proposition . . . ." *Id.*

114. See Richard Natale, *The Net is Alive with Pirated Music*, *L.A. TIMES*, Feb. 2, 1996 (Company Town), at D4.

115. *Id.* (quoting John Shaker, senior vice president of licensing for BMI, an organization that protects the rights of song writers).

116. *Id.* at 5.

117. 17 U.S.C.A. § 101 (West 1997).

118. See Natale, *supra* note 114, at 4.

119. *Id.*

world.<sup>120</sup> This technology would allow the listener to re-mix music to his satisfaction, altering different tracks of a recording.<sup>121</sup>

Although infringement should be established when an end user re-transmits digitally sampled works, a question remains: What is the extent of liability that can be assigned to an online service, such as CompuServe, when it provides musical works to end users who revise, and subsequently transmit, the new piece across the Internet.<sup>122</sup>

In 1991, the court in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*<sup>123</sup> examined sound recording sampling issues. Three words and a small portion of the Gilbert O'Sullivan song, "Alone Again (Naturally)," were used in a Biz Markie song entitled "Alone Again."<sup>124</sup> Since the defendant had provisionally sought a license for use of the material, the court found that the defendant had knowingly infringed on the O'Sullivan copyright.<sup>125</sup> The court provided little in the way of legal analysis and did not discuss whether the offending work violated the reproduction right or the derivative works right. Substantial similarity was not addressed. Similar cases of this kind have caused the courts to look for infringement in small portions of songs that were sampled and used in subsequent works.<sup>126</sup>

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120. See David Toop, *Interactive but not Hyperactive; Multimedia*, TIMES OF LONDON, Oct. 1, 1991 (Features Section), available in 1994 WL 11542031.

121. See Christos B. Badavas, Note, *MIDI Files: Copyright Protection for Computer-Generated Works*, 35 WM. & MARY L. R. 1135, 1136-37 (1994). A Musical Instrument Digital Interface ("MIDI") "workstation can rival professional recording studios. Multitrack recording, unlimited instrumentation, and extensive error correction capabilities permit a musician of 'modest means, and limited talent to achieve remarkable results.'" *Id.* (footnote omitted). The use of a "sequencer program" can allow for the recording, synthesis, and re-recording of musical works. *See id.* at 1338.

122. See Richard Raysman & Peter Brown, *Internet Copyright Developments*, 215 N.Y.L.J. 3 (1996). The authors discuss *Frank Music v. CompuServe*, No. 93 Civ. 8153 (CSH) (S.D.N.Y. Dec. 19, 1995). CompuServe settled with Frank Music for royalties amounting to \$568,000, based on allegations that more than 559 musical compositions were illegally downloaded from the Service. The resulting settlement included a new licensing scheme for similar situations. *See also* Joia Shillingford, *Information Wants to be Free, but Publishers and Authors Want Paying*, THE GUARDIAN, June 8, 1995, available in 1995 WL 7606219.

123. 780 F. Supp. 182 (S.D.N.Y. 1991).

124. *See id.* at 183.

125. *See id.* at 184-85. *See also* Kravis, *supra* note 14 (proposing a compulsory licensing scheme amended to the Copyright Act to cover digital sampling).

126. *See* Tin Pan Apple, Inc. v. Miller Brewing Co., No. 88 Civ. 4085 (CSH), 1994 WL 62360, (S.D.N.Y. Feb. 24, 1994) (denying summary judgment where vocal sounds "Brrr" and "Hugga-Hugga" appeared in an advertisement and expert testimony asserted that the defendant had sampled the rap song "Stick 'Em" containing the same sounds). *See also* Jarvis v. A & M Records, 827 F. Supp. 282 (D.N.J. 1993). The court in *Jarvis* granted summary judgment on the issue of ownership to the defendant. *See id.* at 283. Although summary judgment on the issue of ownership was granted, summary judgment on the damages issue was denied to the defendant. *See id.* at 296. The defendant, in his song "Get Dumb," used parts of the plaintiff's songs, such as "ooh ooh ooh," "move," and "free your body." *See id.* at 291. These sounds were used by plaintiff in his song "The Music's Got Me." *See id.* The court remanded for a

