

1)

Copyright

In the claim for copyright infringement, the first issue is whether there is expression that can be protected by copyright. Since S. 102 gives protection only to "works of authorship," it is necessary to first determine what these works of authorship could be. There are five expressions that American Idol could argue are protected by copyright. First, the entire episode/storyline and organization of the show could potentially constitute a literary work in the same way that the storyline of a novel may be protected. However, Idle would respond that this is not protectible expression but merely the idea of having a singing talent show and therefore could not be protected as inextricably linked to the idea. *See Baker*. Even if it is not the only way to express the idea of a talent show, there are only a limited number of ways in which this idea could be express, so it may remain unprotected under the merger doctrine. *See Morrissey*. Second, Idol may argue for copyright protection in the personalities of the judges as protectible characters. Characters may be protected if they are sufficiently developed, so if the judges could be considered "characters" in the same sense, they may be protected, especially the precise line of the former musician judge. *Nichols; Stallone*. Third, the performances themselves may be protected as sound recordings. S. 102(a)(7). Fourth, the video clips, including the way the performances are filmed, may be protected as a motion picture. Fifth, the set may have protection as a pictorial, graphic or sculptural work. For the stage set, Idle could argue it is a useful article and therefore not protected, so Idol would have to show conceptual separability, in other words that the artistic elements of the set were uninhibited by functional considerations. *Brandir*. Although some things like the size and shape may be based on function, the overall design is probably separable and may even be physically separable from the useful function.

Since there is clearly some protectible expression, the works may be protected if they are original and fixed in a tangible medium of expression. The originality bar requires only independent creation and some modicum of creativity, which is a very low requirement. Even if there is sufficient expression in the storyline, Idle could argue that it is not original because other shows have done the same thing. Therefore, the protection would likely extend only to the new

expression. Also, with the video taping, the expression involves some use of facts (the actual performances) so it would extend only to choices in "selection, coordination, and arrangement" of the video cameras. The rest of the expressions would clearly qualify as sufficiently original. For the fixation requirement, these would all qualify if the television station or producers were recording the show at the time it aired. This would be an authorized embodiment and sufficiently permanent to allow it to be viewed later. Therefore, the only difficult issue is probably the protection of the storyline, and the rest are sufficiently protected. Finally, the facts state that all the copyrights at issue were owned by Idol, so Idol would be the one with the exclusive rights in the expression and the right to sue.

Assuming there is copyright protection, Idol would then have to show that Idle infringed on that copyright. This is a two-prong test under *Arnstein* and requires a showing of (1) copying and (2) improper appropriation. The first prong of this test, that there was copying, would likely be conceded by Idle, as they actually showed the precise clips and ran a direct parody of the show. They may not concede so easily, however, with the characters and the set. If they do challenge the copying prong, Idol would likely be able to show through circumstantial evidence that they copied by showing both access to Idol's show (because it was on national television) and by showing that the works are substantially similar, such that they could not have been produced by independent creation (it may even be that they are strikingly similar such that access would not even need to be discussed). *Arnstein*. Although experts could be used in this determination, the resemblance is so close that they would likely not be necessary. If the court finds copying, there is infringement only if there is improper appropriation. This determination is based on a more subjective test and considers whether an ordinary observer would recognize the alleged copy as having taken too much of expression of the copyrighted work. *Nichols; Steinberg*. Furthermore, this should not be an in-depth analysis, but should be based on an overall gut feeling with respect to comparing the two works. Here, it appears the video clips and storyline (if protected) would not be at issue, because the entire thing was taken. (Again, however, Idle could argue that the taking of the storyline was just the taking of the idea and thus not improper appropriation. *Nichols*). However, "the most detailed thing common to both" goes more in depth than just the idea of a talent show and is taking more than the storyline taken in *Nichols*. The set is probably

