

Index

- abstraction-filtration-comparison test *see*
software
- Australia
factual compilations 94–5
skill and labor standard of originality
94–5
- Austria
personal intellectual creation standard
of originality 82
- authorship
'author' (meaning) and originality
142–3, 145, 238
facts and fact-based works and 57–8
'creation' v. 'discovery' of facts by
author 135–6, 142, 145,
152–4, 158, 175, 179, 195,
207, 238
see also facts
indeterminate works *see* indeterminate
works
intellectual invention as a basis of
143
labor as a basis of 8–9, 15,
intellectual labor as a basis of
41–2, 49, 60, 72–3, 181
see also news
see also industrious collection
doctrine
lack of creativity requirement 238
see also 'lack of creativity
requirement' *under*
'originality'
personality or individuality as a basis
of 8, 10, 79, 83–4, 93, 146,
181
see also originality
subjectivity 8
see also originality
- Belgium
author personality test for originality
79–80
- Canada
development as a middle standard
88–91, 93, 100, 102, 104–5
non-mechanical and non-trivial
exercise of skill and judgment
standard of originality 88–92,
102–4
codes of law *see* 'lack of
copyrightability' *under* 'facts';
copyrightability
collective fact approach *see* compilations
common law copyright protection news
and *see* news
compilations
factual 3, 29, 31, 71–2, 93, 145–6,
282
protection for
collective fact approach 110–11,
115–16, 126–32
collective facts as content and
protectable expression
126–32, 187, 239
collective facts as 'original'
121–5, 154, 326–7
copyright protection of fictional
works in comparison with
111, 113, 116, 121, 126,
130, 132
creative spark standard *see*
creativity
distinguishable variation
standard *see* creativity
parallel independent creation
122–4, 126, 128
fallacies 109–11, 125–6, 132
Feist approach as incoherent with
regards to lack of creativity for
copyrightability of selection and
arrangement of compilations
111, 115–21, 132
arrangement 119–21, 322
selection 115–18, 322

- statutory solutions 109
- sui generis* 115, 132, 323–4, 327
- see also* facts; originality
- origin and meaning of 7–8
- as ‘original works of authorship’ 20, 33, 134, 149–50, 162–4
- see also* originality
- originality requirement and creativity of 12, 20
- in fact-expressing and not fact-gathering techniques 177, 183–4
- see also* originality
- in the public domain 29
- scope of copyright protection 20
- in France *see* France
- selection and arrangement of
 - compilations *see* originality
- subjective compilations 29, 31–3
- see also* originality
- types
 - directories 3, 14, 24–5, 33, 80, 88, 94, 104, 115–21, 134, 150–55, 234, 312–13
 - index 27
 - information products *see* information products
 - maps 34–5, 41, 81
 - news 17, 44
 - see also* news
 - price guide estimates 124, 161–6, 203–7, 237, 258–9, 263, 265, 313
 - roadway mileage guide 31
 - taxonomies *see* taxonomies
 - works predicting the future 166–71
 - as compared to opinion and selections based on taste, and ‘judgment and expertise’ *see* selections based on taste, and ‘judgment and expertise’
 - see also* opinion and selections based on taste, and ‘judgment and expertise’
- computer program
 - copyright protection for in Europe 84, 86
 - reconciling Germany’s strict test with Anglo-Saxon ‘skill and labor’ standard 86
 - see also* Germany; originality; UK software originality and copyright protection 81
 - continuum between creativity and labor 6, 15, 18, 32, 34
 - continuum of expression *see* expressions
 - contract law 286–7
 - see also* third party problem
 - convergence of opinion theory *see* ‘theories’ under ‘facts’
 - copyright law
 - aim of 13, 19, 148, 150, 182, 184, 283
 - originality standards in balancing 91
 - benefit 123
 - expansion in scope of protection 13
 - incentive 220–21, 225, 235
 - limited scope 281–3
 - see also* third party problem
 - Copyright Office
 - registration practices 36–7
 - copyrightability
 - as an emergent property 110
 - compilations *see* compilations
 - lack of copyrightability for expressions of law 209 *see also* facts
 - facts *see* facts
 - words and short phrases 198, 202, 246
 - pragmatic copyright protection test 236
 - see also* convergence theory
 - ‘variation in expression’ test *see* expressions
 - correspondence theory *see* ‘theories’ under ‘facts’
 - cost recovery *see* industrious collection doctrine
 - ‘created facts’ *see* ‘human facts’ under ‘facts’
 - creativity 3, 13
 - as emergent property 126
 - collective facts and 129
 - compilations 13
 - selection and arrangement of *see* compilations; originality

