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**COPYRIGHT AND THE LIMITS OF TEXTUALISM**

by THOMAS HEMNES\*

I begin with a confession. When Amy Coney Barrett was nominated to the Supreme Court I thought of her as Church Lady from *Saturday Night Live*, expecting to find in her writings a strident ideologue completely unsuited to assume Ruth Bader Ginsburg's seat on the Supreme Court. Instead, I found a person of intelligence and wit, willing to reconsider the validity of the textualist creed that brought her to eminence in such circles as the Federalist Society. Better yet, she could write! Antonin Scalia, another master of English prose with whom I profoundly disagree, was clearly onto something when he chose her as a clerk and acolyte. And, as a Recovering Catholic myself, notwithstanding that she is a practicing one, I couldn't help but sense a kinship with her theological worldview and its dedication to first principles, tempered by a Jesuitical facility in amending first principles when they collide with reality.

In article after article, published prior to her accession to the Supreme Court, and undoubtedly contributing to her appointment, Justice Barrett declared allegiance to the precepts of Textualism and Originalism<sup>1</sup> (what I will call High Textualism): “the meaning of law is fixed when it is written”;<sup>2</sup> “textualists limit the meaning of text to the semantic communicative content (in context) of the words themselves — not some underlying purpose behind the words — because it is the words themselves that are written down and enacted”<sup>3</sup>; “[o]riginalism rests on two basic claims . . . [f]irst, the meaning of constitutional text is fixed at the time of its ratification . . . [s]econd, the original meaning of the text controls because “it and it alone is law.”<sup>4</sup> Textualism is in opposition to “Purposivism,”

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<sup>1</sup> See, e.g., Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855 (2020); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Amy Coney Barrett, *Stare Decisis and Non-Judicial Actors*, Notre Dame Legal Studies Research Paper No. 8-27 (2008); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, Notre Dame Legal Studies Research Paper No. 05-05 (2005); Amy Coney Barrett & John C. Nagle, *Congressional Originalism*, 19 J. CONST. L. 1 (2016).

<sup>2</sup> Barrett, *Assorted Canards*, *supra* note 1, at 863.

<sup>3</sup> *Id.*

<sup>4</sup> Barrett, *Originalism and Stare Decisis*, *supra* note 1, at 1924.

where a judge interprets the words of a statute or the Constitution in light of its purpose or goal.<sup>5</sup>

I propose to examine these precepts, with reference to *Bostock v. Clayton County*,<sup>6</sup> a notable Supreme Court case highlighting the High Textualist method in both majority and dissenting opinions, and then in the context of two more Supreme Court cases, *Star Athletica v. Varsity Brands*<sup>7</sup> and *Google, LLC v. Oracle America, Inc.*,<sup>8</sup> in which High Textualism founders in the deeper waters of copyright.

### I. THE UNCERTAINTY PRINCIPLE AND LINGUISTIC EVOLUTION IN THE LAW

As we all know, Werner Heisenberg established in 1927 that the more precisely one determines one property of a particle, such as its position, the less precisely one can predict other linked properties such as momentum.<sup>9</sup> This, Heisenberg's "Uncertainty Principle," is closely related to another principle, the "observer effect," which holds in the context of quantum mechanics that the means of measuring a system changes the system.<sup>10</sup> A different measurement necessarily causes different outcomes in the same system.

There is an analogous phenomenon at play in textualists' efforts to "fix" the meaning of words at the moment in time when they become part of a statute or of the Constitution. *Bostock v. Clayton County*<sup>11</sup> displays the Legal Uncertainty Principle in action. There, the Supreme Court's textualists set out to "fix" what the words "because of sex" meant in 1964 so that the Court could decide in 2020 whether discrimination against homosexuals and transsexuals was prohibited by Title VII of the Civil Rights Act of 1964.<sup>12</sup> As we will see, the "fixed" meaning of the words squirmed out of the Justices' grasp, much as Heisenberg's elementary particles refuse to be fixed as to both position and momentum.

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<sup>5</sup> Barrett, *Assorted Canards*, *supra* note 1, at 856. High Textualists like Justice Barrett necessarily assume that words have a "meaning" that can be determined independently of their "purpose." Without this assumption the distinction between textualism and purposivism would vanish. As will be seen, in many cases, and certainly in interpreting the Copyright Act, the words in the statute cannot be understood and applied without first considering their purpose.

<sup>6</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

<sup>7</sup> *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

<sup>8</sup> *Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

<sup>9</sup> See *Uncertainty Principle*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Uncertainty\\_principle](https://en.wikipedia.org/wiki/Uncertainty_principle) (last edited Jan. 22, 2022).

<sup>10</sup> *Id.*; see also *Observer Effect*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Observer\\_effect\\_\(physics\)](https://en.wikipedia.org/wiki/Observer_effect_(physics)) (last edited Apr. 26, 2021).

<sup>11</sup> *Bostock*, 140 S. Ct. 1731.

<sup>12</sup> *Id.* at 1737-39.

Justice Gorsuch begins the majority opinion with recitation of the High Textualist credo:

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.<sup>13</sup>

Having established his High Textualist credentials, he proceeds immediately to restate the statutory terms:

[T]he statute prohibits employers from taking certain actions “because of” sex. And, as this Court has previously explained, “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’” . . . In the language of law, this means that Title VII’s “because of” test incorporates the “‘simple’” and “‘traditional’” standard of but-for causation. [citations omitted]<sup>14</sup>

So, as restated by Justice Gorsuch, Title VII says “it is unlawful . . . for an employer to fail or refuse to hire or to discharge any individual . . . by reason of/on account of/but for . . . such individual’s sex.” Taking his improvement on the original statutory language one step further, Justice Gorsuch later concludes, “From the ordinary public meaning of the statute’s language at the time of the law’s adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex.”<sup>15</sup>

Thus, in Justice Gorsuch’s hands the original statutory words “because of such individual’s sex” morphed into “based in part on [such individual’s] sex.” Even this revision seemed inadequate to the purpose, and Justice Gorsuch then declares, “If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee — put differently, if changing the employee’s sex would have yielded a different choice by the employer — a statutory violation has occurred.”<sup>16</sup> And then his conclusion: “[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”<sup>17</sup>

In Justice Gorsuch’s view, this rather comprehensive refurbishment of the statutory words does not constitute impermissible “remodeling” or

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<sup>13</sup> *Id.* at 1738.

<sup>14</sup> *Id.* at 1739.

<sup>15</sup> *Id.* at 1741.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

“updating.” But he has prodded (not remodeled or updated!) the statutory text into life with words he could apply to the question of discrimination against homosexuals or transsexuals.

Aghast and in dissent, Justice Alito flings at Gorsuch the highest insult a High Textualist can fling: he accuses Justice Gorsuch of legislating from the bench!<sup>18</sup> Citing Chief Justice Webster, a favored arbiter of Constitutional and statutory interpretation in the halls of the High Textualists,<sup>19</sup> with supporting opinions of Associate Justices American Heritage Dictionary and Oxford English Dictionary, Justice Alito declares that “sex” meant in 1964 “[o]ne of the two divisions of organisms formed on the distinction of male and female.”<sup>20</sup> Substituting these words for those of the statute yields “it is unlawful . . . for an employer to fail or refuse to hire or to discharge any individual . . . because of . . . such individual’s [belonging to] [o]ne of the two divisions of organisms formed on the distinction of male and female.” Syntactically this is awkward, so Justice Alito simplifies: “If “sex” in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female.”<sup>21</sup> Like Justice Gorsuch, he does not consider his restatement to be an impermissible

<sup>18</sup> See *id.* at 1754. Justice Alito begins the dissent: “There is only one word for what the Court has done today: legislation.” Ratcheting his indictment, Justice Alito declares, “A more brazen abuse of our authority to interpret statutes is hard to recall.”

<sup>19</sup> Justice Barrett wisely demurs from excessive reliance on dictionaries. Barrett, *Assorted Canards*, *supra* note 1, at 858-59. From the linguist John McWhorter:

Dictionaries are large; the densely printed pages packed with information are fine music to any book person; dictionaries also tend to smell good. One loves them. Yet the weird truth is that for all their artifactual [sic] splendor, dictionaries are starkly misleading portraits of something as endlessly transforming as language. In terms of how words actually exist in time and space, to think of a word’s “genuine” meaning as the one you find upon looking it up is like designating a middle-aged person’s high school graduation snapshot as “what they really look like.” There’s a charming whimsy to it, but still. A person receiving such a compliment often says, “Oh, please” – and words, if they could talk, surely would as well.

JOHN MCWHORTER, *WORDS ON THE MOVE: WHY ENGLISH WON’T – AND CAN’T – SIT STILL* 5-6 (2016).

<sup>20</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1756 (2020).

<sup>21</sup> *Id.* at 1757. It is worth observing that even in 1964 the binary division in Webster’s dictionary was hardly universal. At a human genetic level, the existence of Klinefelter Syndrome, i.e., persons having YXX chromosomes, had been known since at least as early as 1942. See *Klinefelter Syndrome*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Klinefelter\\_syndrome](https://en.wikipedia.org/wiki/Klinefelter_syndrome) (lastg edited Jan. 5, 2020). The first sexual reassignment operation had been performed in 1917. See *Sex Reassignment Surgery*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Sex\\_reassignment\\_surgery](https://en.wikipedia.org/wiki/Sex_reassignment_surgery) (last edited Jan. 3, 2022). And then there are some 65,000 hermaphrodites in the animal

amendment of the statutory language, although this is of course exactly what it is.

What we have here are two committed textualist justices using two different techniques – one precedent-based, the other dictionary-based — to attempt to “fix” the “meaning” of “because of . . . sex” in 1964. In doing so, each of them unavoidably substituted a new set of words to represent or “fix” the “meaning” of the original statutory expression.<sup>22</sup> Can we say which of Gorsuch or Alito was right? No! To do so we would need to have a way of stating the “meaning” of words that did not require us to use a new, observer-dependent set of words.<sup>23</sup> The only observer-independent reference point is the words of Title VII itself, which neither Gorsuch nor Alito found adequate to reach a decision.

To me, a nonbeliever, the lesson is obvious: even for the High Textualist, the words of Title VII, standing alone, are insufficient to inform judgment. Each Justice needed to supplement the statute with his own set of words, pretending, all the time, that they were not considering the statute’s purpose and intent, but only its “meaning.” Gorsuch relies on precedent; Alito on dictionaries, but neither is content to stick with the words of the statute itself. Why is this? It has to do with the nature of language and its relation to law.

What the High Textualist wants to do is to freeze the linguistic process at the moment of enactment, creating a kind of linguistic bug encased in the amber of a statute that cannot further evolve — a fossilized remnant, frozen in time, rather than a living thing capable of further elaboration.<sup>24</sup> The textualist is permitted only to describe it and to speculate how it worked at the moment of death.

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kingdom. See *Hermaphrodite*, WIKIPEDIA, [https:// en.wikipedia.org/wiki/Hermaphrodite](https://en.wikipedia.org/wiki/Hermaphrodite) (last edited Dec. 17, 2021).

<sup>22</sup> Justice Scalia used a similar linguistic sleight of hand in *District of Columbia v. Heller*, 554 U.S. 570 (2008) when he transmogrified the Constitution’s “right to bear arms” in service of a “well-regulated militia” into a right for an individual to own a handgun in the District of Columbia, only to be contested on comparably definitional grounds by Justice Stevens. I reviewed this contretemps in Thomas Hemnes, *How Law Works: Collected Articles and New Essays* 30-33 (Vernon Press 2020).

<sup>23</sup> There are of course other means of expressing ideas — graphics, other images of all kinds, mathematical symbols, but we have no current way of converting the language of our statutes into these other means; furthermore, surely such conversion, even if made, would lead to greater opportunities for disagreement in the methods of conversion.

<sup>24</sup> See, e.g., Barrett, *Assorted Canards*, *supra* note 1, at 863 (“So what does it mean to be bound by written law? Well, at the very least it means that the meaning of the law is fixed when it is written.”); see also Barrett, *Originalism and Stare Decisis*, *supra* note 1, at 1923 (“Originalists maintain that the decisions of prior generations, cast in ratified text, are controlling until lawfully changed.”).

It is submitted, though, that it is no more possible to freeze language than it is to stop evolution. Words are tools of communication.<sup>25</sup> They and the language in which they are used are as much alive as the societies in which they are used and spoken. And as a necessary corollary a law written in words is a living thing that inevitably evolves with the society and language in which it is written. The social expectations associated with the words “because of sex” in 1964 cannot be transposed into the social expectations associated with the same words in 2020 any more than the dodo bird can be resurrected. Many persons reading the words “because of sex” in 2020 will have a different understanding than the same persons or others may have had in 1964 because the nature/meaning/understanding (whatever we want to call it) of “sex” has evolved. Asking a person in 2020 to revert to the 1964 understanding is like asking a dolphin to behave like the extinct species of four-toed ungulate from which it evolved. There is no going back with either biological or linguistic evolution.

