

THE FORM AND THE MATTER: ORIGINS AND FATE OF THE IDEA/EXPRESSION DICHOTOMY IN THE COPYRIGHT SYSTEM

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Abstract:

A cornerstone of copyright law is the so-called “Idea/Expression Dichotomy” according to which copyright is not a property in ideas but only a (temporary) protection of their expression. This dichotomy, which nowadays takes fairly standard shape in every legal system, has quite different rationales in common law and in civil law countries. In the latter it is grounded in the Romantic and Idealistic notion of the creative work as a joining of “form” and “matter” – a notion that profoundly influenced early *droit d’auteur* laws and doctrines in Germany, France, and Italy. In Anglo-American copyright, beginning with *Baker v. Selden* (1879), the dichotomy appears instead to have a pragmatic justification – specifically, that of “balancing” authors’ private interest (in claiming property in their work) and the public interest (in being free to build upon that work). Although the conclusions are the same, the underlying principles are different: natural-law in the former, utilitarian in the latter. Yet, whichever its rationale, this traditional dichotomy is becoming blurred in the digital environment where all matter, or content, is a disembodied sequence of information controlled by code. It has thus become essential to reconsider the rationale of such a dichotomy. What legitimates the principle of non-copyrightability of ideas, facts, discoveries, and the like in a digital world? Is the “utilitarian” rationale sufficient? What would a copyright system living out the form and the matter look like?