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Fundamental Concepts in Japanese and American Copyright Law

INTRODUCTION

With the advent of the information age and the gradual breakdown of physical and legal barriers between nations, the differences in the type and scope of protection of information-based products from country to country becomes a matter of increasing concern to the legal community. The near dominance of Japan and the United States in computer and information-based products, especially computer software, and the already strong mutual economic dependence of the two countries will necessarily lead to steadily increasing exchange of intellectual property related to new technologies. Moreover, both countries have chosen copyright law as the primary vehicle for the legal protection of information-based products. Consequently, an understanding of the similarities and differences in copyright law between the two countries becomes a matter of increasing concern.

This article undertakes a study of the fundamental concepts of copyright protection under Japanese law and compares them to related concepts under the copyright law of the United States. Those concepts involve the nature of the works protected (including requirements for originality, creativity, and novelty), the scope of protection (including the idea/expression dichotomy and its relation to the nature of the work), proof of infringement, and fair use defenses. We begin with an introduction to the relevant provisions of the Japanese Copyright Law, along with corresponding provisions of the United States Copyright Act. We then continue with an analysis of the reported cases in Japan that have interpreted the Japanese statutory provisions (or similar provisions of earlier statutes). This case analysis is comprehensive, in that we have attempted to uncover all reported cases in Japan whose factual holdings are relevant to the fundamental conceptual topics under consideration. Where appropriate for comparative purposes, we also discuss the case law in the United States.

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I. THE STATUTORY AND JUDICIAL FRAMEWORK

A. The Japanese Judiciary and Case Precedent

Except for small claims, civil cases in Japan are decided first in a district court, such as the Tokyo District Court. Appeal may be brought to a high court, such as the Tokyo High Court, and finally to the Supreme Court.\(^1\) Fifteen Justices sit on the Supreme Court, but most appeals are decided by petty benches consisting of five Justices.\(^2\)

In a given case, when a higher court reverses and remands the lower court, it is, of course, bound by the higher court decision. Japan is a civil law country whose legal system was greatly influenced by those of Germany and France. In principle, therefore, Japan has no system of common law as in the United States. In practice, however, the law in Japan does develop through statutory interpretation, and courts may even formulate a legal principle without express reliance on statute.\(^3\)

Moreover, Supreme Court decisions in particular and high court decisions as well have strong de facto binding power with respect to similar cases that arise in the future, because of the likelihood that a different result at the district court level would otherwise be reversed. Among the district and high courts, there is no formal binding power on one another, but courts nevertheless tend to follow similar analysis and to come to similar conclusions, on the fundamental notion that all persons should be treated equally by the law all over Japan. Notwithstanding this de facto binding power, however, it is very rare for Japanese courts to cite other cases as precedent.\(^4\) As a result, the distinction between dictum and holding in a decision, which plays such an important role in American legal education and legal analysis, is much less sharply drawn in Japan, especially by judges. This means that dictum in well-known cases can be as important, even more important, than the holding of the case on its facts.

With respect to intellectual property cases in particular, one must understand a little of Japan's history and geography. Tokyo is

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1. Before World War II, the intermediate appellate courts were called Courts of Appeal, and the highest court was called the Great Court of Judicature.
2. Tanaka, The Japanese Legal System 48 (1976). The court meets en banc to decide constitutional cases in which there is no prior Supreme Court precedent, cases in which a petty bench has overruled a Supreme Court precedent, cases certified to the full court as involving issues of great significance, and cases in which the petty bench cannot reach a decision. Id.
3. Id. at 61.
4. It is even rarer for a Japanese court to admit reliance on legislative history or scholarly commentary, but that does not mean that these sources are without influence in the interpretation of statutes or the resolution of cases. Id. at 97-98.
the capital of Japan and a center of industry and culture. Osaka is
the next largest governmental district. As a result, the Tokyo and
Osaka District Courts deal with the preponderance of commercial
cases, including cases involving intellectual property law. Both of
these district courts have established a special division for handling
intellectual property law cases (Tokyo District Court, Twenty-ninth
Division; Osaka District Court, Twenty-first Division). Because the
judges of these divisions are specialists in intellectual property law,
their decisions are more likely to be treated with respect than those
of other courts. In other words, the decisions of these courts have a
stronger de facto precedential value.

Consequently, although the binding power of case precedent is
less formally structured in Japan, and reliance on prior cases often
less noticeable in the decisions, a study of the case law in Japan is
essential in acquiring a full understanding of the statutes.

B. The Copyright Statutes of Japan and the United States

Japan adopted its first modern copyright statute in 1899 and
joined the Berne Convention in the same year. This statute, as re­
vised from time to time, remained in effect for 70 years. As the
technology of reproduction and communication progressed, however,
pressure for major revision intensified, and ultimately the current
Japanese Copyright Law ("JCL") was approved in 1970. Among
other changes, the 1970 Law divided the panoply of author's rights
into moral rights and economic rights, extended copyright protection
to broadcasting and phonograms, increased the period of protection,
created a number of specific fair use provisions, and established
neighboring rights for performers, phonogram producers, and broad­
casting organizations. The 1970 Law did make changes in the statu­
tory language governing the nature of the works protected and the
scope of protection in them, but the older cases added gloss to the

5. The 29th Division of the Tokyo District Court was established in 1961, and
the 21st Division of the Osaka District Court in 1964.
6. This is not to say that the establishment of these special divisions has re­sulted in uniform judicial handling of all intellectual property issues. The judges of
these divisions change every few years, and their personal ways of thinking are
sometimes manifested in their decisions. Therefore, decisions on the same subject
are not always in accord.
7. Law No. 39 (1899).
Agency for Cultural Affairs is a branch of the Ministry of Education and administers
the Japanese Copyright Law. Except as otherwise noted for post-1983 amendments,
all translations of the JCL are taken from this source. All translations herein of ju­
dicial materials are by the authors.
10. For example, article 1 of the Old Copyright Law simply gave the author the
exclusive right to copy literary, scientific, or artistic "works" (otherwise undefined)
without any reference to the expression of "thoughts or sentiments" and without re-
earlier statutory definition using language very similar to that of the current statute. Consequently, the pre-1970 cases still have influence on these important conceptual problems.

Because copyright protection is statutory in both the United States and Japan, the copyright laws of the two countries cannot be coherently compared without reference to some of the statutory language. To place some order on these comparisons, we have divided the statutory coverage into four topics: Nature of the works protected, nature of the rights granted, limitations on the scope of protection, and the fair use defenses.

1. Nature of the Works Protected

Article 1 of the JCL states its overall purpose:

*JCL Art. 1.* The purpose of this Law is, by providing for the rights of authors with respect to their works . . . , to secure the protection of the rights of authors . . . having regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture. The objects of protection under Japanese copyright law are "works" (*chosakubutsu*), defined in Article 2(1)(i) as follows:

*JCL Art. 2(1)(i).* "[W]ork" means a production in which thoughts or sentiments are expressed in a creative way and which fall within the literary, scientific, artistic or musical domain.

Article 10(1) of the JCL sets forth certain specific examples of works:

*JCL Art. 10(1).* As used in this Law, "works" shall include, in particular, the following:

(i) novels, dramas, articles, lectures and other literary works;

(ii) musical works;

requiring that the expression be effected "in a creative way," both of which phrases appear in the current statute. See infra text accompanying n. 14.

11. E.g., Handa, *Outline of Copyright Law* 77 (4th ed. 1987); Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 100, 104 (19 May 1936, Osaka Court of Appeals). The *Saishin Chosakuken-Kankei Hanreishu* (Newest Copyright-Related Reports), cited herein as Chosakuken Hanreishu, is a four-volume set that seeks to collect the copyright cases in Japan. (There are actually five physical volumes, but Volume II is split into two parts, Volume II-1 and Volume II-2.) With its most recent volume IV, it includes cases decided through 1984. Whenever possible, the Japanese cases are cited to this source.

12. *JCL Art. 1.*

13. A more literal translation of *chosakubutsu* is "work of authorship," but traditionally it is rendered in English simply as "work."

14. *JCL Art. 2(1)(i).*
(iii) choreographic works and pantomimes;
(iv) paintings, engravings, sculptures and other artistic works;
(v) architectural works;
(vi) maps as well as figurative works of a scientific nature such as plans, charts, and models;
(vii) cinematographic works;
(viii) photographic works;
(ix) program works. 15

In contrast, the United States Copyright Act ("USCA"), while containing a similar list of examples of works of authorship in section 102(a), 16 does not independently define the term "work" and does not protect any work unless it is original and until it is fixed in a tangible medium of expression. The JCL does not require fixation (note that "lectures" are included among the literary work examples) 17 but otherwise appears to limit the products of intellectual activity that qualify as works in three ways: First, a work must express thought or sentiment; second, such thought or sentiment must be expressed in a creative way; and third, a work must fall within the literary, scientific, artistic, or musical domains. A primary goal of this article is to investigate the degree to which these definitions result in different protective schemes.

Both statutes provide separately for compilations:

**JCL Art. 12(1).** Compilations which, by reason of the selection [or] arrangement of their contents, constitute intellectual creations shall be protected as independent works. 18

The JCL does not independently define "compilation," but a recent amendment introduced the term "database" and expressly provided for database protection in a manner similar to compilations:

**JCL Art. 2(1)(x-iii).** "Database" means a collection of information consisting of essays, numbers, diagrams, and the like that is systematically organized so that it can be searched by an electronic computer.

**JCL Art. 12-2(1).** Databases which, by reason of the se-

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15. JCL Art. 10(1).
17. Art. 2(1)(xv) defines "reproduction" to be reproduction "in tangible form," so perhaps oral recitation of a work would not infringe, absent public performance (art. 22), broadcast (art. 23), or public recitation (art. 24). See infra text accompanying nn. 21-22.
18. JCL Art. 12(1). The translation of the Agency for Cultural Affairs, supra n. 9, of Art. 12(1) reads "selection and arrangement" rather than "selection or arrangement" as quoted in the text. The Japanese word for the conjunction is "mata ha," which is usually translated as "or" rather than "and."
lection or systematic organization of the information they contain, constitute intellectual creations shall be protected as [independent] works.19

On the other hand, the USCA does not independently define databases but does define compilations:

USCA § 101. A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.20

2. Nature of the Rights Granted

The United States Copyright Act grants to the owner of the copyright the exclusive right to reproduce the work, to prepare derivative works based on the work, to distribute the work to the public, and to perform or display certain works publicly.21 The JCL is similar in most important respects, granting to the author the exclusive right to reproduce the work, to perform the work publicly, to broadcast the work, to recite literary works publicly, to exhibit publicly the originals of artistic works and unpublished photographic works, to present publicly and distribute cinematographic works, to lend copies of the work to the public (except for cinematographic works), and to translate, arrange musically, transform, dramatize, cinematize, or otherwise adapt the work.22 The foregoing economic rights (copyrights) in Japan may be transferred in whole or in part.23 Japan also grants to authors moral rights to make a work public, to determine what name, if any, should be placed on the work as author, and to preserve the integrity of the work,24 and these moral rights are inalienable.25

19. JCL Arts. 2(1)(x-iii) & 12-2(1). These database provisions were adopted by Law No. 64, 16 May 1986, effective 1 January 1987, and have been translated by the authors. The word "independent" appears in the translation of the Agency for Cultural Affairs of Art. 12(1), quoted supra text accompanying n. 18, and the Japanese language version of new Art. 12-2(1) is identical at that point. However, there is nothing in the Japanese language version of either provision that directly corresponds to the word "independent" in these translations.


22. JCL Arts. 21-27.

23. Id. Art. 61(1).


25. Id. Art. 59.
3. Limitations on the Scope of Protection

The traditional idea/expression distinction is expressly incorpo­rated into the United States statute:

USCA § 102(b). In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.26

The Japanese copyright statute contains no such general limitation on the scope of protection. As discussed below, however, the cases have imputed the idea/expression distinction into the law.

4. Fair Use Defenses

United States copyright law has long incorporated a judicially created principle of fair use, which provided a defense to liability even where copying of protected elements was proved. The fair use defense was vague but general, in the sense that it was not limited to particular types of works or fact situations. That principle now has explicit, if no less vague, statutory authorization.27

Japanese copyright law has never contained a general fair use defense under either the statute or the case law, although the statute does contain a number of provisions that permit reproduction or exploitation of works in specific situations or for specific purposes. Thus, the JCL permits, among other things, reproduction for private use,28 “fair” quotation, reproduction in school textbooks (subject to paying a royalty in an amount fixed by the Agency for Cultural Affairs), reproduction in Braille, nonprofit performance, exploitation of political speeches, and reproduction for judicial proceedings.29 These specific fair use provisions under Japanese law, while different in many of their details, are roughly analogous to the specific limitations on the exclusive rights of the copyright holder under United States law.30

28. JCL Art. 30:

It shall be permissible for a user to reproduce by himself a work . . . for the purpose of his personal use, family use or other similar uses within a limited circle, except in the case where such reproduction is made by means of automatic reproducing machines . . . placed for the use of the public.

It will be interesting to observe how this provision is interpreted with respect to the copying of computer programs for use with the home computer.
29. Id. Arts. 30-50.
II. FUNDAMENTAL COPYRIGHT CONCEPTS IN JAPAN AND THE UNITED STATES

A. Nature of the Works Protected

1. United States

United States copyright law protects "original works of authorship" that are fixed in a tangible medium of expression. Outside the seven nonexclusive categories listed in section 102(a) of the USCA, the phrase "works of authorship" was intentionally left undefined by the drafters of the statute. In general, the originality requirement means simply that the work must be the product of independent efforts by its creator and not the product of copying. Thus, novelty in the sense of variation from prior works is not a factor in determining whether a work is protected by copyright provided independent creation can be demonstrated. Creativity in the sense of an input of intellectual labor may be part of the constitutional basis for federal copyright protection, but if any such creativity requirement remains, the quantum of creativity that must be shown is minimal. Broadly speaking, United States law treats as a copyrightable work of authorship any expression that is fixed in a tangible medium and is the product of independent effort. Most of the policy issues involved in drawing the balance between providing an incentive to create new works and allowing as much free use of existing works as is consistent with that incentive and basic notions of fairness are resolved by varying the scope of protection (including the standards for infringement), in conjunction with the doctrine of fair use.

2. Japan

The Japanese copyright statute, in contrast to that of the United States, does define the "works" that are protected by copyright, and at first glance this definition appears to be more limited than the courts have permitted for copyrightability in America. Thus, protected works cannot be just any expression but rather must ex-

31. 17 U.S.C.A. § 102(a). The constitutional term is "writing," defined by the Supreme Court to include "any physical rendering of the fruits of creative intellectual or aesthetic labor." Goldstein v. California, 412 U.S. 546 (1973); see generally 1 Nimmer on Copyright § 1.08[B] (hereinafter referred to as "Nimmer").


34. 1 Nimmer § 2.01[A]. Some early cases sought to establish a novelty requirement for copyrightability, but they run counter to the clearly prevailing trend. Id.

35. Id. § 1.08[C][1].


37. See supra text accompanying n. 14.
press "thought or sentiment." Moreover, the thoughts or sentiments must be expressed "in a creative way," and the work must fall within the literary, scientific, artistic, or musical domain. Furthermore, the absence of a general fair use defense against a charge of infringement may mean that some of the social policy tradeoffs must be effected at the copyrightability stage. Therefore, although Japanese copyright law protects more broadly by covering even works that are not fixed in a tangible medium, it appears that Japan sets a higher threshold to qualify for copyright protection. The succeeding subsections analyze the Japanese case law interpreting these elements of the definition of the works protected by copyright.

a. Expression of Thought or Sentiment

Only two cases in Japan have directly faced the issue of whether the work under consideration was ineligible for copyright protection on the ground that it did not contain expression of thought or sentiment. In the *Bill of Lading Form* case, plaintiff developed at defendant's order a form bill of lading and sold defendant 2 million copies. Later, defendant printed and began to use additional sets of the bill of lading that were identical to those created by plaintiff except for an emblem in the corner. Plaintiff sought damages for both copyright infringement and breach of contract. Defendant challenged plaintiff's claim of copyright, and the court upheld the challenge, concluding that the form contained no expression of plaintiff's thoughts. Rather, what was expressed in the form was nothing more than a manifestation of intent between defendant and the persons with whom defendant would transact business regarding a contract to be entered into in the future. The court went on to say that plaintiff's effort in selecting the clauses used in the form could not create a basis for copyright protection.

While the court in the *Bill of Lading Form* case should have considered whether plaintiff's selection process qualified the work...
for protection as a compilation, there is a clear problem in granting copyright protection too broadly in forms of this type, in that the first creator of a concise, easy to use, but still comprehensive form might have a long-term monopoly on a particular method of contracting. The well-known case of Continental Casualty Co. v. Beardsley provides an interesting contrast to the Japanese Bill of Lading Form case. The Japanese court denied copyrightability on the ground that the form did not express plaintiff’s thought or sentiment. Continental Casualty, however, admits that such forms can be the object of copyright protection, at least in principle, and solves the problem of undue monopoly by severely limiting the scope of protection. It protects the literal language used by the creator of the first form to the extent consistent with the free use of the underlying thought and idea.

The Fancy Seaweed Box case is the second in which a Japanese court has invoked the “thought or sentiment” requirement of the JCL to deny status as a work. Defendant designed a fancy container for gourmet sales of kombu (a Japanese seaweed specialty) and shiitake (Japanese mushrooms). The box had a wood-grain appearance and pictured the sea and craggy mountains with pine trees. Large Japanese brush script of the words “Kombu” and “Shiitake” appeared at the top and smaller but similar script said “Specialty” near the right corner. Both the scenery and the words had the appearance of gold leaf, with the letters raised in relief.