But the High Textualist judge is not permitted to recognize or nurture its further evolution. To the High Textualist, a statute or constitutional provision is, in short, language frozen in time. And, like a fossil, the language that was once a living thing is now dead and no more functional than that bug encased in amber.

A High Textualist might well complain that I seem to be saying something demonstrably untrue, namely, that it is not possible to understand what a word meant in the past. This is not my point. It is certainly possible to puzzle out what a word meant in the past, but it is quite another thing to communicate using the archaic meaning, much less render a coherent judicial decision in that idiom that will be understood and accepted in the society. Consider the following example the linguist John McWhorter gives us from Shakespeare, *Henry V, Act V*.<sup>26</sup> The Duke of Burgundy is suing Henry V for peace. He notes the finer things in life that have

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<sup>25</sup> Justice Barrett acknowledges as much: “Language is a social construct made possible by shared linguistic conventions among those who speak the language. It cannot be understood out of context, and literalism strips language of its context.” Barrett, Assorted Canards, *supra* note 1, at 857. How words behave as tools of communication in a social context was of course explored in profound depth by Wittgenstein. See, e.g., LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 1 1-14 (Gertrude E. M. Anscombe, Peter Hacker & Joachim Schulte trans., 4th ed. 2009) (1953).

<sup>26</sup> JOHN MCWHORTER, WORDS ON THE MOVE: WHY ENGLISH WON’T – AND CAN’T – SIT STILL 56-57 (2016). It is worth noting that the drift in meaning of “reduce” to the point where it did not any longer mean “go back” took only about a century. It is not unreasonable to suppose that the meaning of “sex” during a period as transformative as the last half-century of extraordinary social transformation (1964 to 2020) could have evolved at least as quickly.

fallen into decay by reason of war and then says, “Which to reduce into our former favor/You are assembled.” From McWhorter: “In its modern meaning, *reduce* is simply incoherent in that passage. It implies that change would be a minimization, something unwelcome.” The explanation, it turns out, is that in 1600 “reduce,” meant something closer to “go back.” It morphed into its current meaning a century or so later:<sup>27</sup>

So we can unearth, as McWhorter does, what “reduce” meant to Shakespeare when he wrote *Henry V*. Speaking for myself, though, I am incapable of hearing “reduce” in its Shakespearian sense, much less expressing myself in that sense.<sup>28</sup> This in spite of my intellectual understanding of McWhorter’s explanation that for Shakespeare “reduce” meant something like “go back.” If I think that someone’s reputation has been rehabilitated, I would never say that they were “reduced” in stature. And if I did, I doubt that anybody, even a Shakespearian scholar, would think that I was giving the person a compliment.

This principle is very much at work when a High Textualist purports to apply a word’s “original communicative intent.” We may be able to understand the “original communicative intent” as an antiquarian curiosity, but if that “original communicative intent” is different from what the words mean today, the effort to render a decision that will be understood and acted upon in its obsolete meaning will fail as surely as my effort to compliment someone by saying they were “reduced in stature.”

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<sup>27</sup> *Id.* at 58.

Only in the eighteenth century did *reduce* come to always mean what it does to us. It happened gradually, as a result of the fact that words’ meanings always have certain redolences beyond what we consciously consider. If you take something back to the way it was, that process will typically involve either improvement or ruin of some degree. For transformation to result in something neither better nor worse is, perhaps, what we least expect. *Reduce*, then, would as often as not have meant not only return but betterment, as in the Shakespeare quote. But just as often, it would have meant not only return but lessening, and in Middle and Early Modern English, quotes illustrating that are just as common as ones illustrating improvement. They are more common, actually — such that as things panned out, *reduce* was used so often with an added implication of diminishment that after a while, diminishment was actually what the word was always used to mean.

<sup>28</sup> McWhorter drives this point home at length in *Words on the Move*, *supra* note 26. I commend to the reader his argument for bringing Shakespeare up to date, at pages 85 to 94. We might well ask whether this isn’t what Justices Gorsuch and Alito were trying to do in their restatements of the Civil Rights Act of 1964. The fact that they could not agree on how to do this suggests, however, that something more than puzzling out what words meant in 1964 may have been involved.

Thus, even if we could puzzle out, as Justices Gorsuch and Alito attempted to do, what “because of sex” meant in 1964,<sup>29</sup> it is impossible to announce a decision regarding discrimination “because of sex” that will be understood in the 1964 meaning. Regardless whether “sex” meant “male or female” in 1964, in today’s LGBTQAI age this binary division will fall on deaf ears. To return to my earlier analogy, we know something about dodo birds – where they lived, what they looked like, how they behaved; we even have images of them – but we can’t bring them back to life. Words live and die in the same way. A decision rendered in 2020 relating to discrimination “because of sex” will be understood and acted on as the word “sex” is understood in 2020, not 1964. The 1964 meaning, whatever it may have been, is no longer a living part of our culture and language.

## II. COPYRIGHT

That judges breathe life into the words of a statute<sup>30</sup> is nowhere more evident than in the law of copyright.<sup>31</sup> The recent case of *Google, LLC v. Oracle America, Inc.*<sup>32</sup> is but one of a long line of cases in which the courts, like Geppetto, have animated such wooden verbal artifacts as “writings,” “ideas,” “methods of operation” and “fair use.”<sup>33</sup>

Ironically, the Copyright Act of 1976 (the “Act”)<sup>34</sup> seems to realize the High Textualist’s dream: it replaces the common law of copyright altogether<sup>35</sup> and then regulates the field of copyright directly and in the mi-

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<sup>29</sup> I would suggest that the meaning of “sex” has been in the process of rapid evolution since 1964, keeping pace with the evolving mores of our culture with respect to homosexuality, bisexuality, and transsexuality.

<sup>30</sup> In Blackstone’s happy phrase, judges are the “living oracles” of the “customs and maxims” that comprise the common law. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 52 (Oxford ed. 2016) (1765). I would add that those “customs and maxims” are no more fixed than the society in which they live. Law, and the language in which it is embodied, necessarily evolves with the underlying culture, and its “oracles,” the judiciary, must move with the culture’s tide.

<sup>31</sup> My critique of the Supreme Court’s copyright jurisprudence has much in common with Professor Joseph Liu’s recent excellent analysis. See Joseph Liu, *Who’s Afraid of the Common Law: Georgia v. Pacific.Resource.org and the Supreme Court’s Recent ‘Straightforward’ Copyright Jurisprudence*, 67 J. COPYRIGHT SOC’Y 397 (2021). Professor Liu argues with compelling force that the Court’s insistence on “straightforward” interpretation of the Copyright Act has deprived its copyright jurisprudence of the policy-driven nuance of earlier cases.

<sup>32</sup> 141 S. Ct. 1183 (2021).

<sup>33</sup> And, as Gorsuch and Alito discovered in *Bostock*, the words, like Pinocchio, do not always behave themselves when brought to life.

<sup>34</sup> Copyright Act of 1976 (codified at 17 U.S.C. §§ 101-1401).

<sup>35</sup> *Id.* § 301(a) ((a) (“On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified

nutest detail, leaving no special interest or lobbyist unheeded.<sup>36</sup> In its minutia it harbors special little legislative knives designed to carve up the financial pie among myriad interest groups – broadcasters,<sup>37</sup> cable operators,<sup>38</sup> architects,<sup>39</sup> persons with disabilities,<sup>40</sup> juke box operators,<sup>41</sup> computer users,<sup>42</sup> recording studios,<sup>43</sup> satellite networks,<sup>44</sup> – in short, anyone who might be involved in creating, exploiting, transmitting, reproducing or using copyrightable subject matter has inserted some little provision in the Act to protect their interest.

One would think that in such a thicket of direct legislative statements there would be no room whatsoever for judicial maneuver, and that a court's job would be as simple as looking up the relevant provision in the Act and applying it without regard to any overarching policy (other than the policy of implementing whatever it was that a particular interest group's lobbyists prevailed on Congress to do). This is in fact the case for many of the specific provisions in the Act, particularly those regulating broadcasting, cable transmission and music publishing.<sup>45</sup> Strangely, though, this is not the case with respect to the most fundamental questions of copyright law: what does it protect, and how far does its protection extend?

#### A. *Copyrightable Subject Matter*

Sitting at the very beginning of the Copyright Act, § 102(b) provides:

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.

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by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”).

<sup>36</sup> For example, Disney Company and similar actors play an outsized role in lobbying for and structuring the Copyright Act. The Copyright Act, with its appendices more than 400 pages in length, must be one of the most heavily lobbied pieces of legislation in existence, leaving no special interest untouched.

<sup>37</sup> 17 U.S.C. § 111.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 101 (definition of pictorial, graphic and sculptural works); *Id.* § 112, 120.

<sup>40</sup> *Id.* § 121.

<sup>41</sup> *Id.* § 116.

<sup>42</sup> *Id.* § 117.

<sup>43</sup> *Id.* § § 114, 115.

<sup>44</sup> *Id.* § § 119, 122.

<sup>45</sup> See notes 37, 38, 43 *supra*.

As every copyright lawyer knows, and indeed as the legislative history of the Copyright Act confirms,<sup>46</sup> Section 102(b) is the legislative enactment of what folks in the profession colloquially refer to as the “idea-expression dichotomy.”<sup>47</sup> As we also know, courts have labored for years to draw the line between copyrightable and uncopyrightable subject matter, in many cases devising “tests” to this purpose. The issue hasn’t gotten any easier, and rears its head again in numerous cases, including the recent Supreme Court decision in *Oracle v. Google*.

The “dichotomy” has its roots far back in caselaw. One of its first manifestations was the delphic *Baker v. Selden*,<sup>48</sup> which had held that the owner of copyright in a book that contained bookkeeping ledger forms could not prevent a third party from reproducing and using the forms.<sup>49</sup> The Court considered the forms to be a “useful art” protectable if at all only by patent. More recently, one finds the Second Circuit’s “abstraction-filtration-comparison” (no, this is not high school chemistry) test.<sup>50</sup> And of course Learned Hand’s seminal discussions, as in *Nichols v. Universal Pictures*,<sup>51</sup> in which he acknowledged the impossibility of drawing the line once and for all between copyrightable and uncopyrightable material and instead forthrightly considers the policy behind the Act.<sup>52</sup> But these “tests” and discussions are nothing more than judges making stuff up, with only the barest reference to the words of the Copyright statute, be it the statute of 1790 (*Baker v. Selden*), 1909 (*Nichols*) or 1976 (*Altai*). Not one of the judicial pronouncements is incorporated into the Act. Section 102(a) omits the word “expression” entirely; 102(b) says nothing about forms, the “useful arts,” or patentable subject matter, much less a “dichotomy,” and certainly says nothing about filtration. So, applying the High Textualist dogma, all these judge-made approaches are nothing more than the forbidden fruit of temptation to substitute judge-made policy for the written words proclaimed by those democratic heralds in Congress.

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<sup>46</sup> H.R. REP. NO. 94-1476, at 4 (1976) (“Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.”).

<sup>47</sup> This turn of phrase originated in the Supreme Court’s 1954 decision in *Mazer v. Stein*, 347 U.S. 201 (1954).

<sup>48</sup> 101 U.S. 99 (1879).

<sup>49</sup> *Id.* at 107.

<sup>50</sup> *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

<sup>51</sup> 45 F.2d 119 (2d Cir. 1930).

<sup>52</sup> *Id.* at 121 (stating that “[n]obody has ever been able to fix” the boundary between idea and expression and “nobody ever can”).

A second vexing problem at the boundaries of copyright protection is the scope of copyright protection for “pictorial, graphic and sculptural works.” These are defined in § 101.<sup>53</sup> It goes like this:

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

This verbal labyrinth is supplemented by the Act’s contortionist definition of a “useful article”:

A ‘useful article’ is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article.”<sup>54</sup>

Section 113 of the Act bangs away at the problem of disentangling “copyrightable works of applied art [from] uncopyrighted works of industrial design.”<sup>55</sup> Section 113 first declares that “the exclusive right to reproduce a copyrighted pictorial, graphic or sculptural work in copies includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.”<sup>56</sup> But § 113 then backpedals with the announcement:

This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.”<sup>57</sup>

Ironically, the Act that begins by throwing overboard the common law of copyright must turn to it as a last resort in this ontological muddle in which applied art, industrial design, utilitarian “aspects,” useful and useless “articles” vie for independent “existence.”

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<sup>53</sup> “Pictorial, graphic and sculptural works” are of course one of the categories of copyrightable subject matter enumerated in Section 101 of the Act. 17 U.S.C. § 101.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 113; *see also* H.R. REP. NO. 94-1476, at 55.

