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# Capturing Ideas: Copyright and the Law of First Possession

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# CAPTURING IDEAS: COPYRIGHT AND THE LAW OF FIRST POSSESSION

ABRAHAM DRASSINOWER<sup>1</sup>

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## I. INTRODUCTION

‘Originality’ is a cardinal criterion of copyrightability.<sup>2</sup> It is the central category through which the law of copyright understands and posits the author’s acquisition of her exclusive right to reproduce her work. Because it specifies the mode of acquisition in copyright law, the originality requirement is analogous to the requirement of first possession or occupation in property law. Just as originality describes what a person must do in order to constitute herself as an author for purposes of copyright law, so does first possession describe what a person must do in order to constitute herself as an owner for purposes of property law. This paper explores this relation between authorship and ownership, originality and first possession.

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<sup>2</sup>Copyrights, 17 U.S.C. § 102 (2006); *see also* Feist Publ’ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); Copyright Act, R.S.C. 1985, c. C-42, s.5 (Can.); CCH Canadian Ltd. v. Law Soc’y of Upper Can., [2004] 1 S.C.R. 339 (Can.).

The exploration yields two propositions. First, there is a striking correspondence between the idea/expression distinction in copyright law, on the one hand, and the distinction between the intention to possess and the fact of possession—*animus possidendi* and *factum possidendi*—in property law, on the other. Second, contrary to apparently well-established assumptions, neither property discourse nor rights-based discourse are inherently unable to generate a theory of the limits of copyright protection—that is, of the public domain.

My point is not to propose that we embrace uncritically a rights-based proprietary discourse of authorial entitlement. Rather, I want to posit that the distinction between property and copyright cannot be adequately grasped as a distinction between tangible and intangible subject matter. The point of setting forth a correspondence between *animus* and *factum* in property and idea and expression in copyright is precisely to show that an emphasis on the intangibility of copyright subject matter is simply not sufficient to bring into relief the specificity of copyright *vis-à-vis* property. What we require as a starting-point for an account of the specificity of copyright is less a proposition about what copyright is not (i.e. corporeal and rivalrous) than a proposition about what copyright is (i.e. a right arising from an act of authorship). My hope is to evoke in that way the view that a positive theory of the public domain is impossible in the absence of a positive theory of authorship.

Part II of this paper, entitled “Wish and Deed,” sets forth an account of the law of first possession through an analysis of the classic case of *Pierson v. Post*.<sup>3</sup> Part III, entitled “Idea and Expression,” briefly sets forth an account of the idea/expression dichotomy in copyright law through discussion of the classic case of *Nichols v. Universal Pictures Corporation*.<sup>4</sup> On that basis, Part III unfolds a correspondence between *animus* and *factum* in property law and idea and expression in copyright law. Part IV, entitled “Things and Speech,” suggests through discussion of the classic case of *Feist*<sup>5</sup> that central doctrines in copyright law safeguarding the contours of the public domain can be solidly anchored in an account of the nature of authorship.

## II. WISH AND DEED

In *Pierson*, plaintiff Post was pursuing a fox. Just as he was about to capture the fox, defendant Pierson caught, killed, and ran off with the fox, and so prevented Post from getting at his intended prey. Post is the frustrated pursuer. Pierson is the “saucy intruder.”<sup>6</sup> It is common ground that first possession, or occupation, constitutes a property right to a previously unowned object. The question before the court is whether, by virtue of his pursuit, Post had already constituted a right to the fox such that he could sustain an action against the saucy intruder.

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<sup>3</sup>*Pierson v. Post*, 3 Cai. 175 (N.Y. 1805).

<sup>4</sup>*Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

<sup>5</sup>*Feist*, 499 U.S. 340.

<sup>6</sup>The phrase is Judge Livingston’s, writing in dissent in *Pierson*, 3 Cai. at 181.

The Court answers the question in the negative. Only mortal wounding by one not abandoning pursuit is sufficient to constitute possession.<sup>7</sup> Mere pursuit, even if such pursuit has reached a reasonable prospect of capture (which is the rule stated by Livingston J. in his dissent), is not enough.<sup>8</sup> Thus the saucy intruder gets the fox: “However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet this act was productive of no injury or damage for which a legal remedy can be applied.”<sup>9</sup>

Let me start by saying a word or two about the figure whom I take to be the silent and ignored, yet in my view, indisputable protagonist of the case: the fox. I want to start by talking about the silence of the fox. Imagine the following scenario. Imagine that it is not Pierson who intrudes to kill and take away the fox that was about to become Post’s. Imagine, rather, that another fox appears on the scene. Call it Fox 2. So now we have Post about to capture Fox 1, and instead of Pierson, we have Fox 2. Assume now that just as Post is about to capture Fox 1, Fox 2 intrudes at the last moment, kills Fox 1 by biting its neck, and carries it off. You will agree with me that it does not occur to us (or at least it does not occur to property law as we know it) to ask whether Post could sustain a cause of action against Fox 2 in respect of Fox 1 which he was about to capture. On the contrary, if immediately after Fox 2 intrudes on the scene to bite Fox 1, Post smiles gleefully to himself and ensnares either or both Foxes, it is clear that Post has indeed constituted a property right to either or both foxes by virtue of the operation of the rule of first possession.

