

4-2005

Copyright Infringement and Poetry: When is a Red Wheelbarrow THE RED WHEELBARROW?

Jennifer Understahl

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Jennifer Understahl, Copyright Infringement and Poetry: When is a Red Wheelbarrow THE RED WHEELBARROW?, 58 *Vanderbilt Law Review* 915 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol58/iss3/13>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

COPYRIGHT INFRINGEMENT AND POETRY: WHEN IS A RED WHEELBARROW *THE RED* *WHEELBARROW?*

I.	INTRODUCTION: WHERE COPYRIGHT FAILS POETRY.....	916
II.	BACKGROUND: ORIGINALITY AND THE PURPOSES OF COPYRIGHT	918
III.	COPYRIGHT INFRINGEMENT AND SUBSTANTIAL SIMILARITY:	923
	A. <i>Steps in an Infringement Claim</i>	923
	B. <i>Substantial Similarity Tests</i>	924
	C. <i>Intended Audience versus Lay Audience Standard</i>	929
IV.	THE PARTICULAR PROBLEMS POSED BY POETRY	931
	A. <i>What is a Poem?</i>	932
	B. <i>The Line in Poetry</i>	933
	C. <i>Word Choice</i>	936
V.	THE CURRENT TESTS FOR SUBSTANTIAL SIMILARITY DO NOT WORK FOR POETRY	938
VI.	A SUBSTANTIAL SIMILARITY TEST FOR POETRY	944
VII.	CONCLUSION.....	952

I. INTRODUCTION: WHERE COPYRIGHT FAILS POETRY

THE RED WHEELBARROW

so much depends
upon

a red wheel
barrow

glazed with rain
water

beside the white
chickens.

William Carlos Williams

Copyright does not protect facts or ideas, but only an author's original expression.¹ Often, though, it is difficult to distill protected expression from unprotected ideas or facts that reside in the public domain.² Copyright protection for poetry is particularly problematic because a poem's ideas are often intertwined with a poem's sounds, shape, and images. It is often not only difficult to extract ideas from a poem's surface, but once ideas are "discovered," it may even be difficult to articulate exactly what these main ideas or themes are.³ William Carlos Williams' poem, *The Red Wheelbarrow*, one of the most famous twentieth century poems, provides a good example of the problems inherent in distinguishing idea and expression in poetry. Williams' deceptively simple poem exemplifies the melding of idea and expression into syntax and form so that the poem itself becomes the meaning.⁴ In *The Red Wheelbarrow*, it is impossible to separate Williams' "idea" of a red wheelbarrow from the context of his poem's

1. Baker v. Seldon, 101 U.S. 99, 105 (1880).

2. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (1930 2d Cir.) (noting that when a "plagiarist does not take out a block in situ but an abstract of the whole, decision is more troublesome").

3. See, e.g., Günter Eich, *Some Remarks on Literature and Reality*, in A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS 115, 116 (Stuart Friebert, et al., eds. 1997) (describing poetry as a "falling together of word and object" which aims to translate reality). "The aim of poetic communication is to introduce a related feeling or grasp of the one aspect of the human condition to the reader . . ." Miroslav Holub, *Poetry and Science*, in A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS 44, 51 (Stuart Friebert, et al., eds. 1997).

4. Holub, *supra* note 3, at 51.

words, line breaks, and even his distribution of white space on the page, all of which describe and give meaning to Williams' vision.⁵

Copyright currently protects poetry just like it protects any other kind of writing or work of authorship.⁶ Poetry, therefore, is subject to the same minimal standards for originality that are used for other written works, and the same tests determine whether copyright infringement has occurred.⁷ The low threshold of originality that determines if a work is eligible for copyright embodies the notion that judges should not make aesthetic determinations of what is or is not art.⁸ This low standard serves poetry with the same sweeping graciousness that it serves other genres, ensuring that no one kind or style of poetry receives special treatment in terms of protectibility.⁹ However, the tests for copyright infringement that courts use are not adequate in deducing if one poem is impermissibly similar to another.

In an infringement action, once copying has been established,¹⁰ improper appropriation or infringement is determined by a substantial similarity test that compares the two works in question.¹¹ Courts currently apply a variety of substantial similarity tests that attempt to separate the copyrightable elements in a work from the non-copyrightable elements and then determine if the copier has taken a substantial amount of copyrightable elements.¹² Many of the tests designed to determine substantial similarity between works have been criticized for their vague standards and unpredictable

5. *Id.*

6. See RALPH S. BROWN & ROBERT C. DENICOLA, COPYRIGHT: UNFAIR COMPETITION AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP 22 (8th ed. 2002) (noting that once a work is fixed in a tangible medium of expression as required by the 1976 Copyright Act, it qualifies for federal copyright protection).

7. See *Feist Publ'ns, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991) (noting that while originality is required, "even a slight amount will suffice").

8. See *Bleinstein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (explaining why judges should not determine what qualifies as art). Justice Holmes noted that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations" in this case because not only would judges fail to appreciate some "works of genius," but might also deny protection "to pictures which appealed to a public less educated than a judge." *Id.*

9. Poems that may not be considered original by some still get copyright protection. The effect of this is to protect just about anything which someone claims is poetry. While some might argue that this dilutes the "art" of poetry somewhat, it alleviates aesthetic determinations that are almost sure to vary from poet to poet or from reader to reader.

10. There are two steps in any copyright infringement action. First a trier of fact must determine if there has been copy in fact. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, §13.01 (1963). Then, if there is copying in fact, there is a determination if the copying is an infringement. *Id.*

11. *Id.* at §13.01 (B).

12. *Id.*

applications.¹³ These tests become even more problematic when applied to poetry because poetry communicates its ideas differently than genres such as fiction or non-fiction.

Poetry is a genre in which language is carefully manipulated into lines, stanzas, and rhythms, all of which add meaning to a poem. Despite the particular expressive means available in different genres, courts currently use the same tests for substantial similarity for different types of literary works.¹⁴ Copyright infringement actions are usually determined by examining the substantial similarity between two written works by comparing aspects like plot, character, and descriptions.¹⁵ Courts applying copyright law need to recognize how poetry operates as a distinct genre and protect it based on all the elements of original expression that are available for poets to use.

In this paper, I will first summarize the background principles and purposes of copyright. Then, in Part II, I will explain the tests for substantial similarity that are currently used by courts to determine misappropriation. Part III of my paper will outline the ways poetry can be expressive, focusing particularly on Williams' *The Red Wheelbarrow* as an example. In Part IV, using my discussion of poetry's expressive elements as a springboard, I will show how the current tests for improper appropriation are not suited for poetry. In Part V of my paper, I will argue for a new improper appropriation test for poetry that compares not only two poems' words but also the words' arrangement and layout on the page. I will explain how this "expressive elements test" works and how its application would better serve poetry within the purposes of copyright.

II. BACKGROUND: ORIGINALITY AND THE PURPOSES OF COPYRIGHT

The purpose of copyright is to benefit the public by providing an incentive to authors to keep creating new works.¹⁶ As the Supreme Court has interpreted the constitutional grant of power to Congress, it is the public, not the author, whom copyright serves.¹⁷ Copyright

13. See, e.g., *id.* at § 13.03(A) (describing substantial similarity as a standard that is "the least susceptible of helpful generalizations"); Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 DEPAUL-LCA J. ART & ENT. L. & POL'Y 43, 56-57 (1995) (criticizing a test as helpful in theory, but not in practice).

14. Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 725 (1993).

15. See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54-56 (2d Cir. 1936) (comparing the characters, sequence of details, and "dramatic meaning" of two plays).

16. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984).

17. *Id.* at 478. See also Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1223 (1993) ("The primary purpose of copyright is to

serves the public by granting limited rights to authors in their "original works."¹⁸ This reward to authors includes such things as the rights to perform, to "prepare derivative works," to copy, and to distribute their works.¹⁹ The Supreme Court has described the creation of these limited rights as a "difficult balance between the interests of the authors and inventors in the control and exploitation of their writings on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."²⁰ This balancing effort continues when courts not only decide what qualifies for protection, but also decide when an author's rights have been violated.

Some countries recognize an author's moral or natural right to his literary work,²¹ but the United States' system of copyright seeks to benefit the public by "secur[ing] a fair return for an 'author's' creative labor."²² Thus, the Copyright Clause, as interpreted by the Supreme Court, is a system of economic incentive to authors to create for the public benefit.²³ Under this theory, the value of an author's work or contribution to society is the amount "those who benefit from the book would be willing to pay rather than do without it."²⁴ Copyright then serves the function of rewarding authors for contributions that are original or new "[b]y assuring the author of an original work the exclusive benefits of whatever commercial success his or her work enjoys."²⁵ This system works smoothly when authors are given rights

promote creativity and disseminate creative works, so that the public may benefit from the labor of authors.").

18. 17 U.S.C. § 106 (2000).

19. *Id.*

20. *Sony Corp. of Am.*, 464 U.S. at 429.

21. See, e.g., JOHN F. WHICHER, *THE CREATIVE ARTS AND JUDICIAL PROCESS* 8-9 (1965) (describing the concept as it is recognized in some other countries). Cf. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 289-91 (1970) (describing the Kantian view that the "law is needed to protect important personal interests of the author" and noting that while copyright does not aim to protect "dignitary interests" there is possible tort law in this area which might prohibit "garbling a man's work and then attributing it to him"). For historical background on rights theories, see Paul Edward Geller, *Copyright History and the Future: What's Culture Got to Do With It?*, 47 J. COPYRIGHT SOC'Y USA 209, 210-25 (2000).

22. David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 133 (2001) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

23. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (explaining the economic philosophy behind the clause).

24. Breyer, *supra* note 21, at 285. But Stephen Breyer argues that this approach does not necessarily determine the "social value" or just value of a given work. *Id.* at 287.

25. Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 513 (1996). This system of reward may in itself be problematic in genres like poetry because the commercial benefits of creation are arguably minimal for most poets. I intend

to original expression. However, problems can occur if copyright overprotects works or aspects of works and authors are given monopolies over ideas or facts that should belong in the public domain.²⁶

Overprotection chills the creative production of new works because it discourages authors from drawing on ideas and facts presented in prior works for fear that "their creations will too readily be found substantially similar to preexisting works" and thus constitute infringement.²⁷ A fine-tuned appreciation for what rights an author has based on notions of original creation is therefore necessary to optimally spur creation.

One of the challenges for courts has been to define "original works of authorship" in light of the purposes of copyright.²⁸ The Supreme Court has defined an author as "he to whom anything owes its origin."²⁹ Lower courts have also interpreted originality broadly. In *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, the Court of Appeals for the Second Circuit distinguished the "uniqueness, ingenuity and inventiveness" required for a patent from "any such high standard" to obtain a copyright.³⁰ The court found that "[n]o large measure of novelty [was] necessary," and that copyright demanded only that the author contribute "more than a 'merely trivial' variation, something recognizably 'his own.'"³¹ The court found that hand-engraved mezzotint reproductions of paintings in the public domain fulfilled the originality requirement because they were not "exact" copies.³² The choices of the engravers, even if trivial, made the mezzotints different from the paintings they had copied and these

though, not to focus on the problematic aspects of economic incentives for poets but instead on notions of originality for purposes of infringement for poetry.

26. See *id.* at 513 (discussing potential problems with extending copyright protection to elements that are likely to appear in other works).

27. *Id.* (quoting *Warner Bros., Inc. v. Am. Broad. Co., Inc.*, 720 F.2d 231, 240 (2d Cir. 1983)).

28. 17 U.S.C. § 102(a) (2000). See Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 576 (2002) (noting the dichotomy between copyright and patent and concluding that therefore, "[w]hatever an 'author' may be, it must be something different than an 'inventor,'" and that a "'writing' must be something other than a 'discovery'").

29. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

30. 191 F.2d 99, 100 (2d Cir. 1951).

31. *Id.* at 102 (quoting *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512 (2d Cir. 1945)). This court also noted that a "distinguishable variation" might even be caused by an accident such as a "copyists bad eyesight" or "shock caused by a clap of thunder." *Id.* at 105. This idea seems problematic in that the author did not actually create the variation by his own ingenuity. But, on the other hand, it relieves the court from decisions of just how much intent or talent is necessary.

32. *Alfred Bell & Co. Ltd.*, 191 F.2d at 104-05.

differences were sufficient to pass copyright's low originality standard.³³

While the threshold of originality is easily passed, the only part of an author's work that is protected under copyright is the part that is new or original.³⁴ Copyright does not protect "idea[s], procedure[s], . . . concept[s], principle[s], [or] discover[ies]."³⁵ It also does not protect facts or parts of a work that have been taken from the public domain.³⁶ These limits hearken back to the requirement of originality. For example, no one can claim copyright over the general idea of a story about a son who wants to kill his stepfather.³⁷ Likewise, no one can claim copyright protection over the idea of a character like Hamlet.³⁸ Even if someone claimed that a character like Hamlet was his own original idea and that he had not borrowed it even unconsciously from an earlier work, copyright does not protect ideas because ideas are not particular enough to belong to any one person. If someone could claim exclusivity to themes such as these, he would monopolize a large field of creativity that many authors use as impetus. This result would frustrate copyright's purpose of benefiting the public through providing incentives for authors to create.

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court reiterated the necessity of originality for any work to be copyrightable.³⁹ The Court noted that, in order to further the purpose of benefiting the public, "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."⁴⁰ The Court found that a phonebook that was "limited to basic subscriber information and arranged alphabetically" was not copyrightable because (1) the "names, towns, and telephone numbers" were not original and (2) the

33. *Id.*

34. See *Feist Publ'ns, Inc. v. Snyder*, 499 U.S. 340, 348 (1991) (noting that while originality does not mean novelty, originality is still required and therefore "the mere fact that a work is copyrighted does not mean that every element of the work may be protected").

35. 17 U.S.C. § 102(b) (2000).

36. See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (finding that a replica of an Uncle Sam bank, that was in the public domain, did possess the requisite degree of originality just because it was in a different medium than the public domain "prototype").

37. This is an idea, and, therefore, not copyrightable.

38. It is questionable as to whether or not copyright can be claimed in a character at all—it depends on the specificity with which the character is portrayed. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 121, 122-23 (2d Cir. 1930) (noting that the "stock figures" of the "low comedy Jew and Irishman" are not copyrightable).

39. *Feist Publ'ns, Inc.*, 499 U.S. at 346 (finding that "[o]riginality is a constitutional requirement").

40. *Id.* at 349-50.

arrangement of this information “utterly lack[ed] originality.”⁴¹ Facts are not copyrightable because they belong to everyone and are not “original” to anyone, but compilations of facts can be copyrightable if they possess “an original selection or arrangement.”⁴² The protection for compilations does not protect an author’s hard work in gathering factual information because the work itself is not original expression.⁴³ An author’s selection and arrangement of facts are the only original expression in a compilation and therefore are the only elements that copyright protects.⁴⁴

While it is fairly easy to single out facts in a work, distinguishing unprotectible ideas from original “expression” can be much more difficult.⁴⁵ In *Nichols v. Universal Pictures Corp.*, Judge Learned Hand found that there was a point at which a play becomes generalized into a “series of abstractions” and is therefore no longer protectible.⁴⁶ He noted that “otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.”⁴⁷ The problem is, as Judge Hand articulated, “[n]obody has ever been able to fix that boundary, and nobody ever can.”⁴⁸ This imprecise distinction between the idea and the expression calls for a case by case determination that is inherently subjective.⁴⁹ If a determination of the copyrightable elements of a

41. *Id.* at 341, 363-64. The court noted that if some “works must fail” the test for originality, they could not “imagine a more likely candidate.” *Id.* at 364. Still, *Feist* “reaffirms that the requirements of originality are, in fact, minimal.” Alan L. Durham, *Speaking of the World: Fact, Opinion, and the Originality Standard of Copyright*, 33 ARIZ. ST. L. J. 791, 812 (2001).

42. *Feist Publ'ns, Inc.*, 499 U.S. at 348.

43. *Id.* at 350-51 (finding that the copyright in compilations is limited to the “particular selection and arrangement” and that “[i]n no event may copyright extend to the facts themselves”).

44. Kurtz, *supra* note 17, at 1232 (finding that “copyright should protect the meaning embedded within a work less rigorously than it protects the work’s literal elements” because the meaning “tends to be more universal” and part of the “vast accumulation of human experience”).

45. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (noting that in cases where there are non-copyrightable elements it is necessary to distinguish the “expression and what is expressed”); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (noting that a playwright could take public domain information from another play as long as he “kept clear of its ‘expression’”); WHICHER, *supra* note 21, at 121 (noting that the idea/expression issue is one of the “hardest problems to solve in the law of copyright”).

46. *Nichols*, 45 F.2d at 121.

47. *Id.*

48. *Id.*

49. See Kurtz, *supra* note 17, at 1233 (equating copyright with swiss cheese, in which the holes represent the unprotectible elements that “cannot be simply snipped out as with scissors” but rather “conceptualized out by the perceiver, who will need to make judgments and evaluations”); WHICHER, *supra* note 21, at 124 (describing the line between ideas and expression as a “fluid one, drawn in light of the facts of each case”).

work is necessarily subjective,⁵⁰ determining whether a work has unlawfully appropriated the protectible elements of another must also involve subjectivity.⁵¹ The tests for infringement that courts currently use to determine substantial similarity highlight how courts have tried to resolve the idea-expression problem.

III. COPYRIGHT INFRINGEMENT AND SUBSTANTIAL SIMILARITY:

A. Steps in an Infringement Claim

In order to succeed on a claim of copyright infringement, an author must show (1) valid copyright of a work and (2) copying of protected elements of that work.⁵² In *Feist*, the Supreme Court reiterated the minimal requirements for originality but made clear that copyright protection to a work extended only to the protected elements of a work.⁵³ Because the names, addresses, and other information in the phonebook were nonprotectible facts and because the authors of the phonebook had not selected or arranged these facts in such a way as to constitute originality or "authorship," the phonebook was not protected.⁵⁴ Even if the phonebook had possessed sufficient originality, protection in this case would only have extended to the expressive elements in the book, such as the "selection, coordination, and arrangement" of its facts.⁵⁵ Thus, even if a work satisfies the threshold question of originality, it is only protected as to those elements that actually *are* original.

The second step in a copyright infringement action is to determine if protectible original elements have been copied⁵⁶ This is a two-step process. First, it must be shown that the defendant actually

50. Cf. Kurtz, *supra* note 17, at 1231-32 (hypothesizing that the "greater the work of art the more stubbornly it resists simple explanation and the more difficult it is to abstract from it that which makes it unique").

51. This is because in order to determine if one writer has infringed on another's copyright, a trier of fact must determine what is original, and therefore protected, in the first author's work—one must separate the idea from the expression and then compare those elements it finds protectible.

52. NIMMER & NIMMER, *supra* note 10, at § 13.01(B). Protectible elements of an author's work refers back to the requirement of originality.

53. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-49 (1991).

54. *Id.* at 363-64 (concluding that copyright does not "afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality").

55. *Id.*

56. NIMMER & NIMMER, *supra* note 10, § 13.01(B).

copied or copied in fact.⁵⁷ When there is no "direct proof" of copying, copying in fact may be shown by circumstantial evidence of "access" as well as "substantial similarity" between the defendant's and the plaintiff's work.⁵⁸ Second, if actual copying is shown, the plaintiff must then show that the copying is "actionable;" i.e., that this actual copying infringes on the plaintiff's protected expression.⁵⁹ In this second step, the court must ask if the works are "substantially similar . . . such that liability may attach."⁶⁰

For improper appropriation, it is not enough that the non-protected elements of two works are substantially similar; a *substantial* amount of *expression* must be stolen.⁶¹ In *Mazer v. Stein*, the Supreme Court noted that because copyright "protection is given only to the expression of the idea—not the idea itself," the plaintiffs could "not exclude others from using statuettes of human figures in table lamps."⁶² The plaintiffs "[could] only prevent use of copies of their statuettes as such or as incorporated in some other article."⁶³ The *idea* of a statuette incorporated into a lamp is therefore not protected, but a particular author's *expression* of a statuette is.⁶⁴ This holding still begs the questions: (1) What exactly is the expression? And (2) When is a statuette substantially similar in its expression to another?⁶⁵

B. Substantial Similarity Tests

Lower courts have come up with a variety of substantial similarity tests. Some courts follow Judge Learned Hand's famous "abstractions test."⁶⁶ In these cases, the courts must decide "the point"

57. *Id.* (calling it a "factual question" as to whether or not the defendant "used the plaintiff's work as a model, template, or even inspiration").

58. Kurtz, *supra* note 17, at 1235. Note that the substantial similarity necessary here differs from the substantial similarity in determining actionable infringement.

59. NIMMER & NIMMER, *supra* note 10, § 13.01(B).

60. *Id.* See also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (finding that the question in literary appropriation is whether the defendant took a "substantial" part of the plaintiff's work so that the taking was not "fair use").

61. See, e.g., *Feist Publ'ns, Inc.*, 499 U.S. at 363 (finding that the printing of names in a telephone directory, while substantially similar to a previously existing directory, was not a copyright violation because "there is nothing remotely creative about arranging names alphabetically").

62. 347 U.S. 201, 217-18 (1954).

63. *Id.* at 218.

64. *Id.*

65. "Although the cases treat expression as the most valued portion of the text, they rarely say what expression is." Rotstein, *supra* note 14, at 765.

66. *Nichols*, 45 F.2d. at 121. See also NIMMER & NIMMER, *supra* note 10, § 13.03(A)(1)(a) (describing Judge Hand's test).

in a "series of abstraction" at which a story sheds generality and becomes an author's original expression.⁶⁷ While this test "vividly describes the nature of the quest," which is to find the expression, the test lacks any plain method to determine when this line is crossed.⁶⁸ In *Sheldon v. Metro-Goldwyn Pictures Corp.*, Judge Learned Hand found that the expression of the play "Dishonored Lady" had been appropriated by the movie "Letty Lyton."⁶⁹ Both scripts concerned the true story of a Scotch girl tried for murder.⁷⁰ In this case, the court found details in the movie that tracked the play such as the "mis en scene, the same city and the same social class" and the choice of a "South American villain." These overlapping details constituted substantial similarity and were not merely unprotected "general patterns."⁷¹ The court described these details as a confluence of scenes that copied the "dramatic meaning" or the "dramatic significance" of the play.⁷² Judge Learned Hand held that, even though dialogue had not been taken, it was enough that "substantial parts [of the story] were lifted."⁷³ He noted that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."⁷⁴ The problem with Judge Hand's abstractions test, by his own admission, is that the test is uncertain and creates ad hoc determinations of when a particular pattern or idea is sufficiently clothed in expression to be protected.⁷⁵

Professor Zechariah Chafee attempted to refine the abstractions test with his "pattern test."⁷⁶ This test essentially looks at the "sequence of events and the interplay of major characters" in

67. *Nichols*, 45 F.2d. at 121-22. "The process of abstraction can be seen as involving an omission, a setting aside, as more and more of the detail is left out. . . It is those very details or circumstances, stripped from a work by the process of abstraction, that are truly the creation of an author." Kurtz, *supra* note 17, at 1248.

