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Insights from Psychology for Copyright's Originality Doctrine

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Insights from Psychology for Copyright's Originality Doctrine

The discipline of psychology has much to offer the law of copyright.¹ For example, determining whether or not a work is original in a legal sense implicates, and may be enriched by, the psychology of creativity. This paper is a foray into the linkage between psychological understandings of creativity and the legal standard of originality. While the methodologies and approaches to the psychological sub-discipline of creativity are many, certain frameworks are chosen which seem most relevant and probative to the task: psychoanalysis (specifically, Jungian psychoanalysis), experimental psychology (specifically, the cognitive science of creativity or “cognitive creativity”), and social psychology (specifically, systems theory).

In the legal sense, originality means both that a work originated from the author (what I term “authorial originality”) and that it satisfies a threshold of creativity or in Canadian legal parlance “skill and judgment” (what I term “creative originality”). Legal assessment of the former is necessarily process-oriented i.e. was there access to and copying of a prior work under copyright, while determinations of the latter are largely product-oriented, i.e. does the resulting product embody the hallmarks or properties of skill and judgement? I argue that doctrinal emphasis on process-oriented authorial originality and product assessments of creative originality is appropriate. Within these frameworks, however, the law has much to gain from psychological insights about creativity.

Psychological literature analyzes creativity from three perspectives: the creative *person* and personality, the *process* of creativity, and creative *products*. Jung's concept of archetypes of the collective unconscious sheds light on a *process* whereby it is possible that similar works are

¹ There has been very little scholarly exploration of the relationship between copyright and psychology. These works include James C. Fromer “A Psychology of Intellectual Property” (2010) 104 Northwestern University Law Review 1441; Gregory N. Mandel “Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law” 44 UC Davis Law Review (2010) 283; Bradford S. Simon “Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law” (2005) 20 Berkley Technology Law Journal 1613. Ralph D. Clifford “Random Numbers, Chaos Theory, and Cogitation: A Search for the Minimal Creativity Standard in Copyright Law” (2004) 82 Denv. U. L. Rev. 259.

created independently by different authors. Furthermore, experiments in cognitive creativity convincingly document a uniform structuring of human imagination in creative *product* outcomes thus providing yet another account for why similar works may be created by different authors in the absence of copying. Moreover, cognitive creativity beckons the question, just how much added creativity to structured imagination should be required for copyright protection? Finally, systems theory offers an explanation for why and how a work may be determined creative based on the skills and aptitudes of the *person* as well as assessments by domain gatekeepers (or experts) of the resulting *product*. While this theory tempts one to consider the creative person (and to some extent process) in relation to her product, I argue that creative originality must remain true to product assessments of originality in copyright law. Skill and judgment, in other words, should be inferred from the product's attributes though a heightened role for domain gatekeepers (i.e. experts) may be necessary to judge borderline cases of creative originality.

This paper will draw on examples in *Preston v. 20th Century Fox* in particular the *Space Pets* script and Ewok character created by the plaintiff in that case. To illustrate a more fulsome account of alternative conceptions of creativity along *person*, *process* and *product* dimensions in part 3, I will discuss this case in detail in Part 1. Part I concludes with a conventional legal analysis of copyright law doctrine and its application to the *Preston* case. In part 2 of the paper, I describe the psychological sub disciplines I intend to apply to copyright law's originality doctrine, a task I undertake in Part 3.

1. Preston v. 20th Century Fox

Dean Preston was the sole plaintiff and principal writer of *Space Pets*, a script which his friend David Hurry helped him to prepare and mail to movie director George Lucas in October of 1978. In that script, an Ewok character is named and described and it was alleged in this copyright infringement action that Lucas stole this character for his 1983 movie *Return of the Jedi*. Lucas however denied ever seeing the script. In subsection (a) that follows, a brief overview of the story, pieced together from various documents in the trial record as well as court

judgment, is provided together with some background of the main participants involved in the litigation.

(a) The Factual Record

Prior to writing *Space Pets*, Dean Preston had no formal training as a script writer though he had some experience in the world of entertainment. Preston's first encounter with the entertainment industry occurs in the early 1960s as a stunt man in the first iteration of the Canadian TV series *The Littlest Hobo* which at that time was filmed in Vancouver. Through his involvement with this series, he made contacts which launched him as a minor artist manager. He also claims to have acted as a casting director, script evaluator and script writer at various times.² There is no indication of the nature or quality of these scripts in the court record. The mainstay of his activities during these years was to book music tours and travel with lesser known musical acts. Touring was to serve as the inspiration for his Ewok character: while travelling on a bus with musicians he imagined instead being with furry little creatures in a journey across the country entertaining children.³

It was around this time that Preston became friends with David Hurry, an aspiring script writer with a day job. While apparently an avid writer of various genres, commercial success eluded him.⁴ Sharing an interest in screenplays, Preston asked Hurry if he would polish up a script he was working on, consisting of 25 pages of handwritten notes. In fact, Hurry was not interested in the science fiction genre nor this work in particular and later confided that he was an unwilling partner in this enterprise. It seems he did little to transform the work. He claims to

² Information for this paragraph obtained from Examination for Discovery of Dean Preston 21 November 1986. Some of the scripts he claimed to have worked on were "Love in Cold Blood", "Sibannac" (cannabis spelled backward) and "Conception" (about lesbians and artificial conception but never completed).

³ Preston Discovery *ibid*. Carl Chandler, a West Virginia lawyer who worked with Preston on the Littlest Hobo series, corroborated at the trial that Preston discussed the idea of a film involving a "little furry creature" in a space vehicle as early as 1974: Trial Transcript January 15, 1990.

⁴ His plays turn out to be largely sexual in nature and include "Sexcula" (a spinoff of Dracula), and "Wonderful Colourful Dirty Mind of Man" (a comedy). None of these efforts seem to garner even a modest amount of success. Testimony of David Hurry, Trial Record 15 January 1990. When asked if he had any publications of his work, he could cite only a poem that he published in *The White Cap Miracle* (about the Vancouver soccer team) and a fictional sex story in an adult magazine. Testimony of David Hurry, Trial Record 16 January 1990.

have unaltered the first two pages of the handwritten notes verbatim which included the description of the Ewok and Olak characters. He tinkered with the dialogue in the rest of the script but maintained that the resulting product was largely Preston's work and, more importantly, the characters were Preston's alone.⁵

Eventually, Hurry finished the script, a document that is a mixture of character description, story line and some dialogue, totalling 21 typewritten pages and laced with misspellings and typos. In a cover letter dated October 20, 1978, Hurry, acting on Preston's instructions, forwarded the script to George Lucas in care of Twentieth Century Fox in Los Angeles by ordinary mail. While Hurry was familiar with the practice of proving one's copyright by concurrently mailing a copy of the script to himself (with a staple through the envelope), he did not bother to do this. In his opinion, the script was "a dumb film," and he just wanted to be rid of the project.⁶

When the Preston/Hurry script was mailed to Lucas in October of 1978, the iconic producer/director and writer was working on the *Empire Strikes Back*, the second of his hit Star Wars trilogy films released between From 1977 – 1983. It would be another two years before Lucas would begin work on *Return of the Jedi* (Jedi), the final episode in the trilogy and the subject of the copyright infringement action. Small, furry woodland creatures, known as Ewoks, were portrayed in the last third of *Jedi*. But rather than steal the idea and name for these ideas from Preston, Lucas claims to have created these characters himself. He states that he wanted to create a primitive species in *Jedi* but did not want to use the tall, furry but too technologically sophisticated Wookie character from *Star Wars*. In conjunction with his artists at Lucasfilm, the new Ewok characters were developed in drawings over a period of time. He claims to have developed the name Ewok from two sources: as an anagram (or more colloquially "pig latin") of Wookie and which rhymed with the name of an Indian tribe, Miwok, that lived near his ranch in Marin county.⁷

⁵ Testimony of David Hurry, Trial Record 15 January 1990

⁶ Testimony of David Hurry, Trial Record 16 January 1990

Plot and dialogue of *Jedi* are quite different as compared with *Space Pets*. In *Space Pets*, a group of North American astronauts accidentally land on a planet inhabited by two warring factions, Ewoks and Olaks. The astronauts help to convince the leaders of these warring parties of the futility of war and assist in negotiating a peace treaty. A few Ewoks and Olaks are then taken to earth where they become stressed due to media attention. The movie ends with the astronauts secretly removing the aliens to a quiet island off of Mexico. In *Jedi*, the Ewoks appear only during the last third of the movie. They form an alliance with the protagonists to fight a technologically superior Empire on the planet Endor and, with tenacity and great ability, are ultimately successful.

