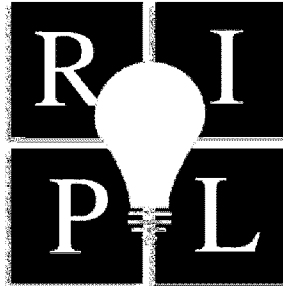


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



PATCHWORK PROTECTION: COPYRIGHT LAW AND QUILTED ART

MAUREEN B. COLLINS

ABSTRACT

Historically, quilts have been denied the same copyright protection available to any other expression in a fixed medium. When quilts have been considered protectable, the protectable elements in a pattern have been limited, or the application of the substantial similarity test has varied widely. One possible explanation for this unequal treatment is that quilting is viewed as 'women's work.' Another is that quilts are primarily functional. However, quilts have evolved over time and may now be expensive collectible pieces of art; art that deserves copyright protection. This article traces the history of quilt making, addresses the varying standards of protection afforded to quilts and concludes that consistent and comprehensive protection is needed for this art form.

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PATCHWORK PROTECTION: COPYRIGHT LAW AND QUILTED ART

MAUREEN B. COLLINS *

INTRODUCTION

When is a quilt a blanket and when is it art? This question takes on greater importance as the universe of quilted art expands and changes. Once relegated to attics and church craft bazaars, the quilt has come out of the closet.¹ Today, quilts are found in museums² and corporate headquarters.³ They are considered to be among the most collectible “new” forms of art.⁴ Quilting is a multi-million dollar industry.⁵ Handmade quilts fetch asking prices in the tens of thousands of dollars.⁶ Hobbyists and artists alike spend increasingly large amounts of money pursuing their craft.⁷ Inevitably, where there is money, there is litigation.

Increasingly, quilt artists are relying on the court system to protect proprietary interest in their fabric creations.⁸ Recently, a quilt artist sued a large hotel chain when it used her quilt design as the template for a carpet featured in its lobby.⁹ In

* © Maureen B. Collins 2010. Associate Professor of Law, The John Marshall Law School. Thank you to Professors Julie Spanbauer and Andrea Kaufman for their helpful comments. Thanks also to Michael Eisnach, Sarah La Voi and Abigail Sue for their invaluable research assistance.

¹ See ELEANOR LEVIE, *AMERICAN QUILTMaking: 1970–2000* 14 (Patricia Staten ed., American Quilter’s Society 2004) (discussing how quilting became more popular in the 1960s but was more enthusiastically practiced during the Bicentennial as a harkening back to America’s roots and traditions).

² *Quilt History List Member Archives for 2008*, QUILT HISTORY, <http://www.quilthistory.com/museums.htm> (last visited May 10, 2010) (providing a listing of museums with quilt exhibits).

³ See *Art In Public Places Registry*, STUDIO ART QUILT ASS’N, <http://www.saqa.com/information.php?ID=104> (providing lists of art displayed in public places, including quilts, organized by time zone regions).

⁴ Julie Keith, *African-American Quilts: Once Considered Crude and Utilitarian, Quilts Made by African Americans are Now Appreciated for Their Powerful Beauty and Jazz-like Improvisations*, ART BUS. NEWS (Jan. 2003) http://findarticles.com/p/articles/mi_m0HMU/is_1_30/ai_96894543/ (“And that’s what makes them interesting as collectible items. It’s not just arts and crafts, there’s a lot of thinking that goes into these quilts . . .”).

⁵ ROBERT SHAW, *ART QUILTS: A CELEBRATION: 400 STUNNING CONTEMPORARY DESIGNS* 15 (Nathalie Mornu et al. eds., Lark Books 2005) [hereinafter SHAW, *ART QUILTS*] (finding that in 2003 there were about 20 million quilt makers just in the United States, who collectively spent more than \$2 billion on quilting supplies).

⁶ See, e.g., *Red & Earth Tones Guatemalan Patchwork Quilts Queen Size*, ECRATER, <http://www.ecrater.com/product.php?pid=1860030> (last visited Mar. 10, 2010) (selling a handmade patchwork quilt for \$10,995.00).

⁷ See, e.g., *Cost of Quilting - How Much Does Quilting Cost?*, COSTHELPER, <http://www.costhelper.com/cost/games/quilting.html> (last visited Mar. 10, 2010) (quoting quilting tools from \$500.00–\$1,000.00; fabric \$200.00–\$350.00; sewing machines \$200.00–\$2,500.00; rail systems \$400.00–\$800.00; quilting books and DVDs \$10.00–\$100 or more; quilting classes \$10.00–\$100.00 or more).

⁸ *E.g.*, *Boisson v. Banian, Ltd.*, 273 F.3d 262, 265 (2d Cir. 2001) (describing plaintiffs’ allegations of copyright infringement for its quilting patterns). The patterns had been registered. *Id.*

⁹ *Quilt Copyright Case Settled*, ME. ANTIQUE DIG., Mar. 2007, http://maineantiquedigest.com/articles_archive/articles/mar07/f-quilt0307.htm (last visited May 26, 2010). In October 2006, Paula

two separate actions, quilt artists sued casinos who had similarly used their respective works as carpet design templates.¹⁰ One of those same artists also pursued Victoria's Secret for the use of her design in a swimsuit.¹¹ These types of actions represent a significant step away from the traditional notion of quilt designs as public domain and toward the realm of recognizing quilts as individual works of art.¹²

Although there are only a small number of judicial opinions which directly address the protection of quilt designs, they nonetheless manage to be inconsistent in their application of the Copyright Act.¹³ These opinions, do, however, reflect an unwillingness to consider quilts, long the province of "craft" and "womens' work," as protectable pieces of art.¹⁴

Nadelstern, a prominent quilt designer, filed a copyright infringement claim against the carpet manufacturer Couristan, Convention Center Hotel Corporation, Hilton Hotels Corporation, and the interior design firm Wilson & Associates alleging copyright infringement of thirteen of her kaleidoscope designs after they reproduced them on carpeting. *Id.* The carpet manufacturer, Couristan, admitted in its reply that, "the interior designer firm Wilson & Associates 'provided copies of the designs and instructed Couristan to use the designs in the carpeting.'" *Id.*

¹⁰ Press Release, McAndrews, Held & Malloy LTD, McAndrews, Held & Malloy Secures Favorable Settlement for Design Firm The Jane A. Sassaman Co. (Oct. 15, 2007), http://www.mcandrews-ip.com/news_releases_article.php?id=66. Jane A. Sassman, a leading textile artist, filed a copyright infringement claim against Wynn Resorts Holdings, LLC and its parent company Wynn Resorts Limited over her "Color Garden" pattern. *Id.* Wynn Resorts installed its "Parasol Up Lounge" carpeting that included a design that was substantially similar to Sassaman's "Color Garden" pattern. *Id.* A settlement between the parties was obtained. *Id.* Sassaman was in a prior dispute with Victoria's Secret over use of one of her designs "Big Leaves" used in Victoria's Secret swimwear. That dispute also settled. *Id.*

¹¹ *Id.*

¹² *Cf. Quilt Case Settled, supra* note 9 (noting the carpet manufacturer in the Paula Nadelstern case, Couristan, first alleged in its reply that "Nadelstern knowingly and intentionally failed to disclose that the Nadelstern Kaleidoscope Quilts featured in the Nadelstern Book are derivative works of third party fabrics." Later, on its website, Courtisan acknowledged that some of its carpeting designs were "inspired by Paula Nadelstern's unique pieced quilts featuring beautiful kaleidoscope medallions and starbursts in vibrant colors." *Id.* See Am. Compl. for Copyright Infringement at ¶¶ 24–30, *Nadelstern v. Couristan, Inc. et al.*, No. 06 CV 0248 (JFK) (S.D.N.Y. June 26, 2006).

¹³ *E.g.*, *Pem-America, Inc. v. Sunham Home Fashions, LLC*, 83 F. App'x 369, 371–72 (2d Cir. 2003) (unpublished table decision) (finding that plaintiff's designs were derivatives of the public domain and thereby protectable); *Boisson*, 273 F.3d at 272 (declining to protect a derivative design of the alphabet but allowing the arrangement to be protected); *Thimbleberries, Inc. v. C&F Enters., Inc.*, 142 F. Supp. 2d 1132, 1139 (D. Minn. 2001) (finding the scenes a faire doctrine inapplicable due to numerous wreath design patterns); *Brown v. McCormick*, 23 F. Supp. 594, 604 (D. Md. 1998) (finding plaintiff's designs to be original as they were based on the author's judgment after vague instructions).

¹⁴ See Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U.J. GENDER SOC. POL'Y & L. 431, 443–44 (2006) ("In the nineteenth century, quilt-making was just one example of women's work considered essential to the household, serving very functional purposes. Quilts were not assigned the status of 'original' given that the primary purpose of quilting was functional, therefore they could not earn copyright protection."); see also Doris Estelle Long, *Traditional Knowledge and the Fight for the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 617, 618 (2006) (defining traditional knowledge as "a potentially large body of knowledge and practices, which have been handed down through the generations," which would include "woman's work" in that definition).

This article examines the increasing need for copyright protection for quilted art, and the means by which that protection can be achieved. Part I focuses on the burgeoning movement among quilt artists to achieve individual recognition and protection for their work. Part II reviews traditional notions of copyright law and the use of the substantial similarity test. Part III examines the application of copyright law to quilted art. Part IV explores the avenues for more consistent and comprehensive copyright protection.