not infringement because it "bears only a passing resemblance" to the set, such that an ordinary observer would not find it to be improper appropriation. The copying of the characters (both the judges and the contestants, not mentioned above) is a more difficult issue. Idle would argue that "the most detailed pattern common to both" is only a judge who says "dog," a woman judge who cries, and a caustic accented judge who cuts down the performances--this, they would say, is an idea. However, as mentioned above, this prong should not depend on in-depth analysis but should be a subjective feeling and based on the overall appearance of the characters, there is sufficient similarities to lead a reasonable observer to find improper appropriation. Furthermore, the fact that Idle adds the clown personality and the princess personality is irrelevant because the focus is on the amount taken from the first work, regardless of whether additional elements are added to the second. *See Steinberg*. Finally, the "copying" of the performances through caricatures is not actually copying of the sound recordings, because this work protects only the actual recording and not an imitation (but the sound recordings were infringed as part of the video clips). In addition to the right to copy, Idle likely infringed the right to prepare derivative works, because of the substantial similarity (*Stallone*), the right to distribute (because it shows unlawfully copied short video clips on the internet, where others may be able to download them), and the right to control public performance (because the show is being aired to the public on the internet).

Even if there is infringement, Idle may argue that they should not be liable because there was fair use. Section 107 protects certain types of infringement if it qualifies as fair use, based on a consideration of (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect on potential market for the work. *Harper & Row*. First, the purpose and character of the use considers both whether the work is commercial and whether the work is transformative, especially if it is a parody. *Campbell*. Here, the web site is arguably commercial because it does have a tip jar where people can donate money. However, *Campbell* stated that commercial use is only one element of the fair use inquiry and may be relaxed where the second work is a parody. Also, this commercial nature is arguably incidental to the use because the show is probably not created to make money, because it does not likely make very much. Therefore, this prong may depend highly on whether

this work qualifies as a parody. A work is a parody if it comments on the original work and the bar for demonstration of parody is quite low. Because the whole purpose appears to be making fun of the "fakeness" of the show and the personalities of the contestants, it should certainly be able to meet the low bar of "parodic character reasonably to be perceived." *Campbell*. It certainly seems more like a parody than the version of *Pretty Woman*. As *Campbell* states, where a work is a parody, the commercial nature is less relevant and all factors of the fair use inquiry are relaxed. Therefore, while the commercial use weighs slightly in favor of the plaintiff, this factor may be neutral.

Second, the nature of the copyrighted work considers (1) whether the work is creative, as opposed to factual; and (2) whether it is published or unpublished. Here, the copyrighted expressions are not quite as expressive as a fictional book or a song, and therefore are not as much of a concern for copyright law. However, there are probably enough creative aspects to have this favor the plaintiff. Since it is airing after the show airs on television, there is not the problem that arose in *Harper & Row* with a pre-publication use. This factor probably weighs slightly in favor of the plaintiff, although *Campbell* stated that the expressive nature of the work is not as important in parody because parody will always copy expressive works. Third, the amount and substantiality of the portion taken. The normal rule is that the second work cannot take the "heart" of the copyrighted work. See *Harper & Row*. However, where the second work is a parody, *Cambell* recognizes that the heart of the work may be necessary so that people can recognize the connection. Therefore, it may be fair use as long as no more is taken than reasonably necessary. With respect to the personalities of the judges, the set, and the organization of the show, Idle probably took no more than necessary and would be entitled to a fair use defense. However, the biggest problem for Idle is the fact that it took entire portions of the video clips. Where the copying is literal, as this is, it is less likely fair use. Also, this was probably not "reasonably necessary" for the parodic purpose, although Idle may say that it was, so that people could see how close the parody is. In sum, taking a literal 30 seconds of a two minute performance is probably too much to qualify for fair use. Finally, the court will consider the effect on the potential market. Because Idle is so transformative, it is less likely to affect the market for the original because it is likely catering to a different audience. Furthermore, the fact

that the market for Idol may be harmed because people now realize it is stupid is not the type of effect on the market this factor is concerned with; it must be harmed through market substitution. *Campbell*. In addition, it will not likely affect any market for any derivatives, because there is probably not a market (at least not one Idol would go into) for an Idol show that uses profanity or is marketed more toward "adult" viewers. Also, the policy favors fair use in this situation, because the parties are not likely to be able to bargain for a license criticizing the show.