- creative spark standard 125–6, 177, 204, 238, 242–4
 human influence 181
 imagination 156
 means/ends analysis 157–8
 substantial and more than ‘merely trivial’ variation (distinguishable variation standard) 13, 27, 88, 96, 106, 122, 125–6
 useful function and utility not enough for creativity 153–4, 201
see also continuum between creativity and labor; news; originality
 creative choices test *see* originality
- databases
 copyright protection for 3–4
 in Europe 84, 86
 in France 77
 historical analysis 5
see also continuum between creativity and labor
 in UK 93
see also information products
 directories *see* compilations
- ‘essential facilities’ doctrine *see* ‘merger doctrine’ *under* ‘facts’
- European Union
 personal intellectual creation standard of originality *see* originality
- expressions
 continuum of expression 247, 251
 ‘variation in expression’ test for copyrightability of expressions 236, 245, 249–57, 264
- fact/expression dichotomy *see* facts
 ‘factness’ in expression *see* facts
 facts 15
 collective facts *see* compilations
 conjectures as uncopyrightable hard facts 159–60
 as compared to copyrightable opinions and selections based on taste 161–2
- copyrightability and independent creation of 109–5
 estimated facts *see* opinion and selections based on taste, and ‘judgment and expertise’
 fact/expression dichotomy 15, 16, 20, 23, 127, 137, 141–6, 149, 155, 159, 166, 169, 171–2, 182, 207, 212, 246
 as compared to idea/expression dichotomy 141, 193
 continuum of expression *see* continuum of expression
 difficulty of 194, 198, 219, 226
 ‘factness’ in expression 212, 215, 228
 line between fact and expression as line between creation and discovery of facts by author *see* authorship
 authorship and originality 144
 fact(hard facts)/opinion(soft facts) dichotomy 172–7
 inconsistency with
 fact/expression dichotomy 176
 idea/expression dichotomy 175
 process/expression dichotomy 175
- fact-based works *see* compilations; news
 facts ‘intrinsic to nature’ 195
Feist definition of facts as inadequate 232
 history of 190–91
 human facts 195
 social facts 197, 203, 206, 212–14, 216–17, 219, 229, 231
 created facts 186, 190, 196, 215, 228–9, 231
 in comparison with ‘facts’
 created by works of literature 215–16
 created facts problem 205–7, 218
- idea/expression dichotomy 16–17, 20, 23, 35, 116, 127–30, 136, 138–41, 150, 155, 164, 166, 169, 171, 175, 182–4, 207, 218, 282, 310–11, 313, 327

- as compared to fact/expression dichotomy 142, 194
- 'building block' v. opinion 'infused' ideas 205, 213
- distinction between fact and content 126–7, 132
- line between idea and expression 141, 167, 311
- as mirrored in § 102(b) of U.S. Copyright Act and TRIPS 100, 138, 310–11
- policy rationales behind 23–4, 140
- information products *see* information products
- lack of copyrightability and 65–8, 113, 133, 136, 145, 149, 180, 185, 187–8, 238, 304, 311
- codes adopted as law 209–10
- mirror analogy 133–4
- parallel independent creation *see* compilations
- law as 211
- see also* 'lack of copyrightability' under 'facts'
- merger doctrine 16, 18, 117, 128, 141, 167, 170, 172, 183, 187, 194, 204–5, 207, 212, 218–19, 240, 282–3, 312
- recalibration of 188, 212, 225–30, 232
- using the 'essential facilities' doctrine as an analogy 188, 225–8
- process/expression dichotomy 136, 147–8, 155, 166, 169–70, 175–6
- policy rationale behind 148–9
- system 167
- in the public domain 15, 16, 139–40, 145, 147, 177, 239, 305
- theories
 - collective intentionality 196
 - convergence of opinion and social influence theory 234–5, 246, 249, 252–3, 257, 263–4
 - correspondence theory 190, 191–2, 216–17
- treatment of factual works 44
- see also* U.S. copyright law
- see also* authorship; opinion; originality
- fair use doctrine 19, 22, 26–7, 188, 222–3, 227, 283, 306, 315, 334
- factors test *see* *New York Times Co. v. Roxbury Data Interface*
- industrious collection doctrine as compared to 29–30
- Feist* approach 206–7
- as incoherent 248, 253
- with regard to compilations *see* compilations
- with regard to copyright protection for video images of spontaneous news events 240–46
- first sale doctrine 283
- France
 - copyright protection of compilations and databases 77–8
 - personal intellectual creation standard of originality 76–9
 - creative choices test and authorship's personality 77–9, 89, 105
 - see also* originality
- Germany
 - personal intellectual creation standard with requirement of minimal creativity for originality 80–82
- 'human facts' *see* 'human facts' under 'facts'
- idea/expression dichotomy *see* facts
- implied licenses *see* licenses
- independent creation *see* originality
- indeterminate works
 - authorship, originality and creativity of indeterminate works as compared to those of factual works 183–5
- India
 - non-mechanical and non-trivial exercise of skill and judgment plus minimal degree of creativity standard 93, 96–7
- industrious collection doctrine ('sweat of the brow' doctrine) 3, 5–6, 14–15, 17, 19, 23–8, 31, 33, 42, 89, 101, 312–13