I: QUILTS: A BRIEF HISTORY

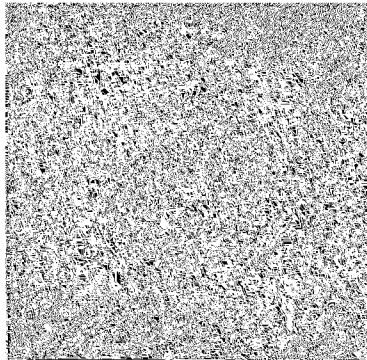
The term “quilt”: may bring to mind a torn and tattered afghan covered in pink roses. The word is often used to describe anything intended as a bedcover.¹⁵ Technically, though, the term refers to something made up of three layers, held together by stitching.¹⁶ For those not familiar with the process of designing and creating a quilt, the terms may appear a bit confusing. To this end, I offer the following glossary of basic terms.

QUILT: When used as a noun, this term is used to describe the finished product. Technically, a quilt is any “sandwich” consisting of two pieces of “fabric” on either side of a piece of batting and joined by stitching.¹⁷ Typically, a quilt is made up of a “pieced” front and a solid fabric backing.¹⁸

QUILTING: When used as a noun, this refers to the stitching which holds the quilt sandwich together.¹⁹ “Quilting” can be as plain and simple as tying a quilt with embroidery thread or it can feature intricate, flowing designs which are an essential part of the artistry of the quilt.²⁰

¹⁵ See SANDRA MEECH, CONTEMPORARY QUILTS: DESIGN, SURFACE AND STITCH 7 (BT Batsford, 2004) (2003).

¹⁶ See ADELAIDE HECHTLINGER, AMERICAN QUILTS, QUILTING, AND PATCHWORK: THE COMPLETE BOOK OF HISTORY AND TECHNIQUE 95 (Stackpole Books 1974).



¹⁷ SHAW, ART QUILTS, *supra* note 5, at 8 (“Quilts are traditionally made from three layers of material, with a soft filling or batting sandwiched between top and backing layers, the whole joined together with hand or machine stitching.”).

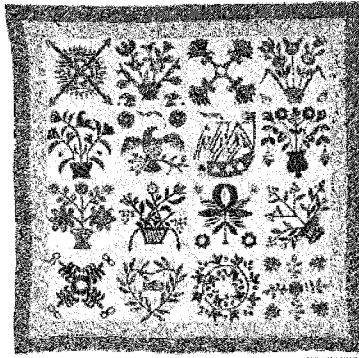
¹⁸ See *id.* at 8–9.

¹⁹ See MEECH, *supra* note 15, at 82.

²⁰ See *id.* at 7; Photograph of “A Visit to Provence,” *in* DIANE GAUDYNSKI: A NEW TRADITION IN QUILTING, <http://www.dianegaudynski.net/provence.html> (last visited Mar. 18, 2010).

PIECING/PATCHWORK: These terms refer to the joining of smaller, separate pieces of fabric into one large piece which constitutes the “top” of the quilt.²¹ Quilt designs often feature hundreds and even thousands of pieces.²²

QUILT BLOCK: Many traditional quilts are constructed by joining smaller pieces together into a distinct pattern, creating what is known as a block.²³ The blocks are then joined to create a larger overall design.²⁴ Block designs may be relatively simple, like the well-known Nine Patch pattern, or more intricate, like the detailed appliquéd designs of birds and fruit appearing in a Baltimore Album-style quilt.²⁵



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A. *The History of Quilting*

Quilts are part of the American tradition. Immigrants brought the art of textile making with them when they settled here.²⁷ Quilts were a matter of necessity.²⁸ They were fashioned from fabric remnants and bits of worn clothing.²⁹ These quilts were strictly utilitarian in nature.³⁰ Eventually, decorative quiltmaking became the province of upper-class women. These women had both the leisure time to create the quilts, and the economic ability to purchase the silks and satins from which they

²¹ HECHTLINGER, *supra* note 16, at 61; *see* SHAW, ART QUILTS, *supra* note 5, at 8–9.

²² HECHTLINGER, *supra* note 16, at 61.

²³ *Brown v. McCormick*, 23 F. Supp. 2d 594, 597 (D. Md. 1998); SHAW, ART QUILTS, *supra* note 5, at 9.

²⁴ *Brown*, 23 F. Supp. 2d at 597.

²⁵ MAGGIE MALONE, 5,500 QUILT BLOCK DESIGNS 6–7 (Nancy E. Sherman ed., Sterling Publishing Co. 2003); *see* SHAW, ART QUILTS, *supra* note 5, at 9.

²⁶ Photograph of “Baltimore Album Quilt, c.1845” in MARYLAND HISTORICAL SOCIETY, THE BALTIMORE ALBUM QUILT TRADITION, <http://www.tfaoi.com/aa/2aa/2aa561.htm> (last visited May 19, 2010).

²⁷ SHAW, ART QUILTS, *supra* note 5, at 8 (“[S]ettlers from the British Isles and other European countries brought the craft of quilt making to America.”).

²⁸ HECHTLINGER, *supra* note 16, at 16.

²⁹ *Id.*

³⁰ *See id.* (“These quilts probably were not very pretty, but there was no complaint about their durability, since they were made of strong material left over from unusable clothing.”).

were made.³¹ This line between the makers of utilitarian and decorative quilts began to blur in the mid-1800's with the expansion of the American textile industry.³² Quilting became more widely popular as more affordable and accessible materials became available.³³ Quilting's popularity dimmed in the mid-1900's with the availability of mass-produced textiles and an increasing desire for all things "modern."³⁴ Interest in quilting revived in the early 1970's with the approach of the Bicentennial celebration.³⁵ This revival brought with it innovations in tools and technology.³⁶ At about this same time, there was a movement among some quilt artists away from traditional patchwork and toward what is now referred to as the "art quilt."³⁷

B. Historical Attitudes in the Quilting Community

Once, the quilting community was centered on the notion of shared work and shared ownership.³⁸ Traditional patterns were traded freely between quilters, and quilters often gathered in groups to jointly design and create the quilts.³⁹ It is easy to conjure up the image of a traditional quilting bee or sewing circle where many women gathered around a single wooden frame to piece the patchwork and join the layers of the quilt with intricate, finely measured stitches. This archetype of the quilting community lives on in many Amish communities where quilting continues to be the result of group production for both personal use and financial gain.⁴⁰ It is also the case in many instances where a group will come together for a common cause to create a quilt, such as a charity fundraiser or to create a gift for someone who is ill.⁴¹ These archetypes represent an emphasis on collective "authorship" rather than individual creation.⁴²

More realistically, though, the great majority of quilts made today are made by individuals.⁴³ Although some quilters still produce their works by hand, and fiercely argue that this is the only proper method of creation, most quilters today use a sewing machine to accomplish in weeks and months what once took many hands and years to achieve.⁴⁴ As a result, much of the creation that once took place in the

³¹ SHAW, ART QUILTS, *supra* note 5, at 8.

³² See HECHTLINGER, *supra* note 16, at 18–19.

³³ SHAW, ART QUILTS, *supra* note 5, at 8.

³⁴ HECHTLINGER, *supra* note 16, at 20.

³⁵ SHAW, ART QUILTS, *supra* note 5, at 12 ("As the [B]icentennial approached, Americans felt the urge to look back as well as forward, and interest in quilts and quilt making soared.")

³⁶ *Id.* at 14.

³⁷ *Id.* at 11.

³⁸ See HECHTLINGER, *supra* note 16, at 18 ("The scrap bag became a topic of conversation among neighboring womenfolk. From it were exchanged 'pieces' with neighbors—a practice which furthered not only the artistic end of quilt-making, but the spirit of community as well."); ROBERT SHAW, QUILTS: A LIVING TRADITION 11 (Deborah Teipel Zindell ed., Hugh Lauter Levin Associates, Inc. 1995) [hereinafter SHAW, A LIVING TRADITION].

³⁹ See HECHTLINGER, *supra* note 16, at 18.

⁴⁰ See SHAW, A LIVING TRADITION, *supra* note 38, at 51.

⁴¹ *Id.* at 11.

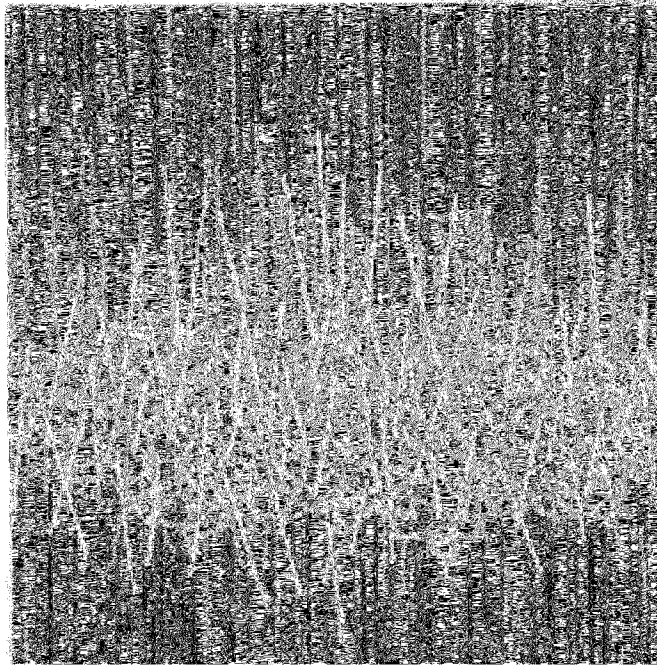
⁴² *Id.*

⁴³ See SHAW, ART QUILTS, *supra* note 5, at 15.