In sum, there are plenty of protectible expressions and Idle definitely is infringing on some of them, especially the video clips. There may be a fair use argument for all of the infringement, except potentially the video clips, because there is too much taken and it is not reasonably necessary for the parodic purpose.

Trademark

There may be trademark protection in any symbol that is used to indicate a source of origin for a product. Here, the trademark most at issue is the word "American Idol" (AI) itself. There may also be a trademark in the set design or the appearance of the show as a whole, which may qualify for trade dress protection. Each of these will be discussed. The marks were used to identify the show, so the main issue for trademark protection will be whether the marks qualify as distinctive, which means that a consumer associates the mark with a single source rather than the product itself. Marks may either be inherently distinctive, in that no secondary meaning is required, or descriptive with secondary meaning. First, with respect to word trademarks, courts have created five categories of words. The most protected marks are fanciful marks, which are entirely made up, and arbitrary words, which have nothing to do with the product--the word American Idol is neither of these. On the other end of the spectrum are generic marks, which merely are the name of the class of which the product is a member, and can never receive trademark protection--AI is not this either because this would be something like "talent show." Therefore, AI would fall either as descriptive (defining a characteristic or quality of the show) or suggestive (requiring a step of imagination to draw conclusion as to the nature. A word is descriptive only if relates so closely to a product that it immediately conveys an idea of the qualities of the product. *Zatarain's*. In making this determination, courts will consider the

imagination test, which is whether the mark requires any imagination to reach a conclusion as to the nature of the show. Here, the use of the word Idol probably does not immediately convey the idea of a pop star and especially of a talent show about pop stars, although there is an argument that the phrase "pop idol" has linked it directly to this kind of show. The court may also consider whether a competitor would need the phrase to describe their own product--a competitor likely would not. This is a very close call, but it is possible that the word would be suggestive and no secondary meaning would be required. If it was descriptive, Idol would have to show that the primary significance to the relevant public was this particular source. It could probably do this, because it is watched by millions of people and the amount of advertising can be considered as circumstantial evidence. *Zatarain's*.

Assuming AI is protected by trademark, which it likely is, a trademark infringement claim would require that the reasonable consumer would be likely to be confused about the source of the product--in other words, the consumer would think that Idle came from Idol. The goods are not competitive, but are related, so the *AMF* factors would apply. First, the Idol mark is arguably very strong because it has been around for five years and has a large following, so this probably favors Idol. Second, the proximity of the shows is arguably very close because they are both being used for entertainment; however, Idle could point to the fact that it is obviously being marketed to a different class of purchasers (foul language) and that you don't need to watch both, so they are not complementary. Third, the similarity of the marks is very high. The court will consider sight (only one letter different), sound (homonyms), and meaning (here, Idle would argue that they were not close enough because they mean such different things). Fourth, there does not appear to be any actual confusion, so this would be a neutral factor. Fifth, there is probably high similarity in the marketing channels used, because both presumably advertise on the internet and use word of mouth. However, Idol probably also uses television, while Idle does not. Sixth, the degree of care exercised by a purchaser is probably relatively low because when people are searching on the internet, they are not particularly discerning. Seventh, the use is at least partially in bad faith because they would have no customers except for the similarities of the mark. Finally, there is not much likelihood of expansion into the same lines (from adult programming to network television and vice versa). In all, this would probably favor a likelihood of confusion

and infringement. In defense, Idle would try to argue parody and protection under the First Amendment. As the court discussed in *Mattel*, parodic use may weigh against likelihood of confusion, especially for titles. Here, the title has relevance to the underlying work and does not explicitly mislead as to source, so the court may find that the title itself is not trademark infringement. Also, the use on the video clips may be necessary to describe American Idol, so it could be nominative use. However, this would be difficult because they probably used more than necessary for identification, because they used the precise clips.