- as alive and well 237, 257, 265
- emergence of 7, 42
- fair use defense doctrine as compared to 28–9
- repudiation of 30, 33–6, 38, 78, 106, 134–5, 152, 235, 245, 297
 - see also Feist Publications, Inc. v. Rural Telephone Service Co.*
 - see also* authorship; UK; news
- information products
 - lack of protection for
 - alternative protection schemes 307, 334–5
 - commentator proposals 326–8
 - international protection 322–4
 - non-intellectual property legal schemes
 - contract law 318–19
 - misappropriation doctrine 317
 - other legal protection 320
 - trade secret protection 316–17
 - trespass to chattels 319–20
 - non-legal mechanisms
 - business schemes 321–2
 - technological mechanisms 320–21
 - proposed legislation 325–6
 - traditional intellectual property law 304, 306–7, 334–5
 - copyright law 310–15
 - patent law 309–10
 - proposed sui generis protection scheme for 308, 327, 331–3
 - components as a whole to be protected 329–31
- protecting
 - dual concerns to address in 328, 336
 - reasons against 306
 - reasons for 306
- types
 - additional information products 331–2
 - databases 310, 325, 331
 - software 310, 312, 325, 331
 - abstraction-filtration-comparison test 314
- informational works
 - scope of early copyright protection for 10
 - as ‘writings’ in
 - the Copyright Act of (1790) 11
 - the Copyright Clause 11
 - infringement
 - theories of indirect 288–9
 - intellectual-labor-based model of
 - originality *see* authorship;
 - industrious collection doctrine; and news
- labor *see* authorship; continuum between creativity and labor; industrious collection doctrine
- licenses
 - implied licenses 188
 - implied license doctrine 222–5
- literary works 58
 - copyright and distinction between form and content 58–9
- ‘market substitute’ doctrine 60
 - news and *see* news
- merger doctrine *see* facts
- misappropriation doctrine *see* information products
- Netherlands
 - author personality test for originality 80
- New Zealand
 - skill and labor standard of originality plus minimal degree of creativity standard 95, 102
- news
 - appropriability problem and 40, 53, 317
 - companies and organizations
 - Associated Press 40, 50–51, 54, 56, 59, 61, 66–7, 167
 - Evening Observer, The* 59
 - International News Service 52
 - National Telegraph News Company 63
 - Southern Press Association 56
 - United Press 56
 - Western Union 40, 50, 54, 60, 63–5, 69
 - history of legal protection for 39–40, 43–4, 49, 54–68
 - authorship and facts 57, 64–5, 67