Our aspiring multi-media mogul discussed in the introduction took a digital sample of the song "Bouncing 'Round the Room" for his *Ninja Mallard* production.<sup>127</sup> Using a "distinct characteristic" standard we would look for a characteristic melodic theme, percussion track, or vocal strain, which is sufficient to generate the identity of the original song. A few characteristic notes from a melody may be all that is required to remind a listener of the underlying work.<sup>128</sup>

The Polynesian drum-beat added to the song may alter the mood and rhythm of the melody, but the original melody may still be fully recognizable. Although it borrows only four words from the song, the phrase, "We feel like *bouncing 'round the room,*" would be strongly associated with the melody. Since this is another expressive element from the song, it would strengthen the author's claim of infringement. The use of this particular song in such a context violates the right that the copyright holder has to adapt portions of the song for use in a work like a movie or multi-media piece. Thus, the distinct characteristics test would protect "Bouncing 'Round the Room." It may be difficult to establish "substantial similarity" when comparing digitally manipulated works. Hence, the distinct characteristics test could capture the copyright holder's rights when a subsequent work derives expressive elements from a preexisting piece. While copyright protection does not require novelty,<sup>129</sup> it does require creative effort that generates work with highly distinctive characteristics, thus making a work easier to protect under the distinct characteristics test.

### B. *Digital Manipulation of Photographs*

A photograph can be scanned into a computer's memory or directly transferred from a camera.<sup>130</sup> "The scanning device divides the picture into thousands of small square geographic areas called pixels and assigns each pixel a numerical value that acts as a descriptor of the color or other visual characteristics of that area."<sup>131</sup> The image can then be manipulated and reworked by changing values for the various characteristics.<sup>132</sup> For example, a photo in *National Geographic* featured the Great Pyramids of Egypt "moved" closer together; the front cover of the magazine *Rolling Stone* "removed" a holster and gun

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factual determination of whether the sounds taken were of significant value so that value of the underlying work was "substantially diminished." See *id.* at 292.

127. See *supra* INTRODUCTION.

128. See Serwer, *supra* note 107.

129. See 17 U.S.C. § 101 (1994) (requiring originality).

130. See Daniel Wiener & Sally Grotta, *Kodak DC-50: Point-and-Shoot Simplicity for the PC*, PC MAG., Mar. 12, 1996, available in 1996 WL 2091871. The DC-50 is a point-and-shoot camera that can produce digital snapshots, and it can be attached to a personal computer for image transfers. See *id.*

131. John Gastineau, *Bent Fish: Issues of Ownership and Infringement in Digitally Processed Images*, 67 IND. L.J. 95, 97 (1991) (footnote omitted).

132. See *id.*

from the cover photo of actor Don Johnson; and the heads of white persons were "replaced" with those of non-whites to alter facts in a minority hiring story featured in a magazine.<sup>133</sup>

Bill Gates, CEO of Microsoft, recently purchased the Bettmann Archive, which contains 16 million images.<sup>134</sup> Gate's company, Corbis, is using the material to develop an online library for digital applications.<sup>135</sup> The digital archive will not only be available to commercial customers, such as magazines, newspapers, book publishers, and CD-Rom producers, but also to students who will have access to low resolution versions for a subscription of approximately \$40 per year.<sup>136</sup>

Currently, there are problems with pilfered images appearing online as the major content in materials or used to dress up web-sites.<sup>137</sup> For example, some online pirates have downloaded, altered, and retransmitted images such as unwholesome versions of Winnie the Pooh.<sup>138</sup> Analysis of the use of expressive elements in a photograph brings derivative rights issues into focus.