The main question in the case was whether George Lucas, in some way, accessed and copied the Ewok character from Preston's unsolicited script or, rather, independently created the character himself. There are a number of striking similarities between the characters and props other than just the same name. In the *Space Pets* script,⁸ there is a description of two races on a distant planet – Olaks and Ewoks—who are constantly at war with one another. Both races live in villages comprised of thatched houses atop a forest canopy with interconnecting bridges (though some transport themselves using swinging vines). Olaks are described as

“Cross between a short haired monkey with smooth, light brown hair, and a Koala bear (facially). Upright and bipedestrian, partially civilized, dressed in a body armour made from softened tree bark and tightly woven, tough thin vines. The helmet is made from hollowed wood. All Olaks stand a mere three feet tall...”

Olak weapons consist of spears, and earth catapults. Ewoks, on the other hand, prefer spinner type weapons, large cross bows, and slings, use net vine traps and are described as

“...shorter than the Olaks, also ape like and bipedestrian, but their hair is darker, longer, and they have a face similar to a panda, with large white patches beneath their eyes...[t]hey dress in a heavier body armour, also of tree bark, with skirt

⁷ Information for this paragraph from Testimony of George Lucas, Trial Record, 18 January 1990, and Examination for Discovery of George Lucas 19 July 1988

⁸ These description obtained from Letter of October 20, 1978 and attached script “Space Pets”: Trial Record

styled lower halves in pieces linked together by tough vines. Their helmets are either wood, or hollowed skulls of larger animals.”

The Ewoks speak in high squeaky voices and their language is translated into English by a “Langread.” The leader of the Ewoks sits in a kind of sedan chair in his large hut.

The *Jedi* Ewok is somewhat different in appearance as compared with the *Space Pets* Ewok: the former are four (not three) feet tall, have large yellow eyes (not panda faces), wear leather (not skull or wood) helmets, and have short (not long) multicolored fur. Still, the similarities are striking: the same name, a small primitive woodland creature that lives in tree villages with connecting bridges / swinging vines, the use of net vine traps and sedan chairs in both (though in different ways), speaking in high squeaky voices, and the use of a language machine translator.

The connection between the unsolicited script and the *Jedi* movie first dawns on Preston after he accidentally encounters dwarf actors who portrayed Ewoks in *Jedi*.⁹ Preston’s immediate reaction is not to sue. Rather, he writes three letters to Lucasfilm, the first of which requests the return of his script “Space Pets”. The reply was that Lucasfilm had no record of receiving any such script. The latter two letters written in June and July of 1983 propose the possibility of Lucas’ support for the EWOK EXPRESS, a bus of furry creatures visiting children’s hospitals, which was part of Preston’s initial conception of the Ewok. In the July 11 letter, he writes:

“Please let me show you how to produce the largest talked about road show in this country and bring home happiness to the hearts of disabled children, and then make a million dollars a year!”¹⁰

⁹ The story goes that Preston was driving down a Los Angeles freeway when he noticed a license plate name “EWOK”. He followed that car to its destination only to find dwarves exiting the vehicle whereupon, after some awkwardness, he made inquiries of the license plate. After learning about their role in what was being filmed, Preston describes a “sinking feeling” that his idea had been taken. Information for this paragraph from Testimony of Dean Preston, 16 January 1990

¹⁰ *Preston v. 20th Century Fox Canada Ltd.* 33 CPR (3d) 242.

At examination for discovery, Preston even suggests that Lucas' cooperation with the Ewok Express would have satisfied him, and no further legal action would have ensued. The reply from Lucasfilm was a cease and desist letter from the legal department advising Preston that his use of the name Ewok and its depiction would infringe their trade-mark and copyright interests. Eventually, in January 1985, Preston initiated this copyright infringement action against Lucas and company.

There is little doubt that Preston and Hurry wrote the script *Space Pets* three years prior to the making of the film *Jedi*. David Hurry, who frankly admitted his lack of interest in the script and the ensuing litigation, testified that he typed the script and mailed it to Lucas in October 1978. His daughter, Annette, attests to coming across her father's script around that time.¹¹ But, it also seems unlikely that George Lucas engaged in a systematic practice of stealing ideas from unsolicited manuscripts.¹² Documentary evidence, as well as the testimony of two administrative assistants to George Lucas however, attest to the fact that there was at least a stated policy of returning to sender unread unsolicited manuscripts. Mail sent to George Lucas at 20th Century Fox would have been forwarded to Lucasfilm. Dorothy Alsup's testified that her job at Lucasfilm was to follow company policy on unsolicited manuscripts (i.e. return to sender) and to keep a copy of transmittal letters to this effect.¹³ Personal mail to George Lucas would have been dealt with by Jane Bay who testified that, if she received what turned out to be an unsolicited manuscript, she would forward it to Alsup.¹⁴

Of course, to deny the likelihood of systemic plagiarism is not same thing as to suggest that Lucas did not have access, at some point, to this particular script. It seems likely that the script was not lost in the mail. One of the plaintiff's witnesses testified that she too send a Star

¹¹ Testimony of Annette J. Schultz (daughter of David Hurry): Trial Record 15 January 1990. Again in 1980, she claims to have reads the script, this time given to her by Dean Preston.

¹² This argument was nonetheless made by Preston's lawyer. At trial, he tried to paint Lucas as a film editor who was not interested or likely capable of developing his own story lines or characters. On appeal, he accused Lucas of systematic plagiarism.

¹³ Testimony of Dorothy Alsup 24 January 1990

¹⁴ Testimony of Jane Bay 19 January 1990

Wars script idea to 20th Century Fox and did not receive any kind of response.¹⁵ Indeed, it was possible that Lucas' mail was forwarded to Lucasfilm and was misplaced. The evidence does disclose a fair bit of disorganization at Lucasfilm. While Dorothy Alsup claims to have returned all unsolicited scripts and kept records of doing so, these records somehow disappeared after she left the company in 1980. Moreover, a misplaced bag of fan mail turned up around this time which no one could account for. Given this state of affairs, it is at least plausible that mail did make its way through to Lucas, or one of his creative team. Moreover, in the case of Preston's script, such a person would only have to read the third sentence of the cover letter to see the reference to Ewoks as small furry creatures – which would at least account for the same name and some of the similar features.

To develop this thought even further, Lucas or one of his team may not have even recalled reading the letter or script. Lucas demonstrated a faulty memory in connection with the creation of the Wookie character in the first *Star Wars* movie, a name he claimed to have created himself:

Q: You did this by yourself...create the name Wookie

A: Yes.

.....

Q: I suggest to you, sir, that Terry McGovern coined and formed the word "Wookie" and gave it to you...Is that correct?

A: Yes, that is¹⁶

Lucas then suggests that he forgot about this incident. While he likely was not lying, it does cast some doubt on the reliability of his recollection of events relating to the creative process, and introduces the possibility of subconscious copying if in fact he did accidentally see the script or

¹⁵ Jennie Rothschild Clement, a telephone operator in Portland Oregon testified that she sent a Star Wars story idea to 20th century Fox c/o Kurtz in July 1978 but did not receive a response or returned mail (Trial Record, 1990 Jan. 24)

¹⁶ Testimony of George Lucas 18 January 1990

cover letter at some point.¹⁷ One question that we will explore in Part 2 is whether there is some psychological explanation validating the possibility of independent creation of Lucas' Ewok character.

(b) Overview of Copyright Doctrine

Copyright offers exclusive rights to an author who creates an original expressive artistic, literary, musical or dramatic work.¹⁸ Copyright does not subsist in respect of the ideas or facts which underlie a work, as opposed to its expression. For example, to describe a character as a “small furry creature” is to convey an idea of rough dimension and form. However, the expressive content would lie in the elaboration of the many details that would make the character unique in relation to the infinite number of other possible manifestations of the very same idea. As relatively straightforward as this concept of “idea/expression” dichotomy may seem from this example, it has proven notoriously difficult to sift out the expression from the idea in a number of cases.

To obtain a copyright, the work must be original, though this term is undefined in the Act. As mentioned in the introduction, originality has been interpreted by courts to pertain to two concepts: (1) that the work originated from the author (authorial originality) and (2) that the work shows a measure of creativity (creative originality). Authorial originality requires that the work not be copied, i.e. it emanates from the author. When a work is not copied but nonetheless appears the same or substantially similar to a work under copyright, a defence of independent creation will shield the second author from a claim of copyright infringement.

¹⁷ Subconscious copying is not a defence to copyright infringement: see *Bright Tunes Music Corp v. Harrisongs Ltd.* 420 F. Supp. 177 (Dist. Ct. N.Y.)

¹⁸ The scope of covered works is broad under *Copyright Act* RSC, 1985 c-42: see s. 2 definitions. Furthermore, for copyright to subsist, the work must be fixated in a tangible form: see *CCH v. Law Society of Upper Canada* 2004 SCC 13.