On the dilution claim, Idol would have to show that the mark was famous, which would probably not be difficult on these facts. Second, in some jurisdictions (such as the Second Circuit), they would have to prove inherent distinctiveness, although this is likely not an additional requirement. Even if it was, if it is suggestive, this may be enough. Third, they would have to show it is commercial use in commerce. This may be difficult here because, as discussed above, the commercial nature of the use is highly incidental to the purpose of the show. Assuming they could show this (because of the tip jar), a cause of action for blurring would lie if the use would cause consumers to associate the Idol mark with both Idle and Idol, rather than solely with Idol, thus reducing the strength of Idol. Furthermore, there must be *actual* dilution, not merely a likelihood of dilution, although this does not require an actual loss in profits. *V Secret*. Idol would probably be able to show this because 10,000 people view the video each week. This is probably enough to make the Idol mark weaker, because these people may hear American Idol and not be sure whether someone is talking about Idol or Idle. In addition, there may be an action for tarnishment, because they are using the trademark to associate with an obscenity-laced program, thus associating the mark with something unseemly. Furthermore, the fact that it is a shoddy set would tend to make it even greater tarnishment. The First Amendment is an even greater defense to dilution, however, because there is a statutory exception for noncommercial use. In *Mattel*, the court found that noncommercial use included anything that does more than propose a commercial transaction. By this definition, the show would be noncommercial and thus would not be subject to a dilution claim. Furthermore, the fact that it is a parody (see above) makes it related directly to the *Mattel* case, in which the court held that limiting parody through the dilution statute would cause serious constitutional problems.

In addition to possible infringement in the words, there may also be a trademark claim for the use of the set and the entire appearance of the show. Trade dress is protectible as a trademark if it helps to identify the origin of the show and the set and appearance of the show probably qualifies as trade dress in the same way the appearance of the restaurant did in *Taco Cabana*. If the appearance of the show qualifies as product packaging, it may be inherently distinctive (*Two Pesos*), although no facts make it appear as such. More likely, it is product design or at least a *tertium quid* (*Samara*), which would require a showing of secondary meaning, based on the test above. Idle could also try to argue that the stage design is a functional trademark and therefore unprotected. Thus, Idol would have to show that the specific design is not (1) essential to the use or purpose of the show; and (2) does not affect the cost or quality. *Traffix*. Here, it could probably do this and would get protection. Likelihood of confusion would be similar to the analysis above, although there is less similarity because of the shoddy set, and there is probably less likelihood of confusion.

2)

A patent gives the patent owner the exclusive right to make, use, sell, offer for sale, or import the claimed invention for the duration of the patent. Here, 3P is making and selling the potentially infringing product, so this threshold matter is satisfied. The question is whether that invention is an infringing patent. First, under a claim for literal infringement, there is infringement only if the allegedly infringing product includes every element of the patented claim. *Larami v. Amron*. (3P would first try to argue the patent is invalid, but it will be assumed valid in this answer.) There appear to be four elements to Claim 1: (1) a small piece of clear, flexible paper or paper-like material; (2) having a top side; (3) having a bottom side; and (4) bottom side coated along one edge with a lightly-binding adhesive. In this instance, the last three elements do not appear to be at issue because the Sticky mark has a lightly-binding adhesive along one edge (and obviously has a top and a bottom side). Therefore, literal infringement will turn on whether the Sticky Mark contains a "small piece of clear, flexible paper or paper-like material." This determination will

depend on the interpretation of a number of the terms in Claim 1, which the court will likely decide as a matter of law in a *Markman* hearing prior to the actual trial. Furthermore, in defining the terms, the court may consider the claim language, the patent specification, the prosecution history, and any extrinsic evidence, including experts or dictionaries. The ultimate determination will be based on what a person of ordinary skill in the art would have thought to be the meaning of the term at the time the patent application was filed. *Phillips*.