In a recent derivative works case, *Davidov v. Tapemeasure Enterprises, Inc.*,<sup>139</sup> the court found that the defendant's fabric contained a pattern that infringed upon "copyrightable components" of plaintiff's photographs of jewelry.<sup>140</sup> The court considered expressive elements such as the composition of the items, the pose, lighting effects, and camera angles.<sup>141</sup> In the digital context, if a user has downloaded a copy of a photograph and then subsequently uses distinct aspects of the photo to create a new work for public consumption,<sup>142</sup> the court should find derivative rights infringement. Those characteristics could be a small portion of the photo that contains the same perspective and placement of the objects, even though they are manipulated as to color or size.

In the *Ninja Mallard* work, two photos are partially used, one promoting Hawaii as a vacation destination, the other a Gaultier dress

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133. *See id.* at n.41.

134. *See* Garth Alexander, *Will Gates Dominate Media Too?; Bill Gates*, TIMES OF LONDON, Oct. 15, 1995, (Business).

135. *See id.*

136. *See* Nicholas Bannister, *Bill's Museum of the Modern Image*, THE GUARDIAN, Feb. 1, 1996, available in 1996 WL 4008304.

137. *See* Coates, *supra* note 34, at 1.

138. *See id.* (reporting that the same sort of rampant stealing of images is taking place in Walt Disney's Mickey Mouse stable of characters and the depositories of other media giants).

139. 27 U.S.P.Q.2d (BNA) 1382 (S.D.N.Y. 1993).

140. *See id.*

141. *See id.* at 1385.

142. *See* Barbara Hoffman, *From Virtual Gallery to the Legal Web*, 215 N.Y.L.J. 5 (1996). A recent lawsuit was settled for \$20,000, considered to be a retroactive licensing fee for "digital plagiarism," because a *Newsday* illustrator scanned and digitally manipulated a photograph by James Porto for the publication's front page. *See id.*

worn by a model. Finding infringement under the distinct characteristics test would require careful analysis of the elements. A problem may arise when a photo is not the product of a highly creative effort. A photo of Hawaii may contain trees, mountains, a beach and a blue-green sea. If a swaying palm tree and a stretch of white sand are incorporated into the *Ninja Mallard* work, it may become nearly impossible to isolate such common features out of a subsequent work as sufficiently distinctive to call to mind the original photograph.

Likewise, the photo of a "cyberdress" may not be composed in such a distinct way that a digital "cut and paste" application<sup>143</sup> of the dress to the body of a Gauguin maiden would remind an observer of the original photograph.<sup>144</sup> If the photograph was the only one available on the Internet, a much stronger claim would result since the origination of the idea would be evident. The distinct characteristic test would provide better protection for the work of a photographer who creates something truly distinctive.

### C. Scanned Displays of Fine Art Works

Bill Gate's company, Corbis, has also acquired the rights to "computer digitized images of art collections."<sup>145</sup> Online sites featuring digitized art works are blossoming. Between July and November of 1994, nearly 5000 "artists, museums, galleries and other arts organizations around the globe opened visual-arts sites on the Internet."<sup>146</sup> Works of art are accessible from elite repositories such as the Metropolitan Museum of Art, and the Art Tower Mito in Japan.<sup>147</sup> You can also preview the items up for bid at elite auction houses such as Sotheby's and Christie's.<sup>148</sup> This would be an ideal place on the Internet from which a potential derivative infringement might emanate.

Transformative use of artwork was at issue in *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*<sup>149</sup> Photographs of an original painting were cut from an art book and remounted on tiles for sale at a sidewalk market.<sup>150</sup> The court found that the author's right to prepare

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143. See Moller, *supra* note 8.

144. To the extent that a copyright could issue on the pattern in the Gaultier dress, infringement of the designer's creative effort could be established by the distinct characteristics test in this context. See *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452 (2d Cir. 1989) (stating that, to the extent design elements are "conceptually separable" from the utilitarian elements, the Copyright Act may extend copyright protection to decorative elements).

145. Alexander, *supra* note 134.

146. Steven Henry Madoff, *Art in Cyberspace: Can it Live Without a Body?*, N.Y. TIMES, Jan. 1, 1995 (Arts and Leisure), at 1.