Prior to 2004, the creative originality threshold (if we may call it that) was “skill, judgment and labor.”¹⁹ The labor component suggested that mere effort, as opposed to creativity, would be enough to satisfy the originality requirement. With the Supreme Court of Canada’s decision in *CCH v. Law Society of Upper Canada*, the standard was raised to “skill and judgment.” In rejecting both an industriousness *and* creativity (as novel or unique) standard as the basis for originality, McLachlin CJC opted for a middle ground between these poles:

“What is required to attract copyright protection in the expression of an idea is an exercise in skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or practiced ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.”²⁰

The conjunctive requirements of skill and judgment arguably set the creativity bar quite high. Read in context, however, it seems McLachlin CJC wished to raise the standard significantly – perhaps on par with “modicum of creativity” standard adopted by the U.S. Supreme Court in *Feist*.²¹

Copyright infringement is found where a defendant’s work is a copy or (more likely) a substantial reproduction of a plaintiff’s work, regardless of whether that copy is made in its original or derivative form.²² This means that a defendant will attract liability if she borrows enough of a previous work whether that borrowing occurs in the original or alternative medium. So, if I borrow some (and not necessarily all) of a description of a character from a book and convey it in a movie (a different medium), I may be liable for copyright infringement. The key is whether the reproduction is “substantially similar”, which courts have determined to be a

¹⁹ See e.g. *Hager v. ECW Press* [1999] F.C. 287 (FCTD)

²⁰ *CCH supra* note 18.

²¹ *Feist Publications Inc. v. Rural Telephone Service Company* (1991) 111 S. Ct. 1282.

²² *Copyright Act*, RSC, 1985 c-42, s. 3.

qualitative determination as opposed to a mere quantitative one.²³ As with the idea/expression dichotomy, filtering out the qualitative “substance” of a work – and whether that has been reproduced in the second work – is an incredibly difficult exercise in many cases.

Defences to copyright infringement usually include the following: (1) the borrowed content is the idea, not the expression, (2) the borrowed content does not constitute a “substantial taking” of the prior work, and (3) the borrowed work comes within a fair dealing provision of the Act.²⁴ As mentioned above, authorial originality or independent creation is also a defence. The idea/expression dichotomy and substantial takings are the focal points of analysis in *Preston v 20th Century Fox* discussed next.

(c) The Court’s Reasoning and Decision

The gist of Preston’s action was one of copyright infringement – specifically, that Lucas appropriated the *Space Pets* script and Ewok character for his movie *Return of the Jedi* such as to constitute copyright infringement. The matter is analysed by the court in two stages: (1) was a substantial part of the script copied in the *Jedi* movie? and (2) did copyright subsist in the Ewok character on its own (thus lending itself to a claim of copyright infringement)?

As to infringement of the script, the court rightly notes that there is at best only indirect evidence as to whether Lucas ever saw the script prior to his work on *Jedi*. As a matter of law, however, the court holds that “access may be inferred in such circumstances where the work complained of is found to contain substantial similarity with a copyright work.”²⁵ Substantial similarity analysis thus precedes (and determines) the issue of access. The court begins by dismissing the similarities between script and movie on two general bases. First, some of the similarities – for example, the concept of a furry primitive species with human characteristics

²³ See *e.g. Hager supra* note 19.

²⁴ See *Copyright Act*, RSC, 1985 c-2, ss. 29, 29.1 and 29.2; see also *CCH supra* note 18.

²⁵ See also *Saul Steinberg v. Columbia Picture Industries Inc.* 663 F.Supp. 706 (Dist. Ct. N.Y.)

living in a forest using primitive weapons – are traceable to the original 1974 Star Wars script. Second, other similarities are too general, e.g. while the concept of primitive furry bipedal creatures is the same, there are important variants in detail including for example their facial appearance.

In respect of the more detailed similarities, such as the high squeaky voices, the use vine net traps, and the living in tree huts with platforms and bridges, the court ruled that these are traceable to a “common store of folklore about primitive species with human characteristics upon which Lucas was as free to draw as were Preston and Hurry.” Here, the court implicitly acknowledges the evidence of the expert evidence of Joan Rayfield, a professor of Anthropology. In her report, Rayfield attributes popular conceptions and misconceptions of folklore as to the source of the similarities between the two Ewoks. Particularly relevant here are: (mis)conceptions of primitive man as small, walking upright, using rudimentary tools and weapons; the fact that archaic Greeks wore animal skulls on their heads; that contemporary Pygmies make bridges of vines; and that Tarzan swung from vines and lived in tree house with vine bridges.²⁶ The court thus finds that there is no substantial similarity between the script and the movie.

With respect to the Ewok character, the court relies on US and English authorities which hold that for copyright protection to subsist, the “character must be sufficiently clearly delineated in the work subject to copyright that it becomes widely known and recognized.” The court then determines that the script does not sufficiently delineate the character to justify copyright protection. In other words, it is an idea of a character that has not be expressed sufficiently in its description to warrant copyright. The court believes this point is illustrated by the fact that it is difficult to distinguish between the Olaks and Ewoks in the script. Moreover, the scripted Ewoks were not widely known by reason of the Preston characterization. Thus, while characters in a story are notionally eligible for copyright protection, Preston’s Ewok did not meet the set criteria.

²⁶ Expert Report of Joan Rayfield: Trial Record. Moreover, according to Rayfield, given that many tribes in the world have short names that end in the letter “k”, it was not “highly improbable that two people should have invented the work Ewok for small humanoids.”

(d) Critique

The court's substantial similarity analysis in this case is problematic. To begin, the court frames its treatment of the purported script infringement under substantial takings doctrine when the actual analysis suggests similarities alleged were not copyrightable in the first instance, i.e. Preston drew his creations from the same popular (mis)conceptions about primitive species as Lucas was to do a few years later.²⁷ Furthermore, while there is little resemblance between the *Space Pet* script with the *Jedi* movie, it is wrong to compare a script to a movie. A film is comprised of "plot, dialogue, action, direction, screenplay, camera work, editing, score and special effects" whereas a script can reveal only a fragment of this.²⁸ Comparing the film, in its totality, with a script distorts substantial similarity analysis as film presents to the viewer elements extraneous to the script.

Preston's much stronger claim was for copyright infringement of his Ewok character. Here, the court may be fairly criticized on a couple of grounds. First, the "widely known" component of the Ewok character analysis is without basis in the statute and without parallel in copyright doctrine. An original, eligible work should find copyright protection under the Act regardless of the work's notoriety. Presumably, the distinction is made to preserve the possibility of copyright protection for characters of *famous* works, e.g. to afford protection to George Lucas' Ewoks. Secondly, the court fails to acknowledge the complexity of "character" copyright analysis – an issue which has sparked considerable judicial and academic debate.²⁹ The possibility of copyright protection for characters introduces a number of vexing issues. First, what aspects of the character's portrayal are relevant to the issue of copyright protection? A

²⁷ These issues are of course related, i.e. one is not taking a substantial amount of a work if that which is taken is not copyrightable in the first instance. However, it muddies these two categories of analysis to conflate them, at least without making this explicit connection.

²⁸ Gordon Graham *Philosophy of the Arts: An Introduction to Aesthetics* 3rd ed. (Routledge: New York, 2005) 123.

²⁹ See e.g. Leslie A. Kurtz, "The Independent Lives of Fictional Characters" (1986) Wis. L. Rev. 429; Steven L. Nemetz "Copyright Protection of Fictional Characters" (1999-2000) 14 Intell. Prop. J. 59; Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters" (1991-1992) 44 Stan. L. Rev. 623; David B. Feldman "Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection" (1990) 78 Cal. L. Rev. 687.

character may be defined in a variety of manners: name, physical attributes, and personality traits being the most obvious.³⁰ On the latter attribute, is it relevant to take into account character development? With respect to physical attributes, should copyright protection apply more easily to visual works as opposed to non-visual works?³¹ Is it even appropriate to disassemble a work into component parts, such as a carving off a character from a script?³² The court sidesteps thoughtful consideration of these tricky issues and finds that copyright may subsist in a character decontextualized from the story.

2. The Psychology of Creativity

The study of creativity has developed into a burgeoning sub-discipline of psychology.³³ In this section, I select three perspectives of this rich sub-discipline: Jungian psychoanalysis, cognitive creativity, and systems theory. As we will see in Part 3 with specific reference to *Preston v. 20th Century Fox*, these approaches to creativity enhance our understandings of both authorial and creative originality.

³⁰ Nemetz at 67.

³¹ See e.g. Marshall McLuhan “Media Hot and Cold” in *Understanding Media: The Extensions of Man* (MIT Press, Cambridge, 1994) at 22-23: “A hot medium is one that extends one single sense in ‘high definition’. High definition is the state of being filled with data. A photograph is, visually, ‘high definition.’ A cartoon is ‘low definition’ simply because very little visual information is provided. Hot media are, therefore, low in participation, and cool media are high in participation or completion by the audience.” Similarly, in copyright, we could say that the choice of media representation of a character – whether written description (cool) or visual image depiction (hot) – will have a critical bearing on determining whether it is sufficiently delineated to garner copyright protection.