Plaintiff began wholesale sales of specialty kombu and shiitake in a box identical to defendant’s, except for name and other identifying marks. This came to defendant’s attention about a year later, at which time defendant wrote to plaintiff’s customer demanding a cessation of sales involving the box. The customer immediately re-

40. In the Court Diary case, Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 106 (20 Nov. 1937, Great Court of Judicature), the pre-war predecessor of the Supreme Court had held that the mental effort in selecting or arranging even well known materials, together with blank forms created by the author, into a diary for use by attorneys and court officials invoked creative thought on the basis of which copyright protection should be recognized. See infra text accompanying nn. 111-15.
41. 253 F.2d 702 (2nd Cir. 1958), cert. denied, 358 U.S. 816.
42. In this respect the Bill of Lading Form case is similar to the famous case of Baker v. Seldon, 101 U.S. 99 (1880). Cf. Gorman, supra n. 36 at 1601.
43. It should be noted, however, that other American cases have denied copyrightability to business forms on the ground that originality was lacking. E.g., M.M. Business Forms Corp. v. Uarco, Inc., 472 F.2d 1137, (6th Cir. 1973); Donald v. Zack Meyer’s T.V. Sales & Service, 426 F.2d 1027 (5th Cir. 1970).
44. Hasuike v. Hashizume, II-1 Chosakuken Hanreishu 36 (Apr. 27, 1979, Kobe District Court).
45. Defendant had given permission to the huge department store chain Mitsukoshi to use the design as a Mitsukoshi original, pursuant to an agreement that prohibited defendant from granting permission to anyone else without Mitsukoshi’s consent. It was primarily to protect his relationship with Mitsukoshi that defendant sent his demand letter. Id. at 40.
fused to deal further with plaintiff until new boxes were made. Plaintiff therefore acquiesced but later sued for the loss of sales and the cost of switching boxes, arguing that defendant had no proprietary rights in the box. Defendant countered that his design was protected by copyright, but the court, while reducing the amount of damages on the basis of plaintiff’s “negligence” in deciding to adopt defendant’s design, simply concluded that defendant’s design did not express thought or sentiment, without giving any reason for such conclusion.

The Bill of Lading Form and Fancy Seaweed Box cases thus seem to place Japanese copyright law in the “hard to copyright” rather than the “easy to copyright/hard to infringe” category. The Japanese cases dealing with compilations as well as those involving useful articles tend to give further support for this conclusion. Rather than denying the expression of thought or sentiment, however, these cases often find that the work in question does not belong to the literary, scientific, artistic, or musical realm or that the thought or sentiment is not expressed in a creative way.

46. The court found it obvious that plaintiff’s adoption of defendant’s design would invite action by defendant because it could easily be imagined that defendant would lose profits and be put to other difficulties as a result. It therefore took this “negligence” into account in arriving at a setoff against plaintiff’s damages. After finding actual damages of ¥367,000, the court reduced the damages defendant would be required to pay to ¥100,000. Setoff on account of “negligent” activity within one’s rights would be unthinkable under United States law, and the case therefore provides an interesting contrast between the cultural view of “rights” in the two countries. Most Americans would think that plaintiff was well within his rights to copy that which was not protected.

The case also provides an interesting contrast in terms of the analysis presented herein, which views Japan as a “hard to copyright” country partially because of judicial inability to temper the monopoly effect with a general fair use defense. As applied to the facts of this case, it may be that American law is the more rigid, because if the work is protected (as it surely would be under United States law if original), there would be no defense to plaintiff’s act of copying. Japanese law, as applied here by the court, denies the copyright with one hand but nevertheless manages to find a certain degree of protection by limiting the rights of someone who shows bad judgment in deciding to make and use a legal copy.

47. The Diode Thesis case, Itoh v. Yamamoto, III Chosakuken Hanreishu 4, 10 (25, Sept. 1978, Osaka District Court), discussed infra n. 151 and in the text accompanying nn. 153-55, offered as a partial alternate holding that statements like “Things having the four-sided structure of the calcogenides of Mg are only compounds of Te; other compounds have the structure of rock salt,” which simply state the properties of materials, do not express thought or sentiment. Moreover, the court found no evidence that they were the product of the plaintiff’s creative thought.

48. See Gorman, supra n. 36 at 1602.

49. See infra text accompanying nn. 131-45.

50. See infra text accompanying nn. 94-120. The useful article cases do not generally deny the expression of thought, as the Bill of Lading Form case does, but rather find that the thought involved is an unprotected idea.

51. Moreover, other cases contain language seemingly taking a broader view of what constitutes thought or sentiment. For example, the Pac Man case includes the following dictum:

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b. Belongs to the Literary, Scientific, Artistic, or Musical Realm

Some cases in Japan seem not to regard the statutory specification of four realms to which works must belong as substantive limitations, provided creativity is present. For example, in the *Minsei Confessions* case, defendant publisher compiled a book entitled "Minsei Confessions," containing notes and articles written by members of the plaintiff Japan Union of Democratic Youths (nicknamed *Minsei*) and originally published in plaintiff’s newspapers and magazines. In response to defendant’s argument that the works were not copyrightable, the court responded:

Works protected by copyright law are considered to be creations of thought or sentiment, that is, mental, intellectual creations belonging to the literary, scientific, artistic, or musical realms. In other words . . . , all creations of thought and sentiment in which truth, goodness, beauty, or other values of human society are expressed [are protected works]. So long as they are creations containing this type of thought or sentiment they can be considered as belonging to one of the literary, scientific, artistic, or musical realms.  

While dictum in the actual case, because the notes and articles in question would surely qualify as literary works without appeal to more abstract language, this same general view has been taken by some of the commentators as well. Still, at least a few cases have taken a narrower view and are worthy of some attention.

For example, in the *Knitting Graph* case, plaintiff created a quick reference chart for use in knitting and weaving, showing the relation between the length of the cloth and the number of stitches in accordance with the thickness and nature of the yarn being used. While finding an absence of both creativity and novelty, which may

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"Thought or sentiment" is not used in a restricted sense. . . . Except for works in which there is no thought or sentiment at all, it should be considered to refer to human mental activity in general.


53. Id. at 96-97.

54. E.g., Kato, *Commentaries on Copyright* 19 (3rd ed. 1979):

By [the four categories] we do not mean that a work must fall within one of the realms of literature, science, art, or music divided separately. A copyrightable work is something that falls within a comprehensive conception of intellect or culture, namely, literature-science-art-music.

constitute independent grounds for the result, the court also concluded that chart did not belong to one of the four statutorily mandated realms:

While copyright applies to those intangible intellectual creations that are the fruit of a person's creative mental efforts, the sphere of application is limited to things belonging to the literary, scientific, artistic, or musical realms. We should consider that the law treats other things as the object of rights like patent and trademark, excepting them from the sphere of copyrightable works.

The court then concludes, unfortunately without giving any reasons, that the knitting graph chart in question did not fit into any of the protected categories.

In contrast, the court in the Typeface Design case discussed at length one of the four statutory categories, namely, artistic works. At issue was the copyrightability of typeface designed by plaintiff. The reasoning of the court is important because it extends well beyond the copyrightability of typeface alone and applies to all useful articles with an artistic component.

The court begins its analysis by observing that the JCL expressly includes “works of artistic craftsmanship” within the category of “artistic works.” The court acknowledges arguments that industrial designs and models could have characteristics of pure art but notes that the industrial property system, in particular the Design Law, gives a certain degree of protection to useful articles that contain esthetic features. The difficulty of harmonizing this protection with a copyright statute interpreted to protect similar features led the court to conclude that the only useful articles protected as artistic works under copyright are those specifically covered by the statute and most closely related to pure works of art, namely, works of artistic craftsmanship. Typeface functions primarily as a means of communicating information and not solely to appeal to esthetic appreciation; therefore, it is not protected by copyright law.

56. See infra text accompanying nn. 83-84.
57. II-1 Chosakuken Hanreishu at 81.
59. JCL Art. 2(2): “As used in this Law, ‘artistic work’ includes a work of artistic craftsmanship.”
60. Law No. 125 (1959). Art. 2(1) of the Design Law defines a “design” as follows: As used in this Law, “design” means an article that, in its shape, pattern, or color, or a combination thereof, arouses a feeling of beauty through the sense of sight. The Design Law is similar to the Patent Law in that rights under it attach only upon registration of the design and have a duration of 15 years. Id. arts. 20(1) & 21. Registrable designs are those that “can be used in industry.” Id. art. 3.
It can of course be argued that typeface is a sui generis category that should be given special treatment. In the United States, for example, both the Copyright Office and the courts have so far concluded that typeface is not protected by copyright notwithstanding their inability to find statutory authority for their position. If limited to its facts, therefore, the *Typeface Design* case in Japan may have little influence on the development of the law in other areas. Nevertheless, as outlined above, the reasoning of the court in the *Typeface Design* case is much more general. It divides works having artistic value into two mutually exclusive groups: pure works of art and works with artistic value having in addition a practical or utilitarian function or element. These latter (except for works of artistic craftsmanship) are completely excluded from copyright protection as artistic works.

The intellectual property section of the Osaka District Court recently followed this approach to artistic works in the *Perpetual Calendar* case and also considered the word "scientific" as applied to works under JCL's Article 2(1) definition. In this case, plaintiff created a single-sheet perpetual calendar based on color-coding the...

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61. Professor Nimmer reviews this history in the course of an argument that typeface designs should in principle be copyrightable under the current USCA. 1 *Nimmer* § 2.15.

62. There are two schools of thought on the problem of overlap between the Copyright Law and the Design Law. Professor Handa prefers the approach adopted by the *Typeface Design* case, arguing that there should be no overlap in protection. Handa, supra n. 11, at 93-95. Other authorities, however, are willing to admit a certain degree of overlap. For example, the *T-Shirt* case found a creative design imprinted on mass-produced T-shirts to be copyright protected under the following standard:

As a rule, designs and models having a practical purpose are relegated to protection under the Design Law [and other industrial property statutes]. If, however, the article can be equated to a pure work of art like a painting or sculpture, in that when viewed objectively and externally and without regard for the subjective purpose in making it, the practical purpose imposes no substantial restrictions on the expression of beauty and the article can be considered a product solely of the search for beauty, it should be protected as an artistic work.

Weiss Mfg. v. K.K. Universe Sales, III Chosakuken HanreiShu 251, 264 (20 Apr. 1981, Tokyo District Court). A slightly different standard is set forth in the *Buddhist Altar* case, which nevertheless recognizes some overlap. Onishi v. Y.K. Kanekura Bukkodo, II-1 Chosakuken HanreiShu 1042, 1048-49 (9 July 1979, Kobe District Court, Himeji Branch) (recognizing a copyright in mass-produced household Buddhist altars but asserting that such protection is available for mass-produced works only where the purpose is high-level esthetic expression).

In application, the standard of the *T-Shirt* case seems not too different from that adopted by the U.S. Supreme Court in *Mazer* v. *Stein*, 347 U.S. 201 (1954) and now codified in U.S.C.A. § 101 ("pictorial, graphic, and sculptural works" include the design of a useful article to the extent that the design incorporates features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article).

months of each year from 1917 to 2084 in a rectangular array.\textsuperscript{64} Defendant used a very similar scheme in handbooks and almanacs that it produced.

The primary ground for denying copyrightability in this case seems to have been the idea/expression distinction.\textsuperscript{65} With respect to plaintiff's argument that the calendar was an artistic work, however, the court restricted that term to works whose object was artistic appreciation like pure works of art or individually created works of artistic craftsmanship. While a viewer might at first regard the calendar as attractive, it could not be considered a pure work of art.\textsuperscript{66}

The court also concluded that the calendar could not be considered a scientific work: It used colors and an index chart to do no more than replace earlier revolving or slide form calendars. Thus, the calendar only communicated the known idea of a perpetual calendar and did not itself express scientific creativity. Unfortunately, this cursory treatment mixes up the nature of the work with the requirement for creativity and is therefore uninformative about the types of works that might qualify for copyright protection if they do meet the creativity requirement.

A final decision dealing with the nature of works protected by copyright in Japan is the \textit{Long Tail Cock} case.\textsuperscript{67} Defendants bred and raised cocks of unusual beauty and uniquely possessing extraordinarily long tails, up to 9 meters in length. The cocks were very famous as objects of tourist interest and were even designated special natural treasures by the national government. The plaintiff in this litigation had taken a picture of the cocks and had it printed on postcards he offered for sale. Defendants had previously brought a copyright claim against plaintiff but abandoned the suit before decision. Now, plaintiff is suing defendants for damages caused by the former, allegedly frivolous, lawsuit.

\textsuperscript{64} Each month begins with one of seven days, so only seven colors are needed to produce all possible monthly variations (not counting variations in the number of days). The color for the desired month in the array instructed the viewer to choose the matching color in the adjacent group of seven monthly calendars.

\textsuperscript{65} Even if the calendar were considered a novel and creative scientific work, plaintiff's new contribution was the idea of organizing it and using colors as markers, and such ideas themselves are not copyrightable.

The court also concluded that the use of the seven colors of the rainbow to classify the months was an idea that almost anyone could come up with, so the calendar lacked originality. This is clearly a different conception of originality than under United States law, but the court may have had a novelty requirement in mind. See infra text accompanying nn. 77-93, in which the novelty requirement is discussed.

\textsuperscript{66} Moreover, the arrangement of colors was determined once colors were chosen for the seven possible variations, so that arrangement did not show artistic expression necessary for an individual work of craftsmanship.

\textsuperscript{67} Hamakawa v. Kubota, IV Chosakuken Hanreishu 71, 559 Hanrei Times 291 (29 Oct. 1984, Kochi District Court).
In defense, defendants again asserted copyrights in the cocks. Because of the effort and skill that go into the breeding and raising of these unique cocks, the court concluded that plaintiff did infringe a general property right of the owners in the cocks. It therefore denied plaintiff's claim. However, the court also denied copyrightability:

We should interpret creative expression of thought [or sentiment] in this provision as requiring novelty in the activity creatively expressing such thought [or sentiment]. With respect to the management and breeding [activity] necessary to produce the cocks, no evidence has been submitted to permit a finding that defendant's scheme was novel and that this novel scheme operated to produce the cocks. Therefore, we cannot view defendant's special management and breeding activity in raising the cocks as novel creative expression. Moreover, the principle of copyright protection of works is to protect creative activity of a cultural nature. . . . Basically, the raising of the cocks comes down to breed improvements based on cross-fertilization and special management and breeding methods, and we should not say that anyone else who produces the same or a similar organism infringes defendant's rights by copying defendant's novel activity.

This is a very interesting case, raising as it does the basic question of the extent to which copyright protection attaches to living "works." Unfortunately, the court's reasoning is far from clear as to

68. IV Chosakuken Hanreishu at 77. Art. 206 of the Japanese Civil Code reads as follows:

The owner of property has the right to use, profit from, and dispose of it freely, within the limits of law and regulations. Although the court did not expressly cite art. 206 as the basis for the general property right of the owners of the cocks, it is obvious that the court had this provision in mind. In this respect, the court's conclusion that taking a photograph of a tangible piece of property belonging to another infringes the general property right under art. 206 may have been repudiated by the Supreme Court. Zaidan Hojin Shodo Hakubutsukan v. Y.K. Shogei Bunka Shinsha, IV Chosakuken Hanreishu 269, 271-73 (20 Jan. 1984, Supreme Court) (photograph of no-longer-copyright-protected work of art does not infringe the art. 206 right).

69. IV Chosakuken Hanreishu at 76. The terms "novelty" and "novel" here derive from the Japanese word dokusousei, which can also be translated as "originality" or even "creativity," depending on the context. See infra n. 90. We translate dokusousei as "originality" when we believe the court intends something like the American copyright meaning for that word (that is, that the work owes its origin to the author) and as "novelty" when it appears that the court has in mind some notion of newness in an absolute sense. Sometimes it is necessary to translate it as "creativity," which raises the possibility of confusion with the statutory term sousakusei, which is also translated as "creativity." Id. When we use "creativity" in these translations, we will attempt to note explicitly those that are based on the nonstatutory term dokusousei rather than on the statutory term sousakusei.
the basis for denying protection and, in particular, does not rely in any way on the living nature of the work. Lack of "novelty" seems to be at the forefront of the court's thinking, and the last sentence quoted above seems to show concern that copyright protection in the cocks might somehow extend to the methods for creating them. With respect to the issue of immediate concern here—whether the work belongs to the artistic, scientific, literary, or musical domains—the court is typically terse and uninformative. But by focusing on the "cultural nature" of artistic works, the decision seems to be in line with those noted earlier that limit artistic works to works of pure art or works of craftsmanship.

c. Creativity

The cases briefly summarized above relied in their reasoning, at least in part, on the statutory requirements that protected works must express "thoughts or sentiments" and must belong to the "literary, scientific, artistic, or musical domain." It seems, however, that the results in most of these cases can be explained by reference to other copyright concepts and that, except possibly in the case of artistic works where there is a problem of overlap with the Design Law, neither of these statutory requirements presents a significant barrier to copyright protection.