The silence of the fox, then, signifies its exclusion from the community of entities whose voice is recognized as a voice that counts, whose acts are worthy of respect. When the fox screams because a hunter mortally wounds it, we do not ask it to tell us its story. But when a hunter screams because another hunter snaps up a prey about to be captured, then we find ourselves before a very difficult question about the origins of ownership, and we in fact ask both hunters to tell us their stories. The point is simply that persons, not animals, have standing as owners, as entities capable of claiming entitlements through their acts, as beings whose stories get a hearing. The lesson we learn by listening to the silence of the fox is that *Pierson*, a classic first possession case, proceeds on the twofold assumption that (1) there is a categorical difference between persons and non-persons (i.e. foxes, or things in general), and that (2) Pierson and Post are each of them a person. Thus, the case is a dispute between persons about who gets to keep a thing.

There is a third proposition that we can now state. If a distinction between persons and things is at the heart of the case, as indeed it is, then the case must be

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<sup>7</sup>*Pierson*, 3 Cai. at 178 (“[T]he mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him.”).

<sup>8</sup>*Id.* at 182 (“[P]roperty in animals *feroe naturae* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking what he has thus discovered an intention of converting to his own use.”).

<sup>9</sup>*Id.* at 179-80. For commentary on *Pierson*, see Peter Benson, *Philosophy of Property Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 752 (Jules Coleman & Scott Shapiro eds., 2002); and CAROL M. ROSE, *Possession as the Origin of Property*, in *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 11-24 (1994).

resolved in a manner that respects that distinction. Neither of the parties can be treated as a mere fox. Neither of the parties can be silenced—or treated as if it were nothing more than a means to the satisfaction of the other party's desire. That is what the fox is, and that is why it is silent or silenced. As far as the law of property is concerned, the fox is a mere object of desire, a mere thing whose claim to be a part of the legal story is only that two persons want it simultaneously. We bother about the fox not because we care about the fox *per se*, but because the parties or persons involved have something to say about the fox. The fox has no independent status or meaning here. Only the parties do. And because each and both of them do, we cannot resolve the dispute by denying either of them that status. We must arrive at the decision of who is legitimately entitled to the fox in a manner that is respectful not only of the winner's but of the loser's status as a person. That is, we must decide the conflict between persons by being respectful of the principle of personality that, according to the case's own presuppositions, each of them equally embodies. On this view, the case is not only about the difference between persons and things, but also about the litigants' equality as persons. In fact, to speak about the equality of the litigants as persons is but another way of saying that there is a difference between persons and things.<sup>10</sup>

Yet, the mere assertion that the two parties are persons does not help us decide the case. We need to fill this out a bit more, so as to enable us to decide the case. So far we can hear Pierson saying: "Hey, I am a person." But we can also hear Post saying: "Hey, I am a person." We cannot disagree with either of them on that, yet we must find a way to give one of them, and not the other, the fox.

What, then, does it mean to be a person, and how does the principle of personality help us decide the case?

There is no need to ask anyone but the Court, or rather the law of property, to answer this question. Here is what the court says:

That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control.<sup>11</sup>

When the Court is thinking about the difference between persons and foxes, it is thinking about a distinctively human capacity to form a specific kind of intent in respect of the world. Being a person means being capable of forming an intent in respect of the world, an intent that, so far as the rule of first possession is concerned, foxes cannot form.

But we can also ascertain that, in the Court's eyes, intent alone will not be sufficient to make out a claim of first possession. It is not enough for Post to say that he thought about the fox first, or even that he saw the fox first, or even that he was

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<sup>10</sup>On the relation between property and personality, see MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993). On the role of equality in private law, see ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

<sup>11</sup>*Pierson*, 3 Cai. at 178 (emphasis added).

the first to form an appropriating intent in respect of the fox. If he dreamed the night before that he caught the fox, that is just not enough. These merely internal or subjective musings are insufficient.

