

1 **§ 13. Copyright Protects Expression**

2 **The scope of copyright protection for “original works of authorship fixed in any**
3 **tangible medium of expression” extends to expression in a work that is original to the work’s**
4 **author or authors.**

5 **Source Note:**

6 17 U.S.C. § 102.

7 **Comment:**

8 *a. Generally.* Courts have long and universally accepted that the Copyright Act protects an
9 author’s original expression in a work of authorship “fixed in any tangible medium of expression.”
10 17 U.S.C. § 102(a). Although the Copyright Act does not include a concise statement of the
11 principle that copyright protects expression, that principle is manifest in 17 U.S.C. § 102 (the
12 current statute’s provision concerning copyright subject matter and scope), which Congress
13 enacted against a long background of decisions interpreting federal copyright law to protect
14 expression in copyrighted works.

15 The statute defines “expression” only by negative implication in 17 U.S.C. § 102(b). By
16 specifying that copyright protection does not extend to “any idea, procedure, process, system,
17 method of operation, concept, principle, or discovery, regardless of the form in which it is
18 described, explained, illustrated, or embodied in such work,” that provision suggests that what the
19 statute *does* protect is the form in which an author describes, explains, illustrates, or embodies his
20 or her creative contribution. 17 U.S.C. § 102(b). That form, then, is the essence of protectable
21 expression. See H.R. Rep. No. 94-1476, at 56 (1976) (“Copyright . . . pertains to the literary,
22 musical, graphic, or artistic form in which the author expressed intellectual concepts.”).

23 *b. Protected expression in different types of works.* The content of the original expression
24 that a work’s copyright protects varies with the subject-matter category of the work. For example,
25 a poet’s expression in a poem will generally include, among other elements, the poet’s particular
26 word choices, while a painter’s expression in a painting will generally include, among other
27 elements, the composition of colors and shapes.

28 **Illustrations:**

29 1. Photographer poses an individual, with background draping and props, and
30 arranges lights to create shadows on the individual and the background and props.

1 Photographer then takes a photograph from a specific angle and using a particular lens,
2 aperture, and focal length. The creative choices made in posing, draping, props, lighting,
3 and camera angle and settings constitute original expressive content of the photograph that,
4 among other elements of expression, can be protected by copyright.

5 2. Company produces a video game with audiovisual output that includes animated,
6 fanciful animals. The pictorial depictions of the animals constitute original expressive
7 content of the video game that, along with other elements of expression in the audiovisual
8 outputs and/or underlying software, can be protected by copyright.

9 *c. Original expression in derivative works and compilations.* Section 103 of the Copyright
10 Act provides that “[t]he copyright in a compilation or derivative work extends only to the material
11 contributed by the author of such work, as distinguished from the preexisting material employed
12 in the work, and does not imply any exclusive right in the preexisting material.” 17 U.S.C.
13 § 103(b). That express definition of the scope of protection is explored in §§ 3 (derivative works)
14 and 4 (compilations) of this Restatement. The scope of protection for derivative works and
15 compilations is consistent with the principle expressed in this Section: copyright protection
16 extends to expression in a work that is original to the work’s author or authors. Copyright in a
17 derivative work or a compilation affords the author of that work protection only for their original
18 expression, not for expression that originates from preexisting works used in the creation of new
19 works (in the case of derivative works) or from preexisting material and/or data that has been
20 selected and/or compiled (in the case of compilations). The Copyright Act also provides that the
21 copyright in a derivative work or compilation “is independent of, and does not affect or enlarge
22 the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting
23 material.” 17 U.S.C. § 103(b). Again, that express acknowledgement of the independent copyright
24 protection for preexisting works is consistent with the principle expressed in this Section: new
25 expression originating from the authors of derivative works and compilations has no effect on the
26 copyright in preexisting works.

27 The Copyright Act also provides that the scope of copyright protection for derivative works
28 and compilations that “employ preexisting material in which copyright subsists does not extend to
29 any part in which such material has been used unlawfully.” See § 3(d) and § 3, Comment g; § 4(d)
30 and § 4, Comment h.

d. Protection can extend beyond a work’s literal expression. Expression in a copyrighted work can include not only a work’s exact words, sounds, or images, but also other “nonliteral” expressive elements of a work. For example, dialogue in a novel or play constitutes literal expression that can be protected by copyright; the plot details of the novel or play beyond the actual dialogue can also constitute expression protected by copyright. Copyright protection for literal and nonliteral elements of any copyrightable work of authorship is constrained by the various limitations on scope discussed in the remainder of this Chapter. Detailed identification of the elements of expression in a work that are protected by copyright typically occurs in the context of analysis of a claim that the work’s copyright has been infringed. Chapter 7 addresses infringement analysis in detail.