⁴⁴ *Id.* at 15–17.

church hall or the community center now takes place at the dining room table or in the studio.⁴⁵

The concept of sharing designs is still strong in the quilting community, but that notion is no longer universally accepted.⁴⁶ What was once considered common property is now being created by individuals as a means of individual artistic expression and personal and financial enrichment.⁴⁷



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C. The Art Quilt

Where once the ability to slavishly follow a pattern was cherished, innovation and individuality may now have pride of place.⁴⁹ Instead of following traditional patterns that involved piecing together a multitude of squares and triangles, some

⁴⁵ See SHAW, A LIVING TRADITION, *supra* note 38, at 11.

⁴⁶ See, e.g., *Free Quilt Patterns*, FREEQUILT.COM, <http://www.FreeQuilt.com> (last visited May 19, 2010) (listing free quilt patterns on a website that promotes sharing of quilt patterns and providing these patterns to the quilting community at no charge).

⁴⁷ See SHAW, ART QUILTS, *supra* note 5, at 11, 13.

⁴⁸ Photograph of "Passage of Time," in EILEEN LAUTERBORN: ART QUILTS, <http://www.eileenlauterborn.com/passageoftime.htm> (last visited May 19, 2010).

⁴⁹ Robin Chenoweth, *Fabrication Nation: Quilters Push Limits with Unusual Materials and Out-there Techniques*, COLUMBUS DISPATCH, June 7, 2009, at 01E ("Former traditional quilters such as Jody Wigton find the new techniques liberating. Ten years ago, the Columbus artist got bored following patterns and took up art quilting. Her contemporary pieces have random patterns and raw, unfinished edges.").

quilt artists are taking another tack.⁵⁰ These artists deviate away from the standard structure and, using both traditional and non-traditional quilting methods of joining fabric to batting to fabric, create fiber art.⁵¹ These “art quilts” may be representational or abstract, they may be constructed entirely of commercially purchased fabric or may include hand-dyed fabric and embellishments such as beading and found objects.⁵² These quilts are not designed for the bed but, rather, the wall.⁵³ Their purpose is not to warm the body but, perhaps, to warm the soul of both the viewer and the artist.⁵⁴ These artists, like artists in any medium, want to protect their creative labors.⁵⁵ Increasingly, they are turning to copyright law as a means of that protection.⁵⁶

This move is not without controversy in the quilting community.⁵⁷ One widely-admired quilt designer was recently excoriated on an artists’ blog for refusing to share her designs with hobbyists⁵⁸ who sought to reproduce them.⁵⁹ The name calling that ensued was more reminiscent of a hockey game than a quilting bee—simply because the quilt artist took the position that she was entitled to compensation for her work.⁶⁰ This attitude reflects a greater rift in the artistic community, but is particularly divisive in a community known for sharing and good will.⁶¹

⁵⁰ See *id.* (“Although artists still use fabric, they don’t just sew it anymore. They paint it. They sculpt it. They print pictures on it and even burn it.”).

⁵¹ See SHAW, ART QUILTS, *supra* note 5, at 11–13; Chenoweth, *supra* note 49, see also *The Quilt as Art*, FIBER REVOLUTION, <http://www.fiberrevolution.com/> (last visited May 19, 2010) (providing examples of many fiber artists). “Fiber Revolution is a network of professional textile artists combining their knowledge and experience in marketing to exhibit and sell their artwork.” *The Quilt as Art*, *supra*.

⁵² SHAW, ART QUILTS, *supra* note 5, at 15.

⁵³ See MEG COX, THE QUILTERS CATALOG: A COMPREHENSIVE RESOURCE GUIDE 23 (Workman Publishing Co. 2008).

⁵⁴ See *id.*

⁵⁵ See *id.* at 515.

⁵⁶ *Id.*

⁵⁷ Weeks Ringle, *The Value of a Pattern*, WHIPUP.NET (Aug. 28, 2007), <http://whipup.net/2007/08/28/the-value-of-a-pattern/> (“[I]t’s hard for quilters to understand and value the concept of intellectual property. . . . because so many traditional patterns are in the public domain (not protected by copyrights), most quilters don’t see why all patterns shouldn’t be available to copy as easily as those that are not protected by copyrights.”).

⁵⁸ The term used to identify quilters who pursue the craft as a hobby rather than a vocation.

⁵⁹ *Id.* An example of one of the hostile comments is as follows:

Kate says, on August 30, 2007 at 8:23 am, The narrowness of Weeks’ viewpoint amazes me. Grow up and get on with your own work. Or maybe use some of the education you refer to in the original post and realize that no one creates in a vacuum. You are undoubtedly ‘copying’ design motifs, details, ideas, etc. that you don’t even remember you ever saw, but they are part of your memory and experience. I guess what really bothers me, and why this post is “harsh” is the focus on art = money. . . . And I seriously doubt that you are actually losing money when a person copies one of your designs to put on her own bed. If anything, your “look” is gaining a wider audience, and you probably profit in the end.

Id.

⁶⁰ See *id.*

⁶¹ See HECHTLINGER, *supra* note 16, at 18.

D. The Changing Market

It is not just the art quilters who find themselves in conflict with other quilters. Those traditional quilters who create and publish designs which can be purchased in quilt stores or are published in books are also raising their artistic hackles.⁶² As more and more money changes hands at quilt stores, either virtual or brick and mortar, more and more pattern designers are attempting to put limitations on what purchasers can create with those patterns.⁶³ These are not little old ladies in their Victorian homes mimeographing patterns anymore.⁶⁴ This is big business.⁶⁵ Many of these pattern designers include notations on their instructions telling the purchaser that the resulting quilt cannot be sold for commercial purposes or setting a numerical limit on how many quilts can be produced from a single pattern.⁶⁶ Many quilt designers are now producing their own lines of fabric featuring their well-known designs.⁶⁷ At least one fabric/quilt designer attempted to limit use of her fabric in products for commercial sale.⁶⁸

Quilt block patterns with evocative names like “Log Cabin,”⁶⁹ “Wedding Ring,”⁷⁰ “Ohio Star”⁷¹ and “Drunkard’s Path”⁷² have been traded among quilters for nearly two hundred years.⁷³ These tradition patterns are, clearly, in the public domain.⁷⁴ Now, patterns are not only being handed down or passed around.⁷⁵ They are being sold.⁷⁶ Questions arise as to the artistic integrity of a quiltmaker who uses a pattern to make a quilt, then displays it in a competition or offers it for sale without attributing the pattern designer.⁷⁷ With the explosion of quilting tools and computerized sewing machines that allow even novice quiltmakers to make intricate

⁶² See COX, *supra* note 53, at 515–19.

⁶³ See, e.g., *id.*; Ringle, *supra* note 57.

⁶⁴ See COX, *supra* note 53, at 18.

⁶⁵ See *id.* at 20 (noting that as of 2008 there were approximately 2,500 quilting stores in the United States and that quilting was a 3.3 billion dollar a year industry).

⁶⁶ Amy Butler, *Amy Butler On Using Her Fabric*, WHIPUP.NET (Dec. 6, 2006), <http://whipup.net/2006/12/06/amy-butler-on-using-her-fabric/> (acknowledging in a letter to a blog, WhipUp.net, fabric designer Amy Butler stated that in the past she put restrictions on her fabric designs). Yet in her letter she stated, “I know the selvedge on my fabrics reads ‘for Non-Commercial Use Only’ but that will be removed in future printings of my material. The ‘for Non-Commercial Use Only’ is not in effect, so it’s totally ok to use those fabrics at any time.” *Id.*

⁶⁷ See, e.g., *The FreeSpirit Designers*, FREESPIRIT FABRICS, <http://freespiritfabric.com/core-pages/designers.php> (last visited May 17, 2010) (listing the pattern designers of FreeSpirit). Such designers include Jane Sassman and Denyse Schmidt. *Id.*

⁶⁸ E.g., Butler, *supra* note 66.

⁶⁹ HECHTLINGER, *supra* note 16, at 56 (“The block, carefully shaded in light and dark, is made with a square center, while four ‘logs’ graduated in length are built up on each of its four sides. A different placing of light and dark corners produced the Straight Furrow and the Barn Raising.”).

⁷⁰ See Photograph of No. 438, *in* MALONE, *supra* note 25, at 40.

⁷¹ See Photograph of No. 207 *in id.* at 24.

⁷² COX, *supra* note 53, at 512.

⁷³ See *id.* at 518.

⁷⁴ *Id.*

⁷⁵ See HECHTLINGER, *supra* note 16, at 18.

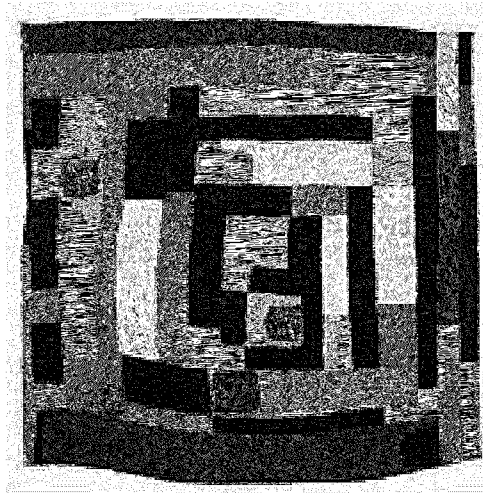
⁷⁶ See, e.g., COX, *supra* note 53, at 514 (listing numerous books for sale with quilting patterns).

