

ABSTRACT: Copyright protection extends to "original" works. The adjective "original" here means a work that originated with its purported author, and is not meant to impute any novelty requirement to copyright law. However, case law and literature offer up several odd examples where two individuals have independently created identical works of art. The theory underlying copyright law requires that, because each work originated independently from separate authors, each work be independently copyrightable. Applying this strict, objective standard of originality to the transformative arts, we begin to see new possibilities for grounding copyrights in parodies and satires. Under current law, parodies escape infringement of their target works through the "fair use" exception to copyright law, while satires frequently do not. However, this essay argues that, under a strict interpretation of the originality standard, parodies and satires alike can be considered independently created works of art that are not derivative of (and hence not infringing) their target works. This essay suggests the application of a new standard of ascertainably different meanings when determining whether one work infringes upon a similar work.

ARTICLE:

Protecting Menard's *Quixote*: A Return to the Strict Originality Standard in Copyright Law

Central to the issue of copyright protection is the question of originality.<sup>1</sup> U.S. law protects "original works of authorship" but little is done to define this phrase.<sup>2</sup> Taken in its barest form, a work is original if it *originated* with its purported author. Case law shies away from judging the creativity inherent in a work, and imposes a more "objective" standard of originality. But this objective standard has some surprising consequences when taken to its logical limit. The

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<sup>1</sup> Howard Abrams, *Originality and Creativity in Copyright Law*, 55-SPG Law & Contemp. Probs. 3, 6.

<sup>2</sup> 17 U.S.C.A. §103(a)

admittedly extreme cases discussed below force us to reexamine our notions of authorship and originality. Properly understood, these two notions suggest that derivative works such as parody and satire may best be considered not as fair use "exceptions" to copyright law, but (in appropriate cases) as original works of authorship protected in their own right. To that end I argue that, in addition to considerations of similarity and access, courts should consider evidence of independent meaning to determine when a work is original.

### **Case One: Hand's Magical Poet**

Copyright inheres in "original works of authorship", and much hinges upon the definition of "original". Does the word define a work that possesses "novelty or freshness of style or character"?<sup>3</sup> Or does it merely mean "made, composed, or done by the person himself"?<sup>4</sup> The first case we shall consider was put forward in a famous thought experiment by Learned Hand. "[I]f by some magic a man who had never known it were to compose anew Keats's *Ode on a Grecian Urn*, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's."<sup>5</sup>

The implications of Learned Hand's words are quite puzzling. First, that someone might by mere accident stumble

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<sup>3</sup> Oxford English Dictionary, "Originality" 2.a.

<sup>4</sup> Oxford English Dictionary, "Original" 4.b.

<sup>5</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2nd Cir. 1936).

upon the very words used by Keats is so improbable as to be absurd. But, granting this unlikelihood, more absurdity follows: Learned Hand suggests that this serendipitous poem could be copyrighted as a work somehow distinct from Keats's, even though the two poems might be word-for-word identical. Though Keats's poem, being in the public domain, might be freely distributed on the internet, the new poem is protected. Of course, this raises the question: how are we to ascertain whether a particular copy is attributable to Keats or to Hand's magical author? But this question leads us down the wrong path, Hand seems to suggest: the objective originality of a work may not always be easy to establish, and may not present us with copyrights that are easy to enforce, but it provides us with the philosophical basis and constitutional justification for our copyright system.

The result may seem counter-intuitive. Imagine entering a bookstore to find a newly published copy of *Jurassic Park*, written by Hand's magical author. The author had been stranded on a deserted island since 1982, and had, by an incredible chance, written a novel word-for-word identical to Michael Crichton's famous book. Under U.S. Patent law, the inventor of a device is protected against those who later create the same device independently. However, there is no such protection under U.S. Copyright law. In this odd situation, Michael

Crichton has no cause of action—legally, his copyright has not been infringed.

What is the likelihood of “accidentally” recreating *Jurassic Park*? The answer, of course, is smaller than miniscule. As David Nimmer notes, “sorcery aside, people do not adventitiously come up with original works mimicking the full text of great romantic poems.”<sup>6</sup> Nevertheless, to say the event is incredibly unlikely is not to say that it is impossible. If someone were to publish an adventitious *Jurassic Park*, the courts (and the literary world) might have a hard time believing that the work was original—but this is a question of fact. The question of law is straightforward: *if* it is found to be original, the adventitious *Jurassic Park* does not infringe.<sup>7</sup>

Hand’s thought experiment cuts to the heart of copyright: it is not novelty that qualifies a work for copyright protection, but the “reach[ing] into the subjective range of interiority, thereby producing words ... fixed in a tangible medium of expression.”<sup>8</sup> This phrase, suggested by David Nimmer, plays an important role in what follows, so an understanding of its meaning is crucial. The subjective range of interiority

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<sup>6</sup> David Nimmer, *Copyright in the Dead Sea Scrolls*, 38 *Houston Law Review*, 1, 39.

<sup>7</sup> It is amusing to imagine the copyright problems that would arise over the serendipitous *Jurassic Park*. While Crichton could license the movie rights of his novel to Universal, the adventitious author could legitimately license the rights of *his* novel to Sony. Or, he could

consists of the mental, and some might say spiritual, life of an individual. It is necessarily subjective, since only the individual has access to it. It consists, in part, of an individual's feelings, beliefs, ideas, emotions, vague sensations, and half-baked notions. To dive into this realm and, influenced by what is there, return with a fixed, objective expression of the objects of this metaphysical realm, is to become an author.