REPORTERS’ NOTES

a. Generally. The U.S. Supreme Court has repeatedly acknowledged that copyright protects an author’s original expression that is contained in a copyrighted work. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (“The copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of the author’s originality.”). Originality is addressed in §§ 6 and 7. This Section identifies the expression as the protectable aspect of a work as opposed to the unprotected elements that are identified and addressed in §§ 14 through 18. See also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-350 (1991) (“[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”); see also *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 254-255 (1918) (Brandeis, dissenting) (stating “the element in intellectual productions which secures such protection, is not the knowledge, truths, ideas, or emotions which the composition expresses, but the form or sequence in which they are expressed; that is, ‘some new collocation of visible or audible points—of lines, colors, sounds, or words.’” *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1, 19; *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63.”)

The Supreme Court long ago linked the protection for expression of an author to the constitutional provision, art. I, § 8, cl. 8, that grants Congress the authority to protect “writings.” See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (“By writings in that clause is meant the literary productions of those authors, and congress very properly has declared these to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible *expression*.”). See also *Goldstein v. California*, 412 U.S. 546, 561-562 (1973) (citing *Burrow-Giles* but stating that “Writings” “may be interpreted to include any *physical* [not just visible] rendering of the fruits of creative intellectual or aesthetic labor,” including sound recordings) (emphasis added).

The legislative history of the Copyright Act also acknowledges the basic principle of copyright law that it is expression that copyright protects. H.R. Rep. No. 94-1476, at 61 (1976) (“Wide departures or variations from the copyrighted works would still be an infringement as long as the author’s ‘expression’ rather than merely the author’s ‘ideas’ are taken.”).

b. Protected expression in different types of works. The expression that is protected will manifest differently in different types of works. What is important in every case is that copyright protection extends only to the author’s original expression that is present in a work.

Illustration 1 is based upon *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

Illustration 2 acknowledges the copyrightability of the audiovisual expression that can be fixed in computer software. See, e.g., *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1113 (9th Cir. 1998).

c. Original expression in derivative works and compilations. Section 4 of this Restatement acknowledges that while “the copyright in a compilation does not itself protect the underlying material, the owner of the copyright in a compilation may also own copyrights in the underlying material used in that compilation.” § 4, Comment *f*. As noted in that Section, the author of the compilation may own copyright in the underlying material by virtue of authorship or transfer. *Id.* Similarly, an author of a derivative work may own the copyright in the underlying work on which the derivative work is based, again either by having been the author of the underlying work or by a transfer of ownership from the copyright owner of the underlying work. The copyright in any preexisting material is a separate copyright from the copyright in a compilation or derivative work.

d. Protection can extend beyond a work’s literal expression. Courts have long recognized that copyright protection for the expression contained in a work extends beyond the literal elements of a work to include nonliteral elements as well. Often this principle manifests in the infringement analysis when a court is seeking to determine whether the alleged infringing work is sufficiently similar to the copyrighted work. “Comprehensive nonliteral similarity,” is one type of similarity recognized by the courts when it is alleged that less than an entire work has been copied verbatim. See *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1372-1373 (2d Cir. 1993); *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240, 242 (2d Cir. 1983). The Nimmer treatise developed the “comprehensive nonliteral similarity” test for infringement. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1], at 13-29, § 13.03[A][2], at 13-45 (1997). Because nonliteral similarity can lead to a determination of infringement, nonliteral elements of a work are, therefore, protected by copyright. Determining whether a nonliteral element of a work is protected expression versus an unprotected “idea” will, as one court phrased it, “inevitably be ad hoc.” *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); see also PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.3.1.2. Fundamentally, when drawing the line between protected expression and unprotected idea, courts should keep in mind the underlying-incentive rationale for copyright protection: the line should not be drawn so narrowly that authors lose the incentive to produce nor so broadly that future authors will find a diminished store of ideas on which to build. See *id.*