⁷⁷ See Ringle, *supra* note 57.

and complicated quilts comes a host of new construction methods.⁷⁸ These methods, and these tools, may be part of what a quilter sells.⁷⁹ Today's quilt designers, traditional and modern, want their financial and artistic due.⁸⁰

E. The Gee's Bend Phenomenon

Consider an example of the changing market's effect on an unchanging location: Gee's Bend, Alabama. Gee's Bend is a small town in rural Alabama.⁸¹ Contact with the outside world was limited for many years when the only connection, the local ferry, ceased to run.⁸² As an unintended result, the quilting tradition remained very strong in the town, and the designs were not influenced by external sources.⁸³



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The Gee's Bend quilts have toured the country in museums and at quilt shows.⁸⁵ The designs have been reproduced on everything from postcards to tee-shirts to

⁷⁸ See COX, *supra* note 53, at 18; SHAW, ART QUILTS, *supra* note **Error! Bookmark not defined.**, at 16–17.

⁷⁹ See, e.g., SHAW, ART QUILTS, *supra* note 5, at 15–19.

⁸⁰ COX, *supra* note 53, at 515–19; Ringle, *supra* note 57.

⁸¹ Alvia Wardlaw, *Introduction: The Quilts of Gee's Bend*, in THE QUILTS OF GEE'S BEND 8, 12 (William Arnett et al. eds., Tinwood Books 2002) (“[O]ne of the several ‘bends’ where the Alabama River makes an abrupt, looping turn. More broadly, Gee's Bend is the traditional but unofficial name of a small African American community centered at the town of Boykin and encircled by the river.”).

⁸² John Beardsley, *River Island*, in THE QUILTS OF GEE'S BEND 20, 20 (William Arnett et al. eds., Tinwood Books 2002).

⁸³ See Wardlaw, *supra* note 81, at 8.

⁸⁴ Photograph of “Blocks and Stripes,” in LINDA PETTWAY: THE QUILTS OF GEE'S BEND, http://www.quiltsofgeesbend.com/quilts/index_quilts_exhibitions.shtml (last visited May 17, 2010).

⁸⁵ Peter Marzio, *Forward*, in THE QUILTS OF GEE'S BEND, *supra* note 81, at 6–7 (noting that the first exhibition occurred at The Museum of Fine Arts in Houston, Texas and displayed seventy quilts).

carpets.⁸⁶ The quilts come from very humble beginnings.⁸⁷ Most were created from scrap fabric or worn clothing.⁸⁸ Many of the designs are interpretations of traditional patterns like the Log Cabin block.⁸⁹

The quilts have a strikingly graphic appeal, yet any modern quilt show judge would scoff at the workmanship, with crooked seams and haphazard stitching.⁹⁰ The women of Gee's Bend created these quilts out of necessity,⁹¹ yet their naïve appeal has brought them to the level of "Art."⁹² These quilts have also become big business.⁹³ Those that have been sold can fetch a price of well over a thousand dollars.⁹⁴ The merchandising alone is multi-billion dollar a year industry.⁹⁵ The man who "discovered" the quilts and brought them to the attention of the public arranged to form a cooperative to share in the profits.⁹⁶ With the profits, a community center has been opened in the town.⁹⁷ Perhaps as a result of the acclaim these quilts have

The "Quilts of Gee's Bend" exhibition has received tremendous international acclaim, beginning at its showing in Houston, then at the Whitney Museum of American Art in New York and the other museums on its twelve-city American tour. Newsweek, National Public Radio's Talk of the Nation, Art in America, CBS News Sunday Morning, PBS's NewsHour with Jim Lehrer, the Martha Stewart Living television show, House and Garden, Oprah's O magazine, and Country Home magazine are among the hundreds of print and broadcast media organizations that have celebrated the quilts and the history of this unique town. Art critics worldwide have compared the quilts to the works of important artists such as Henri Matisse and Paul Klee. The *New York Times* called the quilts "some of the most miraculous works of modern art America has produced." The Museum of Fine Arts, Houston, is currently preparing a second major museum exhibition and tour of Gee's Bend quilts, to premiere in 2006.

Collective History of the Quilts of Gee's Bend, QUILTS OF GEES BEND, <http://www.quiltsofgeesbend.com/history/> (last visited May 17, 2010).

⁸⁶ See Press Release, Gee's Bend Quilters, Gee's Bend Quilters Issue Statement for the Record: Artists Show Continued Support for the Arnetts (Jan. 10, 2008) [hereinafter Gee's Bend Quilters] (on file The John Marshall Review of Intellectual Property Law)

Contrary to the allegations by Annie Mae Young and Loretta Pettway, the quilters indicated that they were well aware of the products and have approved their production and sale to support the Gee's Bend Foundation by Kathy Ireland Worldwide (KIWW) and other companies including Printed Culture, Anthropologie, Gallery Collection, Classic Rug Collection, Chronicle Books, Tinwood Books, Fotofolio, Ronnie Sellers Productions, Uncover and any other company that the Arnetts have arranged to benefit the Gee's Bend Quilters Collective and the Gee's Bend Foundation.

Id.

⁸⁷ See Wardlaw, *supra* note 81, at 15.

⁸⁸ *Id.*

⁸⁹ See *id.* at 14, 16–17.

⁹⁰ See, e.g., Photograph of "Blocks and Stripes," *supra* note 84.

⁹¹ See Wardlaw, *supra* note 81, at 13 ("The quilt was a 'cushion,' in a very real sense of the word, against elements that invaded their log cabins chinked with mud against the wind.").

⁹² See *Collective History of the Quilts of Gee's Bend*, *supra* note 85.

⁹³ COX, *supra* note 53, at 20.

⁹⁴ E.g., *id.* at 21; *Red & Earth Tones Guatemalan Patchwork Quilts Queen Size*, *supra* note 6 (advertising a quilt for sale at a price of \$10,995).

⁹⁵ COX, *supra* note 53, at 20.

⁹⁶ See Gee's Bend Quilters, *supra* note 86.

⁹⁷ Linda Hales, *From Museum to Housewares: Marketing Gee's Bend Quilts*, WASH. POST, Feb. 28, 2004, at C01.

brought to the area, the local ferry service has been restored.⁹⁸ The recognition of the quilts this man brought to Gee's Bend no doubt revolutionized this historically poor community. Yet this very same man was sued by one of the most prolific quilters, a former member of the cooperative, who felt that she was not getting her fair share and questioned the reinvestment into the community.⁹⁹ The quilts no longer represent only the creative spirit of the artists and their ability to make art from scrap.¹⁰⁰ Today, they represent big business and, increasingly, generate costly litigation.

II: QUILTS AND THE COURTS: STRANGE BEDFELLOWS

The very essence of copyright protection is that it is extended only to the tangible expression of ideas, and not to the ideas themselves.¹⁰¹ In order to be protected, this expression must be original, although the bar for originality is notoriously low.¹⁰² When determining the existence of copyright infringement, courts apply a well-established two-part test.¹⁰³ The plaintiff must establish ownership of a valid copyright, and unauthorized copying by the alleged infringer.¹⁰⁴ Although the test itself is well-established, courts often avow a reluctance to engage in the determination of what constitutes protectable "art."¹⁰⁵ This reluctance has come to be known as the "doctrine of avoidance of artistic determination."¹⁰⁶ No matter how a court deals with copyright infringement cases, "[t]he test for the infringement of copyright is of necessity vague."¹⁰⁷

The first step in the inquiry, then, is to determine whether a work is protected by copyright and, if so, to what extent.¹⁰⁸ A copyright registration is *prima facie* evidence of ownership.¹⁰⁹ Even with a registration certificate, however, ownership may still be challenged on the grounds that the underlying work does not possess the

⁹⁸ See Gee's Bend Quilters, *supra* note 86.

⁹⁹ Annie Mae Young v. Tinwood Ventures, No. 07-317 (S.D. Ala. May 4, 2007); see Lucinda Pettway Franklin v. Tinwood Ventures, No. 07-438 (S.D. Ala. June 19, 2007); Loretta Pettway v. Tinwood Ventures, No. 07-423 (S.D. Ala. June 11, 2007).

¹⁰⁰ See COX, *supra* note 53, at 515–19; Ringle, *supra* note 57.

¹⁰¹ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985) ("In addition, no author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality.")

¹⁰² Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily . . .").

¹⁰³ *Id.* at 361; Harper & Row, 471 U.S. at 547–48.

¹⁰⁴ Feist, 499 U.S. at 361.

¹⁰⁵ See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.")

¹⁰⁶ Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 814–15 (2005).

¹⁰⁷ Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

¹⁰⁸ Feist, 499 U.S. at 361.

¹⁰⁹ 17 U.S.C. § 410(c) (2006) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate.")

requisite level of creativity.¹¹⁰ As the United States Supreme Court established in *Feist Publications, Inc. v. Rural Telephone Services Co.*, only a minimal degree of creativity is required.¹¹¹ Even with this low hurdle, though, there are some elements that still do not rise to the requisite level. Certain concepts, designs, and plot lines are considered to be in the public domain.¹¹² Often referred to as “scenes a faire,” these stock plots and elements are essential to any story or work.¹¹³ As such, they are not protected by copyright.¹¹⁴ Where the story or design consists of a combination of protected and unprotected elements, a court will attempt to “filter out” the uncopyrightable elements and focus on those which are protectable.¹¹⁵ Although it sounds as if it is a mechanical process, this filtration is fraught with the kinds of “artistic determination” that so many courts seek to avoid.¹¹⁶

Once the protected elements in the first work have been identified, those elements are compared with the second work to determine whether copying has occurred.¹¹⁷ Direct evidence of copying is often unavailable.¹¹⁸ When this evidence is unavailable a court must decide whether copying can be inferred.¹¹⁹ Copying will be inferred where the plaintiff can establish that the second user had access to the original work, and that the second work is “substantially similar” to the original work.¹²⁰ Access can be proven by direct evidence¹²¹ or, as is more often the case, it can be inferred where the work has been widely distributed.¹²²

More “artistic determination” is required in assessing the substantial similarity between the two works.¹²³ In assessing the similarity between visual works, a court

¹¹⁰ See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.11[A][3] (2009).