On the other hand, the statutory requirement that thought or sentiment be expressed "in a creative way" may be more substantive. While it cannot be said that Japanese courts apply a uniform interpretation to the creativity requirement, and while at least some cases and fact patterns seem to call for an interpretation that differs little from the originality requirement of American law, a comprehensive study of the Japanese cases leaves the impression that Japanese creativity differs from American originality in general and constitutes a greater obstacle to copyrightability.

(1) Quantum of Creativity. The Gold Coin case is the only decision in Japan denying copyright protection on the ground of insufficient difference from existing public domain works.

70. The Long Tail Cock case should be considered also in connection with the novelty and creativity requirements. See infra text accompanying nn. 79 & 96.
71. Insofar as protection of method or effort is concerned, the Long Tail Cock case can be usefully considered together with the compilation cases. See infra text accompanying nn. 131-45.
72. Of course, the only difference between the cocks at issue in the case and most other works of craftsmanship was that the cocks were alive. According to the opinion, the creation of the cocks involved considerable efforts in both breeding and raising, methods that were handed down to the plaintiff from his father. The court, however, did not consider the analogy to folk art traditions.
In this case petitioner designed and sold gold and silver coins based on a large, well known coin of the 16th century. Petitioner substituted the style from a 17th century coin for the form of the characters indicating the face amount of the coin and substituted common but more distinct tree figures at various places on the coin. Petitioner sought a preliminary injunction against respondent, who sold coins of a similar design.

The court concluded that making such slight changes in a pre-existing coin did not result in a work of artistic craftsmanship and denied petitioner's copyright. Although a United States court may have admitted a copyright as a derivative work on these facts, the general standard used by the court in the Gold Coin case seems not too different from the more-than-merely trivial, distinguishable variation standard for determining originality under American copyright law.

(2) Novelty. It is generally accepted under United States copyright law that novelty—having characteristics new and different from all prior works, whether or not known to the current author—is not a condition of copyright protection. The originality requirement demands only independent creation by the author, whose work is then protected even if it turns out to be substantially similar to a preexisting work. While one modern case in Japan, in dictum, seems to interpret the Japanese creativity requirement in a similar way, others adopt an approach suggesting that novelty is an element of copyrightability in Japan.

We have already seen one modern court, faced with unusual facts in the Long Tail Cock case, emphasize that novelty is an ele-

74. The amount was 10 ryo, the ryo being an ancient Japanese unit of currency.
75. See Milworth Converting Corp. v. Slifka, 276 F.2d 443, 445 (2nd Cir. 1960) (recognizing a copyright in a print fabric design giving a "three-dimensional look" to a public domain embroidery design, with protection limited to the distinctive feature originating with plaintiff).
76. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2nd Cir. 1951). Moreover, some recent United States decisions have indicated that the test for originality for derivative works may require more substantial variation than merely distinguishable. E.g., Gracen v. Bradford Exchange, 698 F.2d 300 (7th Cir. 1983), criticized in 1 Nimmer § 3.03.
77. 1 Nimmer, s 2.01[A]. An oft quoted expression of this thought is that by Learned Hand:

...if by some magic a man who had never known it were to compose anew Keats' 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'.

Plaintiff had compiled a telephone directory equivalent to the American Yellow Pages, in which the telephone subscribers were classified in accordance with their types of business or occupations, arranged in alphabetical order. The court begins its analysis with some general thoughts on the nature of copyright:

The essence of copyright is that the work must contain the crystal of new thought. . . . While a simple list of names would not be eligible for protection, . . . a directory should be copyrightable if it is the product of considerable thought faculties, systematically employing a method of arrangement, and contains new thought content.81

The court denied the copyrightability of plaintiff’s directory on the ground that a directory of identical arrangement (occupations in alphabetical order) had been published some years earlier:

The plaintiff’s telephone directory cannot be considered a product of new thought, because the fundamental concept of arranging the telephone numbers in alphabetical order by occupation is identical to the thought [in the earlier work].82

The Telephone Directory court did not rely on any allegation that plaintiff had in fact copied from the earlier work. The mere prior existence of a work containing the same copyrightable elements was sufficient to deny protection. If the case remains authoritative, therefore, it implies the presence of a novelty element for copyrightability under Japanese law.

Similarly, the Knitting Graph case, discussed briefly above,83 offered as an alternative reason for denying copyrightability that showing the functional relationship between two numbers on a graph was a routine, everyday event. Therefore, to do so did not require plaintiff’s creative thought, thereby repeating the theme that something new and nontrivial is required for copyright protection and that originality in the sense of independent creation is insufficient.84

We can say that “creation” means not being a “copy.”

79. See supra text accompanying nn. 67-72.

80. Sakimura v. Yashiro, II-l Chosakuken Hanreishu 84 (20 June 1919, Tokyo District Court).

81. Id. at 86.

82. Id.

83. Yamazaki v. Doshisha K.K., II-l Chosakuken Hanreishu 80 (Aug. 16, 1958, Tokyo District Court); see supra text accompanying nn. 55-57.

84. The Mujin Table case, Murai v. Aikoku Mujin K.K., II-l Chossakuken Hanreishu 60 (1940, Yokohama District Court), denied protection along similar lines of reasoning. A mujin is a type of combination mutual loan association and lottery.
The Traditional Song/Story case\textsuperscript{85} is another venerable and frequently cited decision of the Great Court of Judicature, the prewar forerunner of today's Supreme Court, and it contains a dictum relevant to the novelty question. The owner of the purported copyright at issue was a professional reciter of traditional stories presented in a more or less monotone song form.\textsuperscript{86} Defendant was charged in a criminal proceeding with reproducing without permission authorized recordings of the recitations.

The Great Court of Judicature overturned a verdict of guilty by holding that there was no copyright in the original recordings. Recall that Japanese copyright law does not require a work to be fixed in a tangible medium of expression. It appears, however, that recitations of the particular type of song/stories at issue would vary somewhat from one to another. The Court says that no particular variant of unscored music would be protected until it was so firmly fixed in the performer's mind that it could be repeated from time to time and place to place. It held for the defendant on the ground that the reciter's song/stories were not sufficiently definite.\textsuperscript{87} In any event, the Court had the following to say about novelty in musical works:

Copyright is born when an author composes a new song with his own creativity or creates a melody that has not been found by his predecessors.\textsuperscript{88}

Although the express ground for the decision was lack of definiteness, the opinion implies that the particular recitation did not add

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\textsuperscript{85} In re Shimaguchi, II-l Chosakuken Hanreishu 169 (4 July 1914, Great Court of Judicature).

\textsuperscript{86} The reciter was named Kumoemon, and song/stories of this type are called naniwabushi.

\textsuperscript{87} This is rather strange reasoning from a western point of view, because the particular work copied, directly and exactly, was fixed in a recording and therefore very definite, notwithstanding that it had not been written down in a traditional musical score. We must remember, however, that this case arose in the same era as White-Smith Publishing Co. v. Apollo Co., 209 U.S. 1 (1909), which held that a work illegible to the naked eye was not a copy. The reasoning was quite different from the Traditional Song/Story case, but the result denying copyright protection was the same.

\textsuperscript{88} II-l Chosakuken Hanreishu at 183.
sufficiently new material to the song/stories in question to qualify for copyright protection.

Finally, and much more recently, the Intellectual Property Division of the Osaka District Court looked for novelty as a condition to copyrightability in the *Perpetual Calendar* case, discussed briefly above. After concluding that the arrangement of colors in a color-coded scheme to distinguish the seven possible months (depending on the day of the week with which the month begins) was not an artistic work, the court bolstered its conclusion with the following remark:

> Once one decides to use colors to distinguish the seven elements of the marking scheme required by the conception [of the calendar], choosing the seven colors of the rainbow as was done here is something that anybody could think of. Therefore, the choice of those colors does not show any kind of originality.

Moreover, in independently rejecting plaintiff’s claim on the ground that plaintiff was seeking protection for the underlying idea or conception of the calendar, the court said:

> Even if we assume that the conception is something scientific and contains *new originality*, [the calendar] is simply a useful article not belonging to the category of works that “express in a creative way” that thought (conception).

There are therefore at least some cases in Japan in which the absence of novelty has stood as a barrier to copyright protection. Moreover, there is another side to the novelty coin, suggested by the *Telephone Directory* case discussed above. A number of decisions have found the creativity requirement satisfied when there is novelty in the underlying idea or conception expressed by the work, as opposed simply to novelty or newness in the expression of the idea. These cases and the problems resulting from this approach are discussed in the next subsection.

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89. Ueda v. K.K. Nishin, 1102 Hanrei Jiho 132, IV Chosakuken Hanreishu 61 (26 Jan. 1984, Osaka District Court); see supra text accompanying nn. 63-66.

90. IV Chosakuken Hanreishu at 68. The use of the word “originality” here by the Japanese court must not be confused with that word in English as a term of art in United States copyright law. The Japanese word used by the *Perpetual Calendar* court was “dokusousei,” which is usually translated as “originality” but can also be translated as “creativity” or “novelty,” depending on the context. We are trying to reserve the English word “creativity” for translating “sousakuteki,” which is the noun form of the Japanese statutory adjective “sousakuteki” (“creative”) in art. 2(1)(i).

91. Id. (emphasis added).

92. While not denying copyrightability on novelty grounds, the cases dealing with maps also contain dicta to the effect that something new must be added to the various elements collected together in a map to qualify for copyright protection. See infra text accompanying nn. 139-41.

93. See supra text accompanying nn. 80-82.
(3) Creativity in Idea. American copyright law adopts the following general logic: The works protected are original works of authorship. If a work contains originality of expression, in that the expression owes its origin to the purported author, that expression is protected, while the ideas expressed, whether or not new or original with the author, may be freely adopted by others. The scope of protection is thus limited to the original expression that qualified the work for protection in the first place.

In Japan, a protected work must express thought or sentiment in a creative way. The statutory language thus looks toward creativity of expression in much the same way that the United States statute looks to originality of expression. Nevertheless, some Japanese courts, especially in cases dealing with works of utility, have severed the statutory creativity requirement from its moorings in the work’s expression of thought and sentiment and have sought creativity in the underlying idea as a condition to protection. Such an approach can not only lead to denial of protection when a work presents new information in accordance with an established methodology, but if carried too far it can lead to protection of an underlying creative idea.

We have already introduced the Telephone Directory, Knitting Graph, Long Tail Cock and Mujin Table cases, all of which denied copyright protection to the work in question. In the Telephone Directory case, the court denied a copyright on a compilation arranged pursuant to a scheme that was itself not creative (alphabetical order by occupation) and had been used in the past to make a similar compilation (telephone directory). In the Knitting Graph case, the underlying idea of showing the functional relationship between two variables on a graph was deemed too mundane to warrant protection, even in the absence of evidence that anyone had previously shown those particular variables (length of cloth versus number of stitches) on a chart before. In the Long Tail Cock case, the court found no particular creativity in the method by which the cocks were bred and raised, notwithstanding that such method led to the long and beautiful tails for which they were prized. The Mujin Table case denied protection on the ground that there was no creative value to protect in plaintiff’s expression of a public domain idea concerning a method for making installment payments.

Much of the policy basis for denying copyrightability in cases like these is set forth in the reasoning of the Journalizing Table case.
case, in which plaintiff joined concentrically two paper disks that were marked in such a way that rotations gave a ready reference for the accounting journal entries necessary for some 36 transactions. Defendant modeled a similar device on plaintiff's, and it resembled plaintiff's work in terminology and figures. The Kobe District Court, Himeji Branch, allowed the copyright claim, but the Osaka High Court reversed:

Plaintiff’s journalizing table does not show specific scientific creativity, because the sentences printed in the radial-shaped columns represent common, everyday transactions and because the names, arrangements, combinations, and methods of classification for titles of accounts in debit and credit columns shown by revolving the disk are most fundamental and typical. If copyright were admitted on such common expressions of technical terms, the result would be that only the author could use them. Consequently, the development of culture would possibly be hindered.

Nevertheless, notwithstanding the result denying copyrightability, the focus of these courts on creativity in the underlying idea is an invitation to analytical confusion because it operates broadly and carries with it no natural limitations that can adjust the level of protection or free use to the nature of the work at hand. The works involved in these cases do, in fact, deserve more individualized treatment. For example, to deny copyright protection of a telephone directory simply on the ground that it uses a traditional (and highly useful) ordering scheme can largely obliterate copyright protection for factual compilations. This results in turn in a lessened incentive to produce some socially valuable compilations, while at the same time possibly giving a socially undesirable long-term monopoly in the first person to make a valuable compilation in accordance with a creatively new scheme. What is needed is not an outright denial of copyright protection but a limitation on the scope of protection that permits independent production of a similar compilation (independent legwork) but does not protect the useful aspects of the ordering or arrangement scheme. While United States copyright law, too, has had its difficulties adjusting to the “selection and arrangement” standard for copyrightability of factual compilations, courts have generally found ways to protect the physical labor of collecting the information against misappropriation while leaving the road clear

99. II-l Chosakuken Hanreishu at 78.
100. See supra text accompanying n. 20.
for independent collection of similar groupings of facts.101

On the other hand, the Knitting Graph and Mujin Table cases both involved the creation of charts showing the functional relationship between two variables in accordance with ideas determined to be in the public domain. Any chart seeking to show the same functional relationship will necessarily be similar in that fundamental respect, and that level of similarity alone should not be enough for a finding of copyright infringement. There is, however, in almost all of these cases considerable room for individualization in the labeling of axes, titles, explanatory notes and similar textual information, so it is not necessary to deny copyrightability outright, as these two cases do, to insure against monopoly over the underlying useful idea. The charts in these cases are their authors’ particular expression of the idea, and it is not unreasonable to protect them at least against verbatim copying. Thus, United States copyright law generally protects such works against literal copying, provided of course that the expression in question is original with the purported author.102

Even American copyright law, however, will not protect expression that merges with the idea expressed, that is, where there is only a limited number of ways of expressing the idea or where practical or use considerations dictate that the expression be formulated in a particular way. 103 This may well be the teaching of the Journalizing Table case in Japan, because once the transactions covered and the concentric disk method of representation are chosen, there is likely to be little room for variation in the standard accounting terms that must go into the disk columns. Still, it seems preferable to deny copyright protection on the ground of merger of idea and expression rather than because there is no creativity (or originality) in the idea expressed. While both theories may come to the same result in the Journalizing Table case, the former approach gives (limited) protection in cases like Knitting Graph and Mujin Table. Again, therefore, we see Japan, at least in general, in the “hard to copyright” rather than the “easy to copyright/hard to infringe” category.104

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101. Professor Denicola has proposed the notion of “authorship in the collection” as both a normative and unifying theory for the law of factual compilations. Denicola, “Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works,” 81 Colum. L. Rev. 516 (1981). The creativity requirement under Japanese law for compilations in general is discussed in a special subsection devoted to them. See infra nn. 131-45 and accompanying text.

102. 1 Nimmer § 2.11[B].

103. E.g., Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir. 1967).

104. Interesting as the facts of the Long Tail Cock case are, it is probably dangerous to draw general conclusions from it. A claim of copyright in a living organism will probably be viewed with skepticism anywhere, regardless of the particular language of the statutes or copyright traditions. Nevertheless, if in fact the prized char-
Furthermore, an approach that focuses on creativity in idea as a basis for copyright protection risks protecting too much once sufficient creativity is found. Several cases, for example, have followed the suggestion of the Telephone Directory case to the effect that the first person to make a factual compilation in accordance with a new and creative idea obtains a copyright in the work. The risk is that the scope of protection will be associated with the assumed prerequisite for copyrightability, namely, creativity in the idea, and extended to cover that organizational concept.

Some of the problems that can emerge from reliance on creativity of idea as a basis for copyright protection are exemplified by the Music Notation case. Plaintiff obtained copyright registrations covering 15 musical pieces for the koto (Japanese harp). Under the traditional methods of musical notation, works created by playing and singing were taken down only incompletely and could not be fully reproduced simply from the written notations. Defendant created a new style of notation and, with the permission of plaintiff’s predecessor in interest, took down the works in scores from which they could accurately be reproduced instrumentally or vocally. Defendant then registered her scores as new works, and plaintiff sued for cancellation of the registration and a declaration that defendant had no copyright in the scores.

Three opinions were handed down in the Music Notation case, including a final decision by the Great Court of Judicature. The important point for present purposes is the emphasis by all of the courts in the case on novelty and creativity of the defendant’s new scoring technique in concluding that her works were protected, whether as derivative works or as new works. While it is clear that the Great Court did not intend to imply copyright protection in

acteristic of the birds—their beautiful long tails—was the result of skillful breeding and raising techniques, the result differs from a work by an artist or photographer with skillful techniques and knowledge of materials only in that it is alive. Both, moreover, are intended to please the eyes of viewers who come to see the works. Unfair “verbatim” reproduction of the birds by commercial photographer could be prohibited without affecting breeding and raising methodologies by placing the birds in the “easy to copyright/hard to infringe” category, even though they are not traditional factual works.

105. The JCL requires no formalities for attachment of copyright protection but does permit registration of certain factual information concerning a work, such as the name of the true author of a pseudonymous work and the date of initial publication, which creates presumptions should disputes later arise. JCL Arts. 75-78.

106. Recall that there is no fixation requirement for copyrightability under Japanese law.

107. Watanabe v. Itoh, II-1 Chosakuken Hanreishu 139 (6 Nov. 1933, Fukuoka District Court), aff’d, II-1 Chosakuken Hanreishu 151 (6 Nov. 1934, Nagasaki Court of Appeals), aff’d, II-1 Chosakuken Hanreishu 159 (24 Jan. 1936, Great Court of Judicature).