We can go even further here, if we are to follow the logic of the case. We know that not even hot pursuit of the fox is enough. That is, not even manifesting one's intent in the world, such that the intent is obvious to others, is enough. Post's intent was perfectly clear to Pierson at the time that Pierson caught the fox for himself. Pierson knew very well of Post's intent to capture the fox, and the court is careful to point out to us that Pierson's saucy act lacked courtesy. But even so, the point is that intent by itself will not do. The intent must not only be unequivocally *communicated* to the world, so as to be outside the claimant's head. The intent must also be *materialized* or embodied in the world, so as to have left its mark on the object claimed. In this case, the required mark is said to be a *mortal wound on the body of the fox*. Not pursuit alone, nor pursuit known by another, but nothing short of *mortal wounding* by one not abandoning pursuit is the requirement.

The mortal wound on the body of the fox is not just a sign. It is a privileged sign. It is *the* sign that gives rise to normative relations in the eyes of the law of property. What this sign signifies is the reality not of a prospect but of an accomplishment, not of a purpose but of an achievement. I do not merely wish or desire the fox to be mine. I have made it mine by subjecting it to my control, by depriving it of its liberty, by demonstrating, as it were, that it has no significance independently of what I give it. I not only intend to dominate a thing; I have actually done so. My intention to appropriate is not just a wish but a deed, not a project but an act.

The law of first possession enshrines that deed when it says that where a person exercises control over a previously unowned thing, the person now has a proprietary claim over the thing. On that basis, the Court in *Pierson* decides in favour of the saucy intruder. The point is that the saucy intruder's capture of the fox is worthy of respect because such capture is a person's act – where an “act,” as distinct from a mere intention, is the convergence of intent and fact, *animus possidendi* and *factum possidendi*.

But in what sense is this requirement of embodiment not only consistent with, but in fact required by, the equality of the litigants as persons?

Simply put, the point is that the principle of personality requires respect for deeds but not for projects, for actions, not for intentions. My wish to capture the fox is not sufficient to restrict you from pursuing the fox yourself because pursuit of my purposes is in no way entitled to more respect than pursuit of your purposes. I cannot legitimately claim that you be restricted from pursuing the fox just because I have it in my line of sight any more than I can ask you to stop setting your own purposes just because they conflict with mine. To force you to give up your projects for the sake of mine would be in fact to subject you to my desire, to treat you like a fox. But by the same token, you cannot legitimately ignore the mark I have placed on the body of the fox as I subject it to my control. To disregard my completed act, my deed, as distinct from my mere project, is to disregard the fundamental proposition that, as a person, my acts are worthy of respect. It would be to treat me like a fox. Thus, my project to capture the fox cannot be constitutive of your obligation to forgo pursuing the fox anymore than you can ignore the wound through which I have marked the fox as mine. Respect for the equal personality of each requires that a completed act, not a mere project, be necessary for first possession.

It is true, of course, that the difference between a wish and a deed, a project and an act, an intention and an action, in any given case may not be altogether clear. The facts leading to a finding of possession – and hence of first possession – can be ambiguous.<sup>12</sup> Nonetheless, it is clear that mere thought is insufficient, and that actual manucaption (i.e. bodily seizure) is unnecessary. Between thinking and touching, *animus* and *factum*, there is an expanse of possible moments, a spectrum of possible points at which a court may decide that possession obtains. My point here is not that this point can be determined *a priori*. My point is that the question of where an intention has become an action, or a project a deed, is a question inseparable from a particular conception of the equality of the litigants as persons. The point is that possession is a normative, not a physical phenomenon.<sup>13</sup> Thus, whether possession obtains in any given set of facts is a question not only about the possessor's relation to the thing possessed, but also about her relation to other persons: it is a question about whether her claim to have constituted a special relation to the object is consistent with another's personality.

In *Pierson*, the plaintiff-pursuer had placed himself in a special relation to the contested fox. He was within a reasonable prospect of capture. Yet the Court held that such relation is devoid of legal significance. The holding is intelligible from the standpoint of equality. The law of first possession governs the appropriation of previously unowned things. It defines the circumstances that must obtain for a person to impose upon all others an obligation they would not otherwise have. This is the obligation to abstain from use of the appropriated thing without that person's authorization. The law of first possession requires that she who claims a previously unowned thing must demonstrate control over the thing claimed. This is because ownership arising from anything short of a completed act, as evidenced by that control, would subject parties other than the claimant to the claimant's mere desire. But such subjection is incompatible with equality. The requirement that the claimant demonstrate a publicly accessible deed—and not only a mere prospect or wish—is thus rooted in the very concept of property as an interpersonal relation between equals with respect to things. It is because of equality that possession is—and must be—always already something that has been done, not something that is about to take place. One's *deed* is one's official proof of ownership.