147. See *id.* at 34.

148. See *id.*

149. 856 F.2d 1341 (9th Cir. 1988) (holding that derivative rights are not automatically exhausted by the "first sale doctrine" found in 17 U.S.C. § 109(a) (1994)).

150. See *id.* at 1344.

derivative works had been violated.<sup>151</sup> It is hard to say whether simply mounting a work on a piece of tile would be considered original enough to qualify as a derivative work.<sup>152</sup> However, the transformation and adaptation of the photos of the original painting were aimed at a different market. Consumers of sidewalk artwork may not have purchased a slick hard-bound version of a book featuring the artist's work; but they may have liked this particular painting, and mounted on a tile, it may have been more affordable to them.<sup>153</sup> The distinct characteristics test would not have made this case easier, because all of the elements in the painting appeared in the transformed work.

Scanned and digitized artwork, including paintings and sculptures, can be analyzed in the same way as digitized photographs since they are reduced to two dimensional images. In the *Ninja Mallard* creation,<sup>154</sup> Gauguin paintings of exotic polynesian girls and Tahitian palm trees raise some interesting issues. The underlying work is in the public domain since it dates from the turn of the century. However, a digitized version of the painting may be afforded protection as a derivative work—even though the monopoly on the underlying work would not be extended.<sup>155</sup> Digital incorporation of expressive elements from artwork can be analyzed with the distinct characteristics standard. In Appendix III, the girl on the beach is lifted directly from *Where Do We Come From, What Are We, Where Are We Going?*, which was completed by Gauguin in 1897.<sup>156</sup> She is only one of several characters in the painting. However, Gauguin's style and characterization of the girl would be recognizable to an observer familiar with the work. The characterization of her face is a critical element that would not lose its distinctive force, even though she has been clothed in "cyberwear."<sup>157</sup>

From the second painting, *Tahitian Landscape With Girls*, some uniquely characterized palm trees were borrowed.<sup>158</sup> They appear in the same relation to one another as those in the painting and bear the same relative characteristics and placement. Therefore, they would qualify as expressive elements. On the whole, the paintings would not be considered substantially similar to the *Ninja Mallards* multi-media

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151. *See id.*

152. *See Brown, supra* note 38 (explaining that the standard for copyright protection of a derivative work requires less originality than that required for copyright on the original work).

153. *See Munoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309, 314 (D. Alaska 1993) (characterizing cards mounted on ceramic tiles as transformation of a pre-existing work).

154. *See supra* INTRODUCTION.

155. By implication, a digitized version of a work may be sufficient transformation by definition. *See* 17 U.S.C. § 101 (1994).

156. *See supra* note 9.

157. *See app.* III.

158. *See id.*



work; but derivative rights protection would still be afforded to the owner of the digitized version from which the elements were lifted.<sup>159</sup>

Recent legislation in The Visual Artist Rights Act of 1990 ("VARA") would extend greater protection to Gauguin's painting than a "substantial similarity" analysis under the Copyright Act of 1976. However, the protection afforded by VARA would likely fall short of a distinct characteristics analysis. The VARA acceded to a limited provision of the moral rights of "attribution and integrity" to creators of fine art.<sup>160</sup> The narrow definition of a "work of visual art" includes paintings, drawings, sculptures, and photographs produced for exhibition purposes where such works are limited to 200 signed and numbered copies.<sup>161</sup> The VARA extends exclusive rights in a particular object of "visual art" and does not extend to a reproduction of the work in some other medium.<sup>162</sup> Thus, an artist would probably be unable to assert his moral rights if expressive elements of his "visual art" are digitized and subsequently "distorted or modified" in a transformed work.