68. NIMMER & NIMMER, *supra* note 10, § 13.03(A)(1)(a). See also Kurtz, *supra* note 17, at 1246-48 (noting that the abstractions method is also problematic because a work can be "abstracted at many levels" and that a finding of infringement often depends on the level that is chosen as the abstract-ness cut-off).

69. See generally *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55-56 (2d Cir. 1936) (finding for the plaintiff in a copyright action).

70. *Id.* at 49-53. The story itself was in the public domain because it is a fact and therefore free for everyone to draw from.

71. *Id.* at 53.

72. *Id.* at 55-56. The court also noted this similarity might have been to unconscious copying, but that that did not excuse the infringer. *Id.* at 54. None of these elements were found in the real life, public domain story. *Id.* at 49-50.

73. *Id.* at 56.

74. *Id.* at 55-56 (noting also that "[s]peech is only a small part of a dramatist's means of expression").

75. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

76. NIMMER & NIMMER, *supra* note 10, § 13.03(A)(1)(a). See generally Zechariah Chafee Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503 (1945)(discussing the test).

deciding if two works are substantially similar.⁷⁷ Nimmer explains the pattern test by comparing two variations on Shakespeare's "Romeo and Juliet."⁷⁸ He asserts that the idea "of a romance between members of two rival families" is not an infringement but that "West Side Story," while set in a different time period, would infringe Romeo and Juliet under the "pattern test" because it takes the same sequence of events and characters.⁷⁹ This formulation is different than comparisons of "plot" because the plot of the work can be described very generally or very specifically.⁸⁰ Chafee's test assumes that the story becomes protected expression at the level of sequence, arrangement, characters, and dialogue.⁸¹ While this test may be "more precise than the abstractions test," it has also been criticized as "helpful in theory" but not "in practice" because it still "does not tell us where the line between unprotectible ideas and protected expression should be drawn."⁸²

Another popular approach, which was once widely used but now may be falling into disfavor, is the "total concept and feel test" articulated by the Court of Appeals of the Ninth Circuit in *Roth Greeting Cards v. United Card Co.*⁸³ In *Roth*, the court found that the "total concept and feel of the cards of United [were] the same as the copyrighted cards of Roth."⁸⁴ The court considered the cards as "combined compositions of art and text" and found that there were only "minor variations in color and style of defendant's card" so that "even a casual observer" would recognize the "remarkable similarity" between the cards.⁸⁵

The Ninth Circuit refined this "total concept and feel test" in *Sid & Mary Krofft T.V. Productions, Inc. v. McDonald's Corp.*, which

77. *Id.*

78. NIMMER & NIMMER, *supra* note 10, §13.03(A)(1)(b).

79. *Id.* This assumes, of course, that *Romeo and Juliette* is not in the public domain.

80. Comparisons of two plots would take us back to Judge Hand's abstractions test where it was necessary to abstract the expression from the general themes.

81. *Id.* See also *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 628-29 (2d Cir. 1982) (comparing the story of Tarzan by Edgar Rice Burroughs with the story of the movie "Tarzan, the Ape Man").

82. Broaddus, *supra* note 13, at 56-57 (also noting that its "major drawback is its specific application to literary works" and that it doesn't help in cases "involving works not consisting of a 'sequence of events' or 'the development of the interplay of characters'").

83. 429 F.2d 1106, 1110-12 (1970). See also Broaddus, *supra* note 13, at 57-60 (discussing *Roth* and the "total concept and feel" test).

84. *Roth Greeting Cards*, 429 F.2d at 1110.

85. *Id.* at 1110-11. The court here gave an example of two cards it found to be substantially similar. *Id.* One card had, "on its front, a colored drawing of a cute moppet suppressing a smile and, on the inside, the words 'i wuv you' " and the other card "[w]ith the exception of minor variations in color and style" was "identical." *Id.*

involved the question of defendant's appropriation of the plaintiff's cartoon creations as the basis for the defendant's "McDonaldland" TV commercials.⁸⁶ In this case, the court "established a two-part test to determine substantial similarity. The court used an 'extrinsic test' to determine similarity in general ideas and an 'intrinsic test' to compare the particular expression used."⁸⁷ The extrinsic test allows "analytical dissection and expert testimony" because it depends on "specific criteria which can be listed and analyzed."⁸⁸ The intrinsic test, on the other hand, depends upon the reactions of the "ordinary reasonable person" so that "analytic dissection and expert testimony are not appropriate."⁸⁹ The court found that McDonald's had misappropriated the "total concept and feel" of the Pufnstuf show" because the "Pufnstuf series" was not just a general idea.⁹⁰ The court found protectible expression in the characters' "developed personalities and particular ways of interacting with each other" and in the setting's "several unique features."⁹¹ The court approved of the jury's decision to consider the "works as a whole" instead of focusing on "isolated elements of each work to the exclusion of other elements, combination of elements, and expressions therein."⁹²

The total concept and feel test has been criticized because of its vagueness and indeterminacy.⁹³ For instance, not only is it difficult to determine what "total concept and feel means," but "[n]one of the courts that apply the test have attempted to define these terms."⁹⁴ Another problem is that the terminology for this test is confusing because "concepts," like ideas, are not eligible for copyright protection.⁹⁵ The phrasing "feel of a work" is also unclear since it does not distinguish the protectible from the unprotectible elements of a

86. 562 F.2d 1157, 1165-67 (9th Cir. 1977).

87. *Id.*; see also NIMMER & NIMMER, *supra* note 10, § 13.03(A)(1)(c) (discussing *Sid & Mary Krofft T.v. Prod., Inc.*, and the court's two-part test for determining "substantial similarity").

88. *Sid & Mary Krofft T.V. Prod., Inc.*, 562 F.2d at 1164.

89. *Id.*

90. *Id.* at 1169.

91. *Id.*

92. *Id.*

93. See NIMMER & NIMMER, *supra* note 10, §13.03 (A)(1)(c) (noting that it mostly serves the limited field of "juvenile works" and that if expanded it "threatens to subvert the very essence of copyright, namely the protection of original expression").

94. Broadus, *supra* note 13, at 58-59.

95. NIMMER & NIMMER, *supra* note 10, § 13.03 (A)(1)(c). It is also not clear what function the first part of the test fulfills or what role expert testimony or dissection serves in the final judgment of infringement. See John Shepard Wiley, Jr., *Copyright at the School of Patent*, 58 CHI. L. REV. 119, 131-32 (1991) (noting that "Krofft's exactitude implied that expert opinion fulfills some clear and definite function" but that "once again readers must wonder what that function is").

work.⁹⁶ In *Krofft*, the court particularly noted that, once the extrinsic test is passed, the trier of fact is left to determine infringement by comparing the whole of both works.⁹⁷ At this point in the test, the trier of fact is left to his own understanding of "total concept and feel" in order to determine if two works are substantially similar.⁹⁸ Critics have argued that this test can produce uncertain and random results.⁹⁹ For instance, Nimmer notes that "total concept and feel should not be viewed as the *sin qua non* for infringement" because a work that would otherwise be infringing should not be relieved of infringement just because its "total concept and feel" are different.¹⁰⁰

Some courts have tried to create different tests for specialized or complex areas such as in "infringement of computer programs."¹⁰¹ For example, there is an "iterative test" which focuses on use and literal copying and allows expert testimony to guide the trier of fact in determining infringement.¹⁰² Courts have also applied a test in computer program cases that extends protection to the "structure, sequence and organization" of a work.¹⁰³ This method has been criticized as extending copyright protection too far into the bounds of unprotectible ideas by failing to "recognize that a computer program consists of not one, but a series of ideas."¹⁰⁴ Critics worry that overprotection will lead to a "chilling effect on creativity and innovation."¹⁰⁵

Another approach used to determine infringement for software programs, is the "filtration approach."¹⁰⁶ Here, a court combines

96. *Id.*

97. *Sid & Mary Krofft T.V. Prod., Inc.*, 562 F.2d at 1164-65.

98. *Id.*

99. See Wiley, *supra* note 95, at 132 (arguing that the intrinsic test "implies that the jury's gut governs copyright litigation" which is "a stance that would randomize results and could please no one except copyright litigators and their heirs").

100. NIMMER & NIMMER, *supra* note 10, §13.03 (A)(1)(c); Wiley, *supra* note 95, at 132 (noting that the Ninth Circuit itself may be abandoning this test now).

101. Broadus, *supra* note 13, at 59. *Cf.* Wiley, *supra* note 95, at 132 (noting that "these courts favor a single inquiry about 'substantial similarity' to which both lay and expert testimony is admissible" because the "two-step analysis unrealistically assumes that factfinders can or will forget what they learned in one step when applying the other").

102. See, e.g., *E.F. Johnson Co. v. Uniden Corp.*, 623 F. Supp. 1485, 1493 (D. Minn. 1985) (applying the "iterative test" in a software infringement action). See NIMMER & NIMMER, *supra* note 10, § 13.03 (A)(1)(d) (criticizing this test as not protecting a plaintiff from copying that "does not involve literal copying of code or direct translation" but praising its use of experts as a "step in the proper direction").

103. Broadus, *supra* note 13, at 59. See generally *Wheelan Ass. Inc. v. Jaslow Dental Lab.*, 797 F.2d 1222 (3d Cir. 1986) (applying the test).

104. Broadus, *supra* note 13, at 59-60.

105. *Id.* at 60.

106. NIMMER & NIMMER, *supra* note 10, § 13.03 (A)(1)(d).

Hand's abstraction test with a process of filtration that is supposed to result in a "core of protectible expression" against which the defendant's work can be compared.¹⁰⁷ Some argue that, for software cases, perhaps even greater than the threat of overprotection is the "uncertainty created by the *ad hoc* nature" of these cases because "[s]oftware developers have no adequate guidelines regarding what level of independent development is required to avoid copyright infringement."¹⁰⁸

Regardless of how well these tests may or may not work for computer programming, they at least recognize the inapplicability of the abstractions test to complex creations like computer software and attempt to determine infringement from a more relevant perspective.

C. *Intended Audience versus Lay Audience Standard*

The difficulty in determining substantial similarity between two works is compounded by the different audience standards that courts apply.¹⁰⁹ Some courts apply the ordinary observer or "lay observer" standard.¹¹⁰ For instance, the court in *Roth* noted that "even a casual observer" would find substantial similarity between the cards in question.¹¹¹ The court seemed to imply that, if a casual observer would readily recognize substantial similarity, an "ordinary observer" would obviously find infringement.¹¹² Critics of this standard note that courts that apply this standard often seem to sweep up the "ordinary observer language" and apply it to the outcome that they have already decided.¹¹³ Nimmer also notes that, while the

107. Broaddus, *supra* note 13, at 60-61 (favoring the approach because it involves a "single filtration" as opposed to the "numerous approaches currently being used for separating the protectible from the unprotectible elements of various types of works"). See also *Computer Assocs. Int'l, Inc. v Atari, Inc.*, 982 F.2d 693, 706-12 (2d Cir. 1992) (suggesting a three-step approach based on the abstraction test that would combine abstraction, filtration and comparison).

108. NIMMER & NIMMER, *supra* note 10, § 13.03 (A)(1)(d).

109. See *id.*, at § 13.03. *C.f.* Broaddus, *supra* note 13, at 62-63 (noting that the "lay observer test constitutes the final step in the copyright infringement analysis" once "ownership, access, and copying have been established, and it is determined what elements of the plaintiff's work are protectible").

110. See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (noting that expert witness testimony should not be used to decide infringement, but should only be used to "assist in determining the reactions of lay auditors").

111. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

112. *Id.*

113. Some possible examples of this theory are, *Costello v. Loew's Inc.*, 159 F. Supp 782, 789 (D. D.C. 1958) (finding that "[b]eyond any doubt, the ordinary viewer of Knights of the Round Table who had read the *The Sangreal* would not get the impression that the defendant had copied anything that is original with plaintiff from her drama" after discussing the various pieces

Supreme Court did not expressly reject the use of the immediate reaction of the ordinary observer in *Feist*, the standard “can play no useful role” in analyzing and determining whether there has been “copying of constituent elements that are original.”¹¹⁴

If *Feist* stands for the proposition that originality is the “*sin qua non*”¹¹⁵ of copyright, the reaction of the ordinary observer may not be appropriate in “detail[ing] how said copying was limited to unprotected expression.”¹¹⁶ Instead, the important processes under *Feist* are (1) the filtering out of original expression from unprotected expression and (2) a comparison of these expressive elements.¹¹⁷ The lay audience standard is also questioned in its applicability to complex works or works in which the ordinary audience lacks the required skill to make comparisons.

Other courts, “recognizing the limitations” of the ordinary observer standard, use an “intended audience” standard.¹¹⁸ In these cases, courts substitute the ordinary observer with a “fact finder possessing the requisite skill or knowledge necessary to fully comprehend and understand the works under consideration.”¹¹⁹ It is argued that this standard is not only useful for computer programs but also in “cases dealing with musical works, advanced literary works, and other works that are complex in nature.”¹²⁰ In *Kohus v. Mariol*, for example, the Court of Appeals for the Sixth Circuit used the “intended audience” standard in order to determine if there was substantial similarity between two drawings of latches made for portable children’s play-yards.¹²¹ The court cited *Feist* and *Nimmer* to maintain that the ordinary observer standard only applies where the “lay audience’s untutored judgment determines whether the product

which are protected and similar); *Warner Bros., Inc. v. Am. Broad Co., Inc.*, 654 F.2d 204, 209-11 (2d Cir. 1981) (mentioning the “average lay observer” aspect of the test for substantial similarity, but never referring to it again once the court dissects the elements of the TV show “The Greatest American Hero” to determine it does not infringe on the plaintiff’s copyright in “Superman”).

114. NIMMER & NIMMER, *supra* note 10, §13.03 (B)(2)(c); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

115. *Feist Publ’ns, Inc.*, 499 U.S. at 345.

116. NIMMER & NIMMER, *supra* note 10, § 13.03 (B)(2)(c).

117. *Id.* *Nimmer* finds that the audience test therefore plays no useful role under *Feist*, and should therefore be discarded due to its variable results and the “myriad exceptions in the way it is applied.” *Id.* He also notes that given the disagreement among the circuits and Supreme Court silence, the issue is ripe for review. *Id.* *Cf.*, *Warner Bros., Inc. v. Am. Broad. Co., Inc.*, 720 F.2d 231, 245 (2d Cir. 1983) (noting that surveys and opinion polls are problematic when used for infringement actions because “an inference of copying sufficient to establish infringement of a copyright is not a concept familiar to the public at large”).

118. Broaddus, *supra* note 13, at 64-65.

119. *Id.* at 66.

120. *Id.*

121. 328 F.3d 848, 852 (6th Cir. 2003).

will sell.”¹²² It reasoned that “in cases where the target audience possesses specialized expertise . . . it is appropriate . . . to consider similarity from the specialist’s perspective.”¹²³ The intended audience standard may be more precise at extracting protected material from unprotected material, but there still remains the problem of determining the intended audience for a particular work.¹²⁴

IV. THE PARTICULAR PROBLEMS POSED BY POETRY

The variety of tests and the uncertainty in their applications reflect the problems of determining substantial similarity when a type of work does not lend itself to easy delineations of idea, expression, or originality. Poetry is an example that falls into this uneasy territory. Ezra Pound called poetry the “most concentrated form of verbal expression.”¹²⁵ It is a genre in which the very purpose of the author is often to test the boundaries of the rational and the predictable.¹²⁶ This imaginative and unpredictable nature of poetry makes it even more difficult to apply the infringement tests that courts currently use. Given copyright’s purpose to protect original creation by incentivizing additional creation, there should be infringement “standard[s] [that] give substantial similarity meaning” and predictability in order to avoid “unnecessary stifling of creativity.”¹²⁷ For poetry, as for other works, this standard should be predicated upon how the writing operates as an expressive medium.

122. *Id.* at 854-57 (noting that *Feist* “favors an approach that involves reducing the comparison to elements that are original” and that if the lay audience standard does not further that goal, it must be either modified or discarded). See also *Dawson v. Hinshaw*, 905 F.2d 731, 736 (4th Cir. 1990) (finding that when “conducting the second prong of the substantial similarity inquiry, a district court must consider the nature of the intended audience of the plaintiff’s work”).

123. *Kohus*, 328 F.2d at 857 (noting that in order to apply this standard, there must arise a situation beyond “mere differences in taste and instead must rise to the level of the possession of knowledge that the lay public lacks”).

124. See, e.g., *Warner Bros., Inc.*, 720 F.2d at 243 (using audience surveys of the TV show “The Greatest American Hero” to determine that the intended audience was the average lay observer which was for a “general audience of evening television viewers” notwithstanding that fact that some viewers might not appreciate the humor).

125. EZRA POUND, *ABC OF READING* 36 (New Directions 1987).

126. See David Young, *John Ashbery*, in *THE LONGMAN ANTHOLOGY OF CONTEMPORARY AMERICAN POETRY* 162-63 (1989) (describing John Ashbery’s experimental poetry which he finds is “dedicated to liberating poetry from predictable conventions and tired traditions”).

127. Laura G. Lape, *The Metaphysics of The Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 182 (1994).

A. *What is a Poem?*

The poet C.D. Wright notes that “[p]oetry without form is a fiction.”¹²⁸ A poem, unlike a piece of fiction or non-fiction, does not simply tell or explain something through the use of sentences and paragraphs. The author’s selection, placement, and coordination of words, space, punctuation, and sound produce meaning akin to a painting or a musical composition.¹²⁹ For instance, each word in Williams’ poem is carefully chosen and aligned on the page in order to reconstruct the reality of the red wheelbarrow as it existed in Williams’ vision.¹³⁰ It is this artful attention to detail and intense focus on a seemingly simple object that is the poem’s quest.¹³¹ The red wheelbarrow itself (as it exists in Williams’ vision) *is* the point of the poem.¹³² A poem’s meaning, therefore, is not only tied to the words used and traditional exposition, but also to the poem’s form, sound, and arrangement of words on the page, all of which create an emotional response in the reader.¹³³

Poetry has often been described as appealing to both the intellect and emotions of the reader.¹³⁴ Poetry, in a sense, uses language to transcend language; “it may resemble language as we ordinarily know and use it, but it transcends that use in its power to express what we had thought inexpressible.”¹³⁵ The poet Gregory Orr, for instance, characterizes poetry as having four possible temperaments that affect a poem’s form; story (dramatic unity), structure (measurable patterns), music (rhythm and sounds), and imagination (flow of image to image or thought).¹³⁶ Wallace Stevens described poets as “orator[s] whose speech sometimes resembles music.”¹³⁷ For poetry, uniqueness is, therefore, something different

128. C.D. Wright, *A Taxable Matter*, in *A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS* 240, 242 (Stuart Friebert et al., eds. 1997).

129. See Stuart Friebert, *John Berryman*, in *THE LONGMAN ANTHOLOGY OF CONTEMPORARY AMERICAN POETRY* 31 (1989) (noting that John Berryman’s “Dream Songs” sounds “a little like a xylophone played by a master musician”).

130. FRANCES MAYES, *THE DISCOVERY OF POETRY* 426 (1987).

131. *Id.*

132. *Id.*

133. See generally, Gregory Orr, *Order and Disorder in Lyric Poetry*, in *RICHER ENTANGLEMENTS* 24 (1993) (discussing how order and disorder contribute to the form a poem eventually takes).

134. Holub, *supra* note 3, at 51.

135. David Young, *Language, the Poet as Master and Servant*, in *A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS*, 189 (Stuart Friebert et al., eds. 1997).

136. Gregory Orr, *Four Temperaments and the Forms of Poetry*, in *RICHER ENTANGLEMENTS* 3-5 (1993).

137. *Infra* note 168, at 126.

than what we might look for in a piece of fiction or in a play. A story may be unique in its characterization, setting, words, exposition, or dramatization.¹³⁸ A poem's originality, on the other hand, stems from its unique composition of words, form, sound, and content.¹³⁹ It is a poet's original use of these elements that gives his poems both particularized meaning and expression.¹⁴⁰

B. *The Line in Poetry*

One of the unique characteristics of poetry is the way in which each individual line of a poem adds to the overall meaning or expression of the poem.¹⁴¹ The poet William Matthews noted that, unlike the line in prose which "is like a fishing line, cast out as far as it will go straightforward," the line in poetry resembles a dance as it "goes out from the margin, turns back, goes out again."¹⁴² A line can give "intellectual force" to isolated words in a poem.¹⁴³ The poet's choice of line breaks also creates emphasis on the words that end each

138. See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55-56 (2d Cir. 1936) (finding that a "play is the sequence of . . . conflicts. . . bound together in a unseparable unity").

139. See Shirley Kaufman, *Some Thoughts About Lines*, in *A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS* 91 (Stuart Friebert et al., eds. 1997) (finding that in William Matthew's poetry it is not what he "says that counts as a work of art, it's what he makes").

140. "[M]eaning is not a set cut-off thing like the move of a knight on a chess-board. It comes up with roots, with associations, with how and where the word is familiarly used, or where it has been used brilliantly or memorably." Orr, *supra* note 136, at 36-37 (explaining that meaning can be created through sound, context, and groupings of words). See also Mayes, *supra* note 130, at 45-47 (noting that the "best-formed poems function smoothly with, with oiled and well-fitted parts"). Robert Creeley has said that unlike conversational speech, "the organization of poetry has moved to a further articulation in which the rhythmic and sound structure now becomes not only evident but a primary coherence in the total organization of what's being experienced." Robert Creeley, *With Linda Wagner*, in *TALES OUT OF SCHOOL* 27 (1993).

141. "Poems are written in lines. The length of the line and where it breaks help establish the poem's rhythm." Orr, *supra* note 136, at 5. See also John Haines, *Further Reflections on Line and the Poetic Voice*, in *A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS* 85 (Stuart Friebert et al., eds. 1997) (finding that line breaks create "emotional charge" and come from the "energy or impulse of the poet").

142. William Matthews, *A Note on Prose, Verse and the Line*, in *A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS* 92 (Stuart Friebert et al., eds. 1997). "The line most obviously bodies forth the dance—the pause, the balance, and sudden motion . . ." Donald Hall, *The Line*, in *A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS* 88 (Stuart Friebert et al., eds. 1997). Some poetry does retain more prose-like characteristics and so the importance of the line itself may be lessened somewhat where the poem's lines are long and discursive. On the other hand, these types of poems are often rooted in traditional forms, such as the sonnet, and as such the line takes on a meaning based on this tradition and "type." Even in these forms, musicality can be dictated by line length or words that are chosen to begin or end the line. So, while, even in prose-like poetry the line may appear more regular, the line's shape can dictate meaning based on tradition, sound, or choice of word ends.