Copyright protects only against "copying", and courts wisely note that an independent creation is *not* a copy.<sup>9</sup> Hand himself implies that Keats's *Ode* and the later *Ode* are actually *two different poems*, and suggests that copyright protection is available for the latter, but not for the former, public domain poem.<sup>10</sup>

How can two poems that are word-for-word identical be different? The most straightforward answer is, because the two poems have different origins. Works of art (protectable ones, at least) are expressions, and expressions must, by definition, be expressions of some agent.<sup>11</sup> Keats's *Ode* is an expression of Keats's subjective range of interiority, while the *Ode* written

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underbid Crichton, causing Universal to buy the rights to his novel instead of Crichton's.

<sup>8</sup> Nimmer, *supra*, at 39.

<sup>9</sup> *Sheldon*, 81 F.2d at 54, *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

<sup>10</sup> *Sheldon*, 81 F.2d at 54.

by Hand's author is an expression of *his* subjective range of interiority. It is because each poem *originates* with different authors that each poem is *original*.

The same cannot be said of a pirated *Ode*. When I plagiarize Keats, the result of my plagiarism cannot be said to be an expression of *my* own ideas and experiences—my own subjective impressions. Rather, my plagiarized poem remains an expression of Keats's subjective realm.

A difference in origin is one crucial difference between Keats's poem and the poem by Hand's "magical" author. There may be another difference. Though the forms of the two poems happen to be identical, their *intended meanings* need not be. For example, though each poem uses the phrase:

"Thou still unravish'd bride of quietness,  
Thou foster-child of silence and slow time,"<sup>12</sup>

Keats may have meant to express admiration for the enduring beauty of art, while Hand's fortuitous composer may have felt frustration at art's inability to capture the ever-changing vagaries of life. This difference in intended meaning arises due to the difference in origin; in other words, the meanings of the poems differ precisely because the poems are expressions of differing subjective impressions. Of course, the average reader

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<sup>11</sup> More precisely: Expression, II.2.a. "The action of expressing or representing (a meaning, thought, state of things) in words or symbols;" Oxford English Dictionary.

may not pick up on such differences, but literary critics often consider the social contexts and life experiences of authors when interpreting a work. Critics may analyze the two poems quite differently, depending on the contexts of the authors' lives.

It is important to emphasize that a text is not by itself an expression, and alone it is no more deserving of copyright protection than an idea. Underlying copyright law is the divide between syntax and semantics, between form and content. A work of authorship is created not merely by typing words on a page, but also by attributing meaning to those words. A monkey does not become an author merely by punching keys on a typewriter, even if the monkey miraculously manages to type out coherent sentences. And in just the same way, a drunken blind man pounding wildly on a keyboard is not authoring anything. To qualify as an author, one must at least have an intent to express a subjective internal state.<sup>13</sup>

Of course, form and content must both be present for a work to receive copyright protection; neither one is protectable independently. Usually, the emphasis is placed on the "form" requirement: an idea alone (i.e., content without form) cannot

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<sup>12</sup> John Keats, *Ode on a Grecian Urn*, in *The Odes of John Keats*, p. 114 (Helen Vendler ed., 1983).

<sup>13</sup> Nimmer, *supra*, at 204-205. "Intent is a necessary element of the act of authorship," (emphasis in original).

be copyrighted.<sup>14</sup> But the "content" requirement exists as well: a random or arbitrary series of symbols cannot be protected.<sup>15</sup> The juxtaposition of words can express an idea, but it doesn't necessarily do so: the mere alphabetical ordering of telephone listings is not copyrightable expression, since there is no content to be expressed.<sup>16</sup>

Why does a fortuitous *Jurassic Park*, written by Hand's magical author, fail to infringe upon Michael Crichton's copyright? To sum up, the two novels originate from separate attributions of intended meaning to a set of symbols placed on a page. To create an "original work of authorship," an individual must (1) select the symbols to be included in the work, and (2) intend that the symbols have a meaning or effect, that emerges from the individual's subjective range of interiority.

### **Case Two: Pierre Menard, Author of the Quixote**

The second case is described in great detail by Jorge Luis Borges in his short story *Pierre Menard, Author of the Quixote*.

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<sup>14</sup> In order for an author to "infringe" upon Shakespeare's character of Sir Toby Belch, "it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household...These would be no more than Shakespeare's 'ideas' in the play, as little capable of monopoly as Einstein's Doctrine of Relativity." *Nichols v. Universal Pictures Corp.*, 45 F. 2d 119, 121 (2d Cir. 1930).

<sup>15</sup> "Mitel's arbitrary assignment of particular numbers to particular functions and its sequential ordering in registers and descriptions 'lack[] the modicum of creativity necessary to transform mere selection into copyrightable expression.'" *Mitel, Inc. v Iqtel, Inc.*, 124 F.3d 1366, 1374 (10th Cir. 1997), quoting *Feist*, 499 U.S. at 362. See also *Stuart Ent. Inc. v. American Games Inc.*, Civil Action No. 1-96-CV-70036 (S.D. Iowa Mar. 19, 1998), denying protection to the design of Bingo cards, as described in *Nimmer*, supra, at 31.

Menard, an obscure (and fictitious) French author living at the turn of the century, had the "admirable intention ... to produce a few pages of text which would coincide—word for word and line for line—with those of Miguel de Cervantes."<sup>17</sup> After years of effort and draft after draft of text, Menard managed to produce "the ninth and thirty-eighth chapters of the first part of *Don Quixote* and a fragment of chapter twenty-two."<sup>18</sup>

What was Menard's "admirable intention"? To copy *Don Quixote*? If so, why did it take so much time and effort, so many thousands of torn up pages, to replicate such a small amount of Cervantes's text? And why does Borges call this work "perhaps the most significant of our time"?<sup>19</sup>

Borges is quick to point out that Menard "never contemplated a mechanical transcription of the original; he did not propose to copy it."<sup>20</sup> Rather, Menard proposed to "reach the *Quixote* through the experiences of Pierre Menard."<sup>21</sup> Menard intended to write his own novel, stemming from his own life experiences and social context—from his own subjective realm of interiority. He wanted to convey his own unique outlook and

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<sup>16</sup> *Feist*, 499 U.S. at 362.