However, contemplating derivative rights as preserving a certain control over the integrity of a work would actually please many commentators who champion broader protection of moral rights.<sup>163</sup> If an artist were able to assert a broad exclusive right to create derivative

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159. *But see* *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044 (S.D.N.Y. 1994). The court in *Amsinck* found that the appearance in a movie of plaintiff's artwork, *Baby Bears Musical Mobile*, for periods totaling one minute and thirty-six seconds, did not constitute infringement of the copyright. *See id.* at 1050. The court posited the theory that the act of broadcasting so altered the appearance of *Mobile* that its use in the movie did not constitute infringement of the copyright. *See id.* at 1048 (citing *Mura v. Columbia Broad. Sys., Inc.*, 245 F. Supp. 587, 590 (S.D.N.Y. 1965)).

160. *See* Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (1991) [hereinafter "VARA"].

161. *See id.* *See generally* 3 NIMMER ON COPYRIGHT, *supra* note 68, § 8D.06[A], at 8D-64 to 71.

162. *See* VARA § 106A(a)(3) (explaining that protection does not extend to a "reproduction, depiction, portrayal, or other use of the work"). *But see* Peter Brown, *Intellectual Property and Content Providers*, 67 *JUN. N.Y. ST. B. J.* 24, 25 (1995) (explaining that an "artist who has created a painting which is subsequently edited or colorized as part of its inclusion in a multimedia product might be in a position to assert [moral] rights" under VARA).

163. *See* Christine L. Chinni, *Droit d'Auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 *W. NEW ENG. L. REV.* 145 (1992). "Moral rights pertain to an author's right to claim and control his or her own work, rather than any right to be compensated." *Id.* at 145. Chinni, and other commentators, argue that the Berne Convention Treaty "requires that [intellectual property] rights be unalienable from the author," and thus distinguish this right as being a moral right as opposed to an economic right. *See id.* *See also* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 *BULL. COPYRIGHT SOC'Y* 1 (1980); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 *HARV. L. REV.* 554 (1940).

works, he may be able to protect both his reputation and the integrity of the work itself.<sup>164</sup>

#### D. *Digital Manipulation of Video Works*

Movie companies and other depositories of film and video works are rapidly digitizing and building archives of works to be made available for content in multi-media works.<sup>165</sup> Technology is currently being developed for the “head-snapping” delivery of digital works via coaxial cable through the Internet.<sup>166</sup> “Digital video was the star player at this year’s Consumer Electronics Show in Las Vegas[,]” where a new Digital Video Disc storage medium was demonstrated.<sup>167</sup> The new medium should revolutionize storage of video works for use on personal computers.<sup>168</sup> Strong copyright protection is required to encourage the substantial investment required for the development and production of many film and video works.<sup>169</sup>

Audio-visual works provide an opportunity to create particularly memorable persona with strong, distinct characteristics. A particularly strong character may be very popular because it is associated with numerous works.<sup>170</sup> Expressive elements are used to “flesh out” a character and may include mannerisms, moods, appearance, sounds, associations, vocal qualities, and spoken statements. We could examine the *Ninja Mallard* work for such characteristics.

The use of a morphing program on the Donald Duck clip and the Teenage Mutant Ninja Turtles movie frames this issue nicely.<sup>171</sup> The digitally created *Ninja Mallard* character contains elements of both underlying works. Donald’s eyes, beak, bow tie, sailor shirt, feathered derriere, and feet are distinguishable, as are the Turtles’ shell, musculature, face mask, and gritty grin. From a purely visual perspective, Appendix III illustrates the proposition that a mixture of elements could make it difficult to establish “substantial similarity” or a compa-

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164. See Brown, *supra* note 38. There is also evidence that derivative rights were meant to be broader than reproduction rights. See *supra* note 1 (stating in notes to 17 U.S.C.A § 106 that the derivative right is broader than the reproduction right).

165. See Jonathan Evan Goldberg, *Now That the Future Has Arrived, Maybe the Law Should Take a Look: Multimedia Technology and its Interaction with the Fair Use Doctrine*, 44 AM. U. L. REV. 919 (1995).