First, the court will have to determine what is meant by "small" and whether the size of the Sticky Mark is small. Here, the patent specification may be particularly helpful because it likely states that the purpose of the invention is to be smaller than the original post-it note. Also, the prosecution history and the preliminary amendment may demonstrate that the purpose of small was only to distinguish it from prior art. Experts would likely say the same thing. Therefore, "small" likely would be construed to mean "smaller than a post-it Note). Second, the court would have to determine what "clear" means and whether it includes something that is opaque. Again, the patent specification would be helpful, because it may state that the purpose is so that it can be read through during use. The fact that the Sticky Mark partially obscures the material would make it "not clear" within this definition. Also, dictionaries would probably show that clear explicitly requires that it can be seen through. Although the patentee's definition controls and limits the importance of dictionary definitions, this is highly relevant where there is nothing in the patent to say otherwise. Third, the court would have to determine what "paper-like material" means and whether the special material in the Sticky Mark qualifies. Here, if experts say the same thing that Sticky Mark says, they may say that the 3M's patent does not include this material because this material is a significant improvement. The definition of paper and ordinary usage would probably describe something that rips, and if the material does not rip, then it is probably not paper-like. However, 3M would argue that it includes anything approximately the same consistency. This would all turn on the court's interpretation of the terms and expert testimony and would depend on claim construction. However, if "small piece of clear flexible paper or paper-like material" means anything smaller than a post-it note on partially clear material at all similar to paper, it would be literal infringement. If it was read more narrowly, there would be no literal infringement. Furthermore, the fact that the claim uses the transition

word "comprising" means that the fact that 3P may have added an additional element, such as the special material, does not make it noninfringing.

Even if there is no literal infringement, 3M may still have a claim for infringement under the doctrine of equivalents (DOE). The first argument by 3P to anticipate is that prosecution history estoppel should apply to block the doctrine of equivalents so that the doctrine cannot even apply in this situation. Where language in a patent is modified during the patent process, prosecution history estoppel (PHE) may block infringement by equivalents depending on (1) the reason for the amendment and (2) whether the equivalent in question was surrendered. First, for PHE to even apply, the patentee must have made a narrowing amendment for reasons substantially related to patentability. *Warner-Jenkinson*. Furthermore, there is a presumption that any change made is substantially related to patentability, so PHE applies unless the patentee proves otherwise. *Warner-Jenkinson*. Here, the potentially narrowing amendment is the change from "a piece" to "a small piece." This appears to clearly be a narrowing amendment because it changes the claim from including all pieces to only small pieces, however that is defined. However, PHE only applies if the change was substantially related to patentability. 3M will first argue that it was not related to patentability because the PTO never required the change to be made, and the change was made only to better describe the product. This would make sense because the cases all discuss situations where the PTO said it could not have been patented unless the change was made. However, 3P would respond by arguing that even though the change was not required by the PTO, it was made for reasons substantially related to patentability because 3M knew it would not have been patented without the change. Furthermore, a change for novelty (which this presumably was) is right within the main applicaiton of PHE. *See Warner-Jenkinson*. Even assuming PHE would apply, 3M could then argue that PHE is a flexible bar to DOE and only blocks the equivalents that were surrendered by the amendment. *Festo*. Although there is a presumption that the patentee surrendered all the subject matter between the original and narrowed claim (everything between "piece" and "small piece"), this can be overcome if 3M demonstrates that (1) the alleged equivalent was unforeseeable at the time of the amendment; (2) the rationale for the amendment bore only a tangential relation to the equivalent in question; or (3) some other reason that the patentee could not have reasonably described the equivalent.