<sup>56</sup> 17 U.S.C. § 113(a).

<sup>57</sup> *Id.* § 113(b).

### 1. *Star Athletica v. Varsity Brands*

The “design of a useful article” issue had its birth in Copyright Office pronouncements leading to the 1954 Supreme Court decision in *Mazer v. Stein*,<sup>58</sup> where the Court held that lamp bases in the form of statuettes of male and female figures were copyrightable despite their utilitarian function. In that case, the copyright claimants, a husband and wife named Stein doing business as Reglor, had created molds for statuettes of male and female figures and submitted the resulting statuettes to the Copyright Office for registration.<sup>59</sup> Meanwhile the Steins had begun the manufacture and sale of devices in which the statuettes were wired and otherwise equipped as lamps. The defendants, partners doing business under the name June Lamp Manufacturing Company, made and sold lamps that “meticulously and in minute detail copied every element of the copyrighted statuettes of the plaintiffs.”<sup>60</sup> The Supreme Court found copyright infringement on the ground that the defendant petitioners had copied the statuettes’ “form,”<sup>61</sup> which was a valid subject of copyright, notwithstanding the plaintiffs’ use of that form as a lamp base, and also notwithstanding the potential eligibility of the form for design patent protection.

*Mazer v. Stein* was old-school: it dove into the policy question whether copyright and design patent protection are mutually exclusive, unabashedly discussed the purpose of copyright; and considered the practices of the Copyright Office in allowing copyright registration for works of fine art, notwithstanding the omission of that phrase from the Act.

The Court addressed the issue again in the recent case of *Star Athletica v. Varsity Brands*,<sup>62</sup> but this time with the majority writing in the High Textualist mode. The plaintiff in *Star Athletica*, Varsity Brands, sued Star Athletica for infringement of Varsity Brands’ asserted copyright in the designs of its cheerleaders’ uniforms. The Copyright Office had permitted the designs to be registered in the Copyright Office as “two-dimensional artwork” or “fabric design,”<sup>63</sup> using images of the uniforms as the required deposits.<sup>64</sup> The defendant, Star Athletica, successfully moved for summary judgment on the ground that the designs were utilitarian and therefore not copyrightable.<sup>65</sup> Thus, the sole issue before the Court<sup>66</sup> was

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<sup>58</sup> *Mazer v. Stein*, 347 U.S. 201 (1954).

<sup>59</sup> *Id.* at 202-03. Under the Act of 1909 federal copyright protection required either publication with a copyright notice or registration. 35 Stat. 1075, 1076 (1909).

<sup>60</sup> *Stein v. Mazer*, 204 F.2d 472, 474 (4th Cir. 1953).

<sup>61</sup> *Mazer*, 347 U.S. at 218.

<sup>62</sup> *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

<sup>63</sup> *Id.* at 1027-28 (Appendix to concurring opinion of Ginsburg, J.).

<sup>64</sup> *Id.* at 1030 (Breyer, J., dissenting).

<sup>65</sup> *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 475 (6th Cir. 2015).

whether the design on the plaintiff Varsity cheerleader uniforms was a proper subject for copyright protection.

In the majority opinion, Justice Thomas begins his analysis by reciting the High Textualist's Nicene Creed: "We thus begin and end our inquiry with the text [of the Copyright Act], giving each word its 'ordinary, contemporary, common meaning.'"<sup>67</sup> His orthodoxy established, he immediately follows standard High Textualist practice by veering from the Act's text:

We do not, however, limit this inquiry to the text of §101 in isolation. "[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." . . . We thus "look to the provisions of the whole law" to determine §101's meaning.<sup>68</sup>

We might pause to consider whether the majority really considered the "text of the whole statute," which is over 200 pages in length, or over 400 pages if the provisions establishing the Copyright Office and addressing related statutes are included.<sup>69</sup> One suspects not. The majority opinion instead quotes bits and pieces of three sections in the Act, § 101, § 106 and § 113, seeks help from Patry's treatise to understand what it means for a "pictorial, graphic or sculptural work" to be "identified separately from" the "utilitarian aspects" of an article,<sup>70</sup> and resorts to the Oxford English Dictionary to figure out what the words "design," "graphic," "pictorial" and "capable" might mean in the phrase in § 101 requiring a "pictorial, graphical or sculptural feature" in the "design of a useful article" to be "capable of existing independently of the utilitarian aspects of the article."<sup>71</sup> Leaning on these extra-textual crutches, and with heavy reliance

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<sup>66</sup> As noted below, the Court's opinion never touched the question whether the defendant's cheerleader uniforms infringed the plaintiff's copyright, which was of course the question presented, at least in the lower courts.

<sup>67</sup> *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).

<sup>68</sup> *Id.* at 1010 (citations omitted).

<sup>69</sup> See *Copyright Law of the United States, Title 17*, COPYRIGHT.GOV (2021), <https://copyright.gov/title17>.

<sup>70</sup> On this point Justice Thomas blithely states, "The decision maker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities." *137 S. Ct. at 1010*. For me the more challenging question is not whether one can "spot" a feature, but whether, once "spotted," the feature "exists." What does it mean for a "feature" to "exist?" See Wittgenstein, *supra* note 25, § 50 et seq. (discussing what it means to attribute being or not-being to a feature of something such as its color and how attaching a name to the feature — what Justice Thomas might call "spotting" the feature — relates to the question of its existence). But here I venture into a philosophical realm that might be saved for another article.

<sup>71</sup> 137 S. Ct. at 1009. The quoted definition from the *OED* is "having the needful capacity, power or fitness for." *Star Athletica*, 137 S. Ct. at 1009. Thomas doesn't

on *Mazer v. Stein*, Thomas concludes, “In sum, a feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.”<sup>72</sup> Thomas considers it “straightforward” to apply this judicially contrived “test” to the case at hand. The “surface decorations” on Varsity’s cheerleaders’ uniforms — mainly an assembly of lined and colored chevrons — have “pictorial, graphic, or sculptural qualities,” and could be “imaginatively” applied to another medium such as a painter’s canvas. Ergo: they are copyrightable!<sup>73</sup>

I cannot improve on Professor Beebe’s spirited autopsy of the *Star Athletica* opinions.<sup>74</sup> Suffice to say that he demonstrates with convincing good humor that in the “tests” to distinguish the aesthetic from the utilitarian announced by the majority, consenting and dissenting opinions either the exception consumes the rule or the rule the exception.

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question whether his *OED* definition reflects English or U.S. usage, or whether it reflects the meaning of “capable” in 1976, when the Act became law, rather than now. Why he sought an extra-textual definition of the word “capable” but not of such other critical words as “existing” and “utilitarian” is also left unexplained, as well as why he latched onto the *OED*’s Definition #5 for “capable,” as opposed to the many other definitions in the *OED*, or even why he chose the *OED* as opposed to *Webster’s* or the *American Heritage Dictionary*, which were relied upon by his High Textualist colleague Alito in *Bostock*. *Webster’s 10th Collegiate Dictionary* gives six definitions of “capable”: (1) susceptible, (2) comprehensive (obs), (3) having attributes (as physical or mental power) required for performance or accomplishment, (4) having traits conducive to or features permitting, (5) having legal right to own, enjoy or perform, (6) having general efficiency and ability. One sees why Thomas chose *OED* #5: none of these Webster definitions seems a particularly good fit to the purpose. Would it be impertinent to suggest that he chose *OED* Definition #5 simply because it supported the result he wanted to reach? As Beebe notes, the *OED* definition may have had the great virtue of providing “ballast”: after all, it’s the Great Grandfather of English dictionaries. See Barton Beebe, *Star Athletica and the Problem of Panaestheticism*, 9 U.C. IRVINE L. REV. 275, 282 (2019).

<sup>72</sup> 137 S. Ct. at 1012.

<sup>73</sup> Examples of cheerleaders’ uniforms can be found here: Chevrons, Stripes, Cheerleaders, and Copyright: The Supreme Court Issues Opinion in *Star Athletica v. Varsity Brands* KNOBBE MARTENS (Mar. 24, 2017), <http://knobbe.com/news/2017/03/chevron-stripes-cheerleaders-and-copyright-supreme-court-issues-opinion-star-athletica>. The uniforms all contain visual features that can be “identified and imagined apart from” the uniforms and fixed in another medium—colors, stripes, letters, in short, everything in a graphic designer’s toolkit. According to Justice Thomas, all these are copyrightable. Plainly, something is missing from his “test.”

<sup>74</sup> Beebe, *supra* note 71; see also Liu, *supra* note 31, nn.51-67 (describing the Court’s opinion as “profoundly unsatisfying”; *id.* n.59).

From a policy standpoint this may be all right.<sup>75</sup> It warns a competitor against copying a copyrighted product too closely, for fear of liability; it warns the copyright holder against pursuing competitors too aggressively, for fear of losing the copyright altogether. In my own practice I would typically advise the copyist that copying features that can be credibly said to be required by the product's function is relatively safe; I would advise the copyright holder to find examples of products that perform comparable functions using different features. In many disputed cases this yields a negotiation and either a settlement or, equally likely, mutual exhaustion in which the copyist makes some modest changes and the copyright holder reserves all rights but brings no action. The parties can then return to their respective businesses without the staggering, taxing burden of a copyright lawsuit that, in the case of *Star Athletica*, went all the way to the Supreme Court.

Our present purpose, though, is to consider whether High Textualism works in the heavily legislated field of copyright. I submit that §§ 101, 106 and 113 vividly demonstrate that the text alone cannot inform judicial decision. The drafters of the Copyright Act of 1976 expended a mighty effort to separate the aesthetic from the utilitarian, but try as they might, and even with Justice Thomas' extra-textual improvements and embellishments, we are left with a tenth<sup>76</sup> "test" for separating "pictorial, graphical or sculptural features" from a "useful article's" "utilitarian aspects" that fails in any meaningful way to separate form from function.

If we depart from High Textualist dogma and permit ourselves a purposive question we might well ask, what was Congress trying so hard to achieve in these sections? Yes, the Act was attempting to codify the holding of *Mazer v. Stein*, but that just kicks the question back a step: what was at stake in *Mazer v. Stein*? Why do serious people feel a need to distinguish the aesthetic from the utilitarian, however maddeningly difficult that might be?

I offer the possibility that some clues can be found in the radically different approaches to protection taken by the Copyright and Patent Acts.<sup>77</sup> Copyright arises automatically; patents issue only after an agonizing prosecution process; originality in copyright is a trivial requirement;

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<sup>75</sup> I discussed the practical benefits of unresolved legal issues in the field of computer software at some length in HEMNES, *supra* note 22, ch. 4. Rob Merges' concept of the "waiver space" associated with intellectual property rights is closely related. See ROBERT MERGES, JUSTIFYING INTELLECTUAL PROPERTY 47-49 (2011).

<sup>76</sup> The Sixth Circuit had identified nine competing "tests" in prior cases. See *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 484-85 (6th Cir. 2015), *aff'd* sub nom., *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

<sup>77</sup> I am of course referring here to utility patents, not design patents. Here again I agree with Professor Liu. See Liu, *supra* note 31, at 56-58.

novelty and non-obviousness are high bars to patentability; copyright lasts almost forever; patents for fewer than twenty years; copyright is indeterminate; patents have defined “metes and bounds.”<sup>78</sup> It’s possible to imagine a world in which the copyright model applied to inventions or the patent model to works of authorship, but that has never been the case. Both had origins as reactions to commercial English monopolies, in the case of copyright in the Stationers’ Monopoly<sup>79</sup> and in the case of patents in colonial trade and exploitation.<sup>80</sup> But with the advent of the Statute of Anne for copyright<sup>81</sup> and the creation of the American Constitution following rupture of the American colonies from England<sup>82</sup> their lineages departed. The Statute of Anne for the first time vested copyright in authors, not publishers, and the impetus in copyright since that time, with varying degrees of success, has been to protect the poor, struggling author from the avarice of publishers and other exploiters. The impetus in patent is quite different. It is to provide a stingy, time-limited,<sup>83</sup> narrowly defined reward to the inventor in exchange for disclosure of inventions for the benefit of the public. It is not so much due to a social preference for authors and artists over inventors; it is more a sense (justified I think) that getting useful inventions into the public domain, where they can be freely used and exploited, has a greater importance than getting literary or artistic works into the public domain, and more rapidly outweighs the interest in compensating their creators.

Little wonder, given this background, that it seems important to draw a line between the two realms. Nevertheless, it would be impossibly cumbersome to make patentability a negative condition on copyright protection: no one would want to convert every copyright infringement case into

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<sup>78</sup> I have elsewhere argued that novelty is in effect a hidden component of copyright’s originality requirement, which emerges as the subject matter of copyright extends into utilitarian works like computer software. See “Novelty, Scope and the Shared Geometry of Patent and Copyright Protection,” Hemnes, *supra* note 22 at 163 to 180.