108. The Fukuoka District Court applied art. 22 of the Old Copyright Law to protect defendant’s scores as “derivative works.” While the Old Copyright Law did not
the scoring methodology developed by defendant, the emphasis on creativity in the method as a basis for copyrightability of the individual scores leaves a logical hiatus concerning precisely what is protected by defendant's copyright. If copyright law protects creative expression and creativity is found in the methodology, then either the methodology is protected or there is nothing to protected. Coupled with the reasoning of the Telephone Directory, Knitting Graph, and Mujin Table cases, it implies that scores of other music made by third parties using defendant's notation method might be denied protection altogether. A narrower ground for the decision that would have avoided these difficulties would be that defendant's scores were derivative works as complete written adaptations109 of

expressly use the term "derivative work" (nijiteki chosakubutsu, literally, "secondary work"), art. 22 afforded similar protection in a limited context:

A person who legally reproduces a copyrighted artistic work [including musical works] by means of different techniques from the original shall be regarded as an author and protected under this law.

On appeal, the Nagasaki Court of Appeals followed similar reasoning, treating defendant's scores as derivative works because they were made by a scoring method different from those previously known publicly.

The Great Court of Judicature agreed with the result but said that the lower courts were "hasty" in treating defendant's scores as derivative works. Rather the Court looked by analogy to art. 19 of the Old Copyright Law:

Modifications, additions, subtractions, or other adaptations to an existing work, such as kunten [symbols used in rendering Chinese into Japanese], marginal notes, punctuation marks, critical remarks, commentary, appendices, and drawings, do not give rise to a new copyright; provided, that this rule shall not apply to things that can be regarded as new works.

While the Old Law supplied no standard for what should be regarded as a new work, the Court reasoned that, until defendant's method came along, there was no adequate way to score music for easy reproduction of the original. By adding her creative idea to and modifying the previously incomplete scores, her scores were deemed worthy of protection.

It is not clear just what the Court had in mind in treating defendant's scores in this case as new works. For example, after completing its statutory analysis and its rejection of the lower courts' approach, the Court takes note of the fact that defendant made her scores with permission from the original author. II-1 Chosakuken Hanreishu at 163. This seems to imply that the Court was treating defendant's scores as derivative works under a different name, made with the permission of the copyright holder.

The Music Notation cases can be compared to Wihtol v. Wells, 231 F.2d 550 (7th Cir. 1956) and Italian Book Co. v. Rossi, 27 F.2d 1014 (S.D.N.Y. 1928), both of which held that new scoring or arrangement of public domain music would support a copyright. Like the Great Court in Music Notation, Wihtol said the new score that plaintiff "put in shape for all to read" was an original work, thereby confusing the distinction between original and derivative works. Rossi, too, failed to use the derivative work label, although the language of the opinion suggests that the author's additions to the public domain music were the basis for copyrightability.

109. JCL Art. 2 (1)(xi) defines derivative works:

"Derivative work" means a work created by translating, arranging musically, transforming, dramatizing, cinematizing, or otherwise adapting a pre-existing work.

Art. 27 goes on to give the author the exclusive right to make works following this description, without using the term "derivative work."
Another venerable case out of the pre-war Great Court of Judicature also illustrates some of the problems that can result from seeking creativity in the idea of a useful work as a basis for copyright protection. In the *Court Diary* case, plaintiff printed and published a "Court Diary" that added to a standard schedule book or calendar blank columns for each day with headings relevant to judicial proceedings, intended for use by trial lawyers to keep track of the dates and other developments in their cases. It also included tables of information useful to lawyers. Defendant published a "Lawyer's Diary" that was similar to plaintiff's work, and plaintiff sued for copyright infringement. Two district courts and one court of appeals held for defendant, reasoning that plaintiff's work was not copyrightable on grounds similar to those of the *Journalizing Table* case: The headings and organization of plaintiff's diary, albeit useful and convenient, could easily be conceived of by anyone experienced in litigation. Consequently, there was no creative idea or thought that could serve as a basis for a copyright.

The evidence of actual, verbatim copying in the *Court Diary* case was, however, strong, in that omissions and mistakes in plaintiff's work were carried over into defendant's. Possibly responding to the obvious injustice of allowing verbatim appropriation of the efforts of another, the Great Court of Judicature reversed the lower

110. Although the right to make derivative works is exclusive in the copyright holder, the original authors in the *Music Notation* case had granted the right to make the scores to defendant.

111. Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 106 (20 Nov. 1937, Great Court of Judicature). For example, there were headings for "Court Name," "Docket Number," "Most Recent Hearing Date," "Result," "Next Hearing Date," and "Remarks." Other blank columns permitted hypothetical charting of withdrawal, interruption, or suspension of cases.

112. For example, plaintiff's work contained summaries of important statutory provisions and legal forms, names, addresses, and telephone numbers of all lawyers in Japan, codes for court records, stamp duties, and a table of distances.

113. Plaintiff first sued (and lost) in the Tokyo District Court for infringement by defendant's publication of diaries for 1926 to 1929. Takeuchi v. Ohuchi, II-1 Chosakuken Hanreishu 90 (24 July 1931, Tokyo District Court). Later, plaintiff lost again on the same subject matter in the Osaka District Court for infringement based on defendant's 1930 publication, which decision was affirmed by the Osaka Court of Appeals. Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 95 (12 Dec. 1931, Osaka District Court), aff'd, II-1 Chosakuken Hanreishu 100 (19 May 1936, Osaka Court of Appeals). The Great Court of Judicature, on appeal in the Osaka case, reversed on the copyrightability issue and remanded. Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 106 (20 Nov. 1937, Great Court of Judicature). On remand, the Osaka Court of Appeals concluded that defendant's work did not infringe. Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 113 (13 Apr. 1939, Osaka Court of Appeals). A second appeal to the Great Court of Judicature resulted in another reversal and a finding of infringement. Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 119 (18 May 1940, Great Court of Judicature).

114. See supra text accompanying nn. 98-99.
It found the mental effort of plaintiff in selecting, collecting, arranging, and classifying the material to be the expression of creative thought that was manifested in the work as a whole, which thereby qualified for copyright protection as a compilation. Nevertheless, the Court emphasized plaintiff's creativity in the underlying idea for making a convenient judicial diary, and while permitting a finding of infringement with respect to the slavish copying evident in that case, this approach leaves open both the scope of protection provided by plaintiff's copyright and the question of whether a later producer of a noninfringing diary can show the necessary creativity to obtain a copyright on his own work.

The Court Diary case in Japan invites comparison to the famous decision of the United States Supreme Court in Baker v. Selden.116 The plaintiff in Baker was the author of a book explaining a new system of bookkeeping, and included in the book were some sample forms appropriately laid out with lines, columns, and headings for using the system explained in the book. Defendant wrote a book explaining the same system, with his own set of sample forms that in fact differed in their overall arrangement of headings and columns from plaintiff's forms. Plaintiff sought relief under copyright law asserting that defendant's use of the same system infringed plaintiff's copyright.

The Baker Court could have found for defendant on the limited ground that defendant did not appropriate plaintiff's expression, as defendant's forms were laid out differently. In fact, Professor Nimmer criticizes the case for not so limiting its language.117 Instead the Court wholly denied copyright protection, reasoning that plaintiff's forms were necessary for the implementation of plaintiff's system and that copyright did not protect systems or methods.118 In this respect the Baker approach is much more similar to that of Journalizing Table than Court Diary.

The approach taken by Baker is also important when the question of standardized methodology is considered. Under the Baker approach, even if a variety of ways exists for implementing a system or methodology through graphic or literary works, so that the works would normally be copyrightable, they may not be protected if standardization of a particular form is important in assuring compatibility among users of the system.119 This issue is now arising with increasing frequency in connection with the degree of copyright pro-

115. The reversal applied only to the Osaka cases; the Tokyo case was not appealed.
117. 1 Nimmer, § 2.18[B], [C].
118. 101 U.S. at 103.
119. For example, if one office adopts Selden's forms for bookkeeping and an-
tection available for user interface screens and displays associated with computer programs and is of great importance. The work in Court Diary was not only a collection of blank columnar forms for use by lawyers. It also collected other types of public domain information useful in the legal profession, and this may distinguish it from the work in Baker. Nevertheless, even if the Baker Court had limited its decision in the manner suggested by Professor Nimmer, the emphasis in the Court Diary case on creativity of idea as a basis for copyrightability would still show a sharply different philosophical approach.

(4) Creativity in Expression. In contrast to the cases discussed in the previous subsection, which tended to focus on works of utility and were generally older, more recent cases involving literary and artistic works have based a finding of copyrightability on creativity perceived in the work's expression. At least with respect to traditional literary and artistic works, creativity is rarely even a serious issue provided the book or painting, for example, was not copied from another's. This represents an approach that is much closer to that taken by United States copyright law.

In the Sunshine Rights case, for example, the plaintiff was an attorney (and former judge) who specialized in the so-called "right to sunshine" (in general, a right in urban dwellers to prevent neighbors from building skyscrapers on their property that block the sunshine). He published a book on the subject in 1973, and defendant, also an attorney, published a book on the same subject in 1974. Defendant sought to deny plaintiff's copyright by arguing that plaintiff's book lacked creativity in that its content was all public information and general knowledge. The court, however, had little difficulty finding that the book creatively expressed plaintiff's thought and upheld the copyright. On the standard for creativity, the court stated:

The creativity element of copyrightability is not required with respect to the thought that is the content of the expression but rather in the concrete form of the expression. Even with regard to public information and general knowledge, the perception and words used to express it will

other adopts Baker's, employees would find their job mobility reduced to the extent that learning how to implement the system on new forms requires retraining.


vary with the personality of the individual. 122
Later the court indirectly rejected the notion of creativity in the un­
derlying idea as a basis for copyrightability:
The existence of copyright infringement, in short, is a ques­
tion of whether there was unauthorized use not of the
thought as such but of the creative concrete expression re­
lating to that thought (without necessarily inquiring
whether there is novelty in the thought itself). 123

The Intellectual Property Section of the Osaka District Court
recently followed the approach of focusing on creative expression as
a basis for copyrightability in the Marine Supplies Ad case, which
involved a commercial advertisement. 124 Plaintiff’s ad consisted of a
single page picturing a linked chain parallel to the borders of the
page, depicting on the outside of the chain 18 evenly spaced marine
tool parts (pulleys, anchors, etc.) and showing on the inside a marine
oil drilling rig in silhouette in the ocean, a marine valve in inset, and
English language text concerning the company and its products.
The court concluded that, taken as a whole, the ad was designed for
its visual effect by placing all of the visual and textual elements in
balance and expressed this composition as a single artistic collection.
In concluding that this expression was creative, the court reasoned
as follows:

Looking at the content of what the ad is trying to ex­
press, it does not go beyond merely showing the services
and parts offered by [the plaintiff], but if we turn our eye to
the expressive form, the work appeals to the esthetic appreci­
ation of the viewer as a graphic expression of the single
collection taken as a whole and is seen as the manifestation
of the maker's creativity [dokusousei] in the composition.
Therefore, as a graphic work, [plaintiff’s ad] can be consid­
ered an artistic work similar to the category of paintings
listed in Article 10(1)(iv). 125
Therefore, plaintiff’s ad satisfied the requirements for copyright­
ability. Perhaps more important, however, by focusing on composi­
tion as supplying the creative basis, the court was able to conclude
that defendant’s ad, involving a different composition of otherwise
quite similar elements, did not infringe. 126

The quotation from the Sunshine Rights case above found crea-

122. Id. at 204.
123. Id. at 205. The term “novelty” here is a translation of dokusousei, which
could equally be translated as “creativity.” See supra nn. 69 & 90.
Mar. 1985, Osaka District Court).
125. Id. at 280. On the term dokusousei, see supra n. 69.
126. See infra text accompanying nn. 184-88.
activity when the final product would inevitably vary with the personality of the author. It is important to observe that the Japanese courts have carried this notion over to computer programs. In the *Space Invader* case, defendant made a direct ROM-to-ROM copy of plaintiff's videogame and defended against plaintiff's assertion of copyright infringement on the ground that the symbolic language used to write the program could not be understood by human beings and so was incapable of expressing thought at all, let alone creatively. The court responded that experienced expert programmers could in fact understand the program's expressive content and further found that the program was creative:

> Discovering the algorithms and combining the instructions require logical thought by the program maker. Moreover, it is obvious that the program that is the final product will manifest individual differences depending on the programmer. Therefore, the program is the creative expression of the program maker's scientific thought and is a work protected by copyright.

A similar approach was followed in two other videogame cases as well as in a recent case upholding the copyrightability of a computer operating system.

(5) Creativity in Compilation Works. The *Telephone Directory* and *Court Diary* cases discussed above involved compilations of preexisting factual information or elements in which the courts seemed at least in part to look for creativity in the idea that gave utility to the works. In general, however, compilations must be treated differently from other works, if for no other reason than

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128. Id. at 21.


that the statute gives compilations special treatment by protecting only those that, "by reason of the selection or arrangement of their contents, constitute intellectual creations." Japanese courts tend to read this definition strictly, requiring intellectual—mental as opposed to physical—activity leading to creativity in the selection or arrangement of the compiled materials.

An important and carefully reasoned recent example comes from the Intellectual Property Section of the Tokyo District Court in the American English Glossary case. Here, plaintiff was the author of two works, the "American English Glossary" ("Glossary") and "Introduction to American English" ("Introduction"). The Glossary contained some 3,000 standard American words, idioms, and common phrases, in alphabetical order of English headings, with sample sentences, occasional pronunciation guides, Japanese translations, other ways of saying the Japanese translations in English, notes, and other explanatory material. The sample sentences were taken or adapted from American newspapers and magazines published between 1946 and 1954 and from Japanese university entrance examinations. The Introduction also presented under some 113 headings American words, phrases, and sentence patterns in conversation form, followed by explanations and practice problems (with solutions at the end of the book).

The court had no difficulty in finding that the Glossary was a compilation work, as plaintiff's explanatory notes and arrangement made it a kind of dictionary. Moreover, plaintiff's own thought was applied in choosing appropriate sample sentences from a wide variety of sources. Thus, the "intellectual creation" by "selection or arrangement" standard was easily satisfied. However, the court denied a copyright in the new methods of use and sample sentences themselves on the ground of no creativity, even in those parts that did involve plaintiff's thought:

The Japanese translations of the words, phrases, idioms, and sample sentences as well as the other ways of phrasing the headings in English can be said to express the result of plaintiff's mental activity. However, they are all Japanese translations of, or other English ways of saying, everyday, widely used English words, phrases, idioms, and short sentences. This differs from the translation of a long book, in that anyone having the ability to understand English vocabulary correctly would produce something similar. It cannot be said to be solely plaintiff's creative

132. JCL Art. 12(1); see supra text accompanying n. 18.
expression.\textsuperscript{134}

Furthermore, the court extended this reasoning to deny even a compilation copyright in the Introduction:

Plaintiff argues that the Introduction is a compilation work as well. While we do not ignore the elements of selection and arrangement of materials such as the words, phrases, idioms, and sample sentences collected in [the Introduction] and, in the light of the content of the writing, recognize that they form ingredients of the content of a single work, we cannot say on that ground alone that the Introduction is a compilation work, so plaintiff's argument is unjustified. Moreover, and for the same reasons as given above for the Glossary, we cannot recognize a copyright in the individual words, phrases, idioms, and sample sentences contained in the Introduction.\textsuperscript{135}

Thus, even a lengthy collection of sentences designed to illustrate basic English language skills and arranged according to a scheme devised by the author was denied status as a compilation.\textsuperscript{136} Of course, the number of books in Japan purporting to teach English is reaching astronomical proportions, and the court was perhaps understandably reluctant to give any further incentive to litigate to so many authors, knowing that there could be a very large number of at least colorable claims of similarity. Still, the case evinces a higher barrier to copyrightability than would be expected under American law.