### III. IDEA AND EXPRESSION

I want now to develop the proposition that what appears in property law as a distinction between intention and action, wish and deed, appears also in copyright law as a distinction between idea and expression, an author's project and an author's completed work – the *animus* of his idea and the *factum* of his expression.

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<sup>12</sup>See *Ferguson v. Miller*, 1 Cow. 243 (N.Y. Sup. Ct. 1823); *Tubantia, The* (1924) (HC), 18 Ll. L. Rep. 158 (Adm.); *Parker v. British Airways Board*, [1982] 1 All E.R. 834 (C.A.).

<sup>13</sup>See BRUCE ZIFF, *PRINCIPLES OF PROPERTY LAW* 120-22 (2000); ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* 46 (1995); JAMES W. HARRIS, *PROPERTY AND JUSTICE* 81-84 (1996); and Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795 *passim* (2003).

I have argued elsewhere that every copyright case is a case about the equality of the litigants as authors.<sup>14</sup> I formulated the argument as a rights-based account of the idea/expression dichotomy. A brief summary follows.

The idea/expression dichotomy provides that an author's ideas are not subject to copyright protection. Only her expression of those ideas is. Thus, the plaintiff in a copyright action must show not that her ideas have been adopted by the defendant, but that the defendant has copied the plaintiff's expression.<sup>15</sup>

Assume for a moment that you use or adopt in your own work an idea drawn from another person's work, yet without copying that other person's expression of the idea. Say, for example, that you write an original play developing the idea of "star-crossed lovers." This means not that you have reproduced the text of *Romeo and Juliet* (i.e. William Shakespeare's expression of that idea), but that you have expressed the idea anew. To use in one's own work ideas drawn from another's is necessarily to exercise one's own expressive capacities. It is to say it in one's own words. Strictly speaking, we might say that ideas *per se* cannot possibly be copied; they can only be (re-)expressed anew. This is why the copyright case law speaks not of *copying* ideas but of "adopting" or "using" them.<sup>16</sup>

The lesson to be drawn from this thesis (i.e. that ideas *per se* cannot be copied) is that where the defendant expresses an idea in his own words, the plaintiff cannot complain of a violation of her copyright because her own claim to copyright is but an affirmation that persons have a right to their expression. The idea/expression dichotomy is in this sense an affirmation of the equality as authors of the parties to a copyright action. To the extent that the defendant has not copied the plaintiff's expression but has instead expressed an idea anew, the defendant has exercised his own authorship. The idea/expression dichotomy permits the defendant to avail himself of ideas in pursuit of his own original expression – his own authorship. The idea/expression dichotomy thus defines the scope of the plaintiff's copyright from the standpoint of the parties' equality as authors. The limits of the plaintiff's right

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<sup>14</sup>Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JUR. 1 (2003).

<sup>15</sup>Justice Hand's judgment in *Nichols*, 45 F.2d 119, remains the *locus classicus* of the idea/expression dichotomy. In *Nichols*, the plaintiff was the author of a play entitled "Abie's Irish Rose." *Id.* at 120. The defendant produced a motion picture play entitled "The Cohens and the Kellys," which the plaintiff alleged was taken from her own play. *Id.* Following a description and comparison of the plays, Justice Hand found that "[t]he only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation." *Id.* at 122. On that basis, Justice Hand ruled in favour of the defendant: "A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*." *Id.* Justice Hand held that what the plaintiff claims as her own is "too generalized an abstraction from what she wrote. It is only a part of her 'ideas.'" *Id.*

<sup>16</sup>*See, e.g.,* *Moreau v. St. Vincent*, [1950] Ex. C.R. 198 at 203 (Can. Ex. Ct.). "It is . . . an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely *adopt* and *use* the ideas but no one may *copy* his literary work without his consent." *Id.* (emphasis added).

(i.e. the law's refusal to copyright ideas) are the contours of a public domain that, as a matter of equality, the plaintiff herself must be held to recognize. One might say that the public domain is not solely a space containing freely available materials. It is also a fundamental condition of free and equal interaction between persons in their capacity as authors. The public's domain is the domain of fair interaction.

On the one hand, the plaintiff's authorship is recognized in the requirement that the defendant not copy her expression. On the other, the possibility of the defendant's authorship is preserved and recognized in the free availability of the ideas expressed. The equality of the parties as authors is affirmed in the simple proposition that the defendant may draw from but not copy the plaintiff's work.<sup>17</sup>

The exclusion of ideas from the purview of copyright is thus an affirmation of the equality that structures the relation between the parties to a copyright action. The demarcation of the scope of authorial right, that is, of expression as distinct from idea expressed, is not so much—or not only—an evidentiary matter, as much as a normative exercise conducted under the rubric of interpersonal equality. Just as in property law the category of 'possession' is a normative category, so too in copyright law the category of 'expression' is a normative category through and through traversed by and constructed in terms of an interpersonal relation, a relation between equals.