<sup>79</sup> See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 8 (1967); see also *Statute of Anne*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Statute\\_of\\_Anne](http://en.wikipedia.org/wiki/Statute_of_Anne).

<sup>80</sup> See *A Brief History of the Patent Law of the United States*, LADAS & PARRY (May 7, 2014), <https://ladas.com/education-center/a-brief-history-of-the-patent-law-of-the-united-states-2>.

<sup>81</sup> 8 Ann. c. 21 (1710) (Eng.).

<sup>82</sup> U.S. CONST., art. 1, § 8, cl. 8.

<sup>83</sup> Admittedly, copyright under the Statute of Anne and the Copyright Act of 1790 lasted only fourteen years, but it has now been extended to the lifetime of the author plus seventy-five years, for fear of copyright in Mickey Mouse expiring. See Ashley Harp, *Protecting the Mouse – The Copyright Term Extension Act of 1998*, FOUNDATIONS OF LAW AND SOCIETY (Dec. 9, 2020), <https://foundationsoflawand-society.wordpress.com/2020/12/09/protecting-the-mouse-the-copyright-term-extension-act-of-1998>.

a patentability determination without the benefit of the Patent Office's expertise. So the best the Copyright Act can do is to reference "utility," leaving it to the courts to figure out what that means in a particular case.

If we allow these purposive considerations, in combination with the principles of common law adjudication on a case-by-case basis, many of the difficulties seen in *Star Athletica* melt away. To begin with, one no longer needs a "one size fits all" test demarking the boundary between the aesthetic and utilitarian.<sup>84</sup> The law can be suited to the facts. The objects at stake in *Star Athletica* were cheerleaders' uniforms. They certainly perform basic utilitarian functions: cover the body, permit freedom of motion; being easily laundered come to mind. But they clearly serve important aesthetic functions as well — they should be attractive and vibrant, expressive of the cheerleading ethos. It might be fair to say that in the case of cheerleaders' uniforms the balance tips in favor of protecting what we might call their aesthetic appeal. Not so, for example, if we consider a firefighter's uniform, where non-aesthetic utilitarian functions prevail. And certainly not so if we consider, say, the shape of a building, which can have a powerful aesthetic appeal, but first and foremost must serve a practical function.

For a court unfettered by the supposed constraints of High Textualism these different circumstances are merely another day on the job. If a builder were accused of infringing copyright in an architect's design for a building, and changing the accused's design would make the building structurally unstable, one hopes that any court would find a way to conclude that there was no infringement, perhaps on the ground that the "pictorial, graphical and sculptural" elements of the copyright holder's design were inseparable from its "utilitarian aspects."<sup>85</sup> The cheerleader uniforms at stake in *Star Athletica* are toward the other end of the spectrum, and a court could give the copyright holder more leeway in asserting infringement without jeopardizing the performances of cheerleaders wearing the uniforms. The conclusion in either case could be expressed in terms of pictorial, graphical or sculptural elements that are "capable of existing independently," but these words state the conclusion; they do not drive it. From a purely grammatical standpoint, one can as easily say that the design of a building, considered as a sculpture, is as "capable of existing independently" as a pictorial, graphical or sculptural work as the design of the cheerleaders' uniforms. However, the scope of copyright will depend on the use the defendant makes of the design, not whether is it "capable of independent existence." It is easy to imagine successfully as-

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<sup>84</sup> I would submit that the courts' efforts to define a "test" for the distinction is both futile and unnecessary.

<sup>85</sup> 17 U.S.C. § 101 (definition of pictorial, graphic, and sculptural works).

serting copyright infringement against the manufacturer of toy replica of a building, but not a builder replicating the same design. The reason is that structural integrity is not a concern for the toy, but is of paramount importance for the building. This outcome has nothing to do with “independent existence” of the design but everything to do with the policies underlying the Act.

Would such case-specific, common law-type reasoning constitute “legislating from the bench?” I think not. To begin with, as Beebe and Liu convincingly demonstrate, neither the text of the Copyright Act nor the improvement on the text proposed by Justice Thomas is capable of dictating a result in any of these hypothetical cases.<sup>86</sup> On the other hand, the Act plainly expects and requires a court to distinguish between “pictorial, graphical and sculptural” and “utilitarian” features. How is a court to do that when neither the Act’s text nor precedent dictates a result? I can’t imagine how this can be done without considering and balancing the policies underlying the Act.

A peculiarity of *Star Athletica* is that it nowhere considers infringement, leading to the highly formalistic nature of its opinions, rendered, as it were, in a factual vacuum. The case is an appeal from the district court’s granting of summary judgment for *Star Athletica*. There is no finding of fact; indeed, *Star Athletica*’s accused uniforms appear nowhere in the opinions.<sup>87</sup> We are left with the sterile question whether there was something in *Varsity*’s uniforms that is copyrightable. This question, I submit, is all but meaningless outside the context of an actual infringement claim. One might as well ask, “Is this play copyrightable?” Sure; but does an accused play infringe the copyright? As Judge Hand recognized in *Nichols v. Universal Pictures Corp.*,<sup>88</sup> answering this question requires a determination of how far the copyright extends into the structure of the play, and, again as Hand knew, there is no general answer to this question — it all depends on the very specific facts of each case, which is what judges do for a living.

## 2. *Google v. Oracle*

I turn now to § 102(b) of the Copyright Act. The application of § 102(b) to computer programs, and more particularly to the means by

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<sup>86</sup> See generally Beebe, *supra* note 71; Liu, *supra* note 31.

<sup>87</sup> Images of the plaintiff’s and defendant’s uniforms can be found here: *Varsity Brands*, KNOBE MARTENS, MICROSOFT BING, <https://www.bing.com/images/search?q=cheerleading.uniforms&form=HDRSC&first=/&dsc=Image-BasicHover> (last visited Mar. 7, 2022). The reader might consider whether the accused uniforms are more or less similar to the plaintiff’s than the myriad uniforms referenced at footnote 73 *supra*.

<sup>88</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2nd Cir. 1930).

which people interface with computer programs, had its origins in debates over copyright in “user interface” that took place in the 1980s and 1990s. The debates continue in the *Google v. Oracle* discussion regarding “declaring code” in the Java platform which, as the Court acknowledged, is “part of the *interface* between human beings and a machine.”<sup>89</sup>

The younger readers will forgive my revisiting some ancient history. The memory and RAM capacity of the early personal computers was extremely limited. For software programmers it was like living in an overcrowded tenement with leaky pipes and elevators that didn’t run half the time. The IBM PC, which was introduced in 1981, ran on an Intel 8088 processing chip, which had a processing rate of 4.77 MHz.<sup>90</sup> The base-level IBM PC had 16 kB of RAM (optionally 64 kB). Memory Storage was on floppy disks, each of which could store 320 kB of data.<sup>91</sup> To put this in context, today’s iPhone 12 processes data 1000 times faster (3GHz), has 250 million times the RAM (either 4GB or 6 GB) and almost 1 billion times the memory (64 and 256 GB).<sup>92</sup>

The early limitations of computing power and memory placed a high premium on programming skills. Today, virtually anyone can “write” a “program” using very high-level human-language tools like Javascript, thanks to the “declarative code” that was at issue in *Google v. Oracle*. In fact, it is more the tools that are writing the program than the person using them. The tools translate something that looks a lot like English into the bits of digital information a computer can use. There is absolutely no need for the person using the tools to be able to read or understand their computer-language output. The tools are designed to be compatible with multiple platforms. They generate computer-readable code that may not make most efficient use of the platforms, but this does not matter, given the computing speed and memory capacity of the modern computer. Not so in the early days. Then, the ability of a programmer to write a program in a form much closer to what the computer could use (usually in something called assembly language) was highly valued, and the “source code” output of such efforts were the “crown jewels” of a software company, jealously guarded as a commercially critical trade secret.

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<sup>89</sup> *Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1192 (2021).

<sup>90</sup> *Intel 8088*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Intel\\_8088](https://en.wikipedia.org/wiki/Intel_8088) (last edited Nov. 22, 2021).

<sup>91</sup> *IBM Personal Computer*, WIKIPEDIA, [https://en.wikipedia.org/wiki/IBM\\_Personal\\_Computer#CPU\\_&\\_RAM](https://en.wikipedia.org/wiki/IBM_Personal_Computer#CPU_&_RAM) (last edited Jan. 19, 2022).

<sup>92</sup> *iPhone 12*, WIKIPEDIA, [https://en.wikipedia.org/wiki/IPhone\\_12](https://en.wikipedia.org/wiki/IPhone_12) (last edited Jan. 19, 2022).

The first commercially useful program was VisiCalc, which was released in 1979.<sup>93</sup> It was a primitive spreadsheet that ran on an Apple II computer, which was even slower than the IBM PC. Lotus 1-2-3 came along in 1983, taking advantage of the greater (but still very limited) capacity of the IBM PC.<sup>94</sup> It combined a spreadsheet with database functionality and graphical charts, and quickly outpaced VisiCalc in sales, becoming the first “killer app” for the IBM PC.<sup>95</sup> 1-2-3 was written in assembly language, which allowed the program to operate more efficiently than it would have had it been written in a higher-level computer language such as C, and which contributed to Lotus’s affection for and protection of its source code.

Lotus 1-2-3 was perceived as a knock-off of VisiCalc by many in the field, not least of whom was Dan Bricklin, the creator of VisiCalc.<sup>96</sup> Among other things, it replicated VisiCalc’s identification scheme for spreadsheet cells and menu structure. And then Lotus 1-2-3 attracted its own share of knock-offs. An early one was produced by Mosaic Software and called, rather unwisely, “The Twin.”<sup>97</sup> The Twin, released in the fall of 1985, replicated as nearly as possible the look-and-feel (“user interface”) of Lotus 1-2-3; it could read files created by 1-2-3; it had very nearly the same functionality. It had, however, been written in C and was therefore slower and less efficient than 1-2-3 (although its graphics were arguably better). It was also much cheaper — \$99 vs. \$495 — and achieved some market success.

Lotus was not amused. At that time, it had skyrocketed to the top of the software industry, thanks largely to the popularity of 1-2-3, and Lotus had no intention of seeing its dominant position threatened by what it saw as low-rent imitators like The Twin. Its strategy was to pursue the novel theory that its user interface — the names and organization of commands used to communicate with the program — was protected by copyright, and that Mosaic, and other knock-offs, had infringed this copyright. This has

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<sup>93</sup> *VisiCalc*, WIKIPEDIA, <https://en.wikipedia.org/wiki/VisiCalc> (last edited Nov. 28, 2021); see also *VisiCalc Officially Released*, THIS DAY IN TECH HISTORY (Oct. 19, 1979), <https://thisdayintechhistory.com/10/19/visicalc-officially-released/#:~:text=October%201979%20According%20to%20Dan%20Bricklin%20the%20first%20%20“killer%20app”%20of%20the%20personal%20computer%20market.>

<sup>94</sup> *Lotus 1-2-3*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Lotus\\_1-2-3](https://en.wikipedia.org/wiki/Lotus_1-2-3) (last edited Jan. 1, 2022).

<sup>95</sup> *Id.*

<sup>96</sup> See Dan Bricklin, *Patenting VisiCalc*, DAN BRICKLIN’S WEB SITE, <http://www.bricklin.com/patenting.htm> (last visited Jan. 20, 2022).

<sup>97</sup> Arthur Fiddler, *Mosaic Software The Twin Spreadsheet 1-2-3 Clone*, ARTHUR FIDDLER BLOGSPOT (Apr. 30, 2018), <http://arthurfiddler.blogspot.com/2018/04/mosaic-software-twin-spreadsheet-1-2-3.html>.

an obvious connection to Java's "declaratory code," but it was completely uncharted territory. Following the recommendations of the Commission on New Technological Uses of Copyrighted Works ("CONTU") in 1974, a definition of "computer programs" was added to the Copyright Act in 1980, and cases such as *Apple v. Franklin*<sup>98</sup> had found that even the non-human readable operating systems of computers were copyrightable subject matter, in addition to the trade secret protection customarily accorded their human-readable "source code." There was, however, no indication that The Twin had improperly accessed or copied the assembly-language code for 1-2-3, and in fact it had not: The Twin had been written from scratch, in C, duplicating only the "user interface" of 1-2-3. The user interface was of course not a trade secret – anybody with a copy of the program could see it, and books were published describing what it was and how to use it — there was no patent covering it<sup>99</sup> — and so the only available means of protecting it, if at all, was by copyright.