Maps represent another important area raising difficult conceptual problems under copyright law. Maps are expressly included among the Article 10 examples of works, but the courts still require some form of creativity before admitting protection. For example, the \textit{Residential City Map Book} case\textsuperscript{137} offered by way of dictum some observations on the kinds of maps that could qualify as works:

In general, as maps do nothing more than express terrestrial phenomena objectively through specified symbols,

\textsuperscript{134} IV Chosakuken Hanreishu at 116-17, 525 Hanrei Times at 326.
\textsuperscript{135} IV Chosakuken Hanreishu at 117, 525 Hanrei Times at 326-27.
\textsuperscript{136} The court earlier concluded that plaintiff's efforts in making the Introduction involved sufficient creativity to qualify it as a protectible introductory textbook, id. at 116, but this conclusion did not enter into any of the subsequent analysis. Presumably this was because the scope of protection is quite narrow in works of this type. See infra text accompanying nn. 153-70. As a compilation work, even plaintiff's choice of words and phrases might have been protected, and this is what the court was at pains to deny.
\textsuperscript{137} K.K. Hokuriku Jutakuchizu Publishing K.K. v. K.K. Hokuriku Kankosha, II-1 Chosakuken Hanreishu 560, (22 Sept. 1978, Toyama District Court). The facts of this case, which involved maps made from actual survey, are discussed in more detail below in connection with the scope of protection. See infra text accompanying nn. 165-69.
there is little room for individual expression. Compared with authorship in literature, music, or the plastic arts, it is usual that the scope of copyright protection is narrow. However, with respect to the methods for choosing, selecting, arranging, and displaying the various materials, the author's individuality, knowledge, and experience play an important role, and one can say that creativity is expressed therein. Thus, copyrightability can be recognized in maps in the synthesis of the selection and arrangement of materials and expressive methods. 138

Similarly, the Globe World Map case looked for creativity in a selection or arrangement scheme, and one based on mental as opposed to purely physical efforts. 139 Moreover, by emphasizing creativity that distinguishes the work from other maps, 140 these courts seem to have some concept of novelty in mind, if not as an element of copyrightability then at least as a justification for awarding copyright protection where it appears that the maker has expended significant time and effort in putting the map together. 141

138. Id. at 566.
140. See id., second paragraph of the quotation from Globe World Map.
141. While Japanese courts often purport to look for novelty and intellectual creativity, they are not necessarily indifferent to the unfairness of permitting a later author to reap the fruit sown by the physical or financial efforts of another. In the Kanji Dictionary case, Mitsuishi Publishing K.K. v. K.K. Nihon Mechanical, 566 Hanrei Times 273 (17 Apr. 1985, Tokyo District Court), for example, plaintiff's work was dictionary of Chinese characters, called kanji in Japanese, that form the base of the Japanese writing system. These characters carry their basic meanings with them.
The compilation cases are relevant to the protection of computer databases. Although Japan now makes express provision for the protection of databases, the statutory language invites, if not compels, an interpretation of the creativity requirement similar to that applied to compilations. But by focusing on mental efforts of selection or arrangement, many valuable databases deserving of protection can easily fall outside the protective umbrella. The most comprehensive databases, for example, will not show much ingenuity in what is included because their very purpose is to include everything relevant to a particular area or discipline. Moreover, the individual elements of the database may be facts or other noncopyrightable works. Still, the physical labor of collecting the information and entering it into the database can be enormous, with a concomitant high cost in time and money. In order to include such databases within the protective scheme of copyright, Japanese courts will have to look beyond creativity in selection or arrangement. Even if they do this, however, there remains the possibility that they will start looking for creativity in the underlying idea, as in the Telephone Directory and Court Diary cases. This carries with it the danger of significantly enlarging the scope of protection relating to factual information and ideas involving data format and structure.

B. The Scope of Protection

1. United States

The scope of copyright protection in a work of authorship under United States law is succinctly, although vaguely, expressed by the idea/expression dichotomy, now statutorily embodied in section wherever they appear, but their pronunciation varies with the context of the words or phrases in which they are used. Plaintiff claimed a compilation copyright in the dictionary, and although defendant did not make an appearance, the court analyzed this claim. The court found five features distinguishing plaintiff's dictionary from earlier works, applying again what looked much like a novelty basis for copyrightability. Id. at 273. But that would imply that a later compiler using these general features for ordering a character dictionary to make it more useful might be denied a copyright. Perhaps for this reason the court went on to point out that plaintiff's project leader directed a staff of some 30 researchers and experts who spent 15 months in such activities as examining word usage in 90 different modern magazines and searching newspapers by computer. On the basis of all of the above, the court found copyrightability obvious. Id.

143. See supra text accompanying n. 19.
144. A good example is the Lexis system, which stores in a database all judicial opinions issued by all courts in the United States. None of the opinions is individually protected by copyright, each is entered verbatim without any editing, and all opinions go into the database, with no selection by anybody.
102(b) of the USCA. Because copyright protects only the expression in a work and not the ideas expressed, and because copyright attaches to any work that simply owes its origin to the purported author, drawing the social policy balance between incentives for authorship and free and open exchange of ideas and information primarily involves distinguishing idea from expression. It is not surprising, therefore, that the scope of protection varies with the nature of the work.

It is not possible here to account for or reconcile all the nuances associated with this general principle. However, the Ninth Circuit in *Landsberg v. Scrabble Crossword Game Players, Inc.*, provides an excellent summary:

One consequence of the policy in favor of free use of ideas is that the degree of substantial similarity required to show infringement varies according to the type of work and the ideas expressed in it. Some ideas can be expressed in myriad ways, while others allow only a narrow range of expression. Fictional works generally fall into the first category. . . .

Factual works are different. Subsequent authors wishing to express the ideas contained in a factual work often can choose from only a narrow range of expression. . . . Therefore, similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed.

. . .

*Copyright law protects expression of unprotectible ideas only insofar as is possible without protecting the ideas themselves. . . .*

The court in *Landsberg* concluded that the similarities between the two works in question—handbooks on strategy for the game “Scrabble”—were no more than necessary to explain the unprotected systematic strategy developed by plaintiff.

Because of the low threshold presented by the originality requirement, there is only a tenuous relation under United States copyright law between the standard for copyrightability and the scope of protection. That is to say, only those elements of the work original to the author are protected against copying, but original expression is protected to the extent it consists of more than a “merely trivial” variation or combination of preexisting works. Among the elements original to the author, the scope of protection is deter-

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146. See supra text accompanying n. 26.
147. 736 F.2d 485, 488-89 (9th Cir. 1984) (citations in quotation omitted).
148. Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 909 (2nd Cir. 1980); L. Bat-
mined largely by policy judgments under the idea/expression dis-
tinction concerning how much of an author’s original contribution
should be freely available to subsequent authors. Japanese copy-
right law is similar in many respects, but to the extent the Japanese
creativity requirement differs from the American originality re-
requirement, the standards for determining copyrightability and those
for determining the scope of protection can conflict with one an-
other. This is discussed in the next section, after reviewing the Jap-
anese conception of the idea/expression distinction and the way
courts in Japan adjust the scope of protection according to the na-
ture of the work.

2. Japan
a. Idea/Expression Distinction

Japanese copyright law does not contain a statutory equivalent
to USCA section 102(b) expressly excluding ideas from the scope of
copyright protection, but this general principle has been firmly es-

tablished by judicial rule. For example, in the Warehouse Design
case, plaintiff held a copyright in the design of a refrigerated
warehouse and asserted that defendant’s design, and the building
constructed pursuant to defendant’s design, infringed his copyright.
Plaintiff admitted that there were differences in scale and form as
well as floor plans, so that defendant’s design was not a simple re-
production of plaintiff’s. The court agreed that even a partial taking
can be an infringement if the part taken is essential to the first
work and itself shows originality and individual distinguishing fea-
tures but was careful to limit the meaning of “essential”:

However, as to whether or not the part taken is essen-
tial, the decision should be based on the existence or nonex-
istence of novelty or individual distinguishing features in
the concrete or material expressive form itself. It is inap-
propriate to compare the thoughts or ideas (in this case, the
technological thought in building a refrigerated warehouse)
that are perceived or understood from the work.

Other cases equally illustrate the general reluctance of Japa-
nese courts to extend the scope of protection beyond the form of ex-
ression to ideas. On this point, Japanese and American
copyright principles seem nearly identical.  

b. Dependence on the Nature of the Work

There is also much similarity in how the scope of protection varies with the nature of the work, and this is exemplified by a number of cases. The *Diode Thesis* case dealt with scientific works, in which the scope of protection is narrow:

Laws of nature, their discovery, and the creations of technological thought that make use of them are the common truths of everyone. Because their free use should be permitted to anybody, they cannot become the object of protection of the moral or economic rights set forth in the Copyright Law and should be considered the object of protection only of industrial property rights like patent rights, utility model rights, and design rights separate from copyright. Of course, even with regard to laws of nature, their discovery, and inventions that make use of them, if something describes such things creatively, expresses creatively their logical processes, and belongs to the scientific, artistic, etc., realm, it can be the object of protection of moral or economic rights, separately from its content. The question here is whether [the scientific theses involved] fall into this class.

Concerning the parts of the theses that deal simply with the explanation of scientific laws, there is a difference from a general work of literature in which there are many

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The works protected by copyright are creative expressive forms that concretely and externally express thought or sentiment through things like words, letters, sound, or color. Even if it is original or novel, the content of that expression, namely, the thought or sentiment itself, such as the idea or theory, cannot in principle become a work (except in the case of the story of a novel or the like).

See also the *Perpetual Calendar* case, introduced supra in the text accompanying nn. 63-66:

What plaintiff asserts as copyrightable here is the composition of the perpetual calendar or the idea of using a color-coded marking scheme. The law does not grant copyrightability to such an idea itself.


152. Other decisions denying copyrightability on a "no creativity" theory that might more coherently be analyzed under the idea/expression distinction, coupled with a limited scope of protection for useful articles, are the *Bill of Lading Form* case, the *Knitting Graph* case, and the *Journalizing Table* case. See supra text accompanying nn. 38-43, 55-57 & 98-99. The *Long Tail Cock* case, see supra text accompanying nn. 67-72, can be analyzed in this category as well, but it may be sui generis. See supra n. 104.

ways to explain similar circumstances. By their nature there is much universality and limited individuality in the forms (methods) of expression.\textsuperscript{154}

The court found no evidence of room for creativity in plaintiff’s method of explaining the scientific laws pertaining to the crystal under consideration or its characteristics.\textsuperscript{155}

Several cases vary this theme by denying infringement on the ground that a narrow range of expressive possibilities will necessarily lead to some similarities in the final product. These cases are rarely clear about whether they are simply raising the standard for proving infringement with respect to such works because the probability of independent production is higher,\textsuperscript{156} or whether they are narrowing the scope of protection as a matter of policy, but the result is generally the same, namely, a lesser degree of protection for the original work.

For example, a narrow scope of protection in historical works is shown in the War Chronicles case.\textsuperscript{157} Plaintiff was a historian specializing in modern political and military history. Defendant published two works on the same World War II subjects as two of plaintiff’s works, admitting that he referred to plaintiff’s works as one of his sources. Plaintiff sued for copyright infringement based on descriptive similarities, but the alleged taking covered fewer than nine pages, accounting for some 1/20th, of defendant’s work. The court recognized that a taking of less than the entire work could still constitute infringement, but reasoned that in the case of historical narrative the range of what should be considered substantially similar should be narrow:

When we review the nature of the works and the form and content of their narratives and consider the case of descriptively treating an identical subject as these works, there are times when not only the themes will be the same

\begin{itemize}
\item \textsuperscript{154} Id. at 7-9.
\item \textsuperscript{155} A similar approach to technology-related works showing a narrow scope of protection is evidenced in the Warehouse Design case, introduced briefly supra in the text accompanying nn. 149-50:
\begin{quote}
Because [architectural designs] are works of a highly technological and functional character, the room for choice of expressive form cannot be considered very large.
\end{quote}
\item \textsuperscript{156} Under United States law, copying is normally proved prima facie by a showing of access plus substantial similarity, with independent production as a defense. The standard in Japan is not often articulated in precisely these terms, but the cases do not show a radically different approach to proving copying. See infra text accompanying nn. 202-18.
\item \textsuperscript{157} Hata v. Suzuki, III Chosakuken Hanreishu 28 (23 June 1980, Tokyo District Court).
\end{itemize}
but we can fully expect the partial occurrence of identity or similarity even in the form of description. In this sense, we should say that the range of identity of [the works] is not too broad. Therefore, in order to say that a work is identical [for purposes of copyright infringement] we should require a showing of complete identity or that the large part is identical.158

In this case, at most 8-10 pages (less than 5%) were allegedly taken, and even assuming that a verbatim taking of that amount would infringe, there was sufficient variation in language beyond the basic biographical information that defendant’s language fell outside the scope of plaintiff’s copyright.159 The effect of the case is to treat historical works very much in the same way as the United States decisions.160

Yet another Japanese variation on the scope of protection may be analogous to the scenes a faire doctrine under American law. Under that doctrine, stock scenes, events, and characters based on common experience and ideas are not protected and may even be copied verbatim.161 The Study Aid Book162 case applied a similar limitation to deny infringement in the case of books designed to help high school graduates do better in composition writing on their employment exams.163 Many standard subjects for composition, such as “My Family,” “My Favorite Book,” and “The Person I Respect,” were taken up in both books, and the analytical treatment of the subjects showed additional similarities. Given that there was no verbatim similarity, the court was not too interested in looking further to find infringement:

Both works are aimed at the same readers and have essentially identical purpose and character. There are not a few similar student reference books that take as their

158. Id. at 39.
159. Similarly, while ultimately finding infringement on the particular facts before it, the court in the Sunshine Rights case also seemed willing to limit the scope of protection to near verbatim copying or paraphrasing in the case of a book dealing with the theory and practice of a particular area of law. See supra text accompanying notes 121-23 and infra text accompanying nn. 194-96.
160. E.g., Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2nd Cir. 1980): [T]he scope of copyright in historical accounts is narrow indeed, embracing no more than the author’s original expression of particular facts and theories already in the public domain.
161. E.g., See v. Durang, 711 F.2d 141 (9th Cir. 1983).
163. Most large companies in Japan hire at least partly on the basis of a company-generated written examination, testing general academic skills as well as skills deemed especially useful to the company in question. In particular, the would-be employees are usually asked to write a composition on a given subject as a test of their writing skills.
theme the knowledge, characteristics, and recent examples and trends relating to employment exam compositions. With this type of book, rather than the author's experimenting with his own views or expression, it is usual to follow already accepted opinions and interpretations. It is the rule rather than the exception that sometimes, at least in part, there will be similarity in the essential purport of methods of description.164

The *Residential City Map Book* case165 involved books of detailed maps of Toyama and other cities in Japan, showing the railroads, streets, rivers, sections, houses and other buildings, and open spaces, as well as the names of government offices, businesses, and individual families, partly with telephone numbers.166 Copyrightability was not an issue in the case, but as discussed above167 the decision began by noting that the scope of protection in maps is normally narrow because of the limited room for individual expression. The more functional and utilitarian nature of residential maps was then said to require an even narrower scope of protection:

The choice and selection of the objects to be recorded

164. II-l Chosakuken Hanreishu at 226. A similar approach was taken in the case of common or well known musical themes in the *One Rainy Night in Tokyo* case. K.K. International Music Publishers v. Suzuki, I Chosakuken Hanreishu 396 (24 Dec. 1974, Tokyo High Court), aff’d II-l Chosakuken Hanreishu 760 (7 Sept. 1978, Supreme Court). Here plaintiff owned the copyright to the song “The Boulevard of Broken Dreams” composed by the American Harry Warren and first published in the United States in 1933. In 1963 or 1964, defendant composed a song entitled “One Rainy Night in Tokyo,” which became a big hit in Japan, and plaintiff sued for copyright infringement. The court denied the claim, finding independent creation and reasoning as follows:

The melodies used in popular songs like that of defendant are naturally limited by the simplicity that makes them easy for ordinary people to sing. Particularly because their range and length are restricted, in comparison with other musical compositions the likelihood that similarities will arise by accident is not small.

Id. at 410.

Because plaintiff’s song was not well known in Japan in 1963, defendant’s own extensive career in music was insufficient in itself to show that he was aware of its existence. Under these circumstances, access will be inferred only when the similarity is so strong that it could not have appeared without copying. Id. at 409-10. The case thus seems to say that more than substantial similarity may be required to establish a prima facie case of copying when there is reason to expect that authors working independently are likely to come up with some degree of similarity of expression, at least absent direct evidence of access.


166. Addresses in Japan do not typically follow the street name and number method used in many western countries. Rather, they go, in descending order of size, from city to section (ku), block (cho or chome), and lot (banchi), ending finally with the number of the building on the lot (of which there are typically 20-30). It is essentially impossible for a stranger to find his way around without a detailed map, so residential maps of the type involved in this case are quite common in Japan.

167. See supra text accompanying nn. 137-38.
on residential maps is fixed naturally by their character. The room for admitting creativity in choice and selection is extremely narrow. Their utilitarian and functional nature weighs heavily, and on the other side of that coin, the simple methods of draftsmanship are limited. Therefore, we should say that the copyrightability of residential maps is even more limited than that for maps in general.\textsuperscript{168}

The court found many similarities of a type that one would expect for residential city maps but differences in the shapes of the pages (tall and narrow versus short and wide), the number of pages (151 versus 266), the areas covered (central city versus city plus suburbs), scale, the indication of individual and corporate names, and the method of laying out streets, rivers, and buildings. These differences were sufficient to convince the court that the ordinary observer would not perceive plaintiff’s maps in defendant’s, implying that there would therefore be no infringement even if defendant had partially copied from plaintiff.\textsuperscript{169} In a parenthetical remark, however, the court noted that the plaintiff’s maps showed building lot numbers only in exceptional cases, whereas defendant’s maps showed a large number of them, indicating to the court that the defendant had made individual investigation of these buildings. Consequently, the court may have concluded defendant’s maps were independently created.

The Japanese copyright cases thus show similar patterns to the American cases when the scope of protection is viewed in light of the type of work involved. To the extent the factual, utilitarian, or functional nature of a work limits the range of expressive choices available to achieve the same overall goal, it may take verbatim or nearly verbatim copying before infringement will be found, even where copyrightability itself is not denied for want of creativity.\textsuperscript{170}

\textsuperscript{168.} II-1 Chosakuken Hanreishu at 567.
\textsuperscript{169.} This relates to a very limited fair use defense sometimes referred to in the Japanese cases that denies infringement even in cases of direct reliance on earlier works where the new work hides the special features of the old work from the eyes of ordinary viewers. See infra text accompanying nn. 245-53. This defense derives from the German principle of “freie Benutzung.” Cf. German Copyright Act, Art. 24.
\textsuperscript{170.} The recent American English Glossary case, Fujii v. Sadoya, IV Chosakuken Hanreishu 109, 525 Hanrei Times 323 (14 May 1984, Tokyo District Court), see supra text accompanying nn. 133-36, also recognized the general principle that the scope of protection is narrower for scientific and academic works, although it concluded that even this principle could not save defendant from a charge of infringement with respect to the selection of sample sentences taken nearly verbatim from plaintiff’s Glossary.
c. Relation Between Standards for Copyrightability and the Scope of Protection

As discussed above, at least some cases in Japan have based a determination of copyrightability on a finding of novelty and/or creativity in the underlying idea expressed by the work. If what is new or creative in the work is an idea, however, the idea/expression distinction would deny protection. The question then arises just what, if anything, is protected by the copyright.