¹¹¹ 499 U.S. at 345.

¹¹² See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985); 4 NIMMER, *supra* note 110, § 13.03[B][4].

¹¹³ 4 NIMMER & NIMMER, *supra* note 110, § 13.03[B][4]. *But cf.* Michael D. Murray, *Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 858 (2006) (suggesting that the concepts of scenes a faire and the merger doctrine are appropriate only in the context of literary works and do not translate into the analysis of strictly visual works).

¹¹⁴ See 4 NIMMER & NIMMER, *supra* note 110, § 13.03[B][4].

¹¹⁵ See *id.* § 13.03[E][1][b] (“In the wake of *Feist*, [courts] should . . . determine whether the similarity between plaintiff’s and defendant’s work is substantial, the comparison should not include unoriginal elements of plaintiff’s work; rather, the comparison should take place after filtering out of the analysis elements of plaintiff’s work that are not protectable . . .”).

¹¹⁶ See Murray, *supra* note 113, at 811–12.

¹¹⁷ *E.g.*, *Stromback v. New Line Cinema*, 384 F.3d 283, 297 (6th Cir. 2004) (“After filtering out the unprotectible elements such as ideas and *scenes a faire*, the final step is to determine whether the allegedly infringing work is ‘substantially similar’ by comparing the two works.” (citation omitted)).

¹¹⁸ See 4 NIMMER & NIMMER, *supra* note 110, § 19.D07[B] (“[D]irect evidence of use is more the exception than the norm.”).

¹¹⁹ See *id.*

¹²⁰ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481–82 (9th Cir. 2000).

¹²¹ 4 NIMMER & NIMMER, *supra* note 110, § 19D.07[A].

¹²² *Id.* § 19D.07[B]; *e.g.*, *Three Boys*, 212 F.3d at 484 (“It is entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers’ song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later.”).

¹²³ See 4 NIMMER & NIMMER, *supra* note 110, § 13.03[A] (“Judge Learned Hand has said that this line ‘wherever it is drawn will seem arbitrary’ and that ‘the test for infringement of a copyright is of necessity vague.’” (citations omitted)).

will compare the “total concept and feel.”¹²⁴ By virtue of its name alone, this test is too subjective for many.¹²⁵ In order to provide some guidelines for the application of the test, courts typically conduct a bifurcated analysis featuring both an extrinsic (objective) test and an intrinsic (and more subjective) test.¹²⁶ The extrinsic test permits the use of “analytic dissection and expert testimony.”¹²⁷ The intrinsic test focuses on the perceived response of the “ordinary reasonable person.”¹²⁸

There is an inverse ratio between the access and similarity requirements.¹²⁹ The greater the similarity between the two works, the less evidence of access required.¹³⁰ If the two works are “strikingly similar,” some courts will presume access on the basis that such similarity could not result from independent creation.¹³¹

A. Copyrights and Quilts: A Tangled Thread

The issue of copyright protection for quilts has been addressed by several federal courts.¹³² The outcomes have varied, as have the standards applied by the courts in determining infringement.¹³³

¹²⁴ Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (introducing what would become widely accepted as the “total concept and feel” test); 4 NIMMER & NIMMER, *supra* note 110, § 13.03[A][1][c].

¹²⁵ See 4 NIMMER & NIMMER, *supra* note 110, § 13.03[A][1][c] (noting the “total concept and feel” test’s origin in the comparison of juvenile and therefore simplistic works).

¹²⁶ *Id.* § 13.03[E][3][b][i].

¹²⁷ Sid and Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

¹²⁸ *Id.*

¹²⁹ 4 NIMMER & NIMMER, *supra* note 110, § 13.03[D].

¹³⁰ *Id.*; e.g., Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) (“[W]e require a lower standard of proof of substantial similarity when a high degree of access is shown.” (citation omitted)).

¹³¹ 4 NIMMER & NIMMER, *supra* note 110, § 13.02[B].

¹³² *Boisson v. Banian, Ltd.*, 273 F.3d 262, 265 (2d Cir. 2001); *Thimbleberries, Inc. v. C&F Enters., Inc.*, 142 F. Supp. 2d 1132, 1136 (D. Minn. 2001); *Brown v. McCormick*, 23 F. Supp. 2d 594, 596 (D. Md. 1998); *Pem-America, Inc. v. Sunham Home Fashions, LLC*, 83 F. App’x 369, 370 (2d Cir. 2003) (unpublished table decision).

¹³³ See *Boisson*, 273 F.3d at 272 (applying a heightened level of scrutiny known as the “more discerning observer” test when determining substantial similarity because the plaintiff’s design was not “wholly original” and included elements from the public domain); *Thimbleberries*, 142 F. Supp. 2d at 1139 (requiring plaintiff to show striking similarity rather than merely substantial similarity in order to prove copying and, in determining striking similarity, applying an “extrinsic test” that looks at the similarity of the general ideas behind the work as well as the type of artwork involved, the materials involved, and the subject matter and the setting for the subject); *Brown*, 23 F. Supp. 2d at 604 (finding that the plaintiff could only claim copyright protection over her expression of the basic elements of the “Wedding Block”); *Pem-America*, 83 F. App’x at 371 (applying a narrower, different version of the “more discerning observer” test when determining substantial similarity by looking not only to those elements that “provide copyrightability to the allegedly infringed compilation,” but also to the “total concept and feel” of the two compared works (citations omitted)).

1. *Brown v. McCormack*¹³⁴

In the first case to explicitly address the protection of a quilt pattern, the court considered what portions of the quilt design should be protected as “original” work, and to what extent the use made of the quilt was a fair use.¹³⁵ The dispute in *Brown* arose out of the display and merchandising of plaintiff’s quilt designs made for use in the aptly titled film *How to Make an American Quilt*.¹³⁶ The popular movie followed a group of women as they created a quilt as a wedding gift for one of the main characters.¹³⁷ In order to achieve the desired result, the film studio hired Defendant Patricia McCormick, head of a local quilting guild, to select a quilt artist and to supervise the design.¹³⁸ Ms. McCormick selected Barbara Brown, and the two agreed that Ms. Brown would design a set number of quilt blocks to be assembled into the quilt seen in the film as “The Life Before” quilt.¹³⁹

At the suggestion of the studio, Ms. McCormick directed Ms. Brown to create the designs in the “style” of an African American story quilt, as exemplified by the designs of well-known quilt artist Harriet Powers.¹⁴⁰ Samples of the Powers quilts, characterized as “a folk art style with simple, primitive drawings of human figures and scenes,” were provided to Ms. Brown.¹⁴¹ These samples were accompanied by instructions that the quilt should be in a style similar to Ms. Powers’ quilts, but that the quilt should not duplicate her iconic designs.¹⁴² Ms. Brown negotiated to retain all copyrights in her original quilt block designs.¹⁴³ It was agreed that the studio would produce two quilts featuring the design to accommodate the need to portray the quilt at different stages of completion and as aged throughout the years.¹⁴⁴ Ms. Brown created a series of fifteen quilt block designs, submitting the pattern for each to Ms. McCormick.¹⁴⁵ Each of the patterns included Ms. Brown’s copyright ownership notation.¹⁴⁶ Ms. McCormick arranged for the designs to be executed by an independent quilter, and then delivered to the studio.¹⁴⁷

Due to unrelated events, the studio decided not to feature “The Life Before” quilt in the film.¹⁴⁸ However, after the release of the film, both Brown and McCormick filed copyright registrations for the respective blocks.¹⁴⁹ The dispute arose when Ms. McCormick used the design for one of the blocks in “The Life Before” quilt created by

¹³⁴ 23 F. Supp. 2d 594(D. Md. 1998).

¹³⁵ *Id.* at 603–04, 607.

¹³⁶ *Id.* at 596.

¹³⁷ *Id.* at 597.

¹³⁸ *Id.* at 598.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See id.*; *see, e.g.*, Photograph of “Pictorial Quilt,” *in* MUSEUM OF FINE ARTS BOSTON, COLLECTIONS, http://www.mfa.org/collections/search_art.asp (search Artist/Maker “Harriet Powers”; then follow “Pictorial quilt”) (last visited May 19, 2010).

¹⁴² *Brown*, 23 F. Supp. 2d at 598.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 599.

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 601, 603, 610.

Ms. Brown as the basis for a quilt block design referred to as the “Marriage Block.”¹⁵⁰ The block in question depicted “a scene with a black bird flying over a man and a woman holding hands.”¹⁵¹ The Marriage Block appeared in a quilt referred to in the film as “Where Love Resides.”¹⁵² Ultimately, the quilt was featured in merchandising efforts by the studio in connection with the film.¹⁵³ Further, all or portions of the quilts appeared in brochures, t-shirts, an oil painting and a book relating to the film.¹⁵⁴

In assessing Ms. Brown’s copyright infringement claims, the court first considered the argument that the “Wedding Block” was not sufficiently original.¹⁵⁵ The court found that Ms. Brown did in fact create the designs, and that the originality requirement was satisfied.¹⁵⁶ The court also pointed out that, “on the other hand,” copyright protection would only be awarded to those components of the work that were original to the author.¹⁵⁷ The court found that Ms. Brown could not claim copyright protection against subsequent quilt designs featuring the basic elements of the Wedding Block (“a black bird flying over a man and a woman holding hands”) but only against unauthorized copying of her expression of these elements.¹⁵⁸

In addressing the issue of copying, the court noted that the first element of the test, access, was undeniably satisfied by evidence of the communication between the two quilt designers.¹⁵⁹ In assessing the level of similarity between the two designs, the court utilized a “substantial similarity” analysis.¹⁶⁰ Conducting an extrinsic analysis, the court compared the size, shape, placement, and orientation of the human and bird figures in the two blocks.¹⁶¹ It concluded that a reasonable jury could find a substantial similarity between the two works.¹⁶² The court was unpersuaded by the argument that Ms. McCormick’s works was a separate, derivative work.¹⁶³ Brown’s motion for summary judgment was granted as to the copyright infringement claim.¹⁶⁴

2. *Boisson v. Banian, Ltd.*¹⁶⁵

Plaintiff Judi Boisson alleged that Banian had infringed the copyrights in two of her quilt designs.¹⁶⁶ Following a bench trial, the Eastern District of New York

¹⁵⁰ *Id.* at 600.