So when Lotus set out to protect its market and \$400 per copy premium by suing Mosaic for copyright infringement, alleging infringement of the user interface of 1-2-3,<sup>100</sup> it was taking the risk of an adverse judgment, which could have opened the door to more imitators and greater pressure on its market and price. I and my firm, Foley Hoag & Eliot, were engaged to defend Mosaic, perhaps on the strength of an article I had published in 1982 considering the scope of copyright protection for another new copyrighted product, video games.<sup>101</sup> We immediately understood that Lotus's vastly greater financial resources required us to avoid lengthy discovery and a long, drawn-out lawsuit. I believe it is fair to say that Lotus equally perceived that time and a war of attrition were its best strategy, ideally (for Lotus) leading to a settlement and avoiding the risk of an adverse decision on the merits.<sup>102</sup>

To reach the merits as quickly as possible, we therefore put our client's resources into a motion to dismiss on the ground that Lotus had failed to assert infringement of copyrightable subject matter, and particu-

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<sup>98</sup> 714 F.2d 1240 (2d Cir. 1983).

<sup>99</sup> The patentability of computer software was doubted at that time; indeed, later forays into such protection through "business method" patenting have now been slapped back by the Supreme Court. *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

<sup>100</sup> *Lotus Dev. Corp. v. Mosaic Software, Inc.*, (Civ. A. No. 87-74-K D. Mass 1987). Lotus at the same time sued another \$99 imitator, Paperback Software. The cases were consolidated until the action against Mosaic was settled. *See Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37 (D. Mass. 1990).

<sup>101</sup> Thomas Hemnes, *The Adaptation of Copyright Law to Video Games*, 131 U. PA. L. REV. 171 (1982).

<sup>102</sup> This was a vivid example of the "war of attrition" fostered by discovery practice in the Rules of Civil Procedure. *See Hemnes, supra* note 22 at 9-12.

larly that the “user interface” of 1-2-3 was an uncopyrightable “method of operation” falling squarely within the language of § 102(b) of the Copyright Act. As, indeed, it was, at least from a textualist standpoint: it was the “method” by which a user operated 1-2-3. We sought to limit discovery until the court had considered the merits of our motion to dismiss, but at the same time if discovery proceeded, we sought to obtain a copy of the source code for 1-2-3, the Lotus crown jewels, to prove that Mosaic had not copied it.<sup>103</sup>

The case had been assigned to Judge Keeton of the U.S. District Court for the District of Massachusetts. Keeton, of *Keeton on Torts*, Keeton, former Professor at Harvard Law School, and a man steeped in the “Purposivist” school of legal thought with a commitment to deciding cases only after the facts have been thoroughly unearthed through discovery, which we badly wanted to avoid.

I distinctly recall the telephonic hearing at which the issues came to a head. The case had been languishing for some months with no action on our motion to dismiss. Lotus had, as I recall, moved to compel discovery. I protested, “Your honor, we’ve had a substantive motion to dismiss pending for months . . .” I got not much farther when Judge Keeton said, “What? OK; motion denied.” So much for our cost-saving and issue-raising strategy. The case “settled” not long afterward, when Mosaic had run out of money and needed to concede defeat, taking The Twin off the market.<sup>104</sup>

The court did render a decision against Mosaic’s co-defendant Paperback Software.<sup>105</sup> In an encyclopedic decision running to more than 80 pages, plainly intended to become a seminal case, Judge Keeton held that the user interface of 1-2-3 was protected by copyright and not subject to the exceptions of § 102(b).<sup>106</sup> The opinion was a veritable *tour de force* of policy considerations, anathema to textualist dogma, and straight out of the anti-democratic Professor Kingsfield law school class so castigated by Justice Scalia.<sup>107</sup> Judge Keeton fulminated against the argument that the

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<sup>103</sup> The parties’ strategy exemplifies the weaponization of discovery practice. *Id.*

<sup>104</sup> Lotus scored a PR victory when the *Times* reported that Lotus had “gained a significant victory” in securing a “ruling” against Mosaic and Paperback Software. See *Lotus Wins Copyright Decision*, N.Y. TIMES, June 29, 1990, at D1. Hardly: Mosaic, at least, had been beaten into submission without any judicial consideration of the merits of its defense. The court’s adverse decision concerned only Mosaic’s co-defendant Paperback Software. *Lotus Dev. Corp.*, 740 F. Supp. at 87.

<sup>105</sup> 740 F. Supp 37 (1990).

<sup>106</sup> Judge Keeton’s law clerk at the time, who doubtless wrote the better part of the opinion, later came to work for my firm and became a notable intellectual property litigator in his own right.

<sup>107</sup> Antonin Scalia, Tanner Lectures on Human Values delivered at Princeton University, Common Law Courts in a Civil Law System: The Role of the United States

user interface of 1-2-3 is not subject to copyright protection because it is a “useful article” as that term is used in Title 17. Such an argument, according to Keeton, not only twisted the ordinary meaning of “useful article” (shades of textualism here),<sup>108</sup> but was at odds with the intent of Congress to extend copyright protection to computer programs, which manifestly are “useful articles.”<sup>109</sup> With due reverence for Learned Hand’s seminal decisions abjuring any bright line between what is copyrightable and what is not, and compendious comparisons with VisiCalc and Excel, establishing that it is possible to have a spreadsheet program that does not duplicate the 1-2-3 user interface, Judge Keeton concluded that there are various ways of “expressing” a spreadsheet and that 1-2-3 met the criteria for a copyrightable expression of the spreadsheet “idea.”<sup>110</sup>

Sadly, Judge Keeton’s moment of precedential glory was short-lived. In a case brought just four days after the *Paperback* ruling, Lotus sued another 1-2-3 pretender, Borland International, alleging copyright infringement.<sup>111</sup> The case was assigned to (who else?) Judge Keeton, who, to no one’s surprise, held for Lotus. Borland was made of sterner financial stuff than Mosaic or Paperback, and after several preliminary setbacks in the District Court it obtained a favorable ruling in the First Circuit<sup>112</sup>

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Federal Courts in Interpreting the Constitution and Laws 3-4 (Mar. 8, 9, 1995), <http://tannerlectures.utah.edu/resources/documents/a-to-z/s/scalia97.pdf>,

<sup>108</sup> But to the extent the defendants’ arguments depended on “ordinary meaning” Keeton rejects them as inconsistent with Congressional intent:

In this illustration, “useful,” “article,” and “useful article” are assumed to have meanings consistent with ordinary usage (with an exception to be noted below). The proposition that emerges when the words are interpreted in this way is, of course, plainly contrary to congressional mandates.

*Id.* at 56.

<sup>109</sup> *Id.* at 54 et seq.

<sup>110</sup> *Id.* at 70.

<sup>111</sup> *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807 (1995). Borland had actually initiated the litigation by filing a declaratory judgment action in California the day after the *Paperback* decision. *Id.* at 810. The declaratory judgment action was dismissed in favor of the District of Massachusetts infringement action before Judge Keeton. *Id.* As an indication of the degree of importance attached to this line of cases, there were no fewer than ten amicus briefs filed in the *Borland* appeal to the First Circuit. In retrospect it might be questioned whether the outcome of the case made all that much difference. The Supreme Court never resolved the inconsistency between the First and Third Circuits on the issue, and the software industry prospered nevertheless. How the legal profession filled the gap in formal protection is discussed at some length in *Hemnes, supra* note 22.

<sup>112</sup> The holding was actually somewhat narrower, since Borland had, after a preliminary adverse decision by Judge Keeton, revised its program to eliminate a direct emulation of the 1-2-3 interface. However, its program retained the ability to read and write 1-2-3 files, using the 1-2-3 interface.

holding that the command hierarchy of 1-2-3 (a fundamental part of its “user interface”) was an uncopyrightable “method of operation,”<sup>113</sup> as we had argued for Mosaic way back in 1987 in our motion to dismiss. Literally applying the language of § 102(b) of the Copyright Act, as a textualist court should do, the First Circuit held that “the Lotus menu command hierarchy is a method of operation and therefore not copyrightable.”<sup>114</sup> The First Circuit’s decision was effectively affirmed by the Supreme Court in a 4-4 per curiam decision that established no clear Supreme Court guidance.<sup>115</sup>

Score one for the textualists. But is this all too easy? Is everything not copyrightable to which the phrase “method of operation” or any one of the other words and phrases in § 102(b) can be applied without violence to English grammar? Would such an approach achieve the Constitutional mandate “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries?”<sup>116</sup>

To test this hypothesis, I propose to apply the High Textualist dogma directly to § 102(b) of the Copyright Act. As already noted, in the High Church of the Textualists two sources of meaning are permitted. One is the “ordinary public meaning” of the words in a statute at the time the statute was enacted, oftentimes as evidenced in dictionaries. The other is the interpretation that the words have been given in precedent preceding the statute’s enactment.<sup>117</sup>

Just for fun, I’ve catalogued below dictionary definitions and precedents for the terms in § 102(b). This from the dictionary:

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<sup>113</sup> *Borland Int’l, Inc.*, 49 F.3d 807.

<sup>114</sup> *Id.* at 815-16.

<sup>115</sup> 561 U.S. 233 (1996). The Third Circuit’s diametrically opposed decision in *Whelan v. Jaslow*, 797 F.2d 1222 (3d Cir. 1986) was never overturned. The inconsistency has not been resolved to this day, unless of course one considers *Google, LLC v. Oracle America, Inc.* to be inconsistent with the conclusion. Whether it matters that the issue was never resolved might be questioned. See Hemnes, *supra* note 22, chs. 3, 4.

<sup>116</sup> U.S. CONST. art. I, § 8.

<sup>117</sup> No matter that these two concepts are often in conflict with one another — how many people on the street are familiar with legal precedent, and when the two are in conflict, how do we know which one the legislature “meant?” But we’ll ignore that contradiction for the moment.

Term in Copyright Act of 1976	<i>Webster's New Collegiate Dictionary</i> , 10th Ed. (1993) <sup>118</sup>
idea	<ul style="list-style-type: none"> <li>1.a. a transcendent entity that is a real pattern of which existing things are imperfect representations.</li> <li>1.b. a standard of perfection</li> <li>1.c. a plan for action</li> <li>3.b. an indefinite or unformed conception</li> <li>3.c. an entity (as a thought, concept, sensation, or image) actually or potentially present to consciousness</li> <li>4. a formulated thought or opinion</li> <li>5. whatever is known or supposed about something</li> <li>6. the central meaning or chief end of a particular action or situation</li> </ul>
procedure	<ul style="list-style-type: none"> <li>1. A particular way of accomplishing something or of acting</li> <li>2.a. a series of steps followed in a regular definite order</li> <li>2.b. a series of instructions for a computer that had a name by which it can be called into action</li> <li>3.a. traditional or established way of doing things</li> <li>3.b. protocol</li> </ul>
process	<ul style="list-style-type: none"> <li>1.a. progress, advance</li> <li>1.b. something going on</li> <li>2.a. (1) a natural phenomenon marked by gradual changes that lead toward a particular result</li> <li>(2) a natural continuing activity or function</li> <li>2.b. series of actions or operations conducting to an end, exp: a continuous operation or treatment esp in manufacture</li> <li>3.a. the whole course of proceedings in a legal action</li> <li>3.b. the summons, mandate, or writ issued by a court to compel the appearance of a defendant in a legal action or compliance with its orders</li> <li>4. a prominent or projecting part of an organism or organic structure</li> <li>5. a hairstyle in which the hair is flattened out or slightly waived</li> </ul>
system	<p>A regularly interacting or interdependent group of items forming a unified whole, as (a) (1) a group of interacting bodies under the influence of related forces; (2) an assemblage of substances that is in or tends to equilibrium;</p> <p>(b) (1) a group of body organs that together perform on or more vital functions; (2) the body considered as a functional unit;</p>

<sup>118</sup> This is the closest my library has to a 1976 edition; it'll have to do for present purposes (archaic and obsolete uses omitted).