The well-known "series of abstractions" test formulated by Learned Hand in *Nichols*<sup>18</sup> sets up a spectrum from generality to particularity in terms of which copyright law is said to demarcate the scope of the author's right, the level of specificity and/or generality at which expression ends and idea begins. This spectrum from generality to particularity, from idea to expression, parallels the spectrum from intention to act, wish to deed, that informs the law of first possession. In copyright law, 'expression' is somewhere between literal text and mere idea. Were expression restricted to the literal text, the copycat would escape through immaterial variations. But at the same time, were expression to extend beyond a certain level of generality, the author would be permitted to assert her entitlement in a manner inconsistent with another's authorship. Similarly, in the law of first possession, 'possession' is somewhere between actual manucaption and the mere intent to capture. Were possession to require actual manucaption, the saucy intruder would get away with the fox even after it had been mortally wounded by one not abandoning pursuit. But at the same time, were the law of first possession to accept anything less than certain control of the claimed object as evidence of possession, the pursuer would be permitted to impose his mere projects or wishes on another in a

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<sup>17</sup>For an elaboration of this view in regard to fair use and fair dealing conceived as user rights, see Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 462 (Michael Geist ed., 2005).

<sup>18</sup>See *Nichols*, 45 F.2d at 121.

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.

*Id.*

manner inconsistent with her personality. In short, just as one's *deed* is one's official proof of *ownership*, so is one's *expression* - not mere idea - one's official proof of *authorship*.

The plaintiffs in *Pierson* and *Nichols* are in analogous positions. In *Pierson*, the plaintiff-pursuer has not completed his act. He can claim the fox only on the basis of his mere pursuit, his mere project. The fact that this claim fails is but a way of saying that pursuit *per se* cannot give rise to property. The parallel point in copyright law is that ideas *per se* do not give rise to copyright. They represent mere projects, as yet incomplete acts, dreams, so to speak, that cannot as such be constitutive of another's obligation. To be sure, the plaintiff in *Nichols* has completed her copyrightable work. Nonetheless, the plaintiff in *Nichols* must still fail because her claim against the defendant could stand only at a level of generality inconsistent with the defendant's own authorship.

Ideas, one might say, are like uncaught foxes that have not yet been ensnared in the web of one's own expression. What holds these two cases—*Pierson* and *Nichols*—together is the concept of equality that structures them both and that renders each of their holdings intelligible from a rights-based standpoint. In both cases—the case of mere pursuit and the case of mere idea—granting protection would amount to a violation of the principle of personality. The metaphor that one can capture ideas, that ideas are like uncaught foxes, expresses or captures that parallel.

#### IV. THINGS AND SPEECH

The structural convergence between first possession and original expression indicates that the distinction between tangible and intangible is insufficient as a starting-point for an account of the specificity of copyright. From the standpoint of the structural convergence developed above, there is no specific normative (i.e. justificatory) significance to be attributed to the tangibility or lack thereof of the subject-matter protected under either body of law. The exclusive right of use to which first possession gives rise follows from the fact that such possession is an agent's whose deeds are worthy of respect. Thus, in *Pierson*, Pierson keeps the fox not because the fox cannot be used simultaneously by someone else (i.e. not because the fox is rivalrous in consumption), but because Pierson captured it. Similarly, the exclusive right of reproduction to which original expression gives rise follows from the fact that such expression is an author's whose works are worthy of respect. An author has a copyright in her work not because the work can be used by someone else without her being deprived of it (i.e. the work is nonrivalrous in consumption), but because she authored it. In both cases, the exclusivity in question is a normative phenomenon about the principle of personality, not an empirical phenomenon about the nature of the objects claimed.

My point, of course, is not at all that no normatively significant distinction between property and copyright ought to be drawn. Rather, it is that we need to reconfigure that distinction along an axis different from the tangible/intangible distinction. What we require as a starting point for an account of the specificity of copyright is less a proposition about what the subject matter of copyright is not (i.e. corporeal and rivalrous) than a proposition about what the subject matter of copyright is (i.e. an instance of speech or, more generally, of communication that, as such, is irretrievably directed toward another). I want now to discuss briefly the

classic case of *Feist* with a view to sketching some preliminary steps in the direction of such a positive theory of copyright.