<sup>17</sup> Jorge Luis Borges, *Pierre Menard, Author of the Quixote*, in *Labyrinths*, p.39 (Donald Yates, ed. 1964). There is most certainly a distinction to be drawn between Borges the author and Borges the narrator/critic of the story. However, since the distinction is irrelevant in the present context, I shall ignore it.

<sup>18</sup> *id.*, at 39

<sup>19</sup> *id.*, at 38-39.

<sup>20</sup> *id.*, at 39.

<sup>21</sup> *id.*, at 40.

perspective on life. But he wanted to see if he could express his unique perspective using the very same words the Cervantes used centuries before. In Menard's own words, "[m]y solitary game is governed by two polar laws. The first permits me to essay variations of a formal and psychological type; the second obliges me to sacrifice these variations to the 'original' text and reason out this annihilation in an irrefutable manner."<sup>22</sup>

Menard's text derives its *meaning* entirely from his own subjective experience<sup>23</sup>; this is the point of his first law, which all authors employ. "To essay variations of a formal and psychological type" is the first step in writing anything; it is practically synonymous with Nimmer's concept of "reach[ing] into the subjective range of interiority."<sup>24</sup> All authors will consider many different ways of expressing a particular feeling, idea, or aesthetic impression, before settling on the phrase that best captures the author's fancy.

The second law is meant to be a formal limitation upon the first, and it can be considered in two parts. The first part "obliges [Menard] to sacrifice these variations to the

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<sup>22</sup> *id.*, at 41. Note Borges's use of scare quotes around the word "original". Borges recognizes (as does the fictional Menard) that both *Quixotes* are, in fact, originals; despite their identical formal structures they are different works.

<sup>23</sup> We will assume this is true, for it is what Menard sought to achieve. Of course, it is possible that he cheated, but we will for the time being put our faith in his integrity, and put off our skeptical demands for proof until the fourth section.

<sup>24</sup> Nimmer, *supra*, at 39.

'original' text."<sup>25</sup> Menard uses Cervantes's text not as the basis for his original expression, but as a constraining force, much like a poet may voluntarily limit her own creativity by employing the traditional rhyme and meter constraints of the sonnet form. Menard's use of the "*Quixote* form", so to speak, does not facilitate or contribute to Menard's expression; in fact, it makes Menard's ability to express himself almost infinitely more difficult.

Consider, as an analogy to Menard's endeavor, that of an author attempting to write a novel in palindrome form. Even the most dexterous of authors can compose no more than a dozen or so tortured lines of palindrome; a novel-length palindrome would be an enormous undertaking. If such a novel would be gripping, insightful, and instructive as well, the accomplishment becomes even more astonishing. Each sentence the author adds to her artistic expression must be carefully calculated to be comprehensible forward and backward, and to contribute to the story in both directions. This substantial limitation to the author's artistic expression never determines that expression, though it does tightly constrain the author's choices. In a similar way, Menard's constraint does not *determine* his expression; the choices he makes are his own, and must be

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<sup>25</sup> Borges, *supra*, at 41.

"reason[ed] out ... in an irrefutable manner."<sup>26</sup> This is the force of the second part of the law.

That Menard succeeded—even for just a chapter or two—in his goal is amazing. Menard was able to express his views on life in the twentieth century; he was able to generate, from his own subjective realm of interiority, the same words used by Cervantes three hundred years before. No longer should we be surprised by the "draft upon draft", or the "thousands of manuscript pages" Menard tore up before achieving this small part of his goal.<sup>27</sup> The words must come, as it were, from his soul; they must genuinely be all and only the words he would have chosen to convey his insights and perspectives; and they must be the same symbols used by Cervantes three centuries before. Had Menard merely copied Cervantes's *Quixote*, he would have had much less difficulty; the ratio of effort expended to goals achieved is commensurate with what we would expect from the difficulty of Menard's task. Indeed, if anything about Menard's *Quixote* is surprising, it's not that he wrote so little but that he wrote so much.

This is what allows Menard to claim (portions of) the *Quixote* as his own: the independent and meticulous attribution of meaning, of content, onto a particular formal combination of

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<sup>26</sup> *id.*, at 41.

<sup>27</sup> *id.*, at 44.

symbols on a page. Menard's *Quixote* and Cervantes's *Quixote* constitute different "expressions of ideas" precisely because they are the *expressions of different ideas*.<sup>28</sup> And, as in the case of Keats and the magical poet described above, the difference in meaning is ascertainable through the different contexts of their lives and cultures. For example, Chapter Thirty-Eight (of both *Quixotes*) "treats of the curious discourse of Don Quixote on arms and letters,"<sup>29</sup> and Borges writes:

[i]t is well known that Don Quixote...decided the debate against letters and in favor of arms. Cervantes was a former soldier: his verdict is understandable. But that Pierre Menard's Don Quixote—a contemporary of *La trahison des clercs* and Bertrand Russell—should fall prey to such nebulous sophistries!"<sup>30</sup>

Borges concludes that the seeming anomaly must be attributed to "the influence of Nietzsche."<sup>31</sup> We see here a clear example of the meaning to the works being shaped by the context in which they are written. Elsewhere, Borges quotes the following passage from part one, chapter nine of *Don Quixote*:

...truth, whose mother is history, rival of time, depository of deeds, witness of the past, exemplar and advisor to the present, and the future's counselor.<sup>32</sup>

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<sup>28</sup> More precisely, they are different works because of the different origins of their meaning. Had Menard's *Quixote* had a meaning identical to Cervantes's, though still derived from Menard, the works would still have different origins. Indeed, Menard contemplates (but ultimately rejects as uninteresting) a method aimed at replicating Cervantes's meaning. Borges, *supra*, at 40.