	<p>(c) a group of related natural objects or forces;  (d) a group of devices or artificial objects or an organization forming a network esp for distributing something or serving a common purpose;  (e) a major division of rocks usually larger than a series and including all formed during a period or era;  (f) a form of social, economic, or political organization or practice  2. an organized set of doctrines, ideas, or principles usu. intended to explain. The arrangement or working of a systematic whole;  3.a. an organized or established procedure  3.b. a manner of classifying, symbolizing or schematizing  4. harmonious arrangement or pattern: order  5. <u>an organized society or social situation regarded a stultifying</u></p>
Method of operation	<p>Method: 1. A procedure or process for attaining an object: a) a systematic procedure, technique or mode of inquiry employed by or proper to a particular discipline or art; b (1) a way, technique or process of or for doing something (2) a body of skills or techniques; 2. A discipline that deals with the principles and techniques of scientific inquiry; 3.a. orderly arrangement, development or classification: plan; b: the habitual practice of orderliness and regularity; 4 (cap) a dramatic technique by which an actor seeks to gain complete identification with the inner personality of the character being portrayed  Operation: 1. Performance of a practical work or of something involving the practical application of principles or processes; 2. A an exertion of power or influence; b. the quality or state of being functional or operative; c. a method or manner of functioning; 3. efficacy potency (archaic except in legal usage) 4. A procedure carried out on a living body usually with instruments esp. for the repair of damage or the restoration of health; 5. any of various mathematical or logical processes (as addition) of deriving one entity from others according to a rule; 6.a. a usually military action, mission or maneuver including its planning and execution; b. (pl) the office on the flight line of an airfield where pilots file clearance for flights and where flying from the field is controlled; c. (pl) the agency of an organization charged with carrying on the principal planning and operating functions of a headquarters and its subordinate units; 7. a business transaction esp when speculative; 8. a single step performed by a computer in the execution of a program</p>

Concept	Something conceived in the mind: thought, notion; 2: an abstract or generic idea generalized from particular instances
principle	1.a. comprehensive and fundamental law, doctrine or assumption; b(1) a rule or code of conduct (2) habitual devotion to right principles ; c the laws or facts of nature underlying the working of an artificial device; 2. a primary source; 2.a. an underlying faculty or endowment; b. an ingredient that exhibits or imparts a characteristic quality; 4. (cap)) a divine principle
discovery	1a the act or process of discovering; 2. Something discovered; 3. the usu. Disclosure of pertinent facts or documents by one or both parties to a civil action or proceeding

So, according to *Webster's*, § 102(b) says that copyright does not inhere in:

a transcendent entity that is a real pattern of which existing things are imperfect representations; a standard of perfection; a plan for action; an indefinite or unformed conception; an entity (as a thought, concept, sensation, or image) actually or potentially present to consciousness; a formulated thought or opinion; whatever is known or supposed about something; the central meaning or chief end of a particular action or situation; a particular way of accomplishing something or of acting; a series of steps followed in a regular definite order; a series of instructions for a computer that had a name by which it can be called into action; a traditional or established way of doing things; a protocol; a progress, advance; something going on; a natural phenomenon marked by gradual changes that lead toward a particular result; a natural continuing activity or function; a series of actions or operations conducing to an end, especially: a continuous operation or treatment especially in manufacture; the whole course of proceedings in a legal action; the summons, mandate, or writ issued by a court to compel the appearance of a defendant in a legal action or compliance with its order; a prominent or projecting part of an organism or organic structure; a hairstyle in which the hair is flattened out or slightly waives; a regularly interacting or interdependent group of items forming a unified whole, as (a) (1) a group of interacting bodies under the influence of related forces; (2) an assemblage of substances that is in or tends to equilibrium; a group of body organs that together perform on or more vital functions; the body considered as a functional unit; a group of related natural objects or forces; a group of devices or artificial objects or an organization forming a network esp for distributing something or serving a common purpose; a major division of rocks usually larger than a series and including all formed during a period or era; a form of social, economic, or political organization or practice; an organized set of doctrines, ideas, or principles usually intended to explain; the arrangement or working of a systematic whole; an organized or established procedure; a manner of classifying, symbolizing or schematizing harmonious arrangement or pattern: order; an organized society or social situation regarded a stultifying; a procedure or process for attaining an object a systematic procedure, technique or mode of inquiry employed by

or proper to a particular discipline or art; a way, technique or process of or for doing something; a body of skills or techniques; a discipline that deals with the principles and techniques of scientific inquiry; orderly arrangement, development or classification; the habitual practice of orderliness and regularity; a dramatic technique by which an actor seeks to gain complete identification with the inner personality of the character being portrayed; performance of a practical work or of something involving the practical application of principles or processes; an exertion of power or influence; b. the quality or state of being functional or operative; a method or manner of functioning; efficacy potency (archaic except in legal usage) a procedure carried out on a living body usually with instruments esp. for the repair of damage or the restoration of health; any of various mathematical or logical processes (as addition) of deriving one entity from others according to a rule; a usually military action, mission or maneuver including its planning and execution; the office on the flight line of an airfield where pilots file clearance for flights and where flying from the field is controlled; the agency of an organization charged with carrying on the principal planning and operating functions of a headquarters and its subordinate units; a business transaction especially when speculative; a single step performed by a computer in the execution of a program; a procedure or process for attaining an object; a systematic procedure, technique or mode of inquiry employed by or proper to a particular discipline or art; a way, technique or process of or for doing something; a body of skills or techniques; a discipline that deals with the principles and techniques of scientific inquiry; orderly arrangement, development or classification: plan; the habitual practice of orderliness and regularity; a dramatic technique by which an actor seeks to gain complete identification with the inner personality of the character being portrayed; performance of a practical work or of something involving the practical application of principles or processes; an exertion of power or influence; the quality or state of being functional or operative; a method or manner of functioning; efficacy potency (archaic except in legal usage); a procedure carried out on a living body usually with instruments esp. for the repair of damage or the restoration of health; any of various mathematical or logical processes (as addition) of deriving one entity from others according to a rule; a usually military action, mission or maneuver including its planning and execution; the office on the flight line of an airfield where pilots file clearance for flights and where flying from the field is controlled; the agency of an organization charged with carrying on the principal planning and operating functions of a headquarters and its subordinate units; business transaction especially when speculative; a single step performed by a computer in the execution of a program; something conceived in the mind: thought, notion; an abstract or generic idea generalized from particular instances; comprehensive and fundamental law, doctrine or assumption; a rule or code of conduct; habitual devotion to right principles the laws or facts of nature underlying the working of an artificial device; a primary source; an underlying faculty or endowment; an ingredient that exhibits or imparts a characteristic quality; a divine principle; the act or process of discovering; something discovered; the disclosure of pertinent facts or documents by one or both parties to a civil action or proceeding.

Let's face it: § 102(b), as interpreted by Justice Webster, is quite a mouthful. Does it really mean that anything that can be described using any of the words given above is not copyrightable subject matter? Is it actually credible that Congress meant to enact this prodigious verbal midden? Or is the judge to pick and choose among these various "ordinary public meanings," and, if so, on what basis can she do so without committing the Purposivist heresy of relying on the policies underlying the Act?

The problem, it is submitted, or at least a problem, is that the words in § 102(b) of the Act are so numerous and broad in application that they cannot possibly form a basis for adjudication unless copyright is to become a non-right. Take, as an example, the word "process" in § 102(b). One of its definitions, and surely a reflection of at least one of the word's ordinary uses, is "something going on." OK; is a computer's software "something going on?" It certainly seems to be, at least when the computer is in use. Or, to take another example, are the events in a play "something going on?" Well, sure, so is the play not subject to copyright, at least when it is performed, or subject to copyright but only until it is performed? Or take the word "system," which can mean "a harmonious arrangement or pattern." Is this not exactly what a poem or musical composition is? Are poems and music therefore not copyrightable?

This is of course silliness. No court, even those practicing High Textualism, would conclude that a poem or musical composition is not copyrightable because it is a "harmonious arrangement or pattern." But on what basis would they reach this decision? Perhaps on the ground that a poem is a "literary work," which is included in § 102(a) of the Act? But isn't this trumped by § 102(b), which by using the word "system" negates copyright for a "harmonious arrangement or pattern?" Perhaps it is only unharmonious poems or dissonant twelve-tone musical compositions that deserve protection.

One cannot escape the conclusion that the High Textualist must pick and choose among the various terms in § 102(b) and the various definitions for those terms in *Webster's* to avoid rank nonsense. Justice Barrett acknowledges as much in pointing to the "context" in which words are used as directing their meaning.<sup>119</sup> In Justice Thomas' dissenting opinion in *Google v. Oracle* he considers and then rejects the suggestion that the Act's phrase "method of operation" applies to Oracle's "declaring code" despite its rather snug fit. For this conclusion he relies on "context," in the form of other words in § 102(b):

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<sup>119</sup> See, e.g., Barrett, *Assorted Canards*, *supra* note 1, at 857 (noting that "*Je suis plein*," spoken by a young woman in colloquial French, means that she is pregnant, not that she is "full" after a large meal. The latter is of course "*J'ai bien mangé*").

Other terms in the same subsection such as “idea,” “principle,” and “concept” suggest that “method of operation” covers the functions and ideas implemented by computer code—such as math functions, accounting methods, or the idea of declaring code— not the specific expression Oracle created. Oracle cannot copyright the idea of using declaring code, but it can copyright the specific expression of that idea found in its library.<sup>120</sup>

Justice Thomas thus uses the statutory “context” to revert to the precedential language distinguishing “idea” from “expression,” notwithstanding that the actual statute includes only the word “idea,” says nothing about “expression,” and conspicuously omits mention of a “dichotomy” between the two. Furthermore, in distinguishing the “specific expression” found in the Oracle library of declaring code from the “idea” of a declaring code Justice Thomas echoes Judge Keeton’s Purposivist reasoning in *Paperback Software* that because there are various ways of “expressing” the user interface of a spreadsheet, no one of them is an uncopyrightable “method of operation.” One suspects that the term “context,” as used by Justices Barrett and Thomas, is merely a stand-in for the forbidden concept of statutory purpose.

We might inquire, though, whether the second source of meaning permitted in High Textualism, precedent, may help solve the problem of defining meaning without committing the sin of considering purpose. I offer below some phrases the courts had used prior to 1976 to describe material that is or is not copyrightable.<sup>121</sup>

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<sup>120</sup> *Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1213 (2021) (Thomas, J., dissenting). Justice Thomas omits to consider that the list in Section 102(b) is conjoined by “or” not “and,” strongly implying as a matter of standard textual interpretation that the list is disjoint and that no one word in it should limit any other.

<sup>121</sup> I omit post-1976 caselaw, since, from the High Textualist perspective, it cannot have informed the legislative choice of words in the absence of legislative clairvoyance.

Case	Phrase/word describing uncopyrightable subject matter	Phrase/word describing copyrightable subject matter
Baker v. Selden <sup>122</sup>	The “art” described in a book	The “description” or “illustration” of the art
Baker v. Selden <sup>123</sup>	The “province of patents”	
Baker v. Selden <sup>124</sup>	A “plan” set forth in a [copyrighted] book	
Baker v. Selden <sup>125</sup>	“Blank account” books	
Page v. Wisden <sup>126</sup>	A “mode of ruling” a book	
Brief English Systems v. Owen <sup>127</sup>	A “system of shorthand”	The “explanation of how to do it”
Seltzer v. Sunbrock <sup>128</sup>	A “system” for conducting races on roller skates	
Nutt v. National Institute, Inc. <sup>129</sup>	A memory improvement “system”	
Chamberlin v. Uris Sales Corp. <sup>130</sup>	“rules” and “layout” of the game Acy-Ducy	
Briggs v. New Hampshire Trotting & Breeding Ass’n <sup>131</sup>	Daily-double betting “scheme”	

<sup>122</sup> 101 U.S. 99, 102 (1879).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 104.

<sup>125</sup> *Id.* at 107.

<sup>126</sup> 20 L.T.N.S. 435 (1869) (V.C.) (discussed in *Baker* at 106-07).

<sup>127</sup> 48 F.2d 555 (2d Cir. 1931).

<sup>128</sup> 22 F. Supp. 621 (S.D. Cal. 1938).

<sup>129</sup> 31 F.2d 236 (2d Cir. 1929).

<sup>130</sup> 150 F.2d 512 (2d Cir 1945).

<sup>131</sup> 191 F. Supp. 234 (D.N.H.1960).

Case	Phrase/word describing uncopyrightable subject matter	Phrase/word describing copyrightable subject matter
Brown Instrument Co. v. Warner <sup>132</sup>	“Articles intended for practical use in cooperation with a machine”	
Continental Casualty Co. v. Beardsley <sup>133</sup>	The “thought beneath the language”; the underlying ideas	“forms and insurance instruments”
Morrissey v. Procter & Gamble Co. <sup>134</sup>	“Topic” or “subject matter”	
Nichols v. Universal Pictures Corp. <sup>135</sup>	“The most general statement of what [a play] is about [which] at times might consist only of its title” but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.”	
Cain v. Universal Pictures <sup>136</sup>	“ <i>Scenes à faire</i> ”	

Now let’s try to correlate these to the words and phrases in Title 17:

<sup>133</sup> 161 F.2d 910 (D.C. Cir.1947), *cert. denied*, 332 U.S. 801 (1947) (noting that allowing copyright on printed charts necessary for the operation of a recording machine would improperly monopolize the machine, which is forbidden by both law and policy “except within the comparatively narrow limits of the patent system”) (note the reliance on policy).

<sup>134</sup> 253 F.2d 702 (2d Cir.), *cert. denied*, 358 U.S. 816 (1958). Note that the court found that use of the copyrighted language was not infringing when it was “incidental to its use of the underlying idea.”