³² See for example, s. 2 definition of a “musical work” which means any composition “with or without words”. If a composition is not divisible in discrete and separable aspects – i.e. words and music – then what justifies the severance of character from story?

³³ The study of creativity has developed into a burgeoning sub-discipline of psychology See e.g. Aaron Kozbelt, Ronald A. Beghetto, and Mark A. Runco, “Theories of Creativity” in James C. Kaufman & Robert J. Sternberg (ed.) *The Cambridge Handbook of Creativity* (Cambridge University Press, 2010) 20 at 21 ff. which notes ten categories of theories in connection with the study of creativity. There is much variation in the study of creativity other than theory or approach. For example, there is the problem of defining what creativity is, and whether the concern is big-C creativity (as in highly original) or small-C (or everyday) creativity: *ibid.* at 21-23. Despite such complexities and uncertainties, there is still much to be gained from an examination of this field.

(a) Carl G. Jung: Archetypes of the Collective Unconscious

While Carl Jung was not principally concerned with the study of creativity, his theories of the collective unconscious, archetypes and the phenomena of synchronicity present a treasure trove of implications for copyright law. To understand his approach to creativity, some general background on Jungian theory is needed. Jung coined the term “collective unconscious” to refer to a universal psychic under layer that resides in the human mind.³⁴ The contents of the collective unconscious are comprised of archetypes, which are unknowable forms of psychic energy which take shape upon being perceived in the conscious mind.³⁵ Ancient myth, fairytales and primitive tribal lore are replete with archetypal stories, which represent both a conscious as well as historically and culturally contingent expression of archetypal forms.³⁶ Rather than conceiving of myths as stories which give meaning to the outer, physical world, Jung viewed these as “symbolic expressions of the inner unconscious drama of the psyche which becomes accessible to man’s consciousness by way of projection – that is, mirrored in the events of nature.”³⁷

For Jung, the archetypes of the collective unconscious are the universal source which accounts for the independent creation of similar mythological motifs across cultures and time. According to Jung, “certain motifs from myths and legends repeat themselves the world over in identical form”³⁸ not as pre-formed expressions in the unconscious but rather as “latent

³⁴ Carl G. Jung “Archetypes of the Collective Unconscious” in 9:1 *The Collected Works of C.G. Jung* (Princeton University Press, 1969) at 3 (Jung, Archetypes). Or to put it another way: that “part of the psyche which can be negatively distinguished from a personal unconsciousness by the fact that it does not, like the latter, owe its existence to personal experience and consequently is not a personal acquisition” : Carl G. Jung “The Concept of the Collective Unconscious” in 9:1 *The Collected Works of C.G. Jung* (Princeton University Press, 1969) at 42 (Jung, Collective Unconscious).

³⁵ Jung Archetypes *ibid.* at 4-5

³⁶ *Ibid.* at 5

³⁷ *Ibid.* at 6

³⁸ Carl G. Jung “On the Psychology of the Unconscious” in 7 *The Collected Works of C.G. Jung* (Princeton University Press, 1969) at para. 101.

predispositions toward identical reactions.”³⁹ Thus, archetypes have no intrinsic content but are mere psychic forms which take shape through the conscious experience of the individual.⁴⁰ The archetype expresses itself mostly in metaphors⁴¹ or symbols⁴² and not in any literal sense. But while these archetypes may express themselves in similar ways, they may also manifest their contents as different themes or motifs. The Mother archetype may present, for example, in things representative of our longing for redemption, or which arouse feelings of awe or devotion, or as fertility or fruitfulness, or things or beings which are helpful.⁴³ The purpose of these archetypes – indeed their very meaning – remains a mystery. The conscious mind tries in vain to interpret them but their meaning cannot be described only circumscribed.⁴⁴

Jung distinguishes between two types of creative processes: *psychological* and *visionary*. The psychological is derived from a person’s conscious life whereas the visionary emanates from the unconscious. The psychological creative process is intentional and, through the author’s exercise of skill, the resulting work and the artist become indistinguishable.⁴⁵ Jung’s greater interest is with visionary creativity, in which the artist becomes possessed by her unconscious i.e., creating without thinking.⁴⁶ Here, “the primordial experience is the source of his creativeness but it is so dark and amorphous that it requires the related mythological imagery to

³⁹ Carl G Jung “Commentary on ‘The Secret of the Golden Flower’” in 11 *The Collected Works of C.G. Jung* (Princeton University Press, 1969) at para 11.

⁴⁰ Michael Vannoy Adams “The Archetypal School” in Polly Young-Eisenrath & Terence Dawson (eds.) *The Cambridge Companion to Jung*, 2nd ed. (Cambridge University Press: Cambridge. 2008) at 102.

⁴¹ *Ibid.* at 157

⁴² Robert A Segal “Introduction” in Robert A. Segal (ed.) *Jung on Mythology* (Routledge: London, 1998) at 9-10.

⁴³ Carl G. Jung “Psychological Aspects of the Mother Archetypes” in 9:1 *The Collected Works of C.G. Jung* (Princeton University Press, 1969) at 81.

⁴⁴ Carl G. Jung “The Psychology of the Child Archetype” in 9:1 *The Collected Works of C.G. Jung* (Princeton University Press, 1969) 151 at 156

⁴⁵ Carl G. Jung “On the Relation of Analytical Psychology to Poetry” 15 *The Collected Works of C.G. Jung* (Princeton University Press, 1969) at 72

⁴⁶ *Ibid.* at 73.

give it form...Since the expression can never match the richness of the vision and never exhaust its possibilities, the poet must have at his disposal a huge store of material if he is to communicate even a fraction of what he has glimpsed, and must make use of difficult and contradictory images in order to express the strange paradoxes of his vision.”⁴⁷ Drawing upon mythological figures by the artist is therefore natural to the visionary creative process.⁴⁸

Jung hypothesized that the product of each type of creative process should be different – the psychological process would result in work that is “bounded by the author’s intention” whereas visionary creativity would present “a strangeness in form and content, thoughts that can only be apprehended intuitively, a language pregnant with meanings, and images that are true symbols because they are the best expressions for something unknown-bridges thrown out towards an unseen shore.”⁴⁹ It is not surprising then that the psychological work may be more aesthetically pleasing (thus achieving its intention) whereas archetypal symbols will more likely challenge our thoughts and feelings.⁵⁰ However, he maintains that the product of creation does not self-reveal a visionary creative process. Psychoanalysis must examine “rather closely [the artist’s] personal relations with his work.”⁵¹

The presence of archetypes in our collective unconscious also accounts for the paranormal phenomenon of synchronicity, yet another one of Jung’s interesting theories. Jung viewed some coincidences between our thoughts and the physical environment as meaningful in the sense that such coincidences reflect an underlying unified reality or *unus mundus*. The activation of an archetype in the collective unconscious could trigger this underlying unity but

⁴⁷ Carl G. Jung “Psychology and Literature” 15 *The Collected Works of C.G. Jung* (Princeton University Press, 1969) at 96-98.

⁴⁸ *Ibid.* at 98. More than that, however, the artist becomes a mere medium for the art which expresses archetypes in the language of the times: “Whenever the collective unconscious becomes a living experience and is brought to bear upon the conscious outlook of an age, this event is a creative act which is of importance for a whole epoch.”

⁴⁹ Jung *supra* note 45 at 75-76. Moreover the outcome of such a process is dramatic: “sublime, pregnant with meaning, yet chilling the blood with strangeness, it arises from timeless depths; glamorous, daemonic, and grotesque, it bursts asunder our human standards of value and aesthetic form, a terrifying tangle of eternal chaos...”: *ibid.* at 90

⁵⁰ Jung *supra* note 45 at 77

⁵¹ *Ibid.* at 76.

not in the sense that the external world in some way reacts to the individual psyche. Rather, the archetypal flow within the individual makes her a “participant in, and meaningfully related to, the acausal patternings of events in nature.”⁵²

It is important to emphasize that not *all* coincidences indicate synchronicity and in fact many can be attributed to the laws of probability however slight. So, for example, a number appears on your street car ticket on the way home; on arriving home, you receive a phone call in which the same number is mentioned; and in the evening you purchase a theatre ticket again with the same number.⁵³ While unlikely, Jung maintains these “three events form a chance grouping that, although unlikely to occur often, nevertheless lies well within the framework of probability owing to the frequency of each of its terms.”⁵⁴ At a certain point, however, an accumulation of coincidental events can no longer be accounted for in causal terms. Similarly, the foreshadowing of a detailed event in (say) a dream which is later mirrored in a person’s reality may show “an accumulation of details that coincide” which cannot be convincingly accounted for in cause-and-effect terms.⁵⁵

Synchronistic phenomenon may be grouped into 3 categories according to Jung. The first category is “the coincidence of a psychic state in the observer with a simultaneous, objective, external event that corresponds to the psychic state or content.”⁵⁶ Jung’s famous story of a patient explaining to him a dream about a golden scarab when there appears at that very moment a beetle (that resembled a golden scarab) at the window of his office serves as an example.⁵⁷ Second is “the coincidence of a psychic state with a corresponding (more or less simultaneous) external event taking place outside the observer’s field of perception, i.e. at a distance and only

⁵² Robert Aziz *C.G. Jung’s Psychology of Religion and Synchronicity* (SUNY Press: New York, 1990) at 74. And at 78: this archetypal flow manifests itself as “a numinous or spiritual charge that announces itself to the subject primarily on the feeling level.”