143. *Id.*

line, while the space after each line creates a breath which gives separate identity and importance to each single line.¹⁴⁴ In Williams' *The Red Wheelbarrow*, for example, "so much depends/upon//a red wheel/barrow//glazed with rain/water//beside the white chickens."¹⁴⁵ Williams' chosen line breaks slow the reader down and make the reader pay attention to each small line. This focused attention is part of the meaning of this poem.¹⁴⁶ A red wheelbarrow might easily escape many people's gaze. This poem uses the line breaks to slow the reader down so that the reader does pay attention to the seemingly mundane object, which may appear surprisingly beautiful or strange.¹⁴⁷ Read as a piece of prose without its line breaks, the poem loses its main point: "So much depends upon a red wheelbarrow glazed with rain water beside the white chickens."¹⁴⁸ A poem reprinted as prose is no longer the careful, creative product of its author in which emphasis, rhythm, and the visual impact of the poem are important.¹⁴⁹

Stanza breaks, punctuation, and techniques such as extra spacing within a line also can contribute to the overall meaning of a poem through rhythmic and visual resonance.¹⁵⁰ For instance, the length of lines in a poem can create a rhythm "akin to the bar in music."¹⁵¹ Long lines in a poem may create a slower, stretched-out narrative beat, while short lines may create a quicker more bitten-off feeling.¹⁵² These rhythms create an emotional response in the reader that has been likened to a dance that the reader engages in with the poem.¹⁵³ A poem's sound combined with a poem's visual layout on the page creates the total experience of the poem.¹⁵⁴ The poet Octavio

144. See MAYES, *supra* note at 130, at 5-6.

145. In poetry the "/" represents a line break and "//" represents a stanza break.

146. See, e.g., David Young, *William Carlos Williams*, in THE LONGMAN ANTHOLOGY OF CONTEMPORARY AMERICAN POETRY 14-15 (Stuart Frieber et al., eds. 1989) (noting that form of Williams' poetry parallels the "poet's vision of the world's beauty... manifesting [itself] in unlikely ways").

147. See MAYES, *supra* note 130, at 426 (noting that William's careful timing of images "line by line . . . makes a subtle case that an object itself is worth close attention").

148. Other writers have also expressed this sentiment using this poem as an example. Hall, *supra* note 142, at 88; John Haines, *Further Reflections on Line and the Poetic Voice*, in A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS 85 (Stuart Frieber et al., eds. 1997).

149. Hall, *supra* note 142.

150. See MAYES, *supra* note 130, at 327 (noting that "form is the first thing you notice about a poem").

151. Creeley, *supra* note 140, at 29.

152. Cf. Sandra McPherson, *The Working Line*, in A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS 79 (Stuart Frieber et al., eds. 1997) (comparing the line in poetry to a "conductor we watch").

153. Hall, *supra* note 142, at 88. "The line most obviously bodies forth the dance. . . ." *Id.*

154. MAYES, *supra* note 130, at 462.

Paz, for example, uses form to create a visual and rhythmic experience:

Poetry,
 suspension bridge between history and truth,
 is not a path toward this or that:
 it is to see
 the stillness in motion,
 change
 in stillness.
 History is the path:
 it goes nowhere,
 we all walk it,
 truth is to walk it.
 We neither go nor come:
 we are in the hands of time.
 Truth:
 to know ourselves,
 from the beginning,
 hung.
 Brotherhood over the void.¹⁵⁵

Paz creates “the illusion or illustration of *space*” with his careful crafting of words on the page, and this created space evokes emotion as artfully as the words in the poem.¹⁵⁶

The Red Wheelbarrow uses short lines to create a slow, thoughtful rhythm, reinforcing the poem’s purpose of articulating the beauty that can be found in careful concentration on a single object.¹⁵⁷ For instance, “so much depends” makes the reader stop, and the reader then starts and stops again with the next short line: “upon.” The poem’s lines create a slow, hypnotic rhythm.¹⁵⁸ This hypnosis becomes a part of the poem’s point as Williams works to make the reader stop and notice the seemingly ordinary.¹⁵⁹ The poet Fred Chappell notes the importance of form in finding “new approaches to old subjects,” emphasizing that originality can be found in “new combination of words and new arrangements of such poetic materials

155. *San Idefonso nocturne*, in Fred Chappell, *Paz*, PLOW NAKED 130 (1993).

156. McPherson, *supra* note 152, at 76.

157. MAYES, *supra* note 130, at 426.

158. *Id.*

159. *Id.*

as rhyme, meter, caesura, [and] metaphor.”¹⁶⁰ For poetry, then, the “[p]oem is the form; the form *is* the poem.”¹⁶¹

C. Word Choice

For poetry, as for other literary forms, the selection and coordination of words is also of vital importance.¹⁶² However, poetry’s condensed nature makes word choice and coordination especially important as the poet chooses “words to fit the best sounds and sound patterns to the subject.”¹⁶³ Ezra Pound writes that “[t]he reader’s first and simplest test of [a poet] will be to look for words that do not function; that contribute nothing to the meaning” or that distract the reader from the central meaning in the poem.¹⁶⁴ A poem may tell a story in one page, while a work of fiction may tell the same story over the course of 100 or more pages. A poem may aim to reveal one “aspect of the human condition,” while a fiction piece may unfold slowly and wander through varying introspections.¹⁶⁵ Poetry’s concentrated forms make every word crucial. Each word in a poem carries an added weight and can swing the whole resonance or tone of the poem in a new direction.¹⁶⁶ Therefore, “[a] fiery pepper on a clam has consequences, as does a hot word in a cold poem.”¹⁶⁷

The subject matter of the poem often dictates the choice of the poet’s words. For instance, in a poem about death, it might be surprising to hear a light word such as “cherries” unless the writer wished to create surprise or give a new emotion or resonance to the poem.¹⁶⁸ In *The Red Wheelbarrow*, Williams uses common, simple words such as “a red wheel/barrow//glazed with rain/water” to illustrate the beauty of simple objects.¹⁶⁹ His choice of straightforward and simple words is crucial to the emotional resonance of the poem. If Williams had used emotionally charged descriptors of his red wheelbarrow, the focus of the poem would have shifted from the red

160. Chappell, *supra* note 155, at 26-27.

161. MAYES, *supra* note 130, at 327. “The poem’s form and content are totally interactive systems. Form without balanced content is hollow; content without form is chaos.” *Id.*

162. MAYES, *supra* note 130, at 33.

163. See Holub, *supra* note 3, at 50-51 (noting that poetry as compared to other communications is a concentrated form with a “specific high inner intensity”).

164. POUND, *supra* note 125, at 63.

165. *Id.*

166. See *id.* at 37 (detailing the nuanced meaning words can have).

167. MAYES, *supra* note 130, at 46.

168. See *id.* For a discussion of the emotional authenticity of word choice and poetry, see WALLACE STEVENS, *THE NECESSARY ANGEL* 112-113 (1951).

169. See Young, *supra* note 146, at 14-15 (discussing Williams’ style).

wheelbarrow to the personality or emotional geography of the poem's speaker.¹⁷⁰ For instance, if Williams had described the wheelbarrow as "youthful red" or "sparkling with diamonds of rain water," the reader's focus moves away from the wheelbarrow itself toward the connotations of "youthful," "sparkling," and "diamonds."¹⁷¹ In *The Red Wheelbarrow*, Williams carefully avoids words that intrude the personality of the poet or his particular mood on the pure actuality of the wheelbarrow.¹⁷² In sharp contrast to Williams, Louis MacNeice's poem, *Snow*, uses a variety of simple and complex words to create a dizzying experience:

World is crazier and more of it than we think,
Incorrigibly plural. I peel and portion
A tangerine and spit the pips and feel
The drunkenness of things being various.¹⁷³

Poetry is a "master[ing] of the possibilities of language."¹⁷⁴ This mastering of language is not something that simply happens; it is a process linked simultaneously to both the present and the past. Poets read other poems and use the past as a springboard while also drawing from their present sense of language and the world.¹⁷⁵ Thus, a "new poem fulfills the old habits of expectation in some unexpected way."¹⁷⁶ Authors can use what has come before to launch their own unique perspectives.¹⁷⁷ This use of the past to create new poems creates a tension with traditional notions of originality. Mark Rose hypothesizes that, "[t]he persistence of the discourse of original genius implicit in the notion of creativity . . . obscures the fact that cultural

170. See MAYES, *supra* note 130, at 426 (contrasting Keats's and Neruda's way of describing objects).

171. *Id.*

172. *Id.*

173. *Id.* at 310. For a discussion of the importance of word choice and syntax in a poem by Keats, see Gregory Orr, *Order and Disorder in Lyric Poetry*, in RICHER ENTANGLEMENTS 26-29 (1993) (finding that Keats' "rhetoric" and "elaborate syntax . . . are meant to disorder and disorient the recipient").

174. Young, *supra* note 135, at 188 (referring to the poet Charles Wright as an example of a poet whose abilities in this regard were of a "very high order").

175. See, e.g., Donald Hall, *Goatfoot, Milktongue, Twinbird: The Psychic Origins of Poetic Form*, in A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS 25 (Stuart Friebert et al., eds. 1997) (articulating the poet's process).

176. *Id.* at 26.

177. For an outline of historical ideas of authorship, including the origins of the phrase "dwarfs on the shoulders of giants," see Rebecca Moore Howard, *Some Events and Ideas in the History of Authorship in the West*, at <http://wrt-howard.syr.edu/Handouts/ChronAuth.html> (last visited May 1, 2005).

production is always a matter of appropriation and transformation."¹⁷⁸ In poetry, transformation can occur at many levels, such as form, sound, tone, or image.¹⁷⁹ It is a poem's attention to the "shining particulars" of language and form that make a poem unique or original despite the fact that its subject may have been written about many times before.¹⁸⁰

Because a poem's original expression resides in a particular combination of words, sounds, and form and because copyright seeks to protect original expression,¹⁸¹ it should protect *all* of these original elements in a poem. The current tests for copyright infringement¹⁸² fail to account for the unique aspects of poetry and, therefore, do not adequately protect the original expression of a poem.¹⁸³ This failure to adequately characterize the original expression in a poem not only inadequately protects a poem's originality, but it also prevents other poems from borrowing elements which, when divorced from their form, would not necessarily be original.¹⁸⁴ These problems are best illustrated by applying the substantial similarity tests that courts currently use to *The Red Wheelbarrow*.

V. THE CURRENT TESTS FOR SUBSTANTIAL SIMILARITY DO NOT WORK FOR POETRY

Judge Learned Hand's famous abstractions tests seeks to distill expression from ideas in a given work, "but it does not tell us where in any given work the level of abstraction is such as to cross the line from expression to idea."¹⁸⁵ Thus, in looking at *The Red Wheelbarrow*, the first step in determining improper appropriation would be to decide

178. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 135 (1993).

179. *See infra* Part III.

180. C.D. Wright, *A Taxable Matter*, in *A FIELD GUIDE OF CONTEMPORARY POETRY AND POETICS* 240-41 (Stuart Friebert et al., eds 1997) (finding that it is poetry that "notes on the barely perceptible disappearances from our world such as that of the sleeping porch or the root cellar").

181. *See generally* Feist Publ'ns, Inc. v. Snyder, 499 U.S. 340 (1991) (discussing copyright protection). Mark Rose calls this original expression the "personality" of the author, and quotes Locke to explain that this personal expression is created when the author "removes materials from the state of nature and mixes his labor with them, thereby producing an item of personal property." ROSE, *supra* note 178, at 114.

182. The current tests for substantial similarity. *See infra* Part III.

183. *See generally* Rotstein, *supra* note 14 (arguing that copyright should make room for the insights of literary criticism and that the failure to understand different types of texts and how they work, is a failure to characterize the copyrightable elements within them).

184. "[I]f we expand protection too broadly or in unproductive ways, creativity may be stymied by constraining the use and interplay of ideas." Monrie E. Price & Malla Pollack, *The Author in Copyright: Notes for the Literary Critic*, 10 *CARDOZO ARTS & ENT. L.J.* 703, 706 (1992).