The problem is similar to that arising in the "sweat of the brow" compilation and directory cases in the United States. The United States copyright statute protects compilations to the extent of the material contributed by the author, but the definition of "compilation" seems to look to the selection or arrangement of the materials or data comprising the compilation as the basis for treatment as a work of authorship. As individual facts are not protected, however, this selection and arrangement rationale for copyright protection would leave works like telephone books without copyright protection at all, because neither the selection standard (all the people in a particular geographical area) nor the arrangement (alphabetical order by last name) is original. Seeing social value in providing an incentive for the often costly and time-consuming production of such factual compilations, some courts have deviated from the selection and arrangement rationale in order to supply copyright protection. These courts have found originality in the efforts of the first author in collecting and putting together the materials. This supplies antimisappropriation protection to the fruit of nonintellectual "sweat of the brow" efforts required to create works of this type while still permitting others to create similar or even identical works as long as they do their own legwork.

As discussed above, however, Japanese courts have tended to

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171. See supra text accompanying nn. 105-15 & 139-41.
173. Id. § 101; see supra text accompanying n.20.
175. See supra text accompanying nn. 131-45.
look to intellectual creative efforts of selection and arrangement in determining the copyrightability of compilations. To the extent this notion denies copyrightability, the incentive to produce otherwise valuable "sweat of the brow" works may be reduced, but obviously there is no problem concerning the scope of protection. To the extent that novelty or creativity of idea is the basis for a determination of copyrightability, however, the question is whether a subsequent author can base a new work on the same organizing principle or underlying idea but otherwise pursuant to her own independent efforts.

Logically, if creativity is a requirement for copyrightability and if creativity of idea suffices to meet this requirement, it would appear that the idea itself would be protected, which would conflict with the principle underlying the idea/expression distinction. A research report by four members of the intellectual property section of the Tokyo District Court states that there is no logical relation between copyrightability and the scope of protection, but what is the standard for determining the scope of protection in, say, a compilation of factual information no individual piece of which is protected? If not the organizational idea, that is to say, the selection or arrangement, there is no product of intellectual effort to protect, and it is precisely in the selection or arrangement that Japanese courts have sought the creativity necessary for a finding of copyrightability. Similarly, a report recommending copyright protection for electronic databases issued by an advisory organ to the Cultural Affairs Agency, which administers the Copyright Law, looked to creativity in collecting, arranging, analyzing, processing, or storing data as a basis for protection, but it went on simply to assume that the copyright in a protected database would be infringed by copying of any part or cluster that itself could be considered a work. This may represent implicit adoption of the "sweat of the brow" approach discussed above in connection with the American compilation cases, which is sensible and perhaps even necessary for databases. It provides, however, no standard for the scope of protection in other types of works.

To date no Japanese courts have faced the problem directly. Many have implicitly solved it by denying the existence of creativity in the underlying idea and thereby denying copyright protection al-

176. Araki, Takabayashi, Nozawa & Kiyonaga, "Studies of Copyright-Related Cases Brought before the Tokyo District Court (I)," 713 Hanrei Jiho 11 (1973).
177. See supra text accompanying nn. 131-45.
179. See supra text accompanying nn. 172-74.
together.\textsuperscript{180} The \textit{Music Notation} case, however, based its determination of copyrightability on a finding of creativity in the idea underlying the musical scores in question and thereby at least theoretically raised the scope-of-protection question; it did not, however, attempt to come to grips with the problem.\textsuperscript{181} The \textit{Court Diary} case actually reached the infringement issue, but the finding of infringement was based at least in part on the slavish copying proved by the evidence.\textsuperscript{182} The court referred to the similarity of plaintiff's and defendant's schemes for selecting and arranging the materials and their classification methods,\textsuperscript{183} but did not directly face the question of how much of the blank diary forms would have been protected had no slavish copying been shown. The case at least suggests, however, that organizing schemes for a useful article like an attorney's diary can be protected.

The relation between copyrightability standards and the scope of protection is much clearer when creative expression rather than creative idea is seen as providing both the basis for and the limits on copyright protection. Several Japanese cases show very finely tuned analysis when creativity of expression is the focus.

For example, in the \textit{Marine Supplies Ad} case introduced briefly above,\textsuperscript{184} plaintiff's work was a single page advertisement for marine drilling rig supplies. Defendant's allegedly infringing advertisement contained almost the identical elements as plaintiff's, including a misspelled word ("lord binders" instead of "load binders"), but with a different overall arrangement.\textsuperscript{185} The court first concluded that plaintiff's ad was a protected work as graphic expression manifesting creativity in its composition, implying that its factual content alone (showing the parts and services offered by plaintiff) would not be sufficient to qualify.\textsuperscript{186} In determining that defendant's ad did not infringe, notwithstanding the many similarities of

\textsuperscript{180} This was true in the \textit{Knitting Graph, Long Tail Cock, Telephone Directory, Journalizing Table, and Mujin Table} cases, discussed, respectively, supra in the text accompanying nn. 55-57, 67-72, 80-82, & 98-99 and in n. 84.

\textsuperscript{181} See supra nn. 105-10 and accompanying text. The problem did not arise in the \textit{Music Notation} case because it was the defendant's creativity that served as a shield against plaintiff's effort to deny defendant's copyright. The theoretical issue would arise when defendant later claimed infringement against a third party who scored the same music using defendant's method but without reference to defendant's written scores.

\textsuperscript{182} Takeuchi v. Ogawa, II-1 Chosakuken Hanreiatsu 119, 125-26 (18 May 1940, Great Court of Judicature); see supra text accompanying nn. 111-15.

\textsuperscript{183} Id. at 126.


\textsuperscript{185} The defendant engaged the same advertising firm to create its ad, which is one reason for the similarity of detail.

\textsuperscript{186} See supra text accompanying nn. 124-26.
detail, the court focused very carefully on the aspects of plaintiff’s ad that manifested creativity:

The copyright in [plaintiff’s] work is recognized in the comprehensive balance of the compositional arrangement of the individual elements, which causes the viewer to see it as a whole, as a single graphic work. Therefore, when considered as the expressive form of a copyrightable work, the uniquely expressive parts built up by the basic features are limited to those parts directly grasped from an expressive form having features tied to the concrete composition. It is reasonable to conclude that it does not extend to abstract parts such as the idea of taking up individual elements of composition or subject matter or the image created from simply combining them.

From this standpoint, when we extract the essential features of plaintiff’s and defendant’s ads . . . and compare them, we find that their essential features are rather different when considered as expressive forms. Even though defendant’s ad may have taken suggestions from plaintiff’s to a certain extent, we should say that the essential features of plaintiff’s ad in its expressive form as a copyrightable work are hidden in the shadow of the individual creativity of defendant’s ad so that they cannot be directly perceived. It is reasonable to conclude, therefore, that defendant’s ad is neither a copy nor an adaptation of plaintiff’s and that it infringes neither the moral rights nor the copyrights of the author of plaintiff’s ad. 187

The court recognized that the English titles, part names, chain designs, and drawings of marine tools and parts appearing in the two ads were identical and even that defendant’s ad reproduced the spelling mistake appearing in plaintiff’s. None of these were part of the expressive form of plaintiff’s ad, and consequently none were protected by plaintiff’s copyright. 188 In this case the court specifically linked, with detailed analysis, the scope of copyright protection to the creativity basis for treating plaintiff’s ad as a protected work.

187. 566 Hanrei Times at 282.

188. On this point the Marine Supplies Ad case is quite similar to Tompkins Graphics, Inc. v. Zipatone, Inc., 222 U.S.P.Q. 49, 51 (E.D. Pa. 1983). In Tompkins, plaintiff’s copyrighted works formed a “Library of Shapes,” and defendant allegedly made exactly dimensional copies of variations of squares, rectangles, circles, and ellipses. The court concluded that these basic shapes were in the public domain, so the fact that some of defendant’s shapes were exactly dimensional was “of little consequence.” If the overall arrangements differed, as the court found, there would be no infringement.
The *American English Glossary* case,\(^1\) also carefully linked the basis for a finding of copyrightability to the scope of protection afforded to the work. Plaintiff's work was a Glossary consisting of some 3,000 standard American words, phrases, and idioms, together with sample sentences taken from a wide variety of sources. Defendant's work was a "Current Important English Words Dictionary" consisting of four parts, one part of which was similar to the Glossary in that it contained some 6,500 words and phrases frequently used in the mass media collected under headings in alphabetical order and followed by Japanese translations, other ways of expressing the same thing in English, sample sentences, and other explanatory notes. The court admitted plaintiff's claim to a compilation copyright on the Glossary, finding creativity in plaintiff's explanatory notes and overall arrangement as well as in plaintiff's intellectual efforts in choosing sample sentences from a wide variety of sources.\(^2\) Turning to the liability issue, the court first concluded on the basis of a comparison of the two works that defendant's selection and organization of material did not infringe:

Both the Glossary and defendant's Dictionary have the character of English dictionaries, but the former took as basic materials for choosing standard American English such sources as newspapers and magazines while the latter chose English words used frequently by the mass media. Moreover, the latter collects roughly twice as many headwords as the former and has a rather larger number of parts with different choice of materials. Furthermore, differences can be recognized in the concrete arrangement of the headwords, and even conceding that the selection and arrangement of things like headwords and phrases have parts in common, that alone does not permit the immediate conclusion that the latter relied on the selection and arrangement of materials of the former and copied them, nor is there any other evidence to that effect.\(^3\)

While thus denying infringement of plaintiff's compilation copyright on the basis of common headwords, phrases, Japanese translations, and similar elements, the court did find infringement based on the similarity of the sample sentences found in defendant's Dictionary to those in plaintiff's Glossary:

In comparing the sample sentences contained in defendant's Dictionary to those in the Glossary, as examples

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189. Fujii v. Sadoya, IV Chosakuken Hanreishu 109, 525 Hanrei Times 323 (14 May 1984, Tokyo District Court); see supra text accompanying nn. 133-36.
190. See supra text accompanying nn. 133-36.
191. IV Chosakuken Hanreishu at 118, 525 Hanrei Times at 327.
using the words or phrases of the headwords, it is apparent that they are identical or similar, notwithstanding that one can think of many other different examples. Especially in example 2 of Exhibit 5192 it is clear that there was no need to choose that particular sentence using the headword. The same is true for many other examples. Therefore, we cannot say that these similarities were the result of chance or of necessity. [The court concluded that defendant had copied or adapted many sample sentences from samples contained in plaintiff’s work.]

The act of choosing part of the sample sentences from the Glossary is not the same as choosing samples from newspapers or magazines. The reason is that newspapers and magazines clearly do not select or compile sentences under a predetermined policy regarding English usage. To choose samples of specific usage from such a huge number is an act of original creative selection that does not rely on any act of compilation by the compilers of the newspapers or magazines. But to put into a later dictionary the same samples of specific usage as those appearing in an earlier dictionary of the same type should be regarded as reliance on the act of selection of the earlier compiler.193

Similarly, in the Sunshine Rights case,194 the court based its finding of copyrightability on the particular concrete expression adopted by plaintiff to convey content consisting largely of public information and general knowledge concerning legal rights and remedies in disputes involving loss of sunshine as a result of urban development on nearby property. With respect to the parts of plaintiff’s work allegedly taken by defendant, the court based its determination of infringement on the following reasoning:

When we compare the corresponding portions of plaintiff’s and defendant’s works allegedly taken, in each case every element of expressive text, such as the order of description, the choice of terminology, and the mode of expression is almost identical or extremely similar in both.

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192. Example 2 of Exhibit 5 showed the English headword “add up to.” The sample sentence in plaintiff’s Glossary was,

How can such a wealth of high-priced Hollywood talent add up to such a poor movie?

which in defendant’s Dictionary it came out,

How can such a wealth of high-priced TV talent adds [sic] up to such a poor show?

193. IV Chosakuken Hanreishu at 119-20, 525 Hanrei Times at 327-28.

194. See supra nn. 121-23 and accompanying text.
This is particularly conspicuous in the similarity in choice of terminology. Even taking into account that both works describe themes of very limited scope and even assuming use of substantially identical references and source materials, it is inconceivable that textual expression so similar can be the result of independent production... 195

Having previously rejected creativity in content or subject matter in favor of creativity of expression as the basis for copyrightability, 196 the court was careful to limit the scope of protection to the same creative expression.

The Diode Thesis case took a similar approach. Having denied creativity in plaintiff's method of explaining the scientific principles and properties pertaining to the crystal under consideration, 197 the court rejected plaintiff's claim that defendant infringed his moral rights by failing to give plaintiff credit for being first to come up with the basic idea:

Even if plaintiff was the first to conceive of the idea of making the crystal artificially and the first to explain its properties, they are not the object of protection of the copyright or the author's moral rights. Such content is at most the object of protection of statutes like the Patent Law and the Utility Model Law. This is because, ultimately, copyright and moral rights protect expressive form that expresses thought or feeling creatively. Universal truths, the content of their description, as well as whoever was the first to discover them are not objects of their protection. 198

The court also found sufficient variation in defendant's description of the structure and properties of the crystal as well as the scientific principles under consideration that they did not infringe any sup-

195. Kusumoto v. Kobayashi, III Chosakuken Hanreishu 195, 204 (21 June 1978, Tokyo District Court). The following is an example of the type of similarity shown (italics indicate additions in defendant's text and square brackets indicate text in plaintiff's work omitted in defendant's):

The legislature that adopted the Civil Code in 1896 never imagined circumstances in which sunlight in residential areas would be taken one-sidedly through the erection of tall buildings. Scholarly doctrine and Court decisions as well were not necessarily able to provide an effective resolution [sufficiently] adaptive to these new circumstances. However, the demands of residents to protect sunshine not only earned broad sympathy among the general citizenry but were partially recognized even by opposing enterprises, and a record of voluntary dispute resolution began to accumulate. It is there that we can clearly perceive the bud of sunshine rights as living law of civil society.

Id. at 208-09.

196. See supra text accompanying nn. 121-23.

197. See supra text accompanying nn. 153-55 and nn. 47 & 151.

posed copyright in plaintiff’s work.\footnote{199}

The War Chronicles case, introduced above,\footnote{200} also showed sensitivity to the relation between the creativity requirement for copyrightability and the scope of copyright protection.\footnote{201} It, as well as the Marine Supplies Ad, American English glossary, and Sunshine Rights decisions were all entered by the special sections for intellectual property of the Tokyo and Osaka District Courts. They look to creativity of expression in determining copyrightability and determine infringement or noninfringement by asking whether such creative expression was copied. While results in individual fact situations will remain difficult to predict, in either America or Japan, it is reasonable to assume that these decisions state the general approach to be expected from Japanese courts in future copyright cases, at least insofar as traditional copyrightable works are concerned.

d. Proof of Infringement

(1) In general. With the exception of problems introduced by cases, like Court Diary, that find creativity in the idea or content of a work as opposed to its expression, Japanese courts have been consistent in refusing to base infringement on a finding of similarity of ideas understood or perceived from the works, as discussed above.\footnote{202} Given that infringement requires similarity of expression, however, the questions remain of how much similarity is sufficient and what defenses are available where sufficient similarity is found.

\footnote{199. For example, plaintiff’s work included the statement, MgTe has a Wurtzite ["Wurtzite" written in roman letters] structure, and the lattice constant ["lattice constant" written in Japanese, koshi teisu] is a: 4.53A°, c: 7.36A°. Also, the MgTe mutual distances are 2.76A°, 2.77A°. Defendant’s equivalent was, MgTe possesses an urutsu [presumably the name “Wurtz” phoneticized in Japanese] ore-form structure; the lattice constant ["lattice constant" written in English] is a: 4.53A [sic], c: 7.36A°, and the atomic distances are 2.76A, 2.77A. Id. at 19. The appendix to the opinion contains about 40 such examples of infringement claimed by plaintiff that are rejected by the court on the dual grounds that there is no room for creativity in such factual statements and, in any event, defendant’s form of expression was sufficiently different that it did not infringe.}

\footnote{200. Hata v. Suzuki, III Chosakuken Hanreishu 28 (23 June 1980, Tokyo District Court); see supra text accompanying nn. 157-60.}

\footnote{201. In addition to plaintiff’s original narrative, his works included numerous records, articles, and photographs related to his historical wartime subject. The court recognized compilation copyrights in the works and accepted the evidence that defendant consulted plaintiff’s works in creating his own. The court nevertheless rejected plaintiff’s claim that defendant’s use of some of the photographs and records from plaintiff’s works was infringement. Defendant took only a small number of photographs from plaintiff’s works and added many new ones, in completely different locations and arrangements. With different overall composition, copying a small number of individual elements did not infringe. Id. at 39-40.}

\footnote{202. See supra nn. 149-52 and accompanying text.
The *War Chronicles* case introduced above\(^{203}\) actually adopted a verbal formulation of the infringement standard similar to that used by most United States courts:

In determining whether the descriptive portions [of defendant’s works] pointed out by plaintiff are copies of the corresponding portions of plaintiff’s works, it is necessary that defendant had the opportunity to come into contact with and rely on plaintiff’s works at the time he wrote his own descriptions and that his descriptive portions were the same as those of plaintiff.\(^{204}\)

This sounds very much like the requirement of access plus substantial similarity found in United States law. However, few other courts have been so explicit in expressing the standard for infringement, which therefore remains vague in Japan.