⁵³ C.G. Jung, “On Synchronicity” in Robert Main *Jung on Synchronicity and the Paranormal* (Princeton University Press: Princeton, 1997) at para 969.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at para 974.

⁵⁶ *Ibid.* at 984.

⁵⁷ *Ibid.*

verifiable afterward.”⁵⁸ Finally, and perhaps most importantly for immediate purposes is the coincidence of a psychic event with “a corresponding, not yet existent future event that is distant in time and likewise can only be verified afterward.”⁵⁹ Thus, to encounter a new place that you had dreamed about in exact detail is an example of this third category of synchronicity. Jung further believed that the correspondence between psychic and external events need not necessarily literally correspond but may do so in a figurative and even metaphorical sense.⁶⁰

(b) Creative Cognition

Creative cognition uses cognitive science to explore a particular aspect of creativity: the manner in which stored knowledge of the human mind yields creative ideas.⁶¹ The studies of Thomas Ward are apropos the kind of creativity at issue in *Preston*. The essential thesis of his work is that when people create, they often engage in a process of *structured imagination*, i.e. “ideas heavily structured in predictable ways by properties of existing categories and concepts.”⁶² In other words, the theory holds that when people use their imagination to create,

⁵⁸ *Ibid.* at para 984.

⁵⁹ *Ibid.*

⁶⁰ Aziz *supra* note 52 at 69.

⁶¹ Thomas B. Ward & Yuliya Kolomyts “Cognition and Creativity” in James C. Kaufman & Robert J. Sternberg (ed.) *The Cambridge Handbook of Creativity* (Cambridge University Press, 2010) 93 at 93-94. Further, “the quality of creative outcomes will be influenced by the extent of a person’s knowledge and the manner in which elements of that knowledge are accessed and combined.” It is a tenet of cognitive creativity that creativity is not fundamentally different from normal cognition and in fact can be explicated. Creative cognition recognizes that other factors are relevant to making of creative products, e.g. motivation, timeliness: Thomas B. Ward, Steven M. Smith & Ronald A. Finke “Creative Cognition” in Robert J. Sternberg (ed.) *Handbook of Creativity* (Cambridge University Press, 1999) 189 at 191.

⁶² Thomas B. Ward “What’s New about Old Ideas” in Steven M. Smith, Thomas B. Ward & Ronald A. Finke *The Creative Cognition Approach* (MIT Press, Cambridge: 1995) 157 at 157. At 158, Ward takes pains to point out that many highly creative ideas are in fact “structured in predictable ways by existing knowledge.” Moreover, innovations “are embedded within a highly predictable framework” (a point he makes, by the way, in connection with a study of creatures created by science fiction writers): *ibid.* at 170.

they draw on a common bank of knowledge resulting in some similarities of product outcomes.⁶³ Ward has tested this hypothesis in a number of experiments and has found the following:

- When subjects were asked to imagine, draw and describe an animal living on a planet very different from earth, a vast majority of them created animals that were bilaterally symmetrical and possessed at least one sensory organ (eyes, ears or nose) and at least one major appendage (arms, legs or wings).⁶⁴
- When the creatures of science fiction writers were examined, similar findings were uncovered: the great majority of these creatures possessed “the central properties of symmetry, appendages and sense organs.”⁶⁵
- When subjects were asked to draw an animal living on a planet very different from earth, and in addition were told the animal had fur, feathers or scales, there was an extremely high attribute correlation: i.e. feathered creatures had wings and beaks, scaled creatures had fins and gills and furry creatures had legs and ears.⁶⁶
- Even when subjects were asked to wildly imaginative, they still created creatures with symmetric features, appendages and sense organs. Moreover, many reported relying on specific earth animals as a base for developing their creations.⁶⁷

⁶³ Thomas B. Ward “Structured Imagination: The Role of Category Structure in Exemplar Generation” (1994) 27 *Cognitive Psychology* 1 at 3. This is to be contrasted with the view that creations are highly unique based on the creative, non-cognitive processes of exceptional individuals.

⁶⁴ *Ibid.* at 8

⁶⁵ *Ibid.* at 30

⁶⁶ *Ibid.* at 12-18

⁶⁷ *Ibid.* at 28

These results seem to affirm the hypothesis of structured imagination. Created objects in the above experiments were often structured on the basis of known earth species, and bore many of the same attributes of earth creatures including symmetry, sense organs and appendages together with high attribute correlation.

(c) Systems Theory

Defining creativity as possessing certain universal attributes has proven elusive in psychology, which in part explains the popularity of a theory first propounded by Mihaly Csikszentmihalyi. Csikszentmihalyi argued that creativity is not something that can be described in objective terms, i.e. as having certain descriptive attributes, nor is it generated solely by the efforts of the creating artist. Rather, creativity is as much a social and cultural as it is as psychological phenomenon,⁶⁸ and is the product of three interacting forces: a field or domain that selects the products worth preserving; a stable cultural domain that preserves and transmits these selections; and the individual who brings about creative change in the domain.⁶⁹ To put it another way, creativity is premised on the artist who learns the techniques of a given domain⁷⁰ and then adds creative change to it, as judged by the domain itself at a particular moment in time. Creativity then is considered relative, historically situated and based on social agreement.⁷¹

In her influential book *Creativity in Context* Teresa Amabile develops and modifies the component's of Csikszentmihalyi's theory. In particular, she elaborates upon the necessary skills of the artist and adds the critical component of task motivation. Amabile lists the three main components to creative performance: domain-relevant skills, creativity-relevant skills, and task

⁶⁸ Mihaly Csikszentmihalyi "Implications of a Systems Perspective for the Study of Creativity" in Robert J. Sternberg (ed.) *Creativity: A Handbook* (Cambridge University Press, 1999) 1, at 1 ("Systems Perspective").

⁶⁹ Mihaly Csikszentmihalyi "Society, Culture and Person: A Systems View of Creativity" in Robert J. Sternberg (ed.) *The Nature of Creativity: Contemporary Psychological Perspectives* (Cambridge University Press, 1988) 325 at 325 ("Systems View").

⁷⁰ The creative process, in this model, is founded on a premise of the individual who learns the "customary practices, the language, the specific notation of the 'domain'." *Ibid.* at 330

⁷¹ *Ibid.* at 327. For example, while two paintings may demonstrate the same technical skill and aesthetic quality, they may not be equally creative if the first introduced a variation considered creative at an earlier point in time which the later one merely replicates: *ibid.* at 326.

motivation.⁷² Domain-relevant skills include *factual knowledge* comprised of “facts, principles, opinions about various issues in the domain, knowledge of paradigms, performance ‘scripts’ for solving problems in the domain and aesthetic criteria,”⁷³ *technical skills* or the techniques of the trade,⁷⁴ and *special talents* (or natural aptitude) consisting of “innate cognitive, perceptual, and motor abilities, as well as formal and informal education in the domain.”⁷⁵ Importantly, domain-relevant skills help determine the appropriateness of the response (as fitness for its purpose) whereas creativity-relevant skills determine its novelty (as a variation from what has come before).⁷⁶

Creativity-relevant skills are the “something extra” that makes a creative outcome “surpass previous products or responses in the domain.”⁷⁷ Amabile identifies *cognitive style* (such as understanding complexities, breaking perceptual and cognitive set, using wide categories, breaking out of performance scripts), *knowledge of heuristics* (counterintuitive attempts, making the familiar strange, use of analogies, and investigating paradoxes, are some examples) and *work style* (ability to concentrate for long periods of time, persistence, a willingness to abandon unproductive approaches) as essential to creativity.⁷⁸ Finally, Amabile views intrinsic motivation (engagement in a task for its own sake as opposed to a task externally imposed, i.e. extrinsic motivation) as an extremely important variable for facilitating creativity.