<sup>135</sup> 379 F.2d 675 (1st Cir. 1967).

<sup>135</sup> 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

<sup>136</sup> 47 F. Supp. 1013 (S.D. Cal. 1942).

Term in Copyright Act of 1976	Precedential sources
idea	Nichols v. Universal Pictures; Continental Casualty
procedure	None
process	None
system	Brief English Systems v. Owen, Nutt v. National Institute, Inc., Seltzer v. Sunbrook
Method of operation	None
Concept	None
principle	None
discovery	None

It's quite noteworthy that, despite the House Report's statement that § 102(b) was intended merely to restate the existing law, it used only one or two of the words actually found in precedent at that time to identify uncopyrightable subject matter. Here's a list of words that had been used for that purpose, but that were not included in § 102(b):

Word	Case(s)
Art <sup>137</sup>	Baker v. Selden
The province of patents	Baker v. Selden
A plan	Baker v. Selden
Blank account books	Baker v. Selden
Rules and lay-out [of a game]	Chamberlain v. Uris Sales
A betting "scheme"	Briggs v. New Hampshire Trotting & Breeding Ass'n
Articles "intended for practical use"	Brown Instrument Co. v. Warner
The "thought beneath the language"	Continental Casualty Co. v. Beardsley
"Topic"; "Subject matter"	Morrissey v. Procter & Gamble Co.
<i>Scenes à faire</i>	Cain v. Universal Pictures

<sup>137</sup> The word "art" as used in *Baker v. Selden* is obviously archaic, just as it is in Article 1, § 8 of the Constitution. If one were to ask an ordinary English speaker today what are the "Useful Arts," she might well be stumped — "art" today is almost by definition expressive and not "useful" in any utilitarian sense. Yet another example of the evolution of language.

What is the High Textualist to make of the fact that § 102(b) omits so many of the phrases that were used in the precedential cases to identify uncopyrightable subject matter? Should we apply the venerable textual interpretative principle “*expressio unius est exclusion alterius?*” Is it *verbatim* to consider whether a literary device contained work is a *scène à faire*? Or whether a copyright claim ventures into a realm more appropriate for patent protection? Or must we resort again to Justice Webster to understand all those words in § 102(b) that are not used in the precedents?

Diligent research has not solved the riddle of where many of the words in § 102(b) came from. One suspects that some staffer in the House or Senate committee thumbed through their thesaurus and found some encouraging synonyms for the words “idea” and “system” that are found in the precedents and used the synonymic words and phrases to cast a broader net, perhaps trying to anticipate new technologies or media not yet considered in the precedential cases. It is however striking that one of the most compelling concepts — whether a claimed right ought to be subject to the rigors of patent review — is omitted from § 102(b), notwithstanding the reliance on that very distinction that sits at the heart of *Baker v. Selden* and its progeny.<sup>138</sup>

### B. Fair Use

In *Lotus v. Borland* the Supreme Court had allowed to stand the First Circuit’s conclusion that copyright for the “user interface” of a computer program is precluded by § 102(b) because it is a “method of operation.”<sup>139</sup> Now, in *Google v. Oracle*, the Supreme Court turned to § 107 of the Act to reach a similar conclusion of noninfringement, but this time with respect to “declaratory code”<sup>140</sup> and on the ground of “fair use.”

The background for the monumental legal struggle<sup>141</sup> between Google and Oracle is not dissimilar to the battles over the “user interface”

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<sup>138</sup> See Pamela Samuelson, *The Story of Baker v Selden*, in *INTELLECTUAL PROPERTY STORIES* (Jane Ginsberg & Rochelle Cooper. Dreyfus eds., 2005).

<sup>139</sup> *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 516 U.S. 233 (1996).

<sup>140</sup> Computer programs’ “user interface” might be considered an early iteration of the “declaratory code” at stake in *Google, LLC v. Oracle America, Inc.*

<sup>141</sup> The battle involved a first trial and decision in the district court, a trip to the federal circuit where the district court’s decision was reversed and remanded, an unsuccessful petition for certiorari, then back to the district court for a second trial, this time before a jury resulting in a jury finding of fair use, then back up to the Federal Circuit for a second reversal on the ground that fair use is a question of law, not of fact (commenting, in fine textualist spirit, that “[t]here is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform”), *Oracle Am., Inc. v. Google, LLC.*, 886 F.3d 1179, 1210 (Fed. Cir. 2018), after which certiorari was finally granted and the jury finding of fair use upheld, precluding another trip back to the

of Lotus 1-2-3. Sun Microsystems, Oracle's predecessor, had created the Java programming language, which was popular among computer programmers.<sup>142</sup> Google had acquired a company called Android and through it developed a platform for the development of smartphone applications. Google wanted to enable the millions of developers who were fluent in Java to be able to write applications for its Android platform without re-learning an entirely new programming vocabulary and "language." Google therefore copied from Java commands known as "method calls" and the code, called "declaring code" that translates the method calls into code that a computer can implement. As the Court summarized, "In this way, the declaring code's shortcut function is similar to a gas pedal in a car that tells the car to move faster or the QWERTY keyboard on a typewriter that calls up a certain letter when you press a particular key. As those analogies demonstrate, one can think of the declaring code as part of an interface between human beings and a machine."<sup>143</sup> In other words, the declaring code was highly analogous to the "user interface" of Lotus 1-2-3 that had been copied by Mosaic, Paperback Software and Borland back in the late 20th Century. In each case, it was the learned interface between human (user in the Lotus case, programmer in Google) and computer that was at issue. Monopolize that interface through copyright and you create a barrier to entry for a competitor, which both Lotus and Oracle sought to do.

Like Lotus, Oracle was not amused. Making matters worse for Google, it had actually sought a license from Oracle's predecessor Sun Microsystems to use the Java interface elements, its declaring code, but had been rebuffed. Google proceeded to copy them anyway.

The Supreme Court assumed, without deciding, that the "declaring code" was copyright-protected, notwithstanding § 102(b). It considered, instead, whether Google's actions had been protected by "fair use."<sup>144</sup> Fair use is embodied in § 107 of the Act, which provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or re-

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district court for a damage determination. *Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1194 (2021).

<sup>142</sup> Indeed, there were some six million developers who had become fluent in the Java programming language. *Google, LLC*, 141 S. Ct. at 1190.

<sup>143</sup> *Id.* at 1192.

<sup>144</sup> In this context fair use has a near cousin in the European concept of interoperability. See Pamela Samuelson, *Comparing U.S. and EC Copyright Protection for Computer Programs: Are They More Different Than They Seem?*, 13 J.L. & COMM. 279, 285-92 (1994).

search, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

I won't burden the reader with another assemblage of dictionary definitions of or precedents for words such as "fair," "comment," "scholarship," "commercial," and "nature of the copyrighted work." I trust that the reader and I can agree that they all point in different directions and in themselves provide no definitive (I use this term advisedly) basis for deciding whether the "declarative code" at issue in *Google v. Oracle* might "fairly" be copied by Google without Oracle's permission.

The Act's legislative history states:

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way.<sup>145</sup>

So here we have a statute enacted by Congress that, according to High Textualism, is the sole source of law, but that explicitly states that it is not the sole source of law and in fact is so vague that it cannot in any way be considered part of the law until it has been applied to particular circumstances, on a case-by-case basis, by judges. The House Report also states, fairly enough, "Although the courts have considered and ruled upon the fair use doctrine over and over again no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case rais-

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<sup>145</sup> H.R. REP. NO. 94-1476, at 66 (1976). The drafters of the House Report were untroubled by the apparent contradiction between saying that § 107 was not an attempt to "freeze" the doctrine and at the same time was intended not to "change, narrow or enlarge it in any way."

ing the question must be decided on its own facts.” If § 102(b) tests the bounds of textualism by reason of its resistance to application without consideration of purpose, § 107 quite expressly denies the validity of textualism’s premise: the law, or at least this law, is merely a statement of purpose, the purpose being to facilitate further development of the judge-made doctrine of fair use by further judicial elaboration on a case-by-case basis.

In *Google, LLC v. Oracle America, Inc.*, the Supreme Court majority<sup>146</sup> takes Congress up on the need for case-by-case determination, with only the slightest reference to the words in § 107 of the Copyright Act. Justice Breyer’s majority opinion is a full-throated exposition of the Purposivist tract. He begins with a statement of Constitutional purpose: “Copyright and patents, the Constitution says, are to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>147</sup> He continues:

Copyright statutes and case law have made clear that copyright has practical objectives. It grants an author an exclusive right to produce his work (sometimes for a hundred years or more), not as a special reward, but in order to encourage the production of works that others might reproduce more cheaply. At the same time, copyright has negative features. Protection can raise prices to consumers. It can impose special costs, such as the cost of contacting owners to obtain reproduction permission. And the exclusive rights it awards can sometimes stand in the way of others exercising their own creative powers.<sup>148</sup>

After setting forth the four non-exclusive factors listed in § 107 as pertinent to the question of fair use he concludes: “In a word, we have understood the provision to set forth general principles, the application of which requires judicial balancing, depending upon relevant circumstances, including ‘significant changes in technology.’”<sup>149</sup> That is to say, the words of § 107 do not restrict the judiciary, but empower it to exercise its judgment as one would expect a branch of government to do. A more explicit rejection of the High Textualist creed can hardly be imagined.

The Court then proceeded to consider the § 107 factors in detail, one after the other. One cannot escape the impression, however, that what was determinative was the fact that programmers had become used to the Java elements that Google had copied, and that giving Oracle a monopoly on those elements via copyright would have unreasonably limited compe-

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<sup>146</sup> Per Breyer, J., another former Harvard Law School professor like Judge Keeton.

<sup>147</sup> Citing U.S. CONST., art. I, § 8, cl. 8.

<sup>148</sup> *Google, LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195 (2021).

<sup>149</sup> *Id.* at 1197.

tition in the market for products similar to Oracle's,<sup>150</sup> repeatedly citing with approval Judge Boudin's concurring opinion in *Lotus v. Borland*.

Purposivist analysis no more dictates results than does textualist. Using highly analogous reasoning to the Supreme Court's in *Google, LLC v. Oracle America, Inc.* Judge Keeton reached a substantially opposite conclusion in *Lotus v. Paperback Software*. It is, as the Court said, a matter of balancing. But that is what judges are paid to do and what they must do to the best of their ability, without pretending to be blown in one direction or the other by the feeble puffs of meaning emitted by such vapid statutory words as "idea" and "fair." What is perhaps most striking about the majority opinion in *Google, LLC v. Oracle America* is that at least two High Textualists, Justices Gorsuch and Barrett, joined in the opinion without so much as a whimper of discomfort at its blatantly Purposivist analysis.<sup>151</sup> This gives me some modest comfort: perhaps they are not the ideologues they purport to be.

### C. *Meaning and Purpose*

Copyright and the other species of intellectual property law are often taught in law school and indeed presented in law school texts as parts of the larger law of unfair competition.<sup>152</sup> They are near cousins to antitrust law, whose Sherman Act Sections 1 and 2 is about as far from textualist interpretation as a statute can be. The suggestion that one could determine what is a "combination in restraint of trade"<sup>153</sup> or an "attempt to monopolize . . . any part of the trade or commerce among the several States"<sup>154</sup> by close examination of the "semantic communicative content (in context) of the words themselves" is as hopeless as the thought that one could decide what is a "fair" use of a copyrighted work by careful consideration of the meaning of the word "fair." Contrary to the High Textualist creed, these words are not fossilized remnants; instead, they are intended to be and function as parts of the living and evolving organism that we call the law. Neither the Sherman Act nor the Copyright Act dictates to a court what to decide in a given case, but both of them suggest the issues courts are expected to resolve in reaching their decision. They

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<sup>150</sup> *Id.* at 1216-17.

<sup>151</sup> Justice Thomas's dissent, which deviated from a standard textualist analysis of the phrase "method of operation" to reach a contrary conclusion, has been discussed and dismissed elsewhere in this piece.

<sup>152</sup> See, e.g., RALPH BROWN & ROBERT DENICOLA, COPYRIGHT, UNFAIR COMPETITION AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP (12th ed. 2014); SHERRI BURR, EDMUND KITCH & HARVEY PERLMAN, MODERN INTELLECTUAL PROPERTY AND UNFAIR COMPETITION LAW (6th ed. 2013).

<sup>153</sup> Sherman Act § 1 (15 U.S.C. § 1).