In *Feist*, the United States Supreme Court denied copyright protection to an alphabetically arranged phone directory on the grounds of lack of originality. The decision is widely regarded as a landmark decision because it represents an unambiguous affirmation of a “creativity” standard of originality over a “sweat of the brow” or “industrious collection” standard. The mere labour or effort invested in the compilation of the information that makes up a garden variety phone directory is not sufficient to give rise to copyright protection. From the standpoint of copyright law, the fruit of the compiler’s labour is public domain material: it can be copied with impunity.

The Court formulates the fundamentals of its decision as follows:

The primary objective of copyright is not to reward the labor of authors, but to “promote the Progress of Science and useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result [i.e. that, as the Court puts it, “much of the fruit of the compiler's labor may be used by others without compensation”] is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.<sup>19</sup>

The Court thus finds that the “sweat of the brow” doctrine “flouted basic copyright principles.” It stood in opposition to nothing less than “the most fundamental axiom” of copyright law, the proposition that “no author may copyright his ideas or the facts he narrates.” Accordingly, the Court concludes its decision by stating that:

Rural [i.e. the plaintiff] expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original. . . . This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality [i.e. creativity], not effort.<sup>20</sup>

Three aspects of the Court’s reasoning are worthy of comment.

First, the Court equates the idea/expression dichotomy and the fact/expression dichotomy. *Prima facie*, this equation is at best puzzling: it amounts to an equation, far from self-evident, between “ideas,” on the one hand, and “facts,” on the other. Of course, what the Court has in mind is that neither ideas nor facts are subject to copyright protection, so that ideas and facts are identical in the specific sense of their both being perennially lodged in the public’s domain. Still, the Court’s equation is at best intriguing. While it is unquestionably true that neither facts nor ideas are subject to copyright protection, equating the idea/expression dichotomy and the

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<sup>19</sup>*Feist*, 499 U.S. at 349-50 (citations omitted).

<sup>20</sup>*Id.* at 362-64 (citations omitted).

fact/expression dichotomy obfuscates the possibility that the reasons for which we refuse copyright protection to facts are different from the reasons for which we refuse copyright protection to ideas. This obfuscation, in turn, precludes the formulation of a theory of the public domain able to account in differentiated ways for its variegated contents.

Second, the status of the idea/expression or fact/expression dichotomy in the Court's construal is ambiguous. On the one hand, the dichotomy is said to be but a pithy formulation of a "principle;" namely, the foundational proposition that "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." On the other hand, however, the Court seems to question the foundational status of this so-called "principle." In the very same paragraph, the Court derives this "principle" from an even more fundamental proposition; namely, that "the primary objective of copyright is not to reward the labor of authors, but to 'promote the Progress of Science and useful Arts.'" Thus, the seemingly foundational status of the dichotomy seems to turn, rather, on the assumption that the free availability of ideas and facts is conducive to the "Progress of Science and useful Arts." Yet the Court appears to offer little to substantiate this assumption. The intuitively available suggestion that a compulsory licensing scheme may be more efficiently conducive to progress, for example, is hardly canvassed by the Court.<sup>21</sup>

Third, the Court's response to the "sweat of the brow" view of originality is unsatisfying. The Court's response is, basically, that the sweat of the brow approach is inconsistent with the most fundamental axiom of copyright law: the proposition that facts are not subject to copyright protection. The Court presents two arguments to support its view. One is that "authorship" is a requirement of copyright protection. Facts are not subject to copyright because facts are not authored—they do not owe their origin to the person who compiles or discovers them.<sup>22</sup> The other is that copyrighting facts would contravene the public interest. Because the Court presents its assertion that authorship is a requirement of copyright protection as a constitutional matter rooted in Article I, 8, c.8 of the US Constitution,<sup>23</sup> the Court's argument from authorship is in fact dependent on the Court's argument from the category of public interest. Authorship is a requirement of copyright protection because the public interest in the promotion of the "Progress of Science and useful Arts" so requires it. There is no sense in which the inquiry into authorship is autonomous from the inquiry into the public interest. On the contrary, authorship is entirely parasitical on the public interest. The Court's dismissal of the sweat of the brow position basically amounts to the proposition that copyright protection of facts contradicts the public interest.

Yet nothing in the concept of the public interest necessitates the conclusion that copyright protection of facts contravenes the public interest.<sup>24</sup> On the contrary, it is

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<sup>21</sup>Consider, for example, Norman Siebrasse, *A Property Rights Theory of the Limits of Copyright*, 51 U. TORONTO L.J. 1 (2001).

<sup>22</sup>*Feist*, 499 U.S. at 347.

<sup>23</sup>*Id.* at 346, 351.