(2) *Independent production.* One defense that is clearly available in both countries is that of independent production. An old and somewhat cryptic but oft cited opinion of the Great Court of Judicature in the *Minister of Internal Affairs* case\(^{205}\) states the general rule:

Article 29 of the [Old] Copyright Act establishes liability for infringement of the copyright in a work by imitation or plagiarism. It does not cover a product that fortuitously coincides because it is compiled from similar materials.

A clearer statement to the same effect appears in the *One Rainy Night in Tokyo* decision, introduced above.\(^{206}\)

In contrast to patent rights, the content of which is the “exclusive right to implement” the invention (article 68 of the Patent Law), the content of copyright is the “exclusive right to copy” the work (Article 1 of the Old Copyright Act). The term “copy” here assumes knowledge of the existence and content of the work by the copier, as is the case with an adaption, which is one type of “copy.” Therefore, a condition of copyright (or adaptation right) infringement, different from patent right infringement, is knowledge by the infringer of the existence and content of the work. Consequently, a product that is fortuitously identical or similar in content to an existing work does not in-

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\(^{203}\) See supra text accompanying nn. 157-60 and n. 201.

\(^{204}\) Hata v. Suzuki, III Chosakuken Hanreishu 28, 39 (23 June 1980, Tokyo District Court).

\(^{205}\) Sugimoto v. Yoshikawa, II-l Chosakuken Hanreishu 425, 428 (5 May 1905, Great Court of Judicature).

\(^{206}\) See supra n. 164.
fringe the copyright (or adaptation right) provided it was independently produced without knowledge of the existence and content of the prior work, regardless of whether the absence of such knowledge was due to negligence.\textsuperscript{207}

The court did not cite direct evidence of independent production outside defendant's testimony but concluded that specific knowledge of the song could not be inferred simply from a general knowledge of music when the song in question was not well known.\textsuperscript{208}

A more detailed analysis is presented in the recent \textit{Gateball Rulebook} case,\textsuperscript{209} although it remains unclear whether the court was relying on an absence of substantial similarity sufficient to permit an inference of copying or on affirmative evidence of independent production. The decision also hides the scope-of-protection problem under a standard that purports to look for direct reliance in determining infringement and is worth discussing in some detail.

In the aftermath of the war, plaintiff's husband saw a need for recreational sport that required little expensive equipment and could be played in relatively small places. He developed gateball around 1947 as a five-person-team variation of croquet combined with elements of billiards. Over the next few years he wrote several books roughly 15-20 pages in length containing the rules he created for the game and, in varying versions, describing the necessary equipment, the playing field, and the history and development of the

\textsuperscript{207} K.K. International Music Publishers v. Suzuki, I Chosakuken Hanrei 396, 407 (24 Dec. 1974, Tokyo High Court), aff'd II-1 Chosakuken Hanrei 760 (7 Sept. 1978, Supreme Court). The court cited the Minister of Internal Affairs case in support of this point. The appeal to the Supreme Court in \textit{One Rainy Night} argued that intentional or negligent failure to learn about the existence of a prior work should be considered infringement, but the Supreme Court upheld the Tokyo High Court on this point as well.

A dictum in the \textit{Residential City Map} case, K.K. Hokuriku Jutakuchizu Shuppansha v. K.K. Hokuriku Kankosha, II-1 Chosakuken Hanrei 560, 566 (22 Sept. 1978, Toyama District Court) also recognizes independent production as noninfringing:

\begin{quote}
In determining, in general, whether or not there is copyright infringement, when the new work is created independently and without reliance on the previously existing work of another, there is no copyright infringement even when the result is identical to the other's work.
\end{quote}

\textsuperscript{208} I Chosakuken Hanrei at 409-10. Similarly, in addition to finding lack of novelty, the court in the \textit{Mujin Table} case, discussed supra n. 84, seemed to be relying partially on independent production in finding no infringement:

\begin{quote}
It is proper to find that both plaintiff and defendant independently developed their respective mujin installment charts . . . , by considering various calculation methods in existence from old times and applying everyday calculation practice.
\end{quote}

\textsuperscript{209} Murai v. Aikoku Mujin K.K., II-1 Chosakuken Hanrei 60, 66 (1940 (precise date unknown), Yokohama District Court).

sport. He obtained utility model rights with respect to the equipment and began promoting the game all over Japan.

The game became quite popular throughout the country, but regional variations in the rules began to develop. The defendant was an unincorporated federation of regional gateball associations that developed and published in 1977 what it hoped would become a unified set of gateball rules. This work was based largely on a rulebook developed, with various amendments, between 1970 and 1976 by a prefectural gateball association (the successor to a municipal gateball association) of which defendant's president was then the moving force. National unity remained elusive, however, and in 1981 the defendant got together with three other gateball groups and published a second rulebook aimed at national standardization. Plaintiff brought action for copyright infringement, asserting that the 1977 and 1981 works by defendant infringed the copyright in her deceased husband's works, to which she was the successor in interest. (For simplicity, plaintiff's deceased husband is referred to below as "plaintiff.")

The court first rejected defendant's argument that writing game rules was simply a mechanical task requiring no creativity. Rather, plaintiff's intellectual effort in expressing the various aspects of the new sport and their relationship to each other was creative and could not be denied copyrightability. The court then went on to outline the standards for infringement:

First, copyright infringement arises from the unauthorized reproduction of an identical or similar work in reliance on an existing copyrighted work. Even the creation by a third party of an identical work is not infringement where there is no knowledge of the existing work or reliance on it, even if lack of knowledge was negligent. Therefore, it is infringement where the result of reliance is an identical or similar work, but even when reliance exists there is no infringement where significant changes result in the creation of a work in which identity or similarity is lacking.

As a result, in determining whether there is copyright infringement, we begin with the question of whether there was reliance on a previously existing work. In cases of reliance, we next inquire into identity or similarity. However, where a third party creates something identical or similar to an existing work, that fact becomes an element of the reliance inference. The inference is stronger in proportion to

210. The court cites here the Supreme Court opinion in One Rainy Night in Tokyo. See supra n. 207 and accompanying text.
the degree of close or striking similarity. Thus, instead of access plus substantial similarity the Gateball Rulebook court sets up a test of reliance plus substantial similarity. Theoretically this would leave most plaintiffs in a quandary, because direct proof of reliance is rarely available in the typical copyright case. That, in fact, is the reason United States copyright law has adopted the access plus substantial similarity test as creating a rebuttable presumption of copying. The Gateball Rulebook approach seems to end up at nearly the same place, however, at least where there is striking similarity between the two works. American law, too, essentially dispenses with the access requirement to the extent of striking similarity.

In the Gateball Rulebook case, however, access was clear, because plaintiff’s works had been published. Under American law, even where access or copying is given, there is no infringement where the similarity is only of ideas or other nonprotected elements. When both access and substantial similarity are shown, the court must make the basic policy determination of whether the similarity is of unprotected idea or protected expression. In Landberg, for example, on facts somewhat similar to those of the Gateball Rulebook case, the court emphasized the narrow scope of protection in fact works and based a determination of noninfringement on the absence of verbatim or nearly verbatim similarity.

The Gateball Rulebook court, too, found many differences in verbatim expression and overall structure that seemingly would have justified a finding of noninfringement for a fact work:

With the exception of the rules portion of defendant's [1977] rulebook, the content and expression is completely different from plaintiff's rulebooks and is described by defendant independently. Moreover, when we compare plaintiff's and defendant's works, while they both deal with the game of gateball, including the game's rules, there are some differences in details, such as the size of the court and the method for determining the batting order. In addition, the former places things like “Method of Play” in explanatory text separate from the rules while the latter includes it among the rules, and aspects that the former treats as rules are not so treated by the latter. Therefore, there are some

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211. IV Chosakuken Hanreishu at 12, 1111 Hanrei Jiho at 137.
212. 3 Nimmer § 13.03; see also Selle v. Gibb, 741 F.2d 896, 903-04 (7th Cir. 1984).
213. E.g., Frybarger v. International Business Machines Corp., 812 F.2d 525, 529 (9th Cir. 1987); Walker v. Time Life Films, Inc., 228 U.S.P.Q. 505, 508 (2nd Cir. 1986); Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485, 491-93 (9th Cir. 1985); 3 Nimmer § 13.03[A].
214. See supra text accompanying n. 147.
differences in the essential substantive content, and the two works are obviously different in textual expression, composition, and expressive form. The court did not directly use this factual determination, however, for finding that there was no substantial similarity of copyrightable elements in the two works. Rather, it served indirectly with the other facts in the case to support an inference of nonreliance:

Based on the facts found above, defendant's [1977] rulebook was created with reference to the rulebook of the prefectural association (or its earlier form as a municipal association). It is difficult to conclude that anything was included as a result of direct reference to plaintiff's works. Of course, the game of gateball itself was created and devised by plaintiff, and the basic rules all have their origin in plaintiff's conception and ideas, as recognized earlier in this opinion. Therefore, we can easily infer at the least that the rules of the prefectural association that form the foundation for defendant's [1977] rulebook were created under the influence of plaintiff's works. Therefore, we can also conclude that defendant's [1977] rulebook was influenced by plaintiff's works. But by 1977 when defendant's rulebook was written and published, the game of gateball had developed and spread throughout the entire country. Many gateball associations emerged with no lateral communication among them, leading to the adoption of different rules. We might say that at that time the game was already out of plaintiff's hands and had taken the first steps toward independence. In the adoption of new rules, these circumstances provided significant possibility for writing new rulebooks by adding creative efforts to the experience of a game implemented somewhat differently from that appearing first in plaintiff's works. Simply saying that defendant's [1977] work was influenced by plaintiff's works is not to say that it was created in reliance on plaintiff's works.

The same is true for defendant's [1981] rulebook. This work was the product of discussions among four groups . . . and we cannot say that at that time anything was put into it in direct reliance on plaintiff's works. Therefore, we must deny the existence of reliance with respect to this rulebook as well.

Therefore, we cannot say that defendant's rulebooks infringed the copyright on plaintiff's works.

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215. IV Chosakuken Hanreishu at 13-14, 1111 Hanrei Jiho at 138.
216. IV Chosakuken Hanreishu at 14, 1111 Hanrei Jiho at 138-39.
The factual determination of nonreliance by the *Gateball Rulebook* court would be plausible if the earlier prefectural association rulebook were in fact original in the sense of independent creation, but the opinion supplies no basis for such a finding. The prefectural rulebook on which defendant’s work was based was written more closely in time to the publishing of plaintiff’s works and plaintiff’s active promotion of the game. The likelihood that its drafters saw one or more of plaintiff’s works seems rather high. If the prefectural rulebook could be considered infringing, the court’s reasoning in the *Gateball Rulebook* case leads to the absurd result that direct reliance on an infringing work is not infringement because reliance on the original is only indirect.

Perhaps the *Gateball Rulebook* court was seeking to avoid dealing directly with the idea/expression distinction by looking for direct evidence of reliance, but if so this is an abdication of responsibility. Much of the fundamental copyright policy balance between creation incentives and the free flow of ideas is determined under this distinction, and in both Japan and America the statutory language draws the line only vaguely. As discussed above, Japanese courts vary the scope of protection in a work according to its nature much as the American courts do, and the *Gateball Rulebook* case could have been decided, like *Landsberg*, within that framework. As it is, the emphasis on direct reliance leaves the standard of proof for copyright infringement unclear. The direct-reliance standard has the potential for giving too little protection to many works and at the same time obscures the policy balance between what is protected in a work and what is freely usable by later authors.

(3) Copying of Mistakes. The pernicious influence of a direct reliance standard for infringement can be seen by examining cases in which direct reliance is nearly irrefutable. This occurs when typographical or other errors contained in plaintiff’s work appear identically in defendant’s. Often, the probability that identical errors would occur by chance seems so low that an inference of direct reliance is almost compelled. That should not end the analysis, however. Rather, the court should go on to determine whether any substantial similarities between the two works are similarities of expression or only unprotected ideas.

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217. The court explicitly recognized that the prefectural rulebook was influenced by plaintiff’s works. See supra text accompanying n. 216.

218. See supra text accompanying nn. 153-70.

219. The *Gateball Rulebook* court did include the issue of similarity as a second prong of its test, see supra text accompanying n. 211, that it did not have to reach in view of its finding on nonreliance. Had it reached this issue, it seems likely that the court would have followed the fact work cases and found no infringement because of the absence of nearly verbatim copying.
Under the American decisions, the presence in both works of identical mistakes is regarded as very strong evidence of copying.\textsuperscript{220} In the case of computer program piracy, such evidence seems rather common, and some courts appear to have accepted the evidence of such copying alone as proof of infringement.\textsuperscript{221} Nevertheless, the general rule is that isolated copying of "factual" errors does not eliminate the need to show copying of protected elements.\textsuperscript{222}

The Japanese cases show a generally similar approach when identical mistakes or other unusual features are present in both works. Several courts seem to have been sufficiently offended by the evidence of obviously slavish copying that they did not inquire deeply for copying of protected expression, but at least one recent case out of the intellectual property section of the Osaka District Court carefully distinguished what was slavishly copied from those elements of the work that fell within the scope of protection.

The \textit{Court Diary} case, introduced above,\textsuperscript{223} is a good example of the danger in looking solely to slavish copying as a basis for infringement. Having found plaintiff's work copyrightable because of the creative thought underlying the idea of making a useful judicial diary for lawyers, the language of the opinion relating to its finding of infringement comes very close to providing protection for the underlying idea:

> When we compare items of evidence B-8 ([defendant's] Lawyer's Diary) and A-1-3 ([plaintiff's] Court Diary), on the basis of which the lower court decided the case [for the defendant], there are differences in selection or order of arranging the items collected that form the content described or in the style of compilation. In particular, the Lawyer's Diary explains in an appendix the Hoffman calculation method and includes a selected collection of provisions relating to extinguishment of claims by prescription. The

\textsuperscript{220} E.g., M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 445 (4th Cir. 1986). Similarly, the court in SAS Institute, Inc. v. S & H Computer Systems, Inc., 605 F. Supp. 816, 830-31 (M.D. Tenn. 1985), while finding pervasive structural similarity in the two programs, seemed heavily impressed by the obviously slavish copying of 44 lines out of some 186,000 lines of code and by the duplicity with which the defendants obtained the copy of the source code from which they worked. This direct copying approach to proving infringement in computer programs has the support of some of the commentators, e.g., Conley & Bryan, A Unifying Theory for the Litigation of Computer Software Copyright Cases, 6 \textit{Computer L.J.} 55 (1985) but has drawn the criticism of others, e.g., Goldstein, "Infringement of Copyright in Computer Programs," 47 \textit{U. Pitt. L. Rev.} 1119, 1126 n.29 (1986); Hinckley, "NEC v. Intel: Will Hardware Be Drawn into the Black Hole of Copyright?," 3 \textit{Computer & High-Tech. J.J.} 23, 52 n.122. See generally Karjala, supra n. 120 at 84.

\textsuperscript{221} E.g., Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485, 493 (9th Cir. 1985); 3 \textit{Nimmer} § 13.03[C].

\textsuperscript{222} 3 \textit{Nimmer} § 13.03[C].

\textsuperscript{223} See supra text accompanying nn. 111-15.
lower court was correct in finding that these were not included in the Court Diary. However, many of the items collected . . . were identical or similar, and it was not rare that the items collected were merely modifications, additions, or subtractions. We can see that defendant's work conspicuously follows a number of mistakes and omissions in plaintiff's work. Furthermore, with respect to the selection or arrangement or the classification method for the items collected in the diaries, when we compare and observe plaintiff's and defendant's schemes as a whole, defendant's work does not fall outside the realm of a plagiarized copy of plaintiff's. In other words, we cannot see the expression of defendant's original [dokuji no souken] thought in defendant's work.\(^{224}\)

It seems evident that the existence of identical errors and omissions played an important role in the Court's decision to reverse the finding of no infringement by the lower courts. The Court did not explain why the modifications made, coupled with the additional features offered in defendant's work, were insufficient to permit defendant to escape the charge of infringement. For useful articles of this type there is bound to be much similarity of overall content, and if the slavish copying is put to one side, the finding of infringement represents a very high level of protection for useful articles.\(^{225}\) Moreover, while the Court apparently did not accept the plaintiff's full-blown argument for protection of the diary system as a whole,\(^{226}\) the focus on copying alone, especially when coupled with

\(^{224}\) Takeuchi v. Ogawa, II-l Chosakuken Hanreishu 119, 125-26 (18 May 1940, Great Court of Judicature).

\(^{225}\) Of the eighteen features listed by the Court as comprising plaintiff's diary, eleven seem to be associated with the blank form portion designed for use by attorneys in keeping track of their cases. These included columns for names, dates, times, results, and similar items in pending cases; a temporary diary column for the next year; tables of suspended or concluded cases; and a column for keeping statistical results at the end of the year. The remaining seven features were more like an ordinary compilation and included a selected collection of terms, stamps, and fees; a table showing court jurisdiction; a table of postage, telephone, and exchange fees; and a list of all of the lawyers in Japan, together with their addresses and telephone numbers. Of these eighteen features, defendant's diary eliminated four altogether (three in the blank form portion and one in the general compilation) and added four new features to the general compilation (such as the explanation of the Hoffman calculation method as mentioned in the part of the opinion quoted above).