185. NIMMER & NIMMER, *supra* note 10, §13.03.

what in Williams' poem is protectible original expression. In *Sheldon*, Judge Hand differentiated "general patterns" or "themes" from "expression."¹⁸⁶ In that case, Hand found that the defendants had taken too much because they had used the same scenes, social classes, and "parallelism of incident," all of which infringed on the dramatic significance of the first play.¹⁸⁷

The dramatic significance of *The Red Wheelbarrow* lies not only in words used, which are seemingly innocuous, but in the pattern of short lines and stanzas and in how the words break slowly over the page to create the surprisingly beautiful image of a wheelbarrow "glazed" with rain.¹⁸⁸ It is clear that Williams could not claim copyright in any of the words in this poem individually. It also is clear that the idea of a poem with short lines that make the reader dwell more carefully on individual words cannot be copyrighted.¹⁸⁹ Nor could Williams claim copyright in the idea of a wheelbarrow or a mundane object being beautiful.¹⁹⁰ In *Nichols*, Judge Hand noted that there was a point at which an idea could become clothed in expression and therefore copyrightable.¹⁹¹ But as noted earlier, Hand refused to fix this point and indicated that "nobody ever can."¹⁹² At what point, then, do Williams' form, words, and combination of words working toward a meaning deserve protection under the abstractions test? It is unclear if half of Williams' words used in a different form or all of his words in a different form and order would be an infringement.

The point of Hand's test is to move from general patterns to a more "specific level of abstraction."¹⁹³ In *The Red Wheelbarrow*, a general pattern might be the idea of using a poem to focus attention on the ordinary. A more specific level of abstraction might include a poem that invokes this idea in the specific context of a wheelbarrow, or maybe even more specifically, a red wheelbarrow. The problem is that a poem with a red wheelbarrow, even if it were "glazed" with

186. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936).

187. *Id.* at 55-56.

188. See MAYES *supra* note 130, at 426 (describing Williams' wheelbarrow as a "watercolor image").

189. See POUND, *supra* note 125, at 69 (noting that in "Provence it was [once] considered plagiarism to take a man's form").

190. Ideas are not copyrightable. See *generally infra* Part II.

191. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

192. *Id.*

193. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 624 (2d Cir. 1982) (using the abstractions test to determine if there is substantial similarity between plaintiff's book about Tarzan and defendant's movie). Hand, in *Sheldons*, notes that a play might be pirated "without using the dialogue" because "[s]peech is only a small part of a dramatist's means of expression . . ." 81 F.2d at 55.

rain, might have a completely different tone or personality than Williams' poem. A poem might wish to express the same general idea of *The Red Wheelbarrow* and might even include a red wheelbarrow, but could use different words, a different form, or both.¹⁹⁴ A poet who copied or tried to copy every bit of dramatic significance¹⁹⁵ that he could find in *The Red Wheelbarrow* but who used different words or a different form would create a new poem in which new choices represented his originality as an author.¹⁹⁶ The abstractions test provides no way of delineating between a poem that is a wholly new creation and one which is impermissibly similar to an earlier poem.¹⁹⁷ In failing to take into account all the expressive elements available to poetry, the abstractions test ignores real and important differences, such as tone or rhythm, that might occur between two poems on a similar subject. This method of abstracting expression therefore is too imprecise to provide any accuracy or predictability when applied to poetry.¹⁹⁸

The total concept and feel test, as introduced in *Roth*¹⁹⁹ and refined in *Sid & Mary Krofft*,²⁰⁰ likewise fails to allow for poetry's intermingling of form and function. First, the vague scope of "total concept and feel" probably would create overly broad copyright protection when applied to a poem like *The Red Wheelbarrow*.²⁰¹ For example, the total concept of *The Red Wheelbarrow* might be found to be the idea of beauty in the ordinary.²⁰² The total feel of the poem could be articulated as the use of a few, simple words to make the reader focus attention on one object.²⁰³ Another poet could use both

194. For a discussion of the relationship between personality, value, and original authorship, see ROSE, *supra* note 181, at 120-21.

195. See *Sheldon*, 81 F.2d at 55 (applying the test).

196. David Walker, *Stone Soup: Contemporary Poetry and the Obsessive Image*, in A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS 172-77 (Stuart Frieber et al., eds 1997).

197. Cf. NIMMER & NIMMER, *supra* note 10, §13.03. Robert Rotstein also criticizes *Nichols'* explication of the idea/expression dichotomy by noting that often courts equate idea with convention and expression with "modulation of convention," ignoring the realities of genre or how particular types of texts function. Rotstein, *supra* note 14, at 750-85.

198. For an argument that internal consistency should be a goal of copyright, see Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 607-09 (1985). The patterns test, discussed *infra* likewise fails to take into account sound, tone, and visual impression as expressive elements.

199. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

200. *Sid & Mary Krofft Television Prod., Inc. v. McDonald Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977).

201. Broaddus, *supra* note 13, at 58.

202. This is a simplistic rendering of a possible interpretation of this poem.

203. See *infra* Part III.

the concept and feel of *The Red Wheelbarrow* and yet create a poem nothing like Williams'. Consider this poem by Walt Whitman:

The Runner

On a flat road runs the well-train'd runner,
He is lean and sinewy with muscular legs,
He is thinly clothed, he leans forward as he runs,
With lightly closed fists and arms partially rais'd.²⁰⁴

In both Whitman's poem and in *The Red Wheelbarrow*, the images described are ordinary and realistic.²⁰⁵ If a court defined *The Red Wheelbarrow's* "total concept and feel" as above, it could likewise define Whitman's *The Runner* to have a substantially similar concept and feel. Obviously these poems are nothing alike; they are drastically different in form, actual word choice, and image.²⁰⁶ It could be argued that this example is an exaggeration of the total concept and feel test's problems since no reasonable person would ever conclude that those two poems are substantially similar. However, the point is that "total concept and feel" provides little guidance. This is especially true in a case where almost anyone would agree that two poems are not substantially similar, but where an articulation of both poems' "total concept and feel" might reveal surprising overlap. A poem with a red wheelbarrow in it that was also about beauty in the ordinary, could be just as different from *The Red Wheelbarrow* as is *The Runner*.²⁰⁷ Therefore, in a case where two poems share more in regard to theme or word choice, it becomes critical to decide the exact meaning of "total concept and feel."

Sid & Mary Krofft's extrinsic-intrinsic articulation of the total concept and feel test does little to improve the precision of substantial similarity applied to poetry.²⁰⁸ While this test allows for "analytical dissection and expert testimony" in the first, extrinsic step of the test, that step looks only for substantial similarity of ideas and not for similarity of expression.²⁰⁹ If substantial similarity of ideas is found,

204. MAYES, *supra* note 130, at 93.

205. *See id.* at 82 (discussing the use of literal images in poetry).

206. For the argument that poetry is not written with concepts or ideas, but with words, which, when carefully selected, achieve an "evocative effect, partly as image, partly as woven texture of movement, sound, and the energy released by imaginative juxtaposition," see Young, *supra* note 135, at 186-91.

207. *See* MAYES, *supra* note 130, at 426 (contrasting the styles and meanings of different poems that closely examine specific objects).

208. *Sid & Mary Krofft Television Prod., Inc.*, 562 F.2d at 1164.

209. *Id.*

the trier of fact then must decide if there is similarity of expression.²¹⁰ Therefore, the second, intrinsic step is the equivalent of the total concept and feel test. When asked to evaluate the substantial similarity of ideas between two poems, an expert poet might be hard-pressed to decide which concepts to compare. For example, should an expert comparing a poem to *The Red Wheelbarrow* focus on the concept of a simple form, on the poem's praise of the ordinary, or on the poem's use of ordinary words to show that something is beautiful?

In *Sid & Mary Krofft*, the court noted that the determination "of whether there is similarity in ideas may often be a simple one."²¹¹ It used the example of a nude statue, explaining that a "statue of a horse or a painting of a nude" would not "embody this [same] idea."²¹² But these examples articulate difference only when either the subject or the medium is completely different. This approach still leaves another poem about a red wheelbarrow open to accusations of substantial similarity of ideas. Then, is left to the "ordinary reasonable person" to determine whether there is substantial similarity of expression.²¹³ Here, as with the "total concept and feel" test, the trier of fact has little guidance as to what constitutes infringement other than his own particular predisposition or instincts.²¹⁴

The new approaches that some courts have taken in assessing substantial similarity in complex cases²¹⁵ are mostly limited to analysis of technology or computer programming.²¹⁶ The filtration test, for example, aims to filter out all of the unprotectible elements of a work and then to compare the protectible expression with the allegedly infringing work.²¹⁷ In *Computer Ass'n International v. Altai, Inc.*, the Court of Appeals for the Second Circuit first filtered out such "elements as those dictated by efficiency, hardware requirements, and mechanical specifications" as well as "elements that [the court] found to be in the public domain."²¹⁸ But unlike a computer program, poetry is a "structuring of thought and emotion" through the use of the line,

210. *Id.*

211. *Sid & Mary Krofft Television Prod., Inc.*, 562 F.2d at 1164.

212. *Id.* The court also notes that the expert might consider things such as "the subject matter, and the setting." *Id.*

213. *Id.*

214. See NIMMER & NIMMER, *supra* note 10, §13.03 (A)(1)(c) (discussing the "Total Concept and Feel Test").

215. See *infra* Part II.

216. NIMMER & NIMMER, *supra* note 10, §13.03(e).

217. See Broaddus, *supra* note 13, at 61 (discussing the filtration process).

218. *Id.*

overall form, word choice, and sound.²¹⁹ In *The Red Wheelbarrow*, any filtering changes the meaning of the poem. If, for example, all the common words²²⁰ were filtered out, there would be little if anything left of the poem.²²¹ The idea of a simple poem about an ordinary subject could be filtered out because ideas are not copyrightable, but the poem still would stand as a whole unit. The poem's words, sounds, form, and lines all make the poem original and therefore the particular property of its author.²²²

The ordinary observer or lay audience standards, which generally rely on the immediate reaction of the reasonable person,²²³ provide little or no protection for a poet like Williams whose work is minimal and subtle. Nimmer notes that the "immediate and spontaneous observations of a person untrained" in a complex subject or literary form "may fail to note similarities that, if analyzed and dissected, would be only too apparent."²²⁴ Thus, a trier of fact unfamiliar with poetry might find nothing special about Williams' word choice or form and may deem another poem about a red wheelbarrow in the rain to be an infringement only because it contains a similar image or subject matter. A determination like this would fail to account for the range of expressive elements that poetry offers. This failure would result in a dismissal of many of the truly original or creative elements of a poem.

Even the intended audience test, created in response to the limitations of the ordinary observer test, provides little certainty for a poem such as *The Red Wheelbarrow*.²²⁵ First, the intended audience for this poem is unclear. It might be the general public, other poets, or experienced literary readers in general. If the poem is meant for a general audience, the intended audience is the ordinary observer and, thus, the ordinary observer test applies.²²⁶ If the poem is for other poets or for those who have experience with the subtleties of poetry,

219. Haines, *supra* note 141, at 85.

220. A case that discusses the non-protectibility of ordinary words or phrases in reference to literary works is *Narell v. Freeman*, 872 F.2d 907, 911-12 (9th Cir. 1989) (citing other cases which do not protect ordinary phrases).

221. Perhaps the word "glazed" or the phrase "glazed/with rain water" would remain.

222. ROSE, *supra* note 178, at 113-25.

223. NIMMER & NIMMER, *supra* note 10, §13.03. These tests are the dominant and traditional tests for improper appropriation. *Id.*; see also Broaddus, *supra* note 13, at 62 (noting that the traditional test is the lay observer test).

224. NIMMER & NIMMER, *supra* note 10, §13.03.

225. Broaddus, *supra* note 13, at 64-65.

226. See B. MacPaul Stanfield, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 DRAKE L. REV. 489, 505 (2001) (citing *Dawson v. Hinshaw Music* as an example of a case which found the intended audience to be the general public).

the intended audience provides no guidance to the trier of fact in assessing similarity for the purposes of copyright infringement. A poet may have a refined notion of what makes a poem original²²⁷ but no notion of when another poem impermissibly infringes on another for copyright purposes. Poets chosen to determine infringement might also have different ideas of ownership and creativity that do not relate at all to the purposes of copyright.²²⁸ Copyright infringement suits regarding poetry need a substantial similarity test that accounts for both the unique aspects of poetry and copyright's purpose of providing a creative incentive for the public benefit.