<sup>29</sup> *id.*, at 42.

<sup>30</sup> *id.*, at 42.

<sup>31</sup> *id.*, at 42.

<sup>32</sup> *id.*, at 43.

Borges dismisses Cervantes's passage as "a mere rhetorical praise of history."<sup>33</sup> But of Menard's corresponding (some would say, identical) passage, Borges writes,

History, the *mother* of truth: the idea is astounding. Menard, a contemporary of William James, does not define history as an inquiry into reality but as its origin. Historical truth, for him, is not what has happened; it is what we judge to have happened. The final phrases...are brazenly pragmatic.<sup>34</sup>

Indeed, so drastic is the difference between the two works that Borges finds Menard's *Quixote* to be qualitatively superior: subtler, more profound, and more artistically accomplished than the textually-identical work by Cervantes. "Cervantes's text and Menard's are verbally identical, but the second is almost infinitely richer,"<sup>35</sup> we are told, and Menard's *Quixote* is "interminably heroic," "peerless,"<sup>36</sup> and "astounding."<sup>37</sup>

Menard has created two chapters of text, sometimes critical of contemporary society, sometimes insightful of the human condition, sometimes ironically subverting readers' expectations. The work is the result of years of careful craftsmanship and continuous revision. The text is, intentionally, word for word identical to chapters of Miguel de Cervantes's *Don Quixote*, but Menard takes great care not to borrow any of Cervantes's *expression*. Cervantes never places

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<sup>33</sup> *id.*, at 43.

<sup>34</sup> *id.*, at 43.

<sup>35</sup> *id.*, at 42.

<sup>36</sup> *id.*, 38.

words in Menard's mouth, so to speak; the phrases Menard uses are carefully chosen to express Menard's subjective impressions, chosen according to rules that force Menard to reason through every decision independently. Menard's first rule of construction allows him to contemplate many possible alternative phrases to express his ideas. His second rule of construction forces him to "irrefutably" justify the selection of one phrase over possible alternatives. Together, these rules ensure that each turn of phrase contemplated by Menard during the writing of the novel originates from his own subjective realm of interiority. Menard does not "recast" Cervantes's *Quixote* in some other form; his goal is to create another *Quixote*, by carefully assigning meaning to form *without being influenced by Cervantes's prior assignments*. Menard's work is the expression of *his views, his attitudes, and the context of his environment*—an expression that originates wholly from his own subjective impressions and experience.

It may, of course, happen that some phrase or sentence expresses the same meaning in Cervantes's *Quixote* and in Menard's. This is not problematic: so long as Menard has followed his two rules, the correspondence in meaning between the two expressions will truly be fortuitous. The

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<sup>37</sup> *id.*, 42.

correspondence was not necessary, but the contingent result of two independent assignments of meaning to text.

Menard's *Quixote* is unique in the annals of literature, and it is not surprising that we do not have a name for it. I will coin the somewhat oxymoronic term "independent recreations" to refer to art that, while formally identical to pre-existing art, nevertheless originates from the artist's "subjective realm of interiority."<sup>38</sup>

How can U.S. Copyright law deal with Menard's two-plus chapters? To make the issue more pressing, imagine again that instead of *Don Quixote*, Pierre Menard writes *Jurassic Park*, chapter for chapter, word for word. Would Michael Crichton have a cause of action now? Before you respond, reconsider the lessons of the previous section: if the assignment of meaning to chosen symbols originates from the subjective impressions of the author, then it is an "original work of authorship."<sup>39</sup>

The Supreme Court has held that "[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."<sup>40</sup> The *Feist* Court and Learned Hand both provide a rudimentary guide for assessing originality:

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<sup>38</sup> We can imagine other possible "independent recreations," such as William Faulkner's *Huckleberry Finn*, James Joyce's *The Gospel According to Luke*, and Kurt Vonnegut, Jr.'s *Pierre Menard, Author of the Quixote*.

<sup>39</sup> See p. 7, *infra*

<sup>40</sup> *Feist*, 499 U.S. at 345.

fortuitous similarity is original, but copying is not. But both Courts fall prey to a false dichotomy: they assume that “resemblance through chance” and “resemblance through copying” exhaust the reasons why two works may resemble one another. As we have seen, Menard’s *Quixote* fits into neither category. Unlike Hand’s “magical author,” Menard is well aware of Cervantes’s *Quixote*—in fact it is Menard’s *intention* that his text be identical with Cervantes’s. At the same time, Menard’s *Quixote* is not a transcription, reproduction, or copy—it is a new work painstakingly crafted by Menard, the creative expression of his unique perspective and social context. Again, as I have argued, Menard’s turns of phrase are chosen not for their formal identity to Cervantes’s work; indeed, Menard’s own rules force him to ignore this fact. Instead, Menard selects symbols in order to express ideas that are at times shockingly different from the ideas expressed by Cervantes. Menard may be justly accused of reinventing the wheel, but “reinvent” the *Quixote* is exactly what he did; he did not copy it.

Justice Hand writes that an author “is not a tortfeasor unless he pirates his work.”<sup>41</sup> Menard meticulously avoids incorporating Cervantes’s expression into his own writing, while operating under enormous formal constraints—pirates seldom work so hard. Menard’s *Quixote* is original in the sense that his

expression—his use of formal elements to convey content—originated from a reaching into his own subjective realm of interiority. It is original, too, in that his artistic expression is distinguishable from Cervantes's. His is an original work of authorship cognizable under traditional copyright law.