<sup>24</sup>*C.f.*, Alfred C. Yen, *The Legacy of Feist: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods*, 52 OHIO ST. L.J. 1343 (1991).

by no means implausible that the public interest in the discovery, collection, and compilation of fresh facts is undermined by the absence of copyright protection.<sup>25</sup> Thus, the Court's twin assertions in *Feist* that the sweat of the brow approach contradicts the public interest, and that the creativity approach is conducive to the public interest remain unsubstantiated. The Court's response to the sweat of the brow approach is unsatisfying because the Court summarily dismisses the sweat of the brow approach as incorrect on the basis of an assumption—i.e. that facts are not subject to copyright protection—that is none other than the very matter in issue.

Attempting to locate *Feist* in the context of the foregoing discussion of the relation between *Pierson* and *Nichols* will prove instructive in regard to (a) the Court's puzzling equation of the idea/expression dichotomy and the fact/expression dichotomy, (b) the Court's ambiguous construal of the status of these dichotomies as expressive of a "principle," and (c) the Court's unsatisfying response to the sweat of the brow approach.

At first sight, the Court's distinction between mere effort and creativity in *Feist* may seem to suggest that, like *Nichols*, *Feist* also maps onto the structure of *Pierson*. In *Pierson*, the plaintiff fails to recover because the Court refuses to find an entitlement arising out of mere pursuit. Similarly, in *Nichols*, the plaintiff fails to recover because the Court refuses to extend copyright protection to mere ideas. In this context, it seems but a short step to the observation that, in *Feist*, the plaintiff fails to recover because the Court refuses to extend copyright protection to raw facts on the basis of the compiler's mere effort. Thus, one may be tempted to suggest that the compiler's mere effort (*Feist*) is as insufficient to give rise to legal protection as are a hunter's mere pursuit (*Pierson*) and an author's mere project or idea (*Nichols*).

The analogy between the hunter's mere pursuit and the compiler's mere effort, however, breaks down almost as soon as it is asserted. Chasing a fox can be reasonably described as an incomplete act. So can an author's mere idea for a work. But having compiled information and assembled it in the shape of a phone directory cannot be so described. There is nothing incomplete about a phone directory; nothing, in any case, that would permit an analogy to a pursuer who has not quite captured her prey. The pursuer is attempting to get something done. The compiler who holds the directory in his hands has completed his task of compilation. She cannot be refused copyright protection for her phone directory on the basis that her act is incomplete. She has certainly moved well beyond mere pursuit. She has caught her prey. Her problem is by no means analogous to that of the mere pursuer in *Pierson*. Her problem is that, while she has caught her prey, she has not caught the *kind* of prey that copyright is after.

Operative in *Feist* is not a distinction between wish and deed, intention and action, but rather between different modes of action. The plaintiff in *Feist* does not fail because she has failed to complete her act. Rather, she fails because what she

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<sup>25</sup>See, e.g., Norman Siebrasse, *Copyright in Facts and Information: Feist is Not and Should Not Be the Law in Canada*, 11 CAN. INTELL. PROP. REV. 191 (1994). Note that the history of the recent landmark Canadian copyright case, *CCH Canadian Ltd.*, [2004] 1 S.C.R. 339 (Can.), suggests that the argument from public interest is inconclusive: while the Court of Appeal, (2002), 18 C.P.R. (4th) 161 (Can.) at para. 59, upheld a "sweat of the brow" originality standard in the name of the public interest, the Supreme Court [2004] 1 S.C.R. 339 (Can.) at paras. 22 and 23, rejected that standard in the name of the public interest.

has accomplished is not an original work of authorship. She has *produced* a phone directory, but she has not *created* a copyrightable work.

There can be no doubt that, as the *Feist* Court states, the idea/expression dichotomy and the fact/expression dichotomy converge in the sense that copyright protects neither ideas nor facts. Yet the reasons for which copyright refuses protection in each case are not the same. The idea/expression dichotomy teaches that copyright protects not projects but acts. The originality requirement specifies the particular kind of act required. The originality requirement answers the threshold question of whether someone claiming authorship has a copyright at all. The idea/expression dichotomy demarcates the scope of that copyright by reference to the extent to which the person claiming the copyright has realized her work's idea rather as expression. Originality is about the subject-matter of the entitlement. The idea/expression dichotomy is about the scope of the entitlement. To confuse or equate the idea/expression dichotomy and the fact/expression dichotomy is to confuse acquisition with scope, a question about copyrightability with a question about infringement. To put it bluntly, it is as if one were to conflate the question of whether A owns a fox with the question of whether B has converted A's fox. To suggest without more ado that the idea/expression dichotomy and the fact/expression dichotomy are equivalent seems as far fetched as would be the view that *Nichols* and *Feist* are the same case.