VI. A SUBSTANTIAL SIMILARITY TEST FOR POETRY

Order is the shape upon which beauty depends
 Pearl S. Buck²²⁹

I propose a test by which to determine improper appropriation of poetry that considers all of the expressive elements available in this particular genre.²³⁰ I will call this test the "Expressive Elements Test." This test would compare two poems based on their word choice, form, and arrangement of words. Courts already have a standard for infringement that takes into account a work's selection, coordination, and arrangement, but this standard is only applied to factual or historical works and is considered thin protection.²³¹ That standard is not so much a test for infringement as it is a scope of protection based upon copyright's requirement of originality.²³²

Because copyright only protects original elements of a work and facts are not considered original, a work that consists mainly of

227. Even this standard varies wildly from poet to poet. See, e.g., Young, *supra* note 135 (exploring the different qualities of language that characterize modern poetry).

228. See, e.g., Walker, *supra* note 196, at 174-75 (showing how different poets can interpret and measure the quality and originality of poems differently).

229. TO MY DAUGHTERS, WITH LOVE 1967, available at <http://www.quotelady.com/authors/author-b.html#Buck> (last updated Mar. 28, 2004).

230. Cf. Jeannette Rene Busek, *Copyright Infringement: A proposal for a New Standard for Substantial Similarity Based on the Degree of Possible Expressive Variation*, 45 UCLA L. REV. 1777, 1795 (1998) (arguing that it "makes more sense to consider the degree of expressive variability available to the author given the type of work in question" than to trying to establish a fixed standard).

231. See generally *Feist Publ'ns, Inc. v. Snyder*, 499 U.S. 340 (1991) (asserting that "the copyright in a factual compilation is thin").

232. See *id.* at 348-49 (Originality remains the *sine quo non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.).

facts is entitled to limited protection.²³³ In *Feist*, the Supreme Court held that factual compilations could be protected in copyright only in their “selection and arrangement” and that the compilation’s selection and arrangement must possess a requisite degree of originality.²³⁴ The Supreme Court called this protection for factual compilations “inevitably” thin because “a subsequent compiler is free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”²³⁵ Nimmer refers to this protection for factual works as protection of the “literal form of expression.”²³⁶

The Expressive Elements Test will consider not only the selection of particular words, but also their coordination and arrangement on the page. Originality in copyright does not necessitate invention nor “the production of something that did not exist in the prior art.”²³⁷ However, copyright protection extends only to creative expression.²³⁸ Since the originality standard has been interpreted liberally, it makes sense, in order to carefully limit the sweep of copyright protection, to describe creative expression in reference to a genre’s possibilities. Since a poem’s meaning is often tied to its “literal form,” it makes sense to protect a poem at this concrete level rather than to attempt to articulate and distinguish an idea from the expression in the poem. When this form-conscious level of protection is applied to poetry it protects the expressive elements available in a poem, and is not a “thin” protection; rather, this standard provides fuller protection than any of the other substantial similarity tests in current use.

Since copyright does not protect ideas, it follows that copyright should aim to “protect the meaning embedded within a work less rigorously than it protects a work’s literal elements.”²³⁹ Copyright’s originality requirement attempts to “ensure the presence of the

233. “Facts may be discovered, but they are not created by an act of authorship.” NIMMER & NIMMER, *supra* note 10, § 2.11.

234. *Feist Publ’ns Inc.*, 499 U.S. at 348, 358. “Not every selection, coordination, or arrangement will pass muster.” *Id.* at 358.

235. *Id.* at 349. In *Feist*, the Supreme Court also rejected the notion of protecting an author’s “sweat of the brow” or protecting the hard work of compiling facts or information which copyright does not protect. *Id.* at 353-55.

236. NIMMER & NIMMER, *supra* note 10, § 2.11.

237. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 42 (1967).

238. *Feist Publ’ns Inc.*, 499 U.S. at 349.

239. Kurtz, *supra* note 17, at 1232. Kurtz also notes that the ultimately vague line between idea and expression makes it impossible to clearly delineate a work’s unprotectible elements and thus a work’s “perceiver . . . will need to make judgments and evaluations.” *Id.* at 1233.

author's personality in the work"²⁴⁰ so that protection is only given to what was created by the author.²⁴¹ Originality in poetry stems from the interplay of a poet's word choice, his coordination of words to create meaning and sound, and the final visual form of the poem.²⁴² The ideas in a poem are often tied irretrievably to the poem's form or unique combination of words.²⁴³ Since originality in poetry is this process of creating meanings from surprising or unique combinations of words,²⁴⁴ the Expressive Elements Test provides poets more than just thin copyright protection.

The Expressive Elements Test could use a sliding scale to assess substantial similarity. This test would protect the combination of elements that make a poem like *The Red Wheelbarrow* unique without turning to an abstract determination of the poem's "total concept and feel"²⁴⁵ and without leaving the poem protected only from exact copying.²⁴⁶ Specifically, the more similarity that exists with respect to one element, such as the poem's form, the less allowance there might be for similarity between the poems' choice of words.²⁴⁷ For example, a poem that used the form of Williams' poem and most of the same words might be found substantially similar with the use of a sliding scale. On the other hand, either a poem that used the same form but none of the same words or a poem that used most of the same words in a completely different form probably would not be an infringement under this standard.²⁴⁸

240. Durham, *supra* note 28, at 621.

241. The court in *Feist* notes that this is necessary so that authors can be assured the "right to their original expression" and so that others can be encouraged "to build freely on the ideas and information conveyed by the work." 499 U.S. at 349-50.

242. See *infra* Part IV.

243. "I want my word to be the thing itself, created by my soul a second time." Mayes, *supra* note 130, at 82 (quoting Jimenez).

244. "The poem can be generated by a vocable in common use and suddenly perceived gorged with all its meaning . . . [i]t can also be generated by the sight of a simple object, never before seen in such a way . . ." Jean Follain, *Meanings of Poetry, in A FIELD GUIDE TO CONTEMPORARY POETRY AND POETICS* 117, 117 (Stuart Friebert et al., eds 1997).

245. Neil Boorstyn, *Recent Cases and Developments*, 27 COPYRIGHT L. J. 12 (Jan.-Feb. 2003) (noting that "[a]s a test for infringement, 'total concept and feel' is essentially meaningless unless comparison of the works demonstrates substantial similarity of protected expression").

246. See *infra* Part II (discussing the two-step process for improper appropriation).

247. The use of a sliding scale is already used in copyright to determine the first step in copyright infringement; copying. This standard is called the inverse ratio rule and allows for a finding of copying in fact if there is some access and more similarity or vice versa. BROWN & DENICOLA, *supra* note 6, at 223-24.

248. So that: "So much depends upon a blue wheelbarrow glazed
with streaks of rain water sitting beside
the newly-hatched chickens."

The Expressive Elements test eliminates arbitrary determinations for substantial similarity and makes allowances for various types of poetry. Mark Rose's comparison of two compositions to two human faces is an especially apt analogy for poetry, where both "may resemble each other in various ways, but will always have some distinguishable characteristics, some marks of individuality."²⁴⁹ Just as one face may resemble another because of its bone structure, yet create a completely different overall impression because of other differences such as coloring or age, two poems may have similar features but should not be considered substantially similar as complete compositions. To focus only on the words of a poem or on such vague formulations as "total concept and feel" is to fail to understand all the elements that make a poem distinctive.²⁵⁰

William's choice of words in *The Red Wheelbarrow* is part of what makes his poem distinctive: "glazed with rain water beside the white chickens." The form of Williams's poem and the line breaks throughout play an equally important role:

glazed with rain
water
beside the white
chickens.

Williams could have formed the lines as such:

glazed
with rain water beside
the white chickens

This formulation of the poem ignores Williams' emphasis on the images of "rain" and "white" and transforms the tone of "glazed" from soft to hard. The Expressive Elements Test used on a sliding scale of similarity between word choice and form would still function to protect poems that are more discursive or prose-like.²⁵¹ Attention to a poet's selection, arrangement, and coordination of words with the use of a sliding scale would equally protect these types of poems²⁵²

Is not substantially similar to *The Red Wheelbarrow*. A "total concept and feel" test used on this poem might have a different outcome.

249. ROSE, *supra* note 181, at 125.

250. It is to demonstrate "one kind of distinctiveness at the expense of another." *Id.* at 126.

251. Prose poetry itself is hard to categorize and consists of various styles. *See id.* (noting that some prose poems "have a relaxed appearance, skipping lines or including conversation" while others may be dense, and this density and/or lack of white space can give an "implosive quality to the subject").

252. For examples of prose-like poetry, see Mayes, *supra* note 140, at 360-85.

because the “block of prose *is* the form.”²⁵³ Consider these lines by Walt Whitman:

I hear America singing, the varied carols I hear,
Those of mechanics, each one singing his as it should be blithe
and strong,

A poem that used every word of Whitman’s would probably be found substantially similar. On the other hand, a poem that used only some of the words with a different form would probably not be substantially similar:

I hear
Mexico dancing, the varied
Dances.
I hear,
The farmers, each one
Dancing.
And this as it should be
Wildly strong.

Regard for a poem’s form as well as its word selection allows poets to create poems which are uniquely their own, while still giving them leeway to draw and build upon poetry that has come before.²⁵⁴

The Expressive Elements Test also would help to eliminate aesthetic judgments and random line-drawing in substantial similarity determinations of poetry.²⁵⁵ Justice Holmes condemned the notion of judges imposing their aesthetic values onto works because not only would “some works of genius . . . be sure to miss appreciation” but also because works which “appealed to a public less educated than a judge” might be undervalued.²⁵⁶ A court that relies on the abstractions method or a poem’s “total concept and feel” to determine substantial similarity “can reveal nothing more than [that] court’s

253. MAYES, *supra* note 130, at 360.

254. “The literary form of poems is created largely by learning . . . [p]ossible resolutions of metaphor, diction, and sound are coded into memory from our reading of other poets, occasionally from our reading of criticism, from our talk with other poets . . . [n]ew resolutions are combinations of parts of old ones, making new what may later be combined again and made new again.” Hall, *supra* note 175, at 25.

255. *Cf.* Geller, *supra* note 21, at 231 (noting the tension in copyright stemming from the imprecision with which courts have distinguished idea from expression and “new works from prior works”).

256. *Bleinstein v. Donaldson Lithography Co.*, 188 U.S.239, 251-52 (1903).

preconceptions”²⁵⁷ of what makes two poem’s similar. Copyright tries to avoid aesthetic judgments when determining if a work is eligible to be copyrighted by allowing a minimal amount of creativity to suffice.²⁵⁸ Courts should also avoid aesthetic judgments in tests for improper appropriation of poetry by focusing on the “literal form of expression”²⁵⁹ and not the inconsistent standards reflected in the tests currently used.²⁶⁰

When considering a poem like *The Red Wheelbarrow*, a court using the Expressive Elements Test would no longer have to determine the “ideas” of the poem and then separate those ideas from the poem’s protectible expression. The trier of fact could instead compare the similarities of language and form to determine if an alleged infringing poem is impermissibly similar. While the Expressive Elements Test concededly would still involve an inherent amount of subjectivity in determining whether two poems are substantially similar,²⁶¹ this test at least provides some predictability by allowing the context of poetry to function as an operative element in any determination of copyright infringement.²⁶²

Predictability is important because it allows authors to understand the limits of their protectible expression and the boundaries of acceptable borrowing from prior works. If copyright overprotects, it may stifle new creation by preventing authors from experimenting with prior texts, ideas, and forms to create their own new poems.²⁶³ For example, a poet who admires Williams’ poetry might decide not to create his own version of a poem about a red

257. Lunney, *supra* note 25, at 506-09 (noting that some courts “have relied on a form of metaphysical dart throwing to identify” the level of protection a work should be given).