But does Menard's *Quixote* qualify as a derivative work? If so, then regardless of its originality and meaning, it infringes upon the work from which it derives. Though the question of derivative works appears different from the question of originality, they are in fact identical. It is *expression* that merits copyright protection—not text, nor meaning, but the use of text to convey meaning. I may write a novel exploring the same themes and messages as *To Kill a Mockingbird*—this in itself is no infringement. Harper Lee's copyright prohibits me from copying his *expression*—in other words, I cannot use Lee's "form" to explore Lee's "content". This is the rationale behind Holmes's declaration that "[o]thers are free to copy the original. They are not free to copy the copy."<sup>42</sup> Holmes suggests that while I may paint my own portrait of Whistler's mother, I may not paint a portrait of *Whistler's Mother*.<sup>43</sup> If I

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<sup>41</sup> *Sheldon*, 81 F.2d at 54.

<sup>42</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

<sup>43</sup> That is, I may not paint a version of Whistler's artistic expression, though if I happen to arrive at a similar expression through my own marriage of form to content, then this is unobjectionable.

use new form to convey *Lee's ideas*, the result is new expression and is protectable. But I may not use a new form to convey *Lee's expression*. For example, I may not translate *To Kill a Mockingbird* into German, or write a sequel. Such a work would be not an expression of an idea, but an expression of an expression—a copy of a copy. And such a work is derivative of the original. But Menard's *Quixote* is not an expression of Cervantes's work. It is not even an expression of Cervantes's ideas. It is an expression of Menard's own subjective experiences and impressions.

To examine the question from another angle, consider the definition of a derivative work contained in the 1976 Copyright Act: "A 'derivative work' is a work based upon one or more pre-existing works."<sup>44</sup> Is Menard's *Quixote* "based on" Cervantes's work? Menard's two rules of composition prevent him from relying upon Cervantes's *Quixote* either to determine the subjective content of his expression or to choose the particular form of that expression. Cervantes's work provides the space within which Menard's expression can occur, but it does not directly influence Menard's expression itself. Menard's work is no more "based on" Cervantes's than every modern sonnet is "based on" the Shakespearean prototype.

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<sup>44</sup> 17 U.S.C.A. § 101.

Let's not be blind, however, to the irony of Borges's story. Menard's goal was quixotic—an impossible dream. He "set himself to an undertaking which was exceedingly complex and, from the beginning, futile," understanding that he "should...have to be immortal to carry it out."<sup>45</sup> We needn't worry about any independent recreation knock-offs of John Grisham books hitting the market soon—the likelihood of even Menard's partial success is infinitesimal. But consider the lessons learned: Similarity between artistic expressions is not a matter of mere form, but of the way in which the formal elements are used to convey semantic content. And an intention to achieve formal similarity with another artistic expression does not by itself constitute piracy. These twin concepts will carry us some distance in our consideration of the more common cases of parody and satire in the next section.

### **Parody and Beyond**

As mentioned above, I may write a new novel expressing the ideas explored in Harper Lee's *To Kill a Mockingbird*. Might I not alternatively use the icons, the symbols, and the other formal elements of Lee's novel to explore *different* themes and messages? Isn't this also to create an expression different from Lee's?

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<sup>45</sup> Borges, *supra*, at 40, 43-44.

This is the controversial question central not only to parody, but also to satire and to many of the appropriation arts. Unlike our "intentional recreations," both parody and satire have only a partial similarity to elements of an earlier text. But, as with Menard's *Quixote*, the similarity is highly intentional.

Courts tend to agree that parody, a time-honored form of expression,<sup>46</sup> should be protected and encouraged as "promoting the progress ... of useful arts."<sup>47</sup> But under current case law, judges assume that parodies and satires are derivative works and focus on determining whether they fall under either a "free speech" or "fair use" exception to copyright infringement. Parody is generally found to constitute a "fair use" exception to infringement, while satire is not.

Under current case law, important to a determination of fair use is a work's "function" or "purpose".<sup>48</sup> Parody mimics an earlier work with the purpose of criticizing or commenting upon that work, whereas satire mimics an earlier work to criticize or comment upon society in general. Moreover, "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's...imagination, whereas satire can stand on its own two feet and so requires justification for the

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<sup>46</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>47</sup> U.S. Const, Art I, § 8, cl 8.

<sup>48</sup> *Acuff-Rose*, 510 U.S. at 574.

very act of borrowing.”<sup>49</sup> To criticize a work, the parodist must make use of that work; but to criticize society, the satirist may make use of any number of works. Complicating any judicial standard is “the fact that parody often shades into satire..., or that a work may contain both parodic and non-parodic elements.”<sup>50</sup>

Even when a work is perceived to be a parody, its license to use elements from the earlier work is not unlimited. Under current standards, even when a work is deemed to have a parodic purpose, a further question must be asked: whether the parodist has appropriated more of the parodied work than was necessary to achieve the parodic purpose.<sup>51</sup> In addition, courts look to the “substitution effect”, or the degree to which the alleged parody may prove to be a market substitute for the original.<sup>52</sup>

But remember: our invented genre of independent recreations did not require an “exception” to copyright law in order to gain protection. The theory underlying copyright law naturally extends protection to independently-created artistic expressions, so long as they are “expressions of ideas” and not “expressions of expressions.” No consideration of critical purpose, of amount of material copied, or of market substitution is needed to ground protection in Menard’s hypothetical *Quixote*.

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<sup>49</sup> *id.*, at 574.

<sup>50</sup> *id.*, at 574.

<sup>51</sup> *id.*, at 574.

<sup>52</sup> *id.*, at 574.

Rather, Menard's *Quixote* is the result of Menard's "reach[ing] into the subjective realm of interiority,"<sup>53</sup> "essay[ing] variations of a formal and psychological type,"<sup>54</sup> and selecting from among these variations "in an irrefutable manner."<sup>55</sup> Can simple parody similarly be understood as a "partial independent recreation"? Can parody be reconceptualized as a non-infringing original work of authorship rather than as a non-original exception to infringement law?