¹⁵¹ *Id.* at 603–04.

¹⁵² *Id.* at 596–97.

¹⁵³ *Id.* at 600–01.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 603–04.

¹⁵⁶ *Id.* at 604.

¹⁵⁷ *Id.* (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991)).

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* at 605.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 610–11.

¹⁶⁵ 273 F.3d 262 (2d Cir. 2001).

¹⁶⁶ *Id.* at 265.

dismissed her claims.¹⁶⁷ The Second Circuit reviewed the decision and found that the District Court had applied the test for comparing contested works too narrowly.¹⁶⁸

Boisson owned copyright registrations for several quilts based on her “School Days” pattern.¹⁶⁹ The pattern consisted of square blocks featuring capital letters made up of different colors in a consistent theme, arranged in horizontal rows and vertical columns.¹⁷⁰ The last row of the design was filled with pictures.¹⁷¹ The design was surrounded by a white border and colored edging.¹⁷² Boisson sold her quilts in gift stores and through high-end catalogs.¹⁷³ Banian produced “ABC” quilts in several color schemes and sold them through boutique stores and catalog companies.¹⁷⁴ The District Court applied the “more discerning” ordinary observer test to determine whether the quilts designs were protected under copyright law.¹⁷⁵ It determined that there was no infringement of protectable elements.¹⁷⁶ In so doing, it determined that certain elements of the design were in the public domain: the alphabet, the layout of the alphabet in a six row/five column design with icons in the last row, and the color scheme.¹⁷⁷ It did not render judgment on whether the particular shapes of the letters were protectable.¹⁷⁸

In reviewing the decision, the Second Circuit held that the District Court had properly articulated the “more discerning” ordinary observer test, but had applied it too narrowly when it failed to consider the overall look and feel of the original works.¹⁷⁹ The Appellate Court acknowledged the registration certificates as prima facie evidence of the validity of the copyrights and, hence, the originality of the works, but went on to ask the “threshold question”: “what characteristics of the plaintiff’s design have gained copyright protection.”¹⁸⁰ The Court considered whether elements of the quilt design were in the public domain and, thus, unprotectable.¹⁸¹

Neither the plaintiff nor the Appellate Court disputed the fact that the alphabet was in the public domain.¹⁸² However, the Court found that the layout of the design was a protectable element.¹⁸³ In the absence of direct evidence of copying, the court applied the two-part test for determining the existence of an inference that copying took place: access and substantial similarity.¹⁸⁴

¹⁶⁷ *Id.* at 265–66.

¹⁶⁸ *Id.* at 266.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 271–72.

¹⁷⁶ *Id.* at 275.

¹⁷⁷ *Id.* at 274–75.

¹⁷⁸ *Id.* at 269.

¹⁷⁹ *Id.* at 266.

¹⁸⁰ *Id.* at 268.

¹⁸¹ *Id.* at 268–69.

¹⁸² *Id.* at 269.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 267–68.

Oddly, instead of reviewing whether defendant Banian had access to plaintiff Boisson's design, the court reviewed whether Boisson had access to other alphabet designs when she was in the process of creating her own alphabet quilt.¹⁸⁵ In so doing, it lent credence to the position that a defendant may show copying from the public domain by the plaintiff through the same indirect evidence in an effort to disprove originality.¹⁸⁶ The Court found that Boisson did not have access to a reasonably similar work, and that, as a result, the quilt design was protected as an original work because it was an independent creation.¹⁸⁷ The Court did not address the issue of Banian's access to Boisson's work.

The Appellate Court declined to rule as to the question of whether particular letter shapes were protectable, but did suggest find that an original combination or arrangement of colors could be protected.¹⁸⁸ Concluding that certain elements of the design were protectable, the Court turned its attention to whether the contested works were so similar as to infer copying.¹⁸⁹ Although acknowledging that substantial similarity was the traditional test for determining such copying, the Court relied on its decisions in two previous cases to determine that a heightened standard of scrutiny was required because the design was not "wholly original" and included elements from the public domain.¹⁹⁰ This heightened standard, referred to as the "more discerning observer" test, asks the question of whether there is "substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation."¹⁹¹ More simply stated, the court held that the heightened scrutiny should be applied wherever the design includes "material imported from the public domain."¹⁹²

The Court expressly refrained from "dissect[ing] the works at issue into separate components and comparing only the copyrightable elements," noting that to do so would take the "more discerning" test to "the extreme."¹⁹³ The Court stated that, "[a]lthough the 'more discerning' test has not always been identified by name in our case law, we have nevertheless always recognized that the test is guided by comparing the 'total concept and feel' of the contested works."¹⁹⁴ The Court pointed out that the analysis of the 'total concept and feel' of the works "should be instructed by common sense."¹⁹⁵ The Court conducted a painstakingly detailed analysis of the features of the contested works to determine that, as to the Boisson's first design, the

¹⁸⁵ *Id.* at 270.

¹⁸⁶ *Id.* at 269.

¹⁸⁷ *Id.* at 270.

¹⁸⁸ *See id.* at 271.

¹⁸⁹ *See id.* at 271–72.

¹⁹⁰ *Id.* at 272 (citing *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 765–66 (2d Cir. 1991))

The ordinary observer would compare the finished product that the fabric designs were intended to grace (women's dresses), and would be inclined to view the entire dress—consisting of protectible and unprotectible elements—as one whole. Here, since only some of the design enjoys copyright protection, the observer's inspection must be more discerning.

Id. (quoting *Folio Impressions*, 937 at 765–66).

¹⁹¹ *Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters.*, 945 F.2d 509, 514 (2d Cir. 1991).

¹⁹² *Boisson*, 273 F.3d at 272.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 273.

works contain an “enormous amount of sameness.”¹⁹⁶ The result was based in particular on the perceived similarities in the color choices and similarities in the attire of the teddy bear featured in the final row.¹⁹⁷ No such similarity was found when comparing the original design to the second contested work, due in part to the different placement of the icons and different color and fabric choices.¹⁹⁸ The Appellate Court remanded the matter to the District Court for a determination of damages.¹⁹⁹

3. *Thimbleberries, Inc. v. C & F Enterprises, Inc.*²⁰⁰

Three years later, the District Court in Maryland took a somewhat different approach to protecting quilt designs, but nonetheless granted a preliminary injunction in favor of the quilt designer.²⁰¹ Here, the plaintiff sued to protect a quilt pattern from unauthorized use on table linens.²⁰² *Thimbleberries*, founded by well-known quilt and fabric designer Lynnette Jensen, created the pattern for the “Countryside Wreath” which depicted a Christmas wreath with a bow.²⁰³ The design featured a pattern of assembled triangles and squares in particular colors, accompanied by background quilting stitches.²⁰⁴ The patterns were displayed at popular quilt shows, appeared in a quilt pattern book, and were offered for sale at quilt shops nationwide.²⁰⁵ *Thimbleberries* did not license this pattern, or any other, for mass production.²⁰⁶ *Thimbleberries* brought a copyright infringement action when a tablecloth featuring a “nearly identical” pattern was offered in a retail catalog.²⁰⁷

Although *Thimbleberries* had a copyright registration for the wreath design, it was not entitled to a presumption of copyrightability because of the delay in filing for the registration.²⁰⁸ In examining whether the design was entitled to protection, the court utilized the merger and scenes a faire doctrines.²⁰⁹ Under the merger doctrine, there is no protection if the idea is inseparable from the expression of the idea.²¹⁰ The scenes a faire doctrine, as interpreted by this court, precludes copyright protection “where the work contains features which are indispensable or standard for

¹⁹⁶ *Id.* at 274.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 274–75.

¹⁹⁹ *Id.* at 275–76.

²⁰⁰ 142 F. Supp. 2d 1132 (D. Minn. 2001).

²⁰¹ *Id.* at 1141–42.

²⁰² *Id.* at 1136.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1137.

²⁰⁵ *Id.* at 1136.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1137.