Festo. Here, it would be difficult to argue under the first exception because it is hard to say that a bookmark twice as big was not foreseeable. The second exception may be a better bet, because 3M could argue that the purpose for the amendment was only to better describe the product as distinct from the bigger prior art and not to affect its relation to something between the two sizes. Finally, 3M could argue that it would have been impossible to describe the equivalent in question because it could not have described the exact size it claimed. However, this is a difficult argument because it could have given exact numbers and this exception is very narrow. Overall, PHE would probably not apply because the purpose of the amendment was not related to an equivalent that is still smaller than the original Post-It.

Assuming PHE does not apply, 3M would win on an infringement claim based on DOE, if the Sticky Mark contained elements either identical or equivalent to each claimed element of the patented invention at the time of the infringement, based on an element by element consideration. *Warner-Jenkinson*. All the elements that will be considered are listed above in literal infringement. In determining whether the elements are equivalent, the court could decide based on either the insubstantial differences test (that the infringing element is insubstantially different from the patented element) or the Federal Circuit's "triple identity" test (that the infringing element serves the same function by the same method to produce the same result). Here, the question (which will be a question of fact) is whether the larger, opaque, special material-made mark is equivalent to the small piece of clear flexible paper-like material, as it is defined during the claim interpretation. (As discussed above, the other elements infringe literally so would not be at issue.) Under the insubstantial differences test, 3M can argue that (1) a piece twice as big is basically the same thing, if it is smaller than the original post-it; (2) an opaque material is basically the same thing because it allows you to see through the mark partially; and (3) the special material is essentially just stronger paper. 3P's best argument will be that its product is substantially different because the special material is less likely to rip or crease and thus very different from the claim that is patented. It can also argue that the opaque material is far different from see-through material because the whole purpose is to allow readers to see through the product and theirs prevents it. Also, it would argue that it is completely different that their product is bigger. Because of the improvement, the elements would likely not be equivalent

under the insubstantial differences test. Finally, under the function-way-result triple identity test, 3M would have a better argument that it serves the same function (of marking a book) in the same way (sticky pad) to achieve the same result (quick marking while reading). 3P would argue it serves a different function because it does not allow a reader to see through the mark.

Overall, it is likely that there is no literal infringement, but it is possible that there will be infringement under the DOE.

3)

Intellectual property law seems particularly concerned with the fact that judges, who will be determining whether a particular invention or expression gets protection, are trained only in the law, while questions about the extent of protection often turn on facts and policy. This causes an extreme policy problem because judges essentially control the creativity and progress of the nation through what they are willing to give protection to. Essentially, intellectual property law deals with what will be produced and is based on the fact that the more protection something is given, the more likely it will be produced and the less protection it is given, the more likely the public will be able to use it sooner. Because this is a balancing of important interests, judges are not capable of making these decisions. Therefore, statutory law and judge-made law has solved this problem in three main ways. First, many of the laws set the bar for protection extremely low, so that the judge is just in the position to protect everything rather than being able to protect the things he likes and leave unprotected the things he does not. Second, the formulation of the laws is often based on the appearance to "a reasonable person," which theoretically allows judges to separate their individual views from the questions of fact that are presented. Third, the law may provide bright-line rules for judges to use that leaves their discretion out of it, where it is not necessary.

First, there are many laws that set the bar for protection extremely low and allow the judges to avoid becoming involved in the question at all. For example, trade secrets may qualify as

protectible subject matter if they consist of any valuable information. Furthermore, patents are protectible unless they have "no practical utility" at all. This prevents the court from inspecting the invention to determine whether it thinks the invention is worthy of protection. The court will also not look into the expressiveness or creativity of a work before deciding that it is worthy of copyright protection. In all but the most clear instances of nonoriginality (such as compilation of facts), the court will not decide whether a particular poem or story is worth protecting. In addition, the court does not give greater protection to those works that are more expressive. Likewise, the court will not examine the success of a parody before deciding that it is worthy of First Amendment protection and thus "allowed" to infringe on the works that do have protection. By setting the bar low in each of these ways, the laws have tried to deal with the fact that judges do not know anything and have solved the problem by taking them out of it entirely.