To begin, let's define a "simple parody" as a work using formal elements of a target work solely in order to criticize that target work. Imagine a parody of *Jurassic Park*; instead of Professor Hammond, the greedy theme-park loving mastermind of genetic reconstruction, we are presented with Professor Crichton, a greedy, Hollywood-loving pop writer. His goal is not to recreate living dinosaurs, but to create digital dinosaurs on film. He enlists the aid not of Ian Malcolm and Dr. Alan Grant, but of Steven Spielberg and writer David Koepp. Spielberg and Koepp warn Crichton that his obsession with digital dinosaurs will wreak havoc with the things that should truly be important to him—things like character and plot. But Crichton heedlessly rushes forward with his insane plan. He discovers to his dismay that he is unable to control his digital

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<sup>53</sup> Nimmer, *supra*, at 39.

<sup>54</sup> Borges, *supra*, at 41.

<sup>55</sup> *id.*, at 41.

dinosaurs, and they break loose not to maim and kill, but to steal scenes and ham it up in front of the camera. Spielberg, Koepp and Crichton barely escape the film with their professional careers intact.

Now I'm being needlessly harsh on a perfectly fine popcorn movie, but I do so to illustrate the workings of parody. As with intentional recreations like Menard's *Quixote*, my simple parody is *intended* to be similar to its target. The *Jurassic Park* parody would not be word-for-word identical with the target, and would only partially mirror that text. The non-mirroring elements of the parody originate unproblematically from my own subjective realm of interiority. The important question is, have I "copied" the mirroring elements from Crichton's *Jurassic Park*? Or have I "independently recreated" them?

The answer to this question cannot be found through an examination of the formal similarities alone. Both Crichton's work and my parody are expressions (i.e., both use form to express meaning); copyright law protects them as such. If I can "irrefutably justify"<sup>56</sup> my selection of formal elements (or justify them sufficiently to satisfy a civil burden of proof), then I can establish that my parody is an expression of my own

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<sup>56</sup> *id.*, at 41.

subjective impressions, and not a derivative expression of Crichton's impressions.

How might I justify my selection of formal elements? I must point to the meaning, apparent and intended, underlying my use of similar elements. By showing that my use of the formal elements carries a significantly different meaning than that intended by Crichton's use, I establish that the two expressions have different origins. By selecting Crichton to stand in for Hammond, I imply that Crichton's motives for writing are driven by an obsession for fame and fortune. Spielberg and Koepp become the voices of reason, cautioning him against ignoring the artistic needs of his narrative. The scene-stealing dinosaurs are the fulfillment of this danger. While the elements found in Crichton's work are intended for narrative effect, the similar elements found in my simple parody are intended to be critical of Crichton's endeavor—and they are readily understood as such. The fact is, I do not rely upon Crichton's expression: it neither determines my selection of formal elements, nor does it drive my assignment of meaning to those elements. All this is done by reaching into my own subjective realm of interiority. Of course, but for Crichton's work, my parody would not exist; then again, but for Shelley's *Frankenstein*, Doyle's *The Lost World*, and copyrighted works by Bradbury, Asimov, and Clark, Crichton's book would not exist.

As I have illustrated, the simple parodist does not express the target author's expression. A key to determining this fact is that the *meaning* conveyed by the parodist's use of form is quite distinct from the meaning conveyed by the author of the target work. A character in the target work may represent strength and nobility, while a similar character in the simple parody is constructed to convey something quite different: often a disgust with the target character, or a skewering of his values and ideals. This difference in meaning provides evidence that the two expressions are distinct. Simple parodies generally constitute original works because the critical meaning of the mirroring elements originates with the parodist, in spite of the *intended similarity* of those elements.

A simple parody is the clearest example of a partial independent recreation. Most perceptive readers readily understand the difference in meaning between my parody and *Jurassic Park*. How much of the target work may I imitate in the parody? The answer to this question is simple: as much as I have "independently recreated". In other words, the parodist should be allowed to use any and all formal elements that she can truly claim to have instilled with *independent meaning*. An extremely talented parodist may be able, like Menard, to produce a parody that is word-for-word identical with the target work.

(Like Menard, however, she should be prepared to justify the similarities “in an irrefutable manner”<sup>57</sup> before a judge.)

Where does this standard fit into traditional infringement analysis? Independent meanings of expressions relate both to the *similarity* of works and to their *originality* (or “origin”). Two expressions conveying different meaning are not “the same”, even when the formal elements of the expressions are similar; this is true of the dueling *Odes*, the dueling *Quixotes*, and the dueling *Jurassic Parks*. Consequently, courts should consider not similarity of formal elements alone, but similarity of the expressions as a whole.

Of course, when adopting a rule to guide judges and litigants in infringement cases, we cannot turn a blind eye to issues of practicality. While Learned Hand has set forth the general principles of originality in all their shining theoretical purity, judges are not philosophers and need something more earthy. This does not mean, however, that the theoretical basis of the originality standard should be left out entirely. In most infringement cases, a *prima facie* case for infringement would still be made out based upon the common criteria of similarity and access: given the relative unlikelihood of encountering independently created *Odes* or *Quixotes*, proof of access and similarity can justifiably give

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<sup>57</sup> *id.*, at 41.

rise to an inference of pirating. Evidence for *independent meaning* then becomes critical as a defense to piracy, in determining whether the allegedly infringing work nevertheless constitutes an independent creation.<sup>58</sup> The parodic expression (appropriately understood as the use of form to express content) will be deemed to *originate* with the parodist exactly when the connection of form to content derives not from the target work but from the subjective experiences of the parodist.