²⁰⁹ *Id.*

²¹⁰ *See id.*

such work.”²¹¹ Underlying both doctrines is the fundamental precept of copyright law: that there is no protection for ideas, only their expression.²¹²

Thimbleberries presented the court with numerous examples of other patterns for wreath designs.²¹³ The court interpreted the existence of these other “expressions” of the idea as evidence that Thimbleberries had “utilized the minimal degree of creativity required to obtain copyright protection.”²¹⁴ The court found that the merger doctrine did not apply because of the existence of these other patterns supported the interpretation that the “particular arrangement of public domain shapes is not at all compelled by the underlying idea.”²¹⁵ The court held that Thimbleberries owned a valid copyright in its Countryside Wreath design.²¹⁶

Having established the existence of a valid copyright, the court turned its attention to the issue of copying by the defendants.²¹⁷ Employing the two-prong test for copying - access and substantial similarity--the court found that the designs were so “strikingly similar” as to establish a prima facie case of copying.²¹⁸

Despite the widespread distribution of the quilt pattern, the court found that Thimbleberries offered insufficient proof that the manufacturer had access to the pattern.²¹⁹ It is well-established that access can be inferred when there has been wide distribution.²²⁰ This court acknowledged the obvious shortcomings of the testimony offered by the manufacturer’s quilt designer that she was not aware of the pattern, did not attend quilt shows or frequent quilt shops.²²¹ It nonetheless found that, in the absence of direct proof that the designer had actual knowledge, a preliminary injunction could not be based on Thimbleberries’ “meager record of distribution.”²²² As a result, the court held that Thimbleberries had to prove striking similarity rather than substantial similarity.²²³

The court applied a two-part standard for determining the existence of a striking similarity: an extrinsic test and an intrinsic test.²²⁴ The extrinsic test looks at the similarity of the general ideas behind the work as well as “the type of artwork . . . the materials . . . the subject matter and the setting.”²²⁵ The intrinsic test, on the other hand, is a subjective test which requires the court to examine the two works “to ascertain if they are so dissimilar that ordinary ‘reasonable minds cannot differ as to the substantial similarity in expression.’”²²⁶ The court quotes Judge Learned Hand’s description of the test as whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal

²¹¹ *Id.* at 1138.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 1138–39.

²¹⁵ *Id.* at 1139.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 1140.

²¹⁹ *Id.* at 1139.

²²⁰ *See id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 1140 (quoting *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120 (8th Cir. 1987)).

as the same.”²²⁷ With only a slight nod to the extrinsic analysis, the court conducted an intrinsic analysis.²²⁸ In doing so, it compared the number and angles of the points found in the design, the number and placement of squares and triangles, and the scale and proportion used in both designs.²²⁹ It determined that, to the ordinary observer, the two designs were strikingly similar.²³⁰ The court was unmoved by the manufacturer’s protestations of differences in color choice and quilting stitches between the two designs, finding them “irrelevant to the similarity determination” because these features do not constitute the subject matter of copyright.²³¹ It went further, noting that such subtle differences may “suggest defendants . . . deliberately eliminated elements so as to avoid a determination of copying.”²³² The court granted a preliminary injunction in favor of the copyright owner and denied the defendants’ motion for summary judgment.²³³

4. *Pem-America, Inc. v. Sunham Fashions, LLC* ²³⁴

The Second Circuit had another opportunity to make its mark when, two years later, it considered this copyright infringement action brought by one quilt manufacturer against another.²³⁵ In *Pem-America*, the owner of the copyright registration was not an individual quilt designer or her company but, rather, a linen manufacturer.²³⁶ *Pem-America* contended that the defendant, Sunham Fashions, infringed on the design of its “Velvet Garden” quilt.²³⁷ In applying the two-part test for unauthorized copying, the Appellate Court determined that the “actual copying” requirement had been proven by evidence that the defendant had a “reasonable possibility” of access to the original design.²³⁸ The Court applied the “more discerning observer” test set out in *Boisson* because “Velvet Garden is derivative of the ‘basic block’ quilt design which has long been in the public domain.”²³⁹ In a slightly different, and narrower, iteration of the test, the Court stated that, in conducting its analysis, “[t]his observer is concerned only with those elements that ‘provide copyrightability to the allegedly infringed compilation.’ but is guided, finally, by the ‘total concept and feel’ of the compared works.”²⁴⁰ The Court held that the District Court did not abuse its discretion in finding copying based on the “enormous

²²⁷ *Id.* (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

²²⁸ *Id.* at 1139–40.

²²⁹ *Id.* at 1140.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 1141–42.

²³⁴ 83 F. App’x 369 (2d Cir. 2003) (unpublished table decision).

²³⁵ *Id.* at 370.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 371.

²³⁹ *Id.*

²⁴⁰ *Id.* at 372 (quoting *Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters.*, 945 F.2d 509, 514 (2d Cir. 1991)).

amount of sameness” between the color choices, floral motifs and the embroidery in the two quilts.²⁴¹

III: PATCHWORK PROTECTION

Just as quilters have been reluctant to exercise domain over quilting patterns, so too do some courts appear to be reluctant to protect a quilting design.²⁴² In all four cases, the court granted some level of copyright protection to the quilting designs.²⁴³ Various standards were used to determine whether the *Feist* requirement of minimal creativity had been met.²⁴⁴ In three of the four cases addressing the issue, the court required some heightened level of scrutiny in comparing the similarity between the contested works.²⁴⁵

The Second Circuit in *Boisson* and *Pem-America* applied the “more discerning observer” test.²⁴⁶ The U.S. District Court in Minnesota ignored obvious evidence of access, raising the bar to require not just substantial similarity, but “striking similarity.”²⁴⁷ Only the U. S. District Court of Maryland applied the “substantial similarity” requirement typically required to prove unauthorized copying.²⁴⁸

The Second Circuit applied the more stringent standard based on the assertion that parts of the design were in the public domain and that, as such, the designs

²⁴¹ *Id.*

²⁴² See *id.* at 371–72; *Boisson v. Banian, Ltd.*, 273 F.3d 262, 276 (2d Cir. 2001); *Thimbleberries, Inc. v. C&F Enters., Inc.*, 142 F. Supp. 2d 1132, 1141–42 (D. Minn. 2001); *Brown v. McCormick*, 23 F. Supp. 594, 604 (D. Md. 1998).

²⁴³ See *Boisson*, 273 F.3d at 269 (refusing to afford copyright protection to the alphabet aspect of plaintiff’s design because it was in the public domain, but holding that the alphabetical arrangement of the letters in a five-by-six block format was minimally creative so as to be protected); *Thimbleberries*, 142 F. Supp. 2d at 1138–39 (finding the merger and scenes a faire doctrines inapplicable and plaintiff’s wreath designs protectable due to the existence of numerous examples of other patterns for wreath designs); *Brown*, 23 F. Supp. 2d at 604 (finding plaintiff’s designs to be original because, although plaintiff was given descriptions of some elements for the designs, these instructions were vague, and plaintiff ultimately used her own judgment and created the designs herself) *Pem-America*, 83 F. App’x at 371 (finding that plaintiff’s designs were not merely part of the public domain but derivatives of the public domain and, because defendant did not meet its burden to disprove this, plaintiff’s designs were copyright protectable).

²⁴⁴ *Feist Publ’ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 345 (holding that the requisite level of creativity is “extremely low; even a slight amount will suffice.”); see *Thimbleberries*, 142 F. Supp. 2d at 1138–39 (finding the requisite minimal degree of creativity in plaintiff’s arrangement of squares and triangles, as well as plaintiff’s design and positioning of the bow and “other decorative additions”); *Brown*, 23 F. Supp. 2d at 604 (placing emphasis on the plaintiff’s individual creation of the designs); *Pem-America*, 83 F. App’x at 371 (upholding the copyrightability of plaintiff’s derivative work created from public domain works); *Boisson*, 273 F.3d at 269 (stating that the arrangement of letters requires at least some minimum creativity as well as emphasizing defendant’s failure to present sufficient proof of uncopyrightability).

²⁴⁵ See *Boisson*, 273 F.3d at 272 (applying the “more discerning” test where a plaintiff’s work is not “wholly original” but rather incorporates elements from the public domain); *Thimbleberries*, 142 F. Supp. 2d at 1139 (requiring “striking” similarity where the access requirement is not satisfied); *Pem-America*, 83 F. App’x at 371–72 (also applying the “more discerning” observer test when determining copying).

²⁴⁶ *Boisson*, 273 F.3d at 272; *Pem-America*, 83 F. App’x at 371–72.

²⁴⁷ *Thimbleberries*, 142 F. Supp. 2d at 1139–40.

²⁴⁸ *Brown*, 23 F. Supp. 2d at 604.

should be viewed differently.²⁴⁹ This assertion ignores the reality of quilting design.²⁵⁰ With the exception of truly abstract quilts, virtually every quilt design features some element in the public domain—depictions of fruit or animals, the conjoining of standard shapes like squares and triangles.²⁵¹ This court was willing to acknowledge the existence of the copyrights, but then went to some length to make it more difficult to protect the copyrighted works.²⁵² Interestingly, this same court then went on to apply the same “total concept and feel” approach applied by the *American Quilt* court, taking pains in both cases to assure us that the works will not be “dissected” into separate components and only the copyrightable elements compared.²⁵³ In the case of the School Days quilts in *Boisson*, the court’s distinction between the protected quilt and that which isn’t rings fairly hollow.²⁵⁴

It is the *American Quilt* case which offers the greatest protection to the quilting designs.²⁵⁵ While the court underwent a considered analysis as to which types of designs are in the public domain and which are not, it nonetheless went on to apply the basic “substantial similarity” test generally applied in copyright infringement cases.²⁵⁶ It seems probable that the *American Quilt* court was more willing to find infringement in light of the facts of the case which provided overwhelming evidence of a contractual agreement to provide financial compensation for the use of the designs.²⁵⁷

²⁴⁹ *Boisson*, 273 F.3d at 272; *Pem-America*, 83 F. App’x at 371–72.

²⁵⁰ See Debora J. Halbert, *The Labor of Creativity: Women’s Work, Quilting, and the Uncommodified Life*, 3 TRANSFORMATIVE WORKS AND CULTURES 1, § 1.7 (2009), available at <http://journal.transformativeworks.org/index.php/twc/article/viewArticle/41/118> (“Quilting is heavily reliant upon a shared culture of designs using traditional motifs, often transforming them into new and innovative art.”).