Of course, the difference between the idea/expression dichotomy and the fact/expression dichotomy (i.e. the doctrine of originality) need not preclude us from formulating their relation. Viewed as a whole (i.e. as aspects of the same thing), the two doctrines in their combined operation on the one hand affirm and differentiate the specificity of authorship (i.e. originality) and on the other demarcate the scope of the entitlement arising from that authorship (i.e. idea/expression dichotomy). The idea/expression dichotomy fences the terrain that originality brings into being. As terms of art, the terms 'expression' and 'work' simultaneously capture both the mode of action through which the right is acquired *and* the demarcated subject-matter protected by the right. An author's 'work' is both her act and her *oeuvre*. Her 'expression' is both the act of expressing and that which is expressed.

This view of *Feist* (i.e. originality) and *Nichols* (i.e. idea/expression) as aspects of a doctrinal specification of the concept of authorship permits us to distinguish both cases from *Pierson*. In essence, the identity of act and subject-matter in copyright is to be differentiated from the radical separation between act and subject-matter in property. Whereas it is possible to separate act (e.g. capture) and subject-matter (e.g. fox) in property, so that possession or occupation is of a given pre-existing thing, it is impossible to describe the act (i.e. expression) in copyright without also describing the subject-matter (i.e. expression) to which the act gives rise. The act is, quite literally, the origination of the subject matter.

This identity of act and subject-matter contains the specificity of copyright. In so doing, it facilitates a view of the underlying principle, or most fundamental axiom, of copyright law in the absence of an irreducibly ambiguous reference to the public interest. Facts are not subject to copyright protection because facts are originally self-subsisting; they pre-exist the compiler's act of compilation. Whereas an author's work displays the identity of act and subject-matter characteristic of copyright, the compiler's phone-directory does not. Nor can it. The facts the compiler gathers are no more subject to copyright than are the previously unowned things to which a person may claim proprietary entitlement through possession or

occupancy. Facts are not copyrightable because they pre-exist the compiler's act. In this sense, facts are like foxes, not like works of authorship.

Note that the identity of act and subject matter characteristic of copyright cannot be adequately grasped through the proposition that the subject-matter of copyright is incorporeal and/or nonrivalrous. Facts are not subject to copyright, yet they are incorporeal and non-rivalrous. Similarly, to give one more example, patentable ideas are not subject to copyright, yet they are incorporeal and non-rivalrous. The observation that the subject-matter of the entitlement is incorporeal and/or non-rivalrous may perhaps tell us that the entitlement cannot—on certain views of the nature of property—be understood as proprietary. But this is simply not sufficient to tell us why the subject-matter is copyrightable. To put it otherwise, the concept of a 'public good' is of limited value in facilitating our understanding of the specificity of copyright.<sup>26</sup>

In order to understand the copyrightable, as distinct from the non-proprietary, nature of copyright subject-matter, we must recall once again the combined operation of the doctrine of originality and the idea/expression dichotomy. What is subject to copyright protection is 'original expression.' This is not the capture or compilation of a pre-existing externally self-subsisting 'thing,' but the conveyance of meaning to another, the movement from the generality of idea to the specificity of expression. At issue is an act of communication that, as such, gives rise to an identity of act and subject matter; in a word, *speech*.<sup>27</sup>

The underlying difficulty that besets the *Feist* decision is that it seeks to derive the central principle that facts are not copyrightable because they are not works of authorship from an instrumentalist public interest perspective. This subordination of authorship to derivative status is one of the pervasive ironies that permeate the public interest theory of copyright. The extent to which we fail to assert the irreducible centrality of authorship in its own right is the extent to which we fall prey to construing the conveyance of meaning to another (an act worthy of recognition for its own sake) as a mere function of purportedly higher purposes. In the name of the public interest, the dignity of speech thus threatens to assume the subordinate status of mere 'thinghood,' and the law of copyright appears more and more as the regulation of the transfer of things rather than as the public ordering of the world of intersubjective meaning and communication. The irony is that the propertization of information asserts itself, as it were silently, at the very moment its opponents seek to subvert the principle of authorship in the public's name.

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<sup>26</sup>*C.f.*, Yen, *supra* note 24.

<sup>27</sup>I do not intend to enter here into the question whether, normatively speaking, fixation, as distinct from expression, ought to be a necessary dimension of copyrightability. For an objection to the fixation requirement, see David J. Brennan & Andrew Christie, *Spoken Words and Copyright Subsistence in Anglo-American Law*, 4 I.P.Q. 309 (2000).