This last factor – intrinsic motivation – has proven in study after to study to be critical for the development of creative products. In fact, the Intrinsic Motivation Principle of Creativity, i.e. that intrinsic motivation is good for creativity and extrinsic motivation is almost always bad,

⁷² Teresea M. Amabile *Creativity in Context* (Westview Press: Boulder Colorado, 1996). One of the many assumptions of her theoretical framework is that creativity is that there is a continuum of creativity from low everyday levels to historically significant levels. Implicit in this is that anyone is capable of some level of creativity in some domain. At p. 82.

⁷³ *Ibid.* at 85

⁷⁴ *Ibid.* at 86

⁷⁵ *Ibid.* at 86. While talent may be innate, it most certainly can be developed through training.

⁷⁶ *Ibid.* at 102. Appropriateness and novelty are important concepts which will be explained in Part 3.

⁷⁷ *Ibid.* at 87-88. This sets a high threshold of creativity, particularly in relation to copyright law.

⁷⁸ *Ibid.* at 88-89

“has been elevated to the status of an undisputed principle.”⁷⁹ The rationale is compelling: those who are intrinsically motivated are “propelled by a sense of curiosity” and a feeling of competence for the task whereas those performing the task for external reward seek to do so quickly and efficiently thus minimizing the range of possibilities that might otherwise be considered.⁸⁰

Finally, and perhaps most importantly for our purposes, systems theory holds that a product is creative when gatekeepers or experts of a relevant domain so agree. As Csikszentmihalyi argued, the experts in the field determine creativity based on “past experience, training, cultural biases, current trends, personal values and idiosyncratic preferences.”⁸¹ Those who perform this gatekeeper role vary by context and may include: teachers, critics, journal editors, museum curators, agency directors, foundation officers, and even the public.⁸² Moreover Amabile argues that what is determined as creative is relative to historical and cultural circumstances. For example, “it is doubtful that a group of Italian Renaissance painters would agree well with a group of contemporary American artists in their creativity judgments of a set of Impressionist art works. Clearly the shared subjective criteria of creativity in any domain of endeavour do change over time and do differ across cultures.”⁸³ Implicit in this approach is that the product is deemed by domain gatekeepers to be appropriate to its purpose, e.g. architectural

⁷⁹ Beth A. Hennessey “The Creativity-Motivation Connection” in *The Cambridge Handbook of Creativity* at 346. See 343 which defines extrinsic motivation as “the motivation to do something for some external goal outside of the task itself” and intrinsic motivation as “the motivation to engage in an activity for its own sake, for the sheer pleasure and enjoyment of the task.”

⁸⁰ *Ibid.* at 343, 346, extrinsically motivated individuals thus aim to “play it safe.” See also Mihaly Csikszentmihalyi “The Domain of Creativity” in Mark A. Runco & Robert S. Albert *Theories of Creativity* (Sage Publications, Newbury Park Ca: 1990) 190 at 196: “Of course, motivation is intimately related to values and personality...A person who is too involved with achieving goals external to the activity itself, and whose main concern is winning, cannot pay undivided attention to what he or she is doing. Creative achievements depend on single-minded immersion in the domain. Painters must want to paint above all else, and scientists who hope to advance science must love their labs more than fame. Concern for extrinsic rewards dilutes this unflinching concentration and tends to interfere with the fragile process of discovery.”

⁸¹ Csikszentmihalyi “Systems View” *supra* note 69 at 314.

⁸² *Ibid.* at 315, and at 324: while some fields may consist of very few scholars others, such as motion pictures, may “include not only the small coterie of product developers and critics, but the public at large.”

⁸³ Amabile *supra* note 72 at 66. Consequently, two works of equal technical skill or aesthetic quality may not be equally creative as determined by domain gatekeepers e.g. Rembrandt’s variations were creative when they were introduced but not when such variations were imitated a few years later

drawings cannot be considered creative, no matter how aesthetically appealing, if constructing the building would be structurally unfeasible.⁸⁴

3. Discussion

In this final part, I wish to explore some connections between conceptions of creativity in the discipline of psychology, on the one hand, and copyright law doctrine (and its specific application in *Preston*), on the other. In this way, our understandings of authorial and creative originality should be enhanced.

(a) Person, Process or Product?

The above sampling from the psychological literature accurately conveys the diverse perspectives on creativity in this discipline. Despite that, there are some points of consensus.⁸⁵ One is that psychological study analyzes creativity from one or more of three perspectives: personality, process and product.⁸⁶ The psychological study of creativity per se began with efforts to identify the qualities and personality traits of creative people. For example, are creative people more intelligent or unconventional than the average person?⁸⁷ Process

⁸⁴ R. Keith Sawyer, *Explaining Creativity: The Science of Human Innovation* (OUP, 2006) at 123. Based on the above, Amabile *ibid.* offers the following product-based definition of creativity at 33: A product or response is creative to the extent that appropriate observers independently agree it is creative. Appropriate observers are

those familiar with the domain in which the product was created or the response articulated. Thus, creativity can be regarded as the quality of products or responses judged to be creative by appropriate observers, and it can also be regarded as the process by which something so judged is produced. The author notes that even with the absence of criteria, i.e. relying on subjective judgement, there is a high degree of agreement among competent judges in a domain as to what is creative: at 60.

⁸⁵ A second point of agreement in the psychological literature is that, while a definition remains elusive, there are two widely recognized attributes of creativity: novelty and appropriateness. These attributes map nicely onto a normative understanding of creative originality which I will advance in subpart 3(c).

⁸⁶ Dean Keith Simonton “Creativity” in Shane J. Lopez & C.R. Snyder (eds.) *The Oxford Handbook of Positive Psychology* 2nd ed (OUP, 2009) 261 at 262 – 263. See also Kozbelt et al *supra* note 33 at 24-25 which also includes two other p’s: place (or the environment in which the person operates), and persuasion (those who change the way we think must be persuasive).

⁸⁷ Sawyer *supra* note 84 at 44 ff.

approaches to creativity deal with the manner in which people produce creative products. For example, is creativity a flash of genius emerging from the unconscious and taking a definite ideational form in the mind, or is the result of hard work and incremental achievement that occurs over an extended period of time?⁸⁸ Finally, there is the judging of the *product* as possessing creative attributes in isolation of the process of its creation and without knowing the creator.

Copyright law seems preoccupied with analyzing creative outcomes or products either in terms of judging the originality which qualifies a work for copyright protection, or when comparing two works in a copyright infringement analysis when access to the prior work is established. As well, the manner in which people create, or creative process, may be directly relevant to whether or not a work was copied or independently created. The psychological approaches to creativity discussed above have much to say in connection with these characterizations of originality doctrine, as we will soon discover.

(b) Authorial Originality and the Doctrine of Independent Creation

Jungian psychoanalysis and cognitive science offer interesting insights into the possibility of independent creation of very similar works by different authors. To illustrate these approaches, we will revisit *Preston* where it will be recalled that the court accepted the chance possibility that two people could create a similar extraterrestrial creature drawing from a common pool of popular folkloric conceptions and misconceptions. Jungian psychoanalysis presents an alternative possibility. If Jung is right that archetypal energies of the human unconscious may take typical forms across (and within) time and culture, then it is at least possible that the Ewok character is an archetypal image of some kind. We could even go further and suggest that the triggering of this archetype led to a synchronistic occurrence of a similar motif across a period of time.⁸⁹ In other words, the Ewok was an archetype manifesting in Preston's consciousness which synchronistically appears at a future time during the making of the film *Jedi*.

⁸⁸ *Ibid* at 58 ff.

⁸⁹ Jung's third category of synchronistic phenomenon: see footnote 59 and accompanying text.

This scenario rests entirely on the possibility of the Ewok as an archetype, a venture which I am unqualified to engage in. However, it is enough for present purposes to verify the possibility with reference to Jungian thought. There are suggestions in Jung's writings, when applied to the known facts of this case, which both support and run counter to the theory of Ewok as archetype. So, for example, Jung maintained that creativity as an intentional activity would more likely result in aesthetically pleasing products whereas the visionary creativity of the unconscious produces archetypal symbols that challenge our thoughts and feelings. Both script and movie Ewoks are cute, furry characters more at home in the former category than the latter. Moreover, while Jung speaks of archetypes as taking "identical form"⁹⁰ across space and time, it is open to question whether we should interpret this literally. Indeed, at other points in his writing, Jung speaks of archetypes as not "pre-formed expressions" but "latent predispositions toward identical reactions"⁹¹ within a historical and cultural context. In other words, we might expect the general attributes of the archetype to appear across time and space but not necessarily in the same expressive form or detail.⁹²

On the other hand, archetypes may come to a person quite unexpectedly even while daydreaming.⁹³ Preston's account of his first conception of the Ewok seems to occur in this way as he was travelling on a tour bus.⁹⁴ Furthermore, it is possible that the Ewok image *might* correspond with elements of the child archetype. According to Jung, the imagery of this archetype may take many forms, including chthonic animals.⁹⁵ Moreover, one of the "essential

⁹⁰ See footnote 38 and accompanying text.