Some commentators have argued that the primary theoretical justification for parodies lies in their critical meaning. This, in a sense, is exactly the case. But not, as these commentators suggest, because criticism constitutes a free use exception to infringement (though it, doubtlessly, does). Rather, parodies' use of critical meaning (in place of the meaning intended by the target author) is an instance of "independent meaning" which more broadly distinguishes original from derivative works.

Simple parodies are, of course, not the only partial independent recreations. The partial intentional recreation model also provides a good framework for assessing more complex works. The Supreme Court acknowledged in *Acuff-Rose* that works often contain both parodic and non-parodic elements.<sup>59</sup> When

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<sup>58</sup> The burden of proving independent meaning may fall upon the parodist here.

<sup>59</sup> *Acuff-Rose*, 510 U.S. at 581.

should such works be considered original artistic expressions? The same standard is employed: when the author has used the similar elements to convey a *meaning independent of the meaning conveyed in the target work*. Independent meanings imply independently derived expressions, and so long as the "independent meaning" condition is met, the work counts as original, non-derivative artistic expression.

Note that, in theory, this criterion does not require that the meaning of the partial independent recreation be *different from* the meaning of the target work; it must only be *independently derived*. In certain cases, determining the independent origin of meaning may be quite difficult, requiring testimony from the authors and, perhaps, expert testimony from literary critics or theorists. For many other cases, though, the standard is quite straightforward: if the meanings of the two expressions are different, they must have independent origins. In simple parodies, for example, the meaning attached to the formal similarities found in the parody involves criticism of the target text.

In this way, the desire to protect the venerable parody is reconciled with copyright theory; no "exceptions" are required. Parody, as a partial independent recreation, is entitled to protection as an "original work of authorship". Note, however, that my standard for analysis is in some respects stricter, and

in other respects more lenient, than current law. As discussed above, the parodist must justify any use of similar formal elements through the assignment of independent meaning; the parodist may never rely upon the target author's expression to derive the meaning of her text. In this way, my proposed standard is harsher than the current standards governing parody, which don't require such "irrefutable" justifications once a parodic purpose has been ascertained. In yet other ways, the independent meaning standard is more expansive. Parodists are not limited to the minimum use of similar elements required to achieve parodic effect; rather, they may "use" as little or as much as they assign independent meaning to.<sup>60</sup> Also irrelevant under the independent meaning standard is any consideration of the "substitution effect" mentioned above.

But more significantly, the independent meaning standard extends protection to categories of art not traditionally protected by the court. Consider another *Jurassic Park* scenario: the obsessive mastermind this time is not John Hammond but George W. Bush, and his insane plan is to recreate dinosaurs in order to increase the United State's supply of fossil fuels. Expecting eco-friendly shills Al Gore and Ralph Nader to support his plan to resurrect these extinct species, he's surprised to

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<sup>60</sup> Technically speaking, under my interpretation the parodist doesn't "use" the original work at all, except as a formal constraint on his creativity.

find they object to his continued reliance on oil to solve America's energy crisis.

This *Jurassic Park* is not a parody; it does not comment on Crichton's work. It is, instead, a social satire, lampooning the ideological values of conservative Republicans. As a satire, it is not protected under current U.S. law. Parodies need to use stylistic elements of *Jurassic Park* to criticize the work itself; but courts find that in the case of satire, the use of a particular work is more arbitrary.<sup>61</sup> The satirist could have easily chosen *Don Quixote*, or *Hamlet*, as his vehicle of satire.<sup>62</sup>

But if our standard is to be the independent attribution of meaning to form, then the *Jurassic Park* parody is scarcely distinguishable from the *Jurassic Park* satire. Both originate through the independent attribution of meaning to form, as indicated by a readily discernable difference in meaning between the two works and their target.

How far does the new standard go? Does it apply to a work that has no perceptible critical intent—either literary or social? Imagine I write a book about a crazed

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<sup>61</sup> See *Acuff-Rose*, 510 U.S. at 580-581, *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

<sup>62</sup> Of course, if the artist's purpose is, for example, to criticize the shallowness of contemporary American art, he is arguably confined to using a copyrighted piece of contemporary American art as his vehicle. The particular piece selected may be arbitrary, but in order to express

entrepreneur/scientist John Hammond, who creates an island theme park filled with genetically-reconstructed dinosaurs that proceed to run amuck and wreak destruction on a cast of characters. It's not word-for-word identical with Crichton's novel, ala Menard's *Quixote*, but I claim to have attributed meaning to my characters, setting, and plot points independently of Crichton. I claim my work to be an expression of my own subjective realm of interiority. Is my work protected under the proposed standard?

Yes and no. The response to this question is complex. In theory, the standard is the independent attribution of meaning to text. If my neo-*Jurassic Park* is independently derived, as I claim, then it qualifies for protection under the standard in theory. But the standard in practice is more limited. Using an independently derived meaning standard as I propose, as a defense to piracy, requires a showing of an *ascertainable difference in meaning*, under the assumption that such a showing is objective evidence of the independent attribution of meaning. My neo-*Jurassic Park* may possess an independent attribution of meaning, without possessing much ascertainable difference of meaning. Thus, the standard in practice does not protect me from Crichton's infringement claim.

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the artist's subjective impressions, someone's copyright must be sacrificed—a fact that the Court fails to address in *Koons* below.

In other words, whether the allegedly infringing elements of my work possess an independent attribution of meaning is a question of fact to be decided by the Court. The facts that my novel is similar to Crichton's, and that I had prior access to Crichton's work, count as evidence against independent attribution of meaning; the presumption swings against me. In the absence of readily discernable differences of meaning, the only evidence in my favor is my own claim of independent meaning. But this claim is suspect, not only on the grounds of bias and credibility, but also because an author is not infallible in determining the source of his attribution of meaning.<sup>63</sup> Literary theory has long recognized that what the author intends, and what the author *thinks he intends*, may be two separate things.