²⁵¹ See *id.* §§ 3.12, 3.13 (noting that original designs are a minority and “resulting quilts are instead a combination of inspiration, copying, and the use of already-existing designs”).

²⁵² *Boisson*, 273 F.3d at 268, 272–73.

²⁵³ *Id.* at 272.

²⁵⁴ See *Id.* at 273–75.

²⁵⁵ See *Brown v. McCormick*, 23 F. Supp. 594, 604 (D. Md. 1998) (applying the normal substantial similarity test).

²⁵⁶ *Id.* at 604–05.

²⁵⁷ *Id.* at 599. The agreement read as follows:

As we discussed on the telephone, I will pay you \$ 750.00 to design fifteen 16" (finished) blocks in the style of African American story quilts, circa 1850. Several blocks are described in the script and . . . these descriptions must be replicated in your designs. You may use your own judgement [sic] in creating the remaining blocks to best complete the story. With your permission, two quilts will be made using your designs and they will be sold to Universal Studios/Amblin Productions for use in the film, “How To Make An American Quilt.” Final design approval of these two quilts will be made by the studio.

As we agreed, you will retain all creative rights to the original designs.

By signing and returning the enclosed copy of this letter, you agree to the terms set forth and give permission to use your designs in this project.

Id. (alteration in original).

A. *Why are the courts reluctant?*

The courts profess an unwillingness to dabble in murky matters of the arts.²⁵⁸ The purported adherence to the doctrine of avoidance of artistic determination is unpersuasive, though, even that so much of copyright law falls into this amorphous category and the courts have not hesitated to opine.²⁵⁹ Is it as Professor Dorothy Long suggests: that courts are unwilling to protect forms of “traditional knowledge?”²⁶⁰ The term traditional knowledge includes folkwork and craft created by sub-groups of the population, often ethnic groups.²⁶¹ Some countries recognize particular styles of quilting as a part of their cultural heritage.²⁶² International efforts are afoot to protect this traditional knowledge.²⁶³ There is no reason that such traditional knowledge should be subject to any lesser protection here at home.

It is impossible to avoid asking whether the fact that quilting has traditionally been perceived as “women’s work” impacts the willingness to extend copyright protection.²⁶⁴ In addressing a feminist perspective of intellectual property, Professor Debora J. Halbert considers this very issue. She speculates that the exclusion of quilting from copyright protection may stem from its development in a care-taking or functional role, rather than being profit-driven.²⁶⁵ She also notes that the collaborative approach to creation may impact the perception of the quilter as “artist.”²⁶⁶ Although acknowledged, these historical roots in utility and gender should not dictate the application of copyright law. One wonders whether the recent and rapid increase in the ranks of male quilters,²⁶⁷ and the dramatic increase in the profit associated with the art and business of quilting,²⁶⁸ will impact the application of the law.

²⁵⁸ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903); Farley, *supra* note 106, at 811–15 (discussing the unwillingness of courts to define “art” and the importance of adhering to “the doctrine of avoidance” of artistic determinations).

²⁵⁹ See Farley, *supra* note 106, at 838–40.

²⁶⁰ See Long, *supra* note 14, at 618 (“Today, there tends to be one group who believes that traditional knowledge falls outside the scope of any form of legal protection, including, particularly, any *sui generis* protection based on modified intellectual property principles.”).

²⁶¹ *Id.* at 318 (defining traditional knowledge as “a potentially large body of knowledge and practices, which have been handed down through the generations,” which would include “woman’s work”).

²⁶² MARI LYN SALVADOR, *THE ART OF BEING KUNA: LAYERS OF MEANING AMONG THE KUNA OF PANAMA* 169 (Univ. of Wash. Press 1997) (“Despite its relatively recent development, the Kuna consider the art of making molas to be an integral part of their culture and important to their ethnic identity.”).

²⁶³ See Long, *supra* note 14, at 618, 622.

²⁶⁴ See Halbert, *supra* note 250, § 2.7 (explaining that the “historical disregard for women’s creative expressions” problematizes the way we distinguish what can be protected by copyright and what is unworthy of protection).

²⁶⁵ *Id.* §§ 2.4, 2.9.

²⁶⁶ *Id.* §§ 2.24, 2.26 (noting that, as quilting becomes more “artistic,” copyright becomes more important and quilters begin to see themselves not merely as members of a community of women sharing a craft, but instead as individual artists).

²⁶⁷ Jason Ashley Wright, *Men Prove Quilting Is Sew Not Just for Grannies*, TULSA WORLD, Oct. 9, 2009, at D3.

²⁶⁸ Halbert, *supra* note 250, § 0.1.

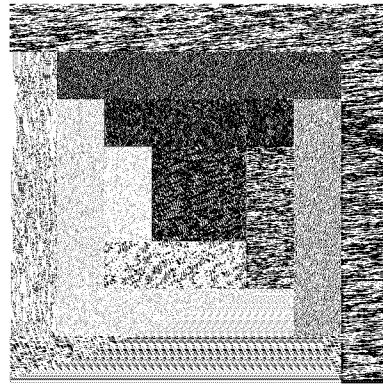
B. Finding a Pattern in the Pieces: Coming to a Consensus as to the Proper Level of Scrutiny.

There is no valid reason for the courts to apply a heightened level of scrutiny in the substantial similarity analysis simply because the medium of expression involves fabric and thread. Quilt designs are protectable as artistic expression.²⁶⁹ That these designs and their execution were once the exclusive domain of women does not alter their inherent value.²⁷⁰ Nor does the fact that the end product—the quilt—once served a primarily utilitarian purpose detract from its artistic merit.²⁷¹ Quilt designs should be treated like any other visual art form. Protection should be granted where a minimal degree of creativity is evident, and the standard two-part test for identifying infringement should be utilized.²⁷²

The determination of which quilt designs are in the public domain should be the starting point for the protectability analysis. There are many block patterns that are a storied part of our textile history and should be freely available for all to use as the basis for their own creations.²⁷³ That being said, the artistic choices of color, layout, and quilting are entitled to the same protection as the choices made in the



Sunbonnet Sue



Courthouse Steps

composition and creation of a painting.²⁷⁴ For that is what many of these quilts are—paintings made of fabric and thread rather than canvas and oils.²⁷⁵ While no one quilter can capture the idea of the “Sunbonnet Sue”²⁷⁶ or the “Courthouse Steps”²⁷⁷ patterns, any quilter who puts her own spin on these traditional designs, or any

²⁶⁹ *Boisson v. Banian, Ltd.*, 273 F.3d 262, 267 (2d Cir. 2001).

²⁷⁰ Halbert, *supra* note 250, § 2.4.

²⁷¹ *Id.*

²⁷² *See Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

²⁷³ *See Halbert, supra* note 250, § 1.7.

²⁷⁴ *See id.*

²⁷⁵ Wright, *supra* note 267.

²⁷⁶ Photograph of “*Grandmother’s Sue*,” in SUNBONNET SUE PATTERN PAGE, SUNBONNET SUE BLOCKS AND PATTERNS, <http://www.sunbonnetsue.com/patterns.html> (last visited May 19, 2010).

²⁷⁷ *Log Cabin Block Variations*, DESIGN DYNAMICS OF LOG CABIN QUILTS, <http://www.quiltstudy.org/includes/downloads/galleryguide.pdf> (last visited May 19, 2010).

quilter who creates a representational landscape or an abstract design, is entitled to protection for those aspects of the design that go beyond the original idea.

Once the quilt design has been found to be protectable, the court should compare the “total concept and feel” of the contested designs to determine if there is substantial similarity.²⁷⁸ The roundly criticized “dissect and exclude” model of analysis has no place here.²⁷⁹ As Professor Murray points out, the scenes a faire and merger doctrines which play such a valuable part in the analysis of literary works is inept when it comes to a comparison of visual works.²⁸⁰ If the proliferation of creativity and revolution in quilt designs shows us anything, it is that there are myriad ways to express the same thought using the same medium. All of these expressions are entitled to the same level of protection as any other art form. A finding of infringement should not require the court to jump through higher hoops or to contort its analysis into an original design of the court’s own making.

CONCLUSION

Quilts are not entitled to any more protection than any other form of visual art.²⁸¹ Nor are they entitled to any less.²⁸² Changes in the way quilts are created,²⁸³ the environment in which they are created,²⁸⁴ and the value they are afforded²⁸⁵ are sure to bring about more frequent demands for protection under copyright law. In order to create a unified and rational analysis of these copyright claims, jurists will have to look around them and embrace the innovative, colorful new reality that is the quilted art form.

²⁷⁸ See, e.g., *Boisson v. Banian, Ltd.*, 273 F.3d 262, 273 (2d Cir. 2001) (applying the “total concept and feel” test to a quilt).

²⁷⁹ See Murray, *supra* note 113, at 805–07 (discussing the United States Court of Appeals for the Ninth Circuit’s decision to strike down the “dissect and exclude” test while applying the intrinsic similarity portion of the substantial similarity test).

²⁸⁰ *Id.* at 858.

²⁸¹ See *Boisson*, 273 F.3d at 267 (finding that a quilt can be copyrighted).

²⁸² See *id.* (noting that despite having a copyright for a quilt, that the prima facie case, as with any copyright, can be rebutted).

²⁸³ See Halbert, *supra* note 250, § 2.26 (discussing that modern quilt makers often have to purchase their patterns).

²⁸⁴ See *id.* § 2.16.

²⁸⁵ *Id.* § 2.26.