- common-law and federal copyright protection 63, 65, 67, 70
- creativity-based originality and 39–40, 57, 64, 67–8, 72, 317
- distinction between form and content 58–9, 65, 67
- fact-based works in comparison with news 60, 71
- intellectual-labor-based originality and 40, 49, 57, 60, 64, 69, 72
- ‘market substitute’ doctrine and 60, 69
- trade secret protection 316–17
- purpose of copyright, as stated in the Copyright Clause, and 44, 63
- history of news outside copyright 45–8
 - exchange system 45–6, 50, 52
 - explanations behind the existence of the 46–7
 - partisan subsidies and patronage 47, 48, 53
 - social developments 53, 72
 - technological developments 50–53, 72
- opinion and selections based on taste, and ‘judgment and expertise’ 161–6, 257
- baseball card price guide 251–6
- car price guide 161–4
- coin price guide 165–6
- as compared to works predicting the future 167, 169, 172, 177–80
- as protectable expression 160
- originality
 - artistic merit as a prerequisite 12
 - authorship and originality *see* authorship; facts
 - balancing function 34
 - compilations
 - selection and arrangement of 3, 12, 25, 27, 32–5, 71, 77–8, 87–8, 93–4, 99, 134, 145, 149–52, 154, 161–8, 170, 176, 202, 310–11, 322, 325
 - creation of facts and originality *see* facts
 - discovery of facts and lack of originality *see* facts
 - not being seen as creative *see* compilations
 - see also* ‘creative choices’ test *under* originality
 - as Copyright Clause’s reqt for copyright 7, 34, 36, 38, 86, 142, 237, 310–11, 313
 - ‘creative choices’ test and 75, 86, 90, 105, 260
 - see also* France; creativity
 - see also* compilations
 - creativity requirement 3, 38, 104, 119, 122, 125, 135, 146, 181, 282, 311
 - lack of creativity requirement 237, 254, 257, 259
 - see also* Feist approach
 - news industry’s contribution in the history of reinforcing the 39–40, 56, 72
 - see also* news
 - photography’s contribution in the history of 70–71
 - see also* creativity
 - independent creation 13, 15, 42, 86, 111–13, 114, 119–21, 127–8, 134, 148, 310
 - see also* authorship; facts; industrious collection doctrine
 - indeterminate works and *see* indeterminate works
 - intellectual-labor-based originality *see* authorship; news
 - international standards of
 - analysis of 101–5
 - minimal degree of creativity
 - standard 114, 121, 135, 145, 150, 152, 177, 184, 310
 - as an extreme 88–90, 100
 - India 96
 - New Zealand 95
 - United States 75, 87, 104, 105
 - non-mechanical and non-trivial
 - exercise of skill and judgment standard
 - Canada 75, 88–92, 100, 102
 - see also* Canada
 - India 96–7
 - personal intellectual creation
 - standard

- Austria 82
- Belgium 79–80
- Berne Convention 98
- Canada's departure from 90
- European Union 76, 82–7, 92, 103, 323
 - author as originator based view 84
 - author personality based view 84
- France 76–9
- Germany 80–82
- Netherlands 79–80
- selection and arrangement of compilations and 100
- skill and labor standard
 - Australia 92, 94–5
 - as an extreme 89–90
 - Ireland 92
 - New Zealand 92, 95
 - Singapore 92
 - South Africa 92, 95
 - United Kingdom 76, 92–4, 103
- see also* industrious collection doctrine
- novelty not requirement 145, 150, 160
- 'original work of authorship' 20, 84, 88, 134, 138, 149
- personal or subjective character 9, 39
 - see also* authorship
- personality as a prerequisite 12–13, 78
- photographs and 143, 239–42
- photographs
 - copyright protection regarding 143–5, 239, 241–3
 - in Europe 86
- printed matter doctrine 310
- process/expression dichotomy *see* facts
- public domain 18–19, 21, 29, 307
 - policy rationale 22, 182
 - see also* facts; fair use defense; scenes a faire
- right of first publication 234
- scenes a faire 21
- selection and arrangement *see* compilations; originality
- social facts *see* 'human facts' *under* 'facts'
- software *see* information products
- South Africa
 - skill and labor standard of originality 95
- sui generis*
 - sui generis* right *see* 'sui generis' *under* 'protection for' *under* 'compilations'
 - sui generis* scheme for information products *see* information products
- sweat of the brow doctrine *see* industrious collection doctrine
- taxonomies 155–9, 199–203, 237, 249, 311
 - as description of reality, and not compilation of reality 159
 - 'useful' taxonomy lacking creativity 201
- third party problem 283
 - incomplete solutions provided by copyright, trade secret and contract law 278, 281, 284, 303
 - copyright law 288
 - patent law 289
 - trade secret law 289–90
 - trademark law 289
 - solution options 279, 289
 - tort theory solution
 - complications in search for 290–94
 - considerations for creation of third party tort liability 295–8
 - information-related independent wrong ('*INS* misappropriation') 301–2
 - requirements of a claim 300
 - scenarios 303
 - tort liability continuum 292
- tort *see* third party problem
- trade secret law and protection of information
 - limited scope 284–6
 - see also* third party problem
 - reasons for its appeal amongst other kinds of intellectual property protection 269

- security measures 270–71
- see also* information products
- trade secrets 269
 - effect of technology on 270–73
 - effect of the Internet on 272–3
 - in the public domain 272
- unfair competition theory *see* fair defense doctrine
- United Kingdom
 - copies 93–4
 - databases 93
 - industriousness standard 92
- skill and labor standard of originality 75, 88–9, 93, 102
- authorship’s personality test 93
- United States
 - minimal degree of creativity standard of originality 75, 87, 102, 135
- usefulness or utility function *see* creativity
- video images of spontaneous news events 237, 243–6, 253, 261–2
- ‘writing’ – meaning 142–3