\(^{226}\) The plaintiff made the following argument, as summarized by the Court: 

*When the purpose, form of thought, and system of compilation of the latter are the same or strikingly imitatively similar in the former and in addition many portions show plagiarized content, infringement is established. Considering the works involved in this case, the content of [defendant's] diary is almost completely plagiarized from [plaintiff's]. The evidence for this is clear at a glance at the two works. In particular, as a result of respondent's plagiarism of the content of appellant's work, omissions and errors appearing throughout appellant's work are followed identically in respondent's.*
the Court's emphasis on similarity of the overall scheme, can lead to copyright protection of ideas and methodology that are normally thought to fall solely within the realm of patent law.

The Student Map case\textsuperscript{227} raises similar concerns. Plaintiff's work was entitled "New and Most Concise Atlas of Japan." Defendant's "Map of Japan for Students" was made by taking a photographic outline of the country from a third-party map and transferring the contents of the "Map of Japan" from plaintiff's atlas, with some modifications, for the internal details. Again, identical errors and omissions seemed to play an important role in the determination of infringement and perhaps led to generalizations inappropriate to copyright protection for works of this type.

The court began by finding that plaintiff's intellectual efforts in selecting and arranging the details to be included in his map justified copyright protection.\textsuperscript{228} It then turned to defendant's claim that plaintiff's copyright did not extend to the selection of places to be included in the map:

The extent to which place names are recorded in the content of the map is one of the most important aspects. . . . The place names shown on the map form its content, so aside from the case in which they are separated from the map they are covered by the copyright as part of the map.\textsuperscript{229}

While copies of the two maps are not included in the opinion, the court describes its comparison of them in some detail. It first takes note of some 34 towns or other geographical phenomena appearing only on defendant's map, as well as 17 stylistic or other changes in representation on defendant's map.\textsuperscript{230} Notwithstanding these differences, the court finds infringement based on the following summary of its factual conclusions:

We can conclude the following [six points] concerning plaintiff's and defendant's maps: (1) The majority of cities and other things besides cities like place names, mountains, and

\textsuperscript{227} Ono v. K.K. Shinkyoiku Kenkyukai, II-1 Chosakuen Hanreishu 575 (18 Oct. 1951, Osaka District Court).

\textsuperscript{228} Id. at 585-86. The court seemed impressed with the experience and talent of the plaintiff in mapmaking and the time and energy involved in producing the map in question.

\textsuperscript{229} Id. at 587. At the same time the court rejected defendant's argument that defendant's change in scale was sufficient to distinguish the maps.

\textsuperscript{230} Among the 34 additions, for example, the height of one mountain and the location of three additional towns were shown on defendant's map for the northernmost island of Hokkaido. Among the 17 changes were different colors indicating certain borders and sea routes and different representational markers for sand dune regions.
rivers shown on the two maps are identical. (2) Among the additions to defendant’s map in comparison with plaintiff’s, only the following show completely new changes by defendant: (a) The indication of the Hokkaido Governmental Office in Sapporo; (b) the town of Yokamachi in Niigata Prefecture; (c) Yamashiro in Ishikawa Prefecture; (d) Takachi on Sado Island; (e) Mirasan in Shiga Prefecture; and (f) Ishizuchiyama National Park. However, even among these (a) and (f) represent no more than decorative indications, while (b) and (d) are only corrections from the easily made [mistaken inversions of characters] appearing on plaintiff’s maps. Therefore, only Mirasan and Yamashiro can be said to be based wholly on defendant’s independent views. (3) The sea routes shown on defendant’s map are almost the same as on plaintiff’s, with the foreign routes omitted and [several other changes] representing no more than abbreviations. (4) The contour of the northern coastline of Hokkaido on defendant’s map resembles that of plaintiff’s map. (5) Both maps denote the sandy portions of coastlines. (6) In comparison with plaintiff’s map, defendant’s coastlines and railroad lines are generally crude. Moreover, the parties are in agreement that both plaintiff’s and defendant’s maps contain [identical] errors and omissions, as pointed out by plaintiff. . . .

But for the evidence of identical errors, barely referred to at the end, this is highly unconvincing reasoning for a finding of infringement. Factual works like maps must necessarily contain a substantial amount of identity in the places represented, so “decorative indications,” abbreviations, and different symbol makers may constitute much of the expression that should be considered in determining substantial similarity of protected elements. The contours of coastlines can hardly be considered a protected element of a map, nor can the decision to indicate beaches (sandy portions of coastline). We can only conclude that the strong evidence of actual copying, as shown by the identical errors, is the basis for the decision.

231. II-1 Chosakuken Hanreishu at 587-88. The identical mistakes involved the use of incorrect characters in some nine names and, in one case, omitting the name of a town. Id. at 579. In addition to these errors, plaintiff asserted that 99% of the place names were identical in both maps and that the other differences were insubstantial. For example, plaintiff used an open “O” to denote city locations, while defendant used a “O” with a dot in the middle, and defendant placed names on the right-hand side of railway lines instead of on the left. Id. Neither these arguments of the plaintiff nor the reasoning of the court deal with the problem that differences in factual works will often be insubstantial. The essence of a map is the accurate location of the features shown, and these will necessarily be substantially similar for maps aiming at the same goals.
In the Kanji Dictionary case, the court relied solely on identity of errors and omissions, as well as deliberately laid "traps," in finding infringement. Plaintiff's dictionary consisted of some 44,300 entries of Chinese characters (kanji) with some special features that distinguished it from other character dictionaries that had been published in the past. Defendant dropped around 200 of plaintiff's entries and added a few new ones. The opinion goes on to describe five sets of examples of slavish copying determined by identity or near identity at corresponding points of typographical errors, inversions in character order, or identity of unusual features deliberately included for the purpose of detecting copiers. The court says nothing about the organization of defendant's work, but apparently it was not wholly identical to plaintiff's, because the page numbers cited for the correspondence of unusual features are not the same in the two works nor is there apparent any but the most general relation between them. If in fact the organization of defendant's work was different from plaintiff's, the finding of infringement involves an implicit recognition of the American "sweat of the brow" approach to compilation works, because individual "facts" are not protected, even if they turn out to be erroneous.

In fact, one recent Japanese case expressly so holds. The Marine Supplies Ad case refused to base a finding of infringement on the use of similar, and in many cases identical, elements of a single-page advertisement, where those individual elements were not copyrightable and were arranged in a different pattern that did not appropriate the expressive features of plaintiff's arrangement. The court was unmoved by the erroneous common term "lord binders" (rather than "load binders") in both...
ads, not even in combination with identical English titles for the ads, identical lists of products, identical design of the chains holding together the (different) compositions of the two ads, and identical photographs of parts.

Similarly, while the *War Chronicles* case did not involve copying of errors or traps, the court did refuse to base a finding of infringement on the appearance of some identical photographs in defendant's compilation. Rather, even in the case of only a partial taking, the plaintiff must show the same selection and arrangement, that is, the same composition, and where defendant has not copied the composition, there is no infringement even if he copied the individual photographs allegedly taken from plaintiff's work.

The appearance in both plaintiff's and defendant's works of common errors or traps is often convincing evidence of slavish copying, and the cases show that Japanese courts are no less offended by it than the American courts. One reason it is so offensive is that it tends to show that the second author did not attempt to separate idea from expression for the purpose of making use of the first author's ideas. Neither knowledge nor culture is significantly advanced by this type of activity, and it is therefore tempting to base a finding of infringement solely on the nearly direct evidence of copying that common errors provide. By hypothesis, when plaintiff's work is copyrightable, it must contain protected expression, and slavish copying of randomly placed errors and traps may create a strong presumption that protected expression was taken as well.

Nevertheless, the reasoning of the *Marine Supplies Ad* and *War Chronicles* cases seems superior. These courts looked carefully at the protected elements of the works concerned and sought to determine whether protected elements were copied. Infringement may well have been justified in the other cases that looked only to the evidence of common errors, but when that is true plaintiff should be able to direct the court's attention to expressive content that was substantially taken along with the errors and traps. By failing to do so, the *Court Diary* case, in particular, opens the path toward the protection of ideas. In America, this same approach of basing infringement on the existence of common errors and traps in computer programs is already resulting in the protection of technological ideas and efficiencies under copyright law.

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239. the actual author of both ads was the same person. See supra n. 185. Therefore, the common error is less compelling on the issue of slavish copying.
240. 566 Hanrei Times at 282.
241. Hata v. Suzuki, III Chosakuken Hanreishu 28 (23 June 1980, Tokyo District Court); see supra text accompanying nn. 157-60 & n. 201.
242. Id. at 39-40.
243. See supra n. 221 and accompanying text; see generally, Karjala, supra n. 120.
the specific statutory provisions covering computer programs, Japanese courts should not go this far, and the Marine Supplies Ad and War Chronicles cases are hopeful signs that the general approach of Court Diary will not be followed in the future.

(4) Fair Use. As pointed out in the first section, the Japanese Copyright Law does not contain a general fair use provision analogous to section 107 of the United States Copyright Act. Nevertheless, the courts have created a very limited type of fair use approach that permits defendant to avoid a finding of infringement even when reliance on plaintiff's work is shown. The basic idea is that if defendant's added creativity results in a work in which the plaintiff's work fades into insignificance, the new work does not infringe.

This principle is stated in dictum in Court Diary case, although by finding infringement it was not applied to the particular facts:

When a work is adapted or devised in reliance upon an existing copyrighted work, the author is liable to the author of the original for damages arising from infringement, unless the new conception is so remarkably creative that an ordinary person would consider it a separate work in comparison with the earlier work.

In its most limited form this could mean that defendant's new creativity so changed its expression that new expression resulted. However, if so limited, the principle is no longer one of fair use, because there then is no substantial similarity of expression and no defenses to infringement are required. As a fair use principle, the Court's emphasis on creativity of conception creates a danger of misapplication. It could mean, for example, that the first person to think of the idea of a musical comedy might escape infringement by adding creative music to the general story line of a protected play.

244. JCL Art. 10(3) provides that copyright protection in a program work does not extend to algorithms used in making the work, and defines algorithm as a method for combining computer instructions in a program. Consequently, program organization or structure is unlikely to be protected. See supra n. 130 and the sources cited therein. Therefore, even where common errors or traps in the detailed coding are shown, there is still an issue of whether there was a taking of protected expression. It remains to be seen whether a Japanese court will find infringement when all that is shown is copying of only a few isolated lines of code.

245. See supra text accompanying nn. 28-30.

246. Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 119, 125 (18 May 1940, Great Court of Judicature); see supra nn. 111-15 & 223-26 and accompanying text.

247. The language used by the Court could also mean that no infringement would result where the parts taken form only a small fraction of the new work, so that the ordinary observer would be unlikely to notice it. It is improbable, however, that the Court intended to create a de minimis quantitative test or that the principle will be applied in this way in Japan. Certainly the general American view is that new crea-
The Residential City Map case\textsuperscript{248} applied the principle stated in Court Diary in a more limited context than that of the above hypothetical. The court first outlined the general idea:

An independently created work made without any reliance on an existing work does not infringe, even though in result it is identical to the other’s work. Moreover, even when the new work is based on the copyrighted work of another, if as a result of independent added creativity the special characteristics of the prior work are hidden in the shadow of the new creativity so that they are not perceived by the ordinary observer, it is recognized as an independent copyrighted work created through the free use of the copyrighted work of another. There is therefore no infringement.\textsuperscript{249}

As discussed earlier, the court reviewed the differences between the two maps in question and found them to be sufficient to prevent the ordinary observer from recognizing plaintiff’s maps in defendant’s. It is not clear that this case actually involves fair use concepts, however, because the court had already recognized the very narrow scope of protection afforded to maps of this type,\textsuperscript{250} and the differences outlined by the court would have permitted it to conclude more simply that there was no taking of protected expression.\textsuperscript{251} Moreover, there is also a hint in the opinion that defendant’s maps may have been independently produced.\textsuperscript{252}

Consequently, while there appears to be a limited form of judicially created fair use defense under Japanese copyright law, it has heretofore existed more in judicial language than in the holdings of the cases. The notion that the expression in the earlier work must

\textsuperscript{248} K.K. Hokuriku Jutakuchizu Shuppansha v. K.K. Hokuriku Kankosha, II-l Chosakuken Hanrei shu 560 (22 Sept. 1978, Toyama District Court); see supra text accompanying nn. 137-38 & 165-69.

\textsuperscript{249} Id. at 566.

\textsuperscript{250} See supra text accompanying nn. 138 & 168.

\textsuperscript{251} The Marine Supplies Ad case, Sanwa Tsusho K.K. v. K.K. Japan Trade Service, 566 Hanrei Times 278, 282 (29 Mar. 1985, Osaka District Court), discussed in detail supra text accompanying nn. 124-26 & 184-88, also commented that plaintiff’s expression was hidden in the shadow of defendant’s creativity, but the analysis makes clear that the court found the similarities to lie outside the scope of protected expression.

\textsuperscript{252} See supra text following n. 169.
be imperceptible by the ordinary observer seems to limit the value of the principle for subsequent authors who wish to make use of prior works. In fact, it seems more likely the general audience test for infringement found in American law,\textsuperscript{253} which would mean it is not a fair use principle at all. Moreover, the emphasis on ordinary observer perception seems to ignore the idea/expression distinction, in that it can permit a finding of infringement where the ordinary observer would not find the works remarkably different because they express the same idea. Finally, the emphasis on creativity of conception used in describing the principle in the \textit{Court Diary} case is amenable to an interpretation that would permit the taking of expression when defendant's creativity is remarkable. It is therefore difficult to see how this inchoate concept fits in with general copyright principles. Still, the language of the cases seems to admit the existence of the general principle, so it is always possible that it will find application.

\textbf{CONCLUSION}

While the total number of Japanese cases interpreting copyright law is only a small fraction of the number in America, they nevertheless show a variety in analytical style that rivals the variety shown in the United States cases. The statutes of the two countries differ in many details, but it is difficult to find inherent contradictions or inconsistencies in the fundamentals. It is also difficult to pick out a single fundamental theme on which the Japanese cases are consistently different in their interpretation of copyright law.

The Japan Copyright Law appears to set a higher threshold for copyrightability over the minimalist originality standard of United States law. There is an express creativity requirement in Japan and the class of protected works is further narrowed by the requirement that the work express thought or sentiment belonging to the literary, scientific, artistic, or musical realms. Some of the cases, particularly older cases, give this distinction some substance by denying copyrightability to expressive works that "owed their origin" to the person claiming the copyright. A few cases even seem to require novelty in either expression or idea as a condition to copyright protection. It is possible that the absence in Japan of a general fair use principle, which allows American judges to temper the harsh results that would follow from rigid application of normal copyrightability and infringement standards, has caused Japanese judges to draw the copyrightability line at a higher level. Nevertheless, more recent cases have much more consistently looked to creativity of expression.

\textsuperscript{253} Arnstein v. Porter, 154 F.2d 464 (2nd Cir. 1946), cert. denied, 330 U.S. 851.
as the standard and in general seem to recognize a copyright in much the same types of works that would qualify under American copyright law.

Moreover, even the cases in Japan that have denied copyrightability for want of creativity might well have come out the same way in America notwithstanding recognition of the copyright. In many of those same situations, the American court might well deny infringement by severely limiting the scope of protection through application of the idea/expression distinction. The result in either case is that the original author loses on his infringement claim. In addition, Japanese courts recognize the idea/expression distinction notwithstanding that the Japanese Copyright Law does not expressly provide for it, and they vary the scope of protection in different types of works in much the same way that the American courts do. Therefore, many apparent differences in analytical style between Japanese and American judges can be reconciled by focusing on the results of the cases rather than the actual language used to justify those results. This is particularly true in the standards for determining infringement. In America, the almost uniform judicial litany is that copying is proved by access plus substantial similarity and that infringement is determined by substantial similarity of protected elements. In Japan, the verbal formulations of the standards for infringement are much more vague and show greater variety, but one cannot say after analysis of the fact patterns and the results that Japanese courts are consistently more or less protective of copyright than those of the United States.254

We regard this as an encouraging finding. The world is increasingly becoming a single international society, and Japan and America, in particular, seem destined to develop increasingly intimate economic and social relationships with each other. Many of these relationships will involve the exchange of information-based products, now primarily computer software but surely biotechnological products in the near future. It is vital that people and businesses in both countries be able to proceed with confidence concerning the protection available for the products of their intellectual efforts, and to the extent that copyright remains the primary tool for the protec-

254. Recent United States decisions involving computer software have deviated from traditional copyright theory in protecting technological ideas and methodologies. See Karjala, supra n. 120. It is too early to predict whether Japanese courts will follow this protective trend for software. The express statutory provisions relating to programs are a strong basis for limiting protection of programs. See supra nn. 130 & 244 and the sources cited therein. On the other hand, the Operating System case, supra n. 130, seems to indicate a highly protective attitude by the Intellectual Property Division of the Tokyo District Court. See Karjala, "The First Case on Protection of Operating Systems and Reverse Engineering of Programs in Japan," 10 Eur. Intell. Prop. Rev. (forthcoming 1988).
tion of these products, mutual understanding of each other's copyright system is an important ingredient of that confidence. The technical differences between the two copyright systems will continue to require that both sides seek expert legal advice in attending to details, but similarity in the fundamental concepts takes everyone a long way in the right direction.