166. See Rhodes, *supra* note 18.

167. Sebastian Rupley, *Digital Video on Parade: DVD Grabs the Limelight at Consumer Electronics Show*, PC MAG., Mar. 12, 1996, available in 1996 WL 2091864.

168. See *id.*

169. See Rice, *supra* note 113 (“[U]nless we are guaranteed a return on our investment by a carefully constructed system of copyright law, it is pointless [to invest] in what is an extremely risky business.” (quoting Richard Constant, general counsel for PolyGram)).

170. See, e.g., *Stallone v. Anderson*, 11 U.S.P.Q.2d (BNA) 1161, 1167 (C.D. Cal. 1989) (finding the “Rocky” character well developed through a series of movies); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (finding Disney characters very well known in popular culture).

171. See app. III.

rable "total look and feel" when examining multiple underlying works.

Furthermore, it is doubtful that the *Ninja Mallard* work as a whole would be considered substantially similar to a Disney documentary or to the *Ninja Turtle* movie that were sampled from the Internet. Comparison of characteristics within the works would reveal disparities of varying degrees in geographic setting, personality, diet, activities, weapons, modes of transportation, villains, expressions, purpose, and market appeal.<sup>172</sup>

Additionally, the *Ninja Mallard* voices were transformed from the soundtrack of the *Ninja Turtles* movie. Under the proposed test, the analysis of derivative rights infringement would include examination of the two works for use of characteristic speech patterns or phrases. If the transformed vocal qualities compel the imagery of the underlying *Ninja Turtles* work, protection of the movie sound track would be afforded under the distinct characteristics test.<sup>173</sup>

#### V. MAINTAINING THE BALANCE

The counterbalance of the utilitarian and the natural rights views of copyright theory creates tension in the protection of intellectual property.<sup>174</sup> A significant gain on the public side of the equation historically anticipates the need for broader protection for artists. Digital technology presents an enormous advance in the public dissemination of information and cultural works. Revitalization of derivative works protection would balance the scale between encouraging creativity on the one hand and social utility on the other, while utilizing the historical value of the distinction between reproduction and derivative rights.

Loose protection of derivative rights may have meaning in a strictly utilitarian world where the objective is the maximum number of works.<sup>175</sup> In fact, some commentators suggest that more work necessarily produces higher quality work, and that "abolishing authorial rights in derivative works would likely mean that fewer people would cease creating than would be encouraged to create by their freer access to existing works."<sup>176</sup>

This view tends to focus on the author as a manufacturer of public goods whose function is to stamp out products for public consumption. Utilitarian views of property were originally developed in the

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172. See *supra* INTRODUCTION.

173. See *Worlds of Wonder v. Veritel Learning Sys.*, 658 F. Supp. 351, 355 (N.D. Tex. 1986) (finding that new tapes with similar voice qualities and diction created by competitors for use in the plaintiff's "talking bear toy" created an infringing derivative work).

174. See *supra* Part I.

175. See Friedman, *supra* note 42, at 183.

176. *Id.* at 179-80.

context of real property. However, in that framework, there is an issue of scarcity. In the realm of “intellectual property” there are no known bounds for human creativity. As such, complete protection should be afforded to the artist who labors to produce creative work. There is robust irony in an assertion that proposes severe limitations on derivative rights—articulated and supported by approximately two hundred footnotes.

#### CONCLUSION

This Article incorporates material derived from many scholarly sources. To some degree, the existence of this Article demonstrates the premise that derivative rights protection nurtures the development of original expressive work. The most difficult part of this Article was the task of crafting an original standard for assessing infringement of an author’s right to prepare derivative work.

Expressive works from around the globe will be available in the GII. Loose protection of derivative rights would allow the distinctive characteristics in a work of authorship to be separated, manipulated and retransmitted without proper attribution to the author. Broad derivative rights protection of expressive elements in works of authorship will safeguard artistic integrity and will encourage the creation of original works. The *distinct characteristics* standard could be used to achieve this goal.

APPENDIX I



APPENDIX II



APPENDIX III