<sup>154</sup> *Id.* § 2.

invite, one might say, a collaboration of the legislative and judicial branches.<sup>155</sup>

A consideration of antitrust law is far beyond the reach of this article or of this author, but in the case of copyright what is often at stake is the question whether an assertion of copyright protection strikes the right balance between rewarding an author and deterring the next author of a similar work. In cases such as *Lotus v. Mosaic/Paperback/Borland* and *Google, LLC v. Oracle America, Inc.*, this can turn on the question whether the elements of the plaintiff's work are, or have become, in a particular industry or genre, basic tools that the next author in the same industry or genre must use to create the next generation of works. The Supreme Court found that the elements of "declaratory code" were such tools in the context of application programs written in the Java. In *Lotus v. Borland*, the First Circuit, affirmed by the Supreme Court, and more artfully articulated by Judge Boudin, found that elements in the command structure of Lotus 1-2-3 were also such tools, while Judge Keeton found they were not. One might well debate whether the decisions were correct, but they all have the virtue of forthrightly confronting the issue at stake, and not hiding behind some pretended solution found in the language of the Copyright Act.

I readily concede that there are wide swaths in the Copyright Act where High Textualism functions and consideration of higher or deeper policy or purpose can be left aside. Consider for example §§ 114, 115, 116, 118, and 119. These provisions labor for page after page to state who can do what with musical compositions, recordings and audiovisual works, in broadcast media and otherwise. It would be folly to articulate by what grand principle or policy the "secondary transmission" of a work "embodied in a primary transmission by a non-network station" should be subject to a compulsory license if it's made by a "satellite carrier" to the "public for private home viewing" if there is a charge for "retransmission" to each "subscriber."<sup>156</sup> Here we have a piece of legislation that is impervious to Purposivist interpretation and can only be applied by careful parsing of the Act's language, with dutiful attention to the minute definitions of each word, virtually none of which have anything approaching an "ordinary public meaning." The provision is, plain and simple, a legislative compromise among competing lobbyists that cannot be further explained.

How do you know then when textualism is or is not adequate to the task? I would suggest a ready answer: you know it the minute you reach for a dictionary or precedent to restate the words in the statute. In the

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<sup>155</sup> Such a collaboration or dialog between the branches was considered and analyzed at length by Calabresi. See GUIDO CALABRESI, COMMON LAW IN THE AGE OF STATUTES 102 (1977).

<sup>156</sup> 17 U.S.C. § 119(a)(1).

case of § 119 of the Copyright Act, this would be useless: the words in that provision mean what they are defined as meaning in § 119(d), no more and no less. It would be ridiculous to presume to supplement those definitions with something from the *Oxford English Dictionary* or *Webster's*. But if you reach for a dictionary to decipher a provision like § 102(b), you are immediately thrust into a series of choices: which of the many dictionary definitions is helpful; which of the many precedents seems close to this case? And the choice necessarily depends on a consideration of the purpose the statute, Constitutional provision or regulation is attempting to achieve. High Textualists are allergic to the word “purpose,” so they prefer to use the word “meaning” or to choose among various “meanings” by reference to “context,” but this is merely hiding the ball: meaning and purpose are but two sides of the same coin.<sup>157</sup>

### III. WHERE LAW COMES FROM

In his article, *Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*,<sup>158</sup> Justice Antonin Scalia gives a nod to the education of American lawyers in the common law and case law tradition, before declaring, with trademark rhetorical flourish, “All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy.”<sup>159</sup> Democracy, in Scalia’s view, precludes judicial initiative. The legislature writes statutes. When it does, they become The Law. It is the duty of judges to apply The Law as it is written, thus serving Democracy. Common law cases, or even cases interpreting statutes, blaspheme The Law. The Common Law, and its progeny, judicial gloss on

<sup>157</sup> Consider the expression, “What did he mean by that?” The question rests on an implicit assumption that there was some motive, intent or goal to be achieved by a statement, which can be discovered and expressed in different words. And the question would never be asked if the “meaning” were clear from the “ordinary public meaning” or “semantic communicative content (in context) of the words themselves.” Is there any difference between that question and the question, “What was his purpose in saying that?” or “What did he want to accomplish by saying that?” I think not, although the first of these three is certainly more colloquial. But all three “mean” about the same thing and seek to accomplish the same “purpose”: to get at what’s “behind” what was said.

<sup>158</sup> Scalia, *supra* note 107.

<sup>159</sup> *Id.* at 9. Scalia’s assertion that passage by a legislature confirms a law’s democratic legitimacy is by no means obvious. As Judge Guido Calabresi put it:

Is there, in a democracy, a special significance that ought to attach to a law because it was once passed by a majoritarian body? If enough time or other circumstances have intervened, undercutting a presumption that the same majority persists, I do not understand why any great significance should attach to a majoritarian origin.

CALABRESI, *supra* note 155, at 102.

statutes, are the products of unelected judges, an undemocratic quasi-aristocracy.<sup>160</sup>

High Textualism is, of course, a reaction against what is perceived as judicial “overreach.” It is closely allied with conservatism; one suspects that its origins lie in the belief that the decisions in cases like *Roe v. Wade* would have been far better accepted had their principles been adopted through legislation rather than forced on the populace by that elitist, unelected cabal of Justices appointed for life who never have to face re-election. Well, fair enough; I take the point. And as a liberal, I must not forget the 1930s, when an overactive Supreme Court seemed for a while determined to reverse the election of FDR,<sup>161</sup> nor the current environment, when the Supreme Court is prepared to dispense with such bedrock legislation as the Voting Rights Act.<sup>162</sup>

But one might ask, have textualists accurately diagnosed the judicial disease and is a slavish adherence to fossilized statutory or Constitutional language the proper cure? The Constitution establishes the judiciary as a third branch of government. Here I emphasize the word *government*. The judiciary is not a chartered lexicographer, tasked with deciphering the historical “meaning” of words and texts.<sup>163</sup> It is one of the organs that govern the Republic. The cases that reach the appellate courts are precisely the ones that aren’t clearly resolved by the language in statutes and regulations. Demanding that a judge or justice resolve such cases solely through the use of the words in the statute or regulation profoundly misunderstands both the gap between statutory language and law and the judiciary’s role in bridging that gap.

Whoever coined the phrase “the dead letter of the law” was onto something. The words of a statute, or of the Constitution for that matter, are no more than ink blots on paper. By themselves, they have no power to regulate or compel behavior. They gain that power through social cus-

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<sup>160</sup> The question whether one can justify judges as additional sources of “The Law” was considered in depth many years prior to Scalia’s writing by Guido Calabresi. *See generally id.*

<sup>161</sup> David Kennedy’s recitation of this history is as good as any available. *See* DAVID KENNEDY, *FREEDOM FROM FEAR, THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 325-37 (1999).

<sup>162</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

<sup>163</sup> Justice Barrett cautions that dictionaries are useful “tools,” but may miss legal nuance. Barrett, *supra* note 1, at 858, but then concludes, “The upshot here is that textualism isn’t about holding language “in isolation from actual usage.” It isn’t about taking things out of context or strictly construing language that isn’t strict. It is about identifying the plain communicative content of the words. *Id.* at 859. So for her, words in a statute have a “plain communicative content,” and it is apparently the judge’s obligation to puzzle out what that is, without at the same time committing the sin of Purposivism. A statute’s “plain communicative content” evidently is not its “purpose.”

tom and institutions, both of which mediate between the words on a page and action, creating standards and principles of social intercourse and consequences for deviance – i.e., creating “law.”<sup>164</sup>

Society gives life to statutes, regulations and to the Constitution when people follow what they understand the “law” to be. The textualist would have us believe that this understanding is, or should be, based on a close reading of what is written down. Here we have a silly fiction. How many people actually read statutes and endeavor to comply with them, and how many understand those words outside of the current idiom?<sup>165</sup> Few I would think. Instead, most people implicitly translate whatever legislatures write down into words and phrases they understand and can act upon, much as Justices Gorsuch and Alito attempted to do in their opinions in *Bostock* when they translated the statutory language into words they felt more comfortable acting upon. When that translation is impossible what is written down no longer has force and becomes quite literally a “dead letter” that sits on the statute books without the power to compel or mediate behavior.<sup>166</sup>

In addition to social acceptance generally, one of the key institutions that breathes life into the law is the judiciary. It does this by making the law relevant to particular circumstances. Unlike the legislature, courts do not always have the luxury of ducking the question presented. There will be some number of situations that the legislative drafters did not anticipate and did not explicitly address, anticipated but could not resolve and therefore didn’t address, or (as in the copyright cases discussed above) anticipated but punted to the courts. These are the situations that can wind up in the courts. What should happen there? Presented with an unanticipated or avoided situation, should a court throw up its hands and say, Well, we’re stuck with the words used by the legislators, their staffs, and the regulatory authorities used to address the situations they expressly addressed, and we just have to do our best to apply those words and no

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<sup>164</sup> Trump taught us this lesson in memorable fashion. Subpoenas issued by Congress had been thought to have the force of law, and did as long as people complied with them, but Trump and his coterie chose simply to ignore them. Then the congressional subpoenas reverted to their original state: ink on paper, without the power to compel compliance.

<sup>165</sup> I am here speaking of the understanding of statutes like the Civil Rights Act of 1964, which was plainly intended to influence the behavior of ordinary people going about their daily lives. The approach of tax attorneys to the Internal Revenue Code, or of copyright attorneys interpreting the special-interest provisions of the Copyright Act, is a different thing entirely. There, “ordinary communicative intent” is supplanted by copious definitions that bear little relation to ordinary discourse.

<sup>166</sup> The problem of anachronistic statutes, and what courts can do about them, was analyzed at length by Guido Calabrese. See CALABRESE, *supra* note 155.

others to address the new situation, however inadequate that vocabulary may be? Or should a judge be allowed a larger vocabulary to consider the right outcome, as the legislators, their staffs, the regulators would have done had they the foresight, prescience or willingness to consider this new situation? The High Textualist would say No!<sup>167</sup> We must not read new words into the statute, however inapt those words may be! But in fact, as we have seen in *Bostock* and *Pro Athletica*, the High Textualists are more than willing to restate the words of a statute to make them more suitable to the situation presented. The difference between them and a Purposivist like Judge Keeton or Justice Breyer is one of candor. In either case, the judge/justice must revise the statutory language to achieve a better fit with the facts presented, with an eye toward what the statutory language was trying to achieve, whether it is called its “meaning” or its “purpose.”

The “Law,” then, is not limited to ink blots on paper. It is comprised of the social acceptance of those ink blots and unwritten traditions as rules of conduct, mediated by society’s current understanding of what the words mean, supplemented from time to time by the evolutionary development of those words, evidenced by the society and sometimes recognized by the judiciary. This is what makes “Law”: an amalgam of words, practice, expectations, pronouncements and decisions that inform behavior. Relegating it to mere words is radically to diminish its depth and power.

#### IV. SUMMARY

In this discussion I have shown that definitions of and the precedential use of words in statutory provisions such as §§ 101, 102(b), 107 and 113 of the Copyright Act are not a sufficient basis for judgment in cases such as *Star Athletica*, *Lotus v. Borland*, and *Google v. Oracle*. I am prepared to believe that a thoughtful jurist like Justice Barrett would at least concede that the purpose standing behind the words must be considered in winnowing the various dictionary or precedential definitions. For my part, I am prepared to concede that there may be situations in which the meanings of statutory words in provisions such as Section 119 of the Copyright Act are so technical and limiting that they preclude any judicial consideration of underlying purpose. But in many, many other situations, meaning and purpose are but two sides of the same coin, and one cannot decide one without consideration of the other.

I return to the subject with which I began. My Confession is that I was once, many years ago, before Antonin Scalia achieved notoriety,

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<sup>167</sup> As demonstrated by *Bostock*, High Textualists are sometimes willing to explore whether the new situation had been considered somewhere in the canon *before* the statute was written, providing a gloss on its language, but not after. For the High Textualist, the legislative cake, once baked, cannot be supplemented with new ingredients, not even an icing.

before Amy Coney Barrett ascended to the Supreme Court, before even Justice Thomas ascended to that lofty perch, an aspiring High Textualist.<sup>168</sup> I believed that words and grammar alone could and should constrain judicial scope. I'm older now and, perhaps, a bit wiser. I hope by means of the examinations in this paper to show that textualism is not sufficient for the exercise of judgment, at least in the most fundamental aspects of copyright and competition law. Judgment in such cases must be informed by consideration of the effect a decision will have on categories of creative behavior, whether they be the design of cheerleaders' uniforms or the creation of software interfaces for "apps." The words of the Copyright Act can sometimes help to state the problem, but are never sufficient to resolve it. My hope is that High Textualists like Justices Barrett, Gorsuch, Thomas and Kavanaugh might over time adjust their orthodoxy as I have and accept that in addition to an examination of text, they must weigh the impact and effect of their decisions, in short, the policies they effect, in realizing their responsibility as a branch of our government.

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<sup>168</sup> See Hemnes, *supra* note 22, at 35 to 56.