⁹¹ See footnote 39 and accompanying text.

⁹² There is some support for this in the writings of certain Post Jungian thinkers. They elaborate that archetypes *per se* are formless unknowable energies while their projected images are "never uniform, but subjectively colored." Representations of archetypal content thus can be quite diverse and may be formed by historical and social influences. See Terrie Waddell *Mistakes: Archetype, Myth and Identity in Screen Fiction* (Routledge: London, 2006) at 13, 14, and 26.

⁹³ *Ibid.* at 12

⁹⁴ See footnote 3 and accompanying text.

⁹⁵ Carl G. Jung, "The Psychology of the Child Archetype" 151 in 9:1 *The Collected Works of C.G. Jung: The Archetypes of the Collective Unconscious* at 159; these animals include crocodiles, dragons, serpents or monkeys. The child motif is "extremely variable" at 160 (Jung, "Child Archetype").

features” of the child motif is futurity⁹⁶ or “future hopes and dreams, of something that will eventually evolve toward wholeness and unity.”⁹⁷ Often the child archetype is in the role of a paradoxical hero, at once small, impotent, or dependent but also possessing the ability to perform miraculous deeds against its villain.⁹⁸ As Jung says, “[it] is a striking paradox in all child myths that the ‘child’ is on the one hand delivered helpless onto the power of the terrible enemies and in continual danger of extinction, while on the other he possesses powers far exceeding those of the ordinary human.”⁹⁹

Preston’s Ewok translates rather awkwardly as a child archetype. While there are elements suggestive of this, such as the small stature, animal form and the evolution of the character from a negative (warring) to a positive (peaceful) outcome, there is a noticeable lack of paradox in Preston’s Ewok. In other words, the character remains in a wholly dependent and subservient state to the astronauts and never shows a superhuman or heroic ability. This seems to undermine the thesis of Ewok as archetype. By contrast, this paradoxical element is present in *Jedi* specifically the fighting abilities of the Ewoks as they overcome the technologically superior Empire. We see then in Preston’s Ewok only a partial archetype, which may suggest no archetype at all.

Alternatively, Ward’s theory of structured imagination may account for the similar works in this case. Ward’s studies show that when subjects were asked to conceive an extraterrestrial creature, most created beings which had appendages, sense organs and were symmetrical. Moreover, these creatures had an extremely high attribute correlation, i.e. those with fur tended to have legs and ears (rather than say wings and beaks). As well, many of these subjects based their creatures on specific earth animals. We see in these studies a structure of creation – or structured imagination – which might account for a high degree of similarity between two independently created extraterrestrial creatures. Indeed, both creations seem bear like – one explicitly acknowledged as such-with normal bear like appendages, and sense organs all of

⁹⁶ *Ibid* at 164.

⁹⁷ James F. Iaccino *Jungian Reflections Within the Cinema: A Psychological Analysis of Sci-Fi and Fantasy Archetypes* (Praeger Publishers, Westport CT: 1998) xiii

⁹⁸ Jung “Child Archetype” *supra* note 95 at 166-7.

⁹⁹ *Ibid.* at 170

which are symmetrical. Moreover, arms, legs, nose, ears and eyes are the accompanying sense organs. Structured imagination does not answer why two bear-like creatures were chosen in these works but it does suggest that once that choice was made, a number of similarities may be accounted for: the creation of an earth like animal, with normal earth like features and attributes, as an extra-terrestrial.

The most convincing account of independent creation of these two works might blend aspects of Jung's archetypes, Ward's structured imagination, and Rayfield's claims about popular (mis)conceptions concerning primitive species. Here we could posit that the Ewok first appeared in Preston's mind as a child archetype and only later through a process of intentional creativity did he transform it into something less. This would account for some of the archetypal features of the Ewok: its small stature, its animal form, even its high squeaky voice and use of primitive weapons.¹⁰⁰ Then, during the process of intentional creativity, Preston's "structured imagination" modified the archetypal image. This would have reinforced the Ewok as an earth-like animal creature with high attribute correlation. Despite this, there remain remarkable coincidental similarities which do not seem to be attributable to Jungian archetypes or structured imagination: the choice of a bear-like creature, tree huts, swinging vines, a sedan chair, net vine traps, use of a language translator, and the same choice of name. Some of these may indeed have been coincidentally drawn from folkloric conceptions of a primitive species created in popular culture to which Rayfield alludes, e.g. Tarzan. Other props, such as a language machine translator, may arguably be *scenes-a-faire*. Nonetheless, the coincidence of all of these attributes and accompanying props in both of these characterizations leads to a reasonable inference of copying.

The point of this section has not been to make the argument for independent creation in *Preston v. 20th Century Fox*. Rather, by applying psychological insights about the creative process, my aim has been to offer a more plausible account for independent creation in this case and others like it. By drawing on Jungian psychoanalysis and creative cognition, certainly a more convincing account of independent creation has been presented compared with what was offered in the court's reasons.

¹⁰⁰ For a comparison of the two Ewoks, see footnote 8 ff, and accompanying text.

In a more general sense then, both Jungian theory and structured imagination shed light on the creative process and, further, the possibility of independent creation of similar works by different authors. Both process and product determinants bear on the analysis of each approach to creativity. To the extent Jung addressed creativity in psychoanalytic terms it was very much tied to a process of manifesting the unconscious through a medium into an objective form. While Jung allowed some leeway for uncovering archetypal forms in created *products*, it seems that if we are to inquire into the possibility of independent creation in Jungian terms, we must be principally concerned with the *process* of creation and in particular the meaning of the motif in the individual human psyche under consideration. In other words, it is by knowing the process of creation that we can best determine the relevant archetypal attributes of the product. Ward's theory of structured imagination operates on the reverse premise – it is through the attributes of the end *products* that we can make inferences about the *process* of creation. In either case, we should be concerned with both product and process when assimilating these approaches into a legal analysis of independent creation.

(c) Creative Originality & Skill and Judgment

Psychological insights are readily adaptable to copyright's creative originality doctrine though they must be tailored in some instances to the thresholds set by copyright law. While the psychological literature itself acknowledges the definitional problems of "creativity" as well as the distinction between "big-C" and "little-C" creativity, it has settled on identifying two attributes of creativity, about which there seems to be much consensus: creative products are both novel and appropriate.¹⁰¹ Novelty suggests that the work is in some measure different as compared with existing works while appropriateness refers to its ability to achieve its purpose.¹⁰²

¹⁰¹ Robert J. Sternberg & James C. Kaufman, "Constraints on Creativity: Obvious and Not So Obvious" in James C. Kaufman & Robert J. Sternberg (ed.) *The Cambridge Handbook of Creativity* (Cambridge University Press, 2010) 467 at 467. Also, Simonton *supra* note 86 at 262.

¹⁰² Sternberg et al. *ibid* at 468: "What is appropriate is a judgement call, and may vary across time, space, persons, and situational constraints."

The doctrine of independent creation forecloses novelty as a pre-requisite for copyright protection.¹⁰³ Creative originality as a legal standard, however, is concerned with appropriateness in terms of a work meeting a sufficient level of quality to achieve its purpose. This is not a stated requirement in the “modicum of creativity” or “skill and judgment” tests though it must be an implied term. In other words, skill and judgment implies, admittedly at a low threshold, that an author makes the right choices (judgement) and demonstrate sufficient aptitude in creating a work (skill) to meet the purpose for creating the work. Thus, creativity as a psychological phenomenon and the legal test of originality would both demand that a movie, for example be sufficiently coherent to at least minimally engage an audience (its purpose). The trouble of course in copyright law is drawing that low threshold in individual cases and, moreover, how one makes that determination.¹⁰⁴

Before tackling that question, it is important that we first attempt to explicate the Supreme Court of Canada’s “skill and judgment” test for creative originality. To repeat, the test is as follows:

“By skill, I mean the use of one’s knowledge, developed aptitude or practiced ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.”¹⁰⁵

While the court should be commended for trying to clarify the meaning of originality, this standard invites as many perplexing questions as it attempts to answer. To begin, it is unclear whether skill and judgement is to be inferred from the work or *product* separate from, or in addition to, indicia of *process* and *person*. It is possible that the process of creation or even the person creating may assist in determining whether a work or *product* meets the skill and judgment test. The following discusses whether or not process and person indicia should be relevant to assessments of creative originality.

¹⁰³ The vast majority of copyrighted works are of course variations relative to prior works and in this sense are novel.

¹⁰⁴ Among the problems here is determining the purpose of the work. Is that to be determined objectively or with reference to the author’s intention. This is an interesting question for future research.