Second, where factual determinations are necessary, the law attempts to take the judges out of the equation by relying on the reasonable observer or the person of ordinary skill in the art. Thus, the meaning of terms in patent (and thus the breadth of protection) depends not on what the judges think should be protected, but on what an ordinary person would actually think the claim actually said. Likewise, whether an invention is protectible at all as nonobvious depends not whether the judge thinks it is obvious, but whether a person of ordinary skill in the art would have thought it was obvious. Since the judge is not the one inventing, he would be incapable of determining whether they should have invented it sooner--there may be all kinds of factors that prevent it that the judge does not think of. Also, something the judge may think was a far-fetched idea may have been obvious to everyone in the field. In copyright law as well, the court relies on experts to determine whether works are sufficiently similar to constitute circumstantial evidence of copying, rather than simply listening and determining by their untrained ear whether the works sound close enough. This gives the decision to someone who is much more capable at making these determinations. In the same way, the question of whether improper appropriation has occurred is not based on what the judge thinks, but what a reasonable person would think. In trademark law as well, the court does not decide whether it thinks the mark is an indication of source, but whether the consuming public would think so. In all these ways, the law essentially (at least facially) removes the judge from the equation.

Finally, the law solves the problem in some ways by creating bright-line rules which remove discretion from the judge, similarly to setting the bar low for protection. Examples of these laws include the rule that business methods are nonprotectible unless connected to a practical application producing a useful, concrete, and tangible result, *State Street Bank*, or the rule that where something already exists in nature, it can never be protected, regardless of the "inventive spirit" required to protect it.

Although these laws make an effort to address these problems, there are significant difficulties with each of the methods suggested by the current law. First, the laws that set the bar extremely low for protection may actually provide too great of protection and thus impede the entire purpose of copyright law, which is to encourage the public progress. Although protection may be necessary to create the incentive to invent, protection of things that should not be protected, such as very limited expressive works or "not really useful" inventions, actually harms the public interest by keeping these things out of the public domain. Thus, by stating that almost everything can be protected, the "wheels of innovation, creativity, and commerce" may still be ground to a halt by the judges because too much is protected. Second, the laws that provide for examination from the perspective of a "reasonable observer" do not really provide sufficient protection to keep the judge out of it, because too often, these questions are questions of law that essentially just place the judge in the position of the reasonable observer. Although these laws may separate the judge on their face, they are really placing the determination right in the hands of the judge to determine, e.g. whether too much was taken from a copyrighted work. Finally, bright line rules have a similar problem as the low bar, because it may prevent things from being protected that otherwise should.

Therefore, a couple proposals are necessary to avoid overprotection of copyrighted works and thus encourage public innovation without placing the judge as the one to make the decisions. This can be done in two ways. First, Congress should provide that the law should look further into whether a particular work is expressive enough, invention useful enough, or trademark distinct enough to have adequate protection. However, this could quickly cause great problems

by placing the judge more in the role that Rogers opposes unless the second proposal is also brought into place. This second, and more important, proposal is that more of these issues become questions of fact rather than questions of law. For example, the fundamental questions of (1) whether an invention is obvious; (2) what terms in a patent mean; (3) whether a parody is sufficiently parodic; (4) whether a work is sufficiently original--should all be questions of fact. This way, the judge is completely out of the business of deciding what gets protection and it is instead left to the jury. Furthermore, this avoids later judges overturning what earlier judges have determined and thus becoming even more activist. *Dissent, Phillips*. Of course, this brings to question the final consideration of whether a jury is any more capable of deciding these things than the judges. The only other option, however, would be to protect everything, which as discussed above, could cause hampering to innovative spirit through overprotection.

END OF EXAM