258. See NIMMER & NIMMER, *supra* note 10, §3.04[2] (noting that “the threshold for originality is low”); see also Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 38-39 (2002) (noting that the constitution does not discriminate between high art and low art and that central to this notion is the problem that “judges are not art critics” and “that even art critics cannot say what is art and what is not”).

259. NIMMER & NIMMER, *supra* note 10, §2.11.

260. Alfred C. Yen notes that when judges use their aesthetic tastes to make determinations artists might “prefer creating works that meet the aesthetic judgments of judges because other works would either not get the benefits of copyright protection or wind up being suppressed.” *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 248-49 (1998).

261. A trier of fact would still have to ultimately decide when two works are substantially similar, this test just provides a basis for determining that level.

262. “The question becomes for copyright whether the law can adequately identify those factors that allow an audience to react consistently to a particular work, such that triers of fact can meaningfully compare two works to determine whether infringement has occurred.” Rotstein, *supra* note 14, at 726.

263. See Geller, *supra* note 21, at 260-61 (questioning at what point “too much protection would strifle cultural feedback”).

wheelbarrow for fear that he will infringe on Williams' work.²⁶⁴ The poet may intend a poem that reveals aspects of his childhood in a city devoid of red wheelbarrows, ultimately bringing his perspective to a subject embedded in his literary heritage.²⁶⁵ Instead of being stifled by fear of misappropriation, writers should be free to "study and cultivate themselves" so that they can build upon the past and "find the distinctiveness of their works and the right to call themselves authors."²⁶⁶ The tricky distinction between idea and expression, which John Whicher describes as "one of the hardest problems to solve in the law of copyright,"²⁶⁷ is alleviated by a comparison that focuses on similarity of form and word selection instead of abstraction. The Expressive Elements Test, when applied to poetry, should protect poetry at a level more consistent with the expectations of both those poets who put their works into circulation and those who borrow from pre-existing works.²⁶⁸

This new standard also would help eliminate differing outcomes based on a court's choice of audience standard and would avoid a subjective determination of the intended audience for a particular poem.²⁶⁹ A lay audience or an expert audience could calculate both substantial similarity of word choice and selection and arrangement of the page. It would not make much difference which audience is used; an expert and a lay audience could easily reach the same conclusion as to substantial similarity in word choice, form, or a combination of both. In *The Red Wheelbarrow*, for example, Williams' word choice is clear for all: he chose the word "glazed" instead of a word like wet; he chose the word "red" to describe the wheelbarrow; he chose the to describe the chickens as "white"; and so on. Any type of audience could compare the word arrangements or phrasings. All types of audiences also could compare the overall shapes of the

264. This is assuming that Steven's poem was not in the public domain.

265. See, e.g., Walker, *supra* note 196, at 171-73 (discussing the reoccurrence of certain images in poetry, such as the stone, and noting that what makes a particular poem effective or not is how well the poem "marks out the territory of inward vision" so that the "image is integrally related to the impulse behind it").

266. ROSE, *supra* note 178, at 117.

267. WHICHER, *supra* note 21, at 121.

268. It is more consistent with poet's expectations because most poets create poems with the understanding that form and content are inseparably linked and that language's "possibilities are multitudinous." Young, *supra* note 135, at 196. "Indeed the concept of copyright is enriched and rationalized by an approach that provides some legal substance to the concept of authorship." Monroe E. Price & Malla Pollack, *The Author in Copyright: Notes for the Literary Critic*, 10 CARDOZO ARTS & ENT. L.J. 703, 713 (noting, however, that the intention of the author is to "profit from the system").

269. Is, for instance, a poem by an accessible poet like Robert Frost *intended* more for a general audience than a poem by Ezra Pound?

poems, the line breaks, and stanza breaks. While this test does not provide a systematic equation which can be used with complete objectivity in every infringement case, it does at least create a standard from which the expressive elements of poetry can be compared with equal effectiveness by both lay and expert audiences.²⁷⁰

When applied to poetry, the Expressive Elements Test also would better effectuate the purposes of the Copyright Clause. The Supreme Court has stated that copyright protection is not based on a natural or moral right but instead is a "limited grant" intended to incentivize authors to create for the public benefit.²⁷¹ "[E]xpression is protected so that authors will develop new facts and ideas for the betterment of the public."²⁷² This benefit to the public is also a benefit to authors. Poets create by building upon the ideas and genius of prior works.²⁷³ Word choice and form in poetry are ideas as well as particular expressions of personality. A poet has taken too much of the expression of a prior work when the poet has not built upon it, but instead has built around it or has not built anything himself.²⁷⁴ Just as a building is not completely created out of newly invented materials, so a poem makes use of materials that have been developed and introduced to the literary marketplace over time. The Expressive Elements Test protects what a poet has built while allowing the ideas and building materials of the poem to freely circulate back into the public domain.

The Supreme Court's articulated aim for copyright is to provide an economic incentive to authors to create, but the Court "occasionally adopts statements which reflect copyright's roots in fairness and justice."²⁷⁵ Since courts seek to balance creative incentive with public optimal public benefit, their application of copyright law should not be arbitrary or based on personal aesthetics. Any determination of infringement should be based upon an understanding of a work's possible expression. Also, since poetry inevitably draws from works of the past, there needs to be some method to evaluate what it is that the author is "using" versus what the author has added to the literary

270. Cf. Busek, *supra* note 230, at 1781 (arguing for substantial similarity tests which reflect the "expressive variation" possible in a given subject).

271. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

272. Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1278 (2003).

273. See Hall, *supra* note 175, at 25.

274. Mark Rose notes that Henry Fielding thought that "stupidly derivative writing cannot be treated as property" or as original work. ROSE, *supra* note 178, at 116.

275. Alfred C. Yen, *The Intradisciplinary Future of Copyright Theory*, 10 CARDOZO ARTS & ENT. L.J. 423, 429 (1992)

world.²⁷⁶ Since the purpose of copyright is to balance the creative incentive with maximum public access,²⁷⁷ any test for infringement should consider the importance of using prior works of poetry to inspire and create new works. Different types of work depend more or less on the forms that are in the public domain; it is therefore "very difficult to lay down any legal definition of originality in a literary composition that may be resorted to as a universal test."²⁷⁸ Courts have interpreted the word "author" for purposes of copyright to mean an "originator,"²⁷⁹ but the legal definition which has evolved through case law does not appreciate the distinctiveness of authorship in poetry.²⁸⁰ Copyright law's misconceived focus on the "author" as originator imposes court-made aesthetic determinations of originality onto poetry²⁸¹ that fail to value poetry as a collaborative genre²⁸² in which detail and form can be transformative.

VII. CONCLUSION

[Poets] words have made a world that transcends the world and a life livable in that transcendence. It is a transcendence achieved by means of minor effects of figurations and the major effects of the poet's sense of the world and of the motive of music of his poems and it is the imaginative dynamism of all these analogies together. Thus poetry becomes and is a transcendent analogue composed of the particulars of reality, created by a poet's sense of the world, that is to say, his attitude, as he intervenes and interposes that appearances of that sense.²⁸³

Mark Rose notes that copyright is still important to "our conception of ourselves as individuals" and linked to protection of the

276. *Cf. id.* at 423-25 (noting that creative production "depends on striking a socially acceptable balance between the interests of authors and the public" so that authors can borrow from the public domain without monopolizing it).

277. See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (Copyright involves balancing "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.").

278. GEORGE TICKNER CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT* 170 (1847). "[I]n every species of composition, in all literatures, there is of necessity a constant reproduction of what is old, mixed with more or less that is new, peculiar and original." *Id.*

279. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). "[O]riginality" means that the work derives from the copyright owner. . . ." NIMMER & NIMMER, *supra* note 22, at 14.

280. *Cf. Peter Jaszi, The Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 294-95 (1992) (noting the recent interaction between legal and "cultural figuration[s]" of authorship).

281. See Price & Pollack, *supra* note 268, at 703 (questioning whether the "definition of authorship, for purposes of copyright law, turns on anything more than the judge's perception of the nature of the work produced").

282. Jaszi, *supra* note 280, at 304.

283. STEVENS, *supra* note 168, at 130.

private sphere.²⁸⁴ If copyright is to operate usefully for poetry or for any other genre, it must use a standard for infringement that accurately defines originality and extends protection accordingly. In order to determine if one text inappropriately intrudes on another text's expression, it is crucial to know how that type of text operates and to know all of the elements that that type of text uses to express itself.²⁸⁵

Poetry refuses to be neatly categorized as fiction, music, or a visual art.²⁸⁶ Poets make use of a complicated range of forms in order to create meaning.²⁸⁷ Poetry is unlike fiction because the elements that make poetry distinct vary from the elements that make fiction distinct. In fact, according to many poets, poetry is more about feeling than understanding.²⁸⁸ Wallace Stevens, for instance, thought that poetry could not be written about directly because, unlike other literary works, it seeks to test the limits of the rational by using many sensory elements to express itself.²⁸⁹ The sounds, the images, the connotative and denotative elements of words, the image the poem creates on the page, and the rhythm of the poem all work together to create the "feeling" of the poem.²⁹⁰ It is this combination of elements that is original and that, therefore, should be protected by copyright.²⁹¹ The Expressive Elements Test protects poetry by assessing similarity of form and word choice on a sliding scale for purposes of copyright.

Definitions of authorship for copyright purposes have yet to reflect relevant literary theories.²⁹² Just as it is impossible to generalize about a poet's process of imagination,²⁹³ so is it impossible to generalize about a poem's meaning or ideas. The meaning of a poem unfolds "explicably and inexplicably in language" and form.²⁹⁴ Any process of abstraction or filtration upsets the delicate web that a

284. ROSE, *supra* note 178, at 142.

285. Rotstein, *supra* note 14, at 725 (arguing that it "would be unthinkable for a court to decide a patent or products liability case without at least trying to understand how the new invention works or how the supposedly defective product malfunctioned").

286. "Indeed, the greater a work of art, the more stubbornly it resists simple explanation and the more difficult it is to abstract from it that which makes it unique." Kurtz, *supra* note 17, at 1232.

287. *Id.*

288. See, e.g., Hall, *supra* note 175, at 22-23.

289. STEVENS, *supra* note 168, at 71-79

290. See *infra* Part IV.

291. Hall, *supra* note 175, at 25.

292. See Rotstein, *supra* note 14, at 726-30 (Positing that "current copyright dogma does not recognize that so-called 'works of authorship' are...unstable and dependent on context.").

293. See Orr, *supra* note 139, at 12.

294. *Id.*

poet has woven and isolates words or ideas from the crucial context of the poem. In *The Red Wheelbarrow*, Williams' original expression consists of his "conscious analysis" of word combinations and lines to create the unique impression of his particular view of a particular glazed red wheelbarrow.²⁹⁵ It is the literal form of *The Red Wheelbarrow* and the word choice combined with that form that Williams can claim ownership over and that should be exclusively his for a limited time under the law of copyright. The Expressive Elements Test, protects this literal form, and therefore, the original expression in Williams' poem.

This test ensures that courts do not find *The Red Wheelbarrow* substantially similar to just any other red wheelbarrow.

*Jennifer Understahl**

295. *Id.* It is his revision of what already existed; "making new what may later be combined again and made new again." *Id.*

* I want to thank my friends, family, and fellow law review members for all their help and support regarding this note.