¹⁰⁵ See footnote 20 and accompanying text.

In terms of the process of creation, products of unconscious creativity may be excluded from copyright protection under the skill and judgement test which could be interpreted to imply a conscious and deliberate process of creation, i.e. as exercising aptitude and making creative choices. Does this mean that creative masterpieces such as the poem *Xanadu* which it is said came to Coleridge in a dream,¹⁰⁶ or works that result from Jungian visionary creativity¹⁰⁷ would not qualify for copyright protection? To ensure that works are not arbitrarily discriminated against on the basis of the process of psychological creation, it must be the case that skill and judgment are qualities which are to be inferred from the attributes of the creative product under examination. Rationales for copyright protection seek to encourage the creation of works and providing just rewards to authors.¹⁰⁸ To require that works must emanate from a conscious process would do nothing to further these objects of copyright protection. Alternatively, we might say that no matter how a work comes to the author, its ultimate fixation as a product is a work of skill and judgment. In other words, the “copying” of a painting that comes to the artist in a dream is still an exercise of skill (aptitude as the ability to translate and create the perceived image) and judgment (choices as determining what elements to include or leave out).

Process may be relevant to creative originality in another way. Recall that there is near universal consensus on the Intrinsic Motivation Principle of Creativity, i.e. that intrinsic motivation is conducive to creativity whereas extrinsic motivation is not. We might speculate that an author’s motive may be an indicia of a work’s originality in borderline cases. Preston’s *Space Pets* script serves as an instructive example. While his efforts in drafting the script or his true motivation were not in issue in this case, there is some indirect evidence of extrinsic motivation: the seemingly hurried script writing, as well as his correspondence to Lucas indicating the profitability of the *Ewok Express*.¹⁰⁹ Should judicial findings of fact as to motivation influence determinations as to originality, especially in borderline cases of originality like the *Space Pets* script? It should not matter, for the purpose of copyright, whether a work is

¹⁰⁶ Nancy C. Andreasen *The Creative Brain: The Science of Genius* (Penguin Group, New York: 2005) at 21ff.

¹⁰⁷ See footnote 46 ff. and accompanying text.

¹⁰⁸ *Theberge v. Galerie d’Art du Petit Champlain Inc.* 2002 SCC 34.

¹⁰⁹ See footnote 2 ff. and accompanying text.

inspired by love of art or for money. More importantly, this is an unreliable indicator of creative quality. Many highly creative products, we may presume, are a flash of genius inspired by a craving for success and/or money. Motivation tells us nothing about the ultimate quality of the product and indeed introducing this as an indicia risks distorting legal analysis away from a focus on the creativity of the product.

Related to motivation is the requirement of authorial judgment.¹¹⁰ Should it matter whether a series of options were considered and rejected prior to adoption of the final work? If we recall that creativity in a psychological sense, and originality in a legal sense, is determined by that which is appropriate to its purpose, then we might simply say that judgement is a product-oriented determination, i.e. the option used in the final product either does or does not work for its purpose. Considering the two Ewoks, for example, we might say that either manifestation may have achieved its purpose of creating an attractive extraterrestrial creature and thus was appropriate to its purpose. Ultimately of course, a work which is very successful in relation to its purpose may occur immediately to an author without her experimenting with different options. Again, introducing process elements into creative originality analysis risks shifting the focus away from the product's attributes.

Moving to person indicia, the skill requirement as “developed aptitude or practiced ability” may invite consideration of the author involved in creating the work. A person-oriented view of skill finds support in the psychological literature, in particular Amabile's description of domain-relevant (including technical skills and education in the domain) and creativity-relevant (including cognitive style, knowledge of heuristics and work style) skill sets.¹¹¹ We might, in other words, judge someone's aptitude in connection with a particular work by referencing the author's other works, their career, or even their practicing habits. These suggest both person and

¹¹⁰ Recall that extrinsically motivated authors may not consider a full range of possibilities in creating the work: see *infra* note 80 and accompanying text.

¹¹¹ See *infra* note 72 ff and accompanying text. See also Berys Gaut “Creativity and Skill” 83 in Michael Krausz, Denis Dutton and Karen Bardsley eds. *The Idea of Creativity* (Brill: Leiden, 2009) 95: “Some of the marks of skills are as follows. First, the capacity in some domain is special (not universally shared): we tend to talk about people as skilled in some activity when they have an ability that is not possessed by everyone who engages in that activity. Second, we talk of skills as a kind of accomplishment (the words ‘skilled’ and ‘accomplished’ are near-synonyms). Third, it makes sense to talk about practicing one's skills: in practicing music making, I thereby practice my music-making skills. Finally, skills are something one can learn, so we oppose skills to purely natural ability.”

process attributes of the author. Again, this risks recognizing copyright not in the work itself but in the person who creates it. For example, are we to protect Lucas' Ewok because he was a famous and successful movie director and not Preston's Ewok because he was neither a trained nor successful playwright or director? This would introduce an unfair bias into the assessment of the originality of works which copyright would do very well to avoid.

Psychological insights into creativity are not lost by reason of copyright remaining focused on the product. Skill and judgment may still be inferred from an examination of the product's attributes. Aptitude and good judgment are obvious in impressive works of art. Given copyright's low threshold, the real challenge comes with borderline works like the Ewok character or the *Space Pets* script. Here, psychological methods are of some assistance. Cognitive creativity tells us, for example, just how many of the choices in the Ewok's expression are manifestations of a structured imagination in human beings. Jungian archetypes help explain some other attributes that might be common to a child archetype in an animal form. Are the value added expressions, e.g. the choice of animal, the length and color of fur, in addition to props like skull caps and animal skins, enough to meet the minimum threshold of creative originality? Regardless of any one person's answer to this question, we are surely better equipped to respond after considering the psychological insights of Jung and Ward.

Perhaps the most important insight we can take from psychology is the key component of systems theory which instructs that a product is creative when experts in a field agree that it is creative. In other words, we are left to the gatekeepers in a domain to make inferences of skill and judgement (and appropriateness) in connection with a product based on their knowledge of, and experience with, the domain. When we consider *Preston* in this light, there is a very real question of whether the *Space Pets* script would ever have met this standard. In this regard, one could note the expert report of Patricia Demers, a University of Alberta literature professor who made the following qualitative comparison between the *Space Pets* script and the Lucas film:

“Tremendous differences separate the crude draft of the script from the imaginative unity of the film. The script shows a great disregard for syntax and spelling, and provides no coherent motivation for action and offers no developed characterization. Characters do not move beyond the prosaic sketches of the opening depiction; furthermore, they speak in clichés and banalities, such as ‘You hit the nail, Sam,’ ‘We’ll take a good looksee up close,’ ‘Do your stuff,’ ‘Three out of four aint bad. There’s hope for us yet,’ and ‘I think what we have here is a

failure to communicate... Unlike the script, the film entertains without lagging or pontificating.”

The script is indeed full of cliché scenes and the dialogue is poorly written, in this writer’s lay opinion. An intriguing question for copyright scholars is how the *CCH* skill and judgment test (which post dated the *Preston* case) would apply to this case in light of the product-oriented, gatekeeper-assessed approach to skill and judgment advocated in this paper.

Conclusion

Preston v. 20th Century Fox presented an unsatisfactory and in some respects unconvincing analysis of copyright law and its application to the facts of that case. Part of the problem was the unavailability of the probative psychological insights that were presented in this paper. While a more compelling case for independent creation of similar works was offered in this paper, the main point was to show that psychology can aid us in answering legal questions of independent creation and creative originality. When two similar characters are the subject of a future copyright infringement case, the participating parties would do well to investigate whether these characters might be classed as archetypes or whether cognitive studies might account for many of the similarities.

Application of a creative originality standard will remain tricky in individual cases. We know the threshold is intended to be low and, despite articulation of the meaning of skill and judgment in *CCH*, many unanswered questions remain. This paper has attempted to answer some of those questions by advocating what in all likelihood was intended by the Supreme Court of Canada to be a product-oriented determination of creativity. There is little to be gained by introducing *process* and particularly *person* elements into the analysis of whether there is skill and judgment in an impugned work. Copyright is not, and should not be concerned with, who makes a work or how it was made for the purpose of assessing creative originality. Uncreative people engaged in an uncreative process are indeed capable of producing creative products. The question has to be whether a product demonstrates the qualities of skill and judgement in terms of achieving the purpose of the work (i.e. it is appropriate). This elicits two questions about

satisfying creative originality in light of the psychological literature canvassed in this paper (1) Where there is evidence of creative cognition data or a presented archetype (or both), how much value added creativity is needed to satisfy the creative originality standard? (2) In cases where skill, judgment and appropriateness for its purpose are not apparent, should courts defer to expert opinions of domain gatekeepers?