Does the independent meaning standard allow traditionally derivative works? Most derivative works are straightforwardly derivative. Sequels and spin-offs rely upon the earlier expression to provide content for the later expression—a character's traits or past, a world's political or social structure. Films and dramatizations are explorations of the content present in the original work. Derivative works are

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<sup>63</sup> George Harrison had a good-faith belief that "My Sweet Lord" was the product of his own subjective realm of interiority, though the court later determined he had been subconsciously influenced by the song "He's So Fine." *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F.Supp. 177 (D.C.N.Y. 1976).

continuations or extensions of the author's earlier expression; their meanings, and their forms, derive from the initial works. Some works, though, blur the line between "derivative" and "original"; and unfortunately, the independent meaning standard advocated here does not draw clear lines for judges. Can a T.V. commercial incorporate copyrighted material? Can a new film incorporate the plot from an old book? Can a rap song use the melody of an old love ballad? The answer is left to the discretion of the finder of fact: if an independent attribution of meaning is found, then the work may be deemed a non-infringing independent creation. But more is required than the mere façade of meaning, a post hoc rationalization of piracy. The expression must not hitch itself to the meaning of the earlier text.

If the line is not clear to judges, it is also not clear to authors. At the very least, authors are on notice that any intended similarity to existing copyrighted works must be justified in Menard's "irrefutable manner." But while authors are thereby subject to heightened scrutiny by judges, they have a certain degree of added freedom. Writers of satire, and appropriation artists who work by transforming existing art, have some claim of right to their art, under the independent meaning standard.

To a large degree, a standard of *ascertainable differences in meaning* coincides with the standard of the *transformative value of a work* laid out in *Acuff-Rose*. Of course, the Court's decision merely enhanced the importance of the transformative value of a work in determining whether it involved a fair use exception to copyright law. I urge the adoption of a more powerful standard that directly addresses the issue of the originality of a text: the independent attribution of meaning to form constitutes the separate, non-infringing origin of a work.

### **The Independent Meaning Standard Applied**

The facts of *Rogers v. Koons* are this: a visual artist appropriates the image of a couple with their puppies. He transforms the image into a three-dimensional sculpture, with some alteration. The sculpture is intended to convey exasperation and bewilderment at the banality of middle-class American culture and sensibilities—and most observers understand the sculpture as such. The sculpture has taken on a different significance: the independent meaning behind the artist's use of the form is clear. The photographer of the image sues alleging infringement. What result?<sup>64</sup>

The Court in *Rogers v. Koons* rejects the theory that such a sculpture constitutes a "fair use" exception, since it is satire

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<sup>64</sup> *Koons*, 960 F.2d at 301.

and not parody.<sup>65</sup> Koons need not have chosen that particular image to convey his message of disgust.<sup>66</sup> Perhaps the Court is correct to deny that Koons's "String of Puppies" is a fair use of Rogers's photograph. But the lesson of Menard's *Quixote* is that the Court never should have gotten as far as a consideration of fair use. Koons's sculpture should qualify under copyright law as an independent and original artistic creation. It is the result of his use of particular formal elements to express his own independently derived subjective impressions. His application of meaning to the formal elements of Rogers's photo is evident to most observers, and independent of any meaning Rogers himself intended to convey. This simultaneously indicates the independent origination of Koons's expression, and establishes a fundamental dissimilarity between the two works.

Although the independent meaning standard requires some subjective artistic discernment on the part of the finder of

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<sup>65</sup> *id.*, at 310. "The problem in the instant case is that even given that "String of Puppies" is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph "Puppies" itself." Interesting in *Koons* is that the Court hits upon a crucial issue, but fails to explore it thoroughly: "in looking at these two works of art to determine whether they are substantially similar, focus must be on the similarity of the *expression* of an idea or fact, not on the similarity of the facts, ideas or concepts themselves." *Koons*, 960 F.2d at 308. However, the Court envisions an "expression" as merely the formal elements of the work, divorced from the idea it expresses. Such an interpretation of the word "expression" forces a conclusion that Keats's *Ode* and the *Ode* created by Hand's author are identical.

<sup>66</sup> *id.*, at 310.

fact, such subjective discernments are already required in the current case law regarding fair use, where judges must decide upon the "purpose" and "nature" of the allegedly infringing work, as well as the amount of borrowing "required" to achieve parodic effect. Though copyright law has trended toward the use of objective measures, subjectivity continues to seep into judicial opinions. This fact is hardly surprising; it would be more surprising to find a completely objective standard that addressed all aspects of copyright theory satisfactorily. After all, artistic expression is the subject of copyright law, and it is inherently and irreducibly subjective.

### **Conclusion**

It is important to recognize the distinction between the meaning of the text and the text itself. Neither alone constitutes artistic expression; the act of aligning meaning with form is required. This is the very definition of the word "expression".

Most cases of clear infringement involve the replication of both text and meaning. But where text and meaning diverge, analysis of infringement must proceed with great care. Works with textual similarity to prior works may nevertheless be original works of authorship recognizable under copyright law. The telling question that must be answered to determine

infringement is, whether the assignment of meaning to form is the independent, subjective work of the putative author.

While the absence of ascertainable differences of meaning does not by itself indicate a lack of originality, the presence of ascertainable differences of meaning is indicative of a different source of origin. Independent meaning is one factor that should be given important weight in determining the originality of a work.

The use of an "independent meaning" standard to determine when a work is original requires a change in the current conception of copyright. The standard extends protection to satiric works and even serious works, so long as the use of similar elements is accompanied by the expression of independent meaning. Extending protection to such works promotes the "Progress of Science", as transformative works continue to add new ideas and perspectives to our collective social dialogue.