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E.T. PHONE HOME: THE PROTECTION OF LITERARY PHRASES*

RICHARD W. STIM**

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I. INTRODUCTION

Literary phrases¹ are common targets for appropriation. They are easily severable from larger works and can be used for a range of commercial purposes.² In order to prevent appropriation, the creator or popularizer of a literary phrase may try to protect the phrase under copyright.³ In order to prove that a work, such as a

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1. For purposes of this Article, a literary phrase is a brief sequence of words or syllables, generally spoken or read as a unit, i.e., "Where's the beef?," "Make my day," "Beam Me Up, Scotty," "Just when you thought it was safe to go back in the water" Literary phrases appear in literary works, musical compositions, motion pictures, audio-visual works, dramatic works, and other copyrightable subject matter.

2. One common commercial use of phrases is on merchandise. *E.g.*, Universal City Studios, Inc. v. Kamar Industries, Inc., 217 U.S.P.Q. (BNA) 1162 (S.D. Tex. 1982) ("E.T. Phone Home" used on drinking mugs and pencil sharpeners). *See infra* notes 77-86 and accompanying text. Another common use of phrases is for promotion or advertising. *E.g.*, D.C. Comics, Inc. v. Crazy Eddie, Inc. 205 U.S.P.Q. (BNA) 1177 (S.D.N.Y. 1979) (phrase "Look! . . . Up in the sky! . . . It's a bird! . . . It's a plane . . . It's Crazy Eddie!" used in advertising for discount chain). Phrases also are taken for their "literary" value. *E.g.*, Columbia Broadcasting System, Inc. v. DeCosta, 377 F.2d 315 (1st Cir.), *cert. denied*, 389 U.S. 1007 (1967) (television network appropriated plaintiff's phrase "Have Gun Will Travel").

3. According to one source, Joan Rivers has a "battery of lawyers working on getting a copyright for her famous phrase, 'Can we talk?'" *20 Things You Never Knew About Joan Rivers*, STAR, Sept. 16, 1986, at 23.

biography, has been appropriated, the plaintiff in an infringement action may aggregate similar phrases in the defendant's work.⁴ Alternatively, an author may prove infringement based on the taking of only one phrase.⁵

A claim for protection on a literary phrase, however, is viewed with suspicion. Copyright Office Regulations state that "[w]ords and short phrases such as names, titles and slogans" are not subject to copyright.⁶ These regulations are premised on two tenets of copyright law. First, copyright will not protect an idea.⁷ Phrases conveying an idea typically expressed in a limited number of ways, therefore, are not subject to copyright protection.⁸ Second, phrases are considered as common idioms of the English language and are therefore free to all.⁹ Granting a monopoly would eventually

4. *Harris v. Miller*, 50 U.S.P.Q. (BNA) 306 (S.D.N.Y. 1941) (verbatim use of 37 phrases from a biography of Oscar Wilde constituted a substantial appropriation). *But cf.* *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987) (copying of 89 passages—or 3,500 words—from a biography of Stravinsky excused as fair use); *Leeds Music Ltd. v. Robin*, 358 F. Supp. 650 (S.D. Ohio 1973) (finding the presence of several vaguely similar phrases related to life of Jesus Christ was not an infringement). *See also Did Hersey Borrow From Agee Bio?*, *NEW YORK*, July 25, 1988, at 9 (author John Hersey admits borrowing a dozen words from another author's biography of James Agee. Hersey stated, "[I]t's not that I borrowed his words but that those were the right words for the circumstances.").

5. *E.g.*, *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. (BNA) 1162 (S.D. Tex. 1982) (protecting "E.T. Phone Home"); *Dawn Assocs. v. Links*, 203 U.S.P.Q. (BNA) 831 (N.D. Ill. 1978) (protecting "When there is no room in hell . . . the dead will walk the earth"); *Brilliant v. W.B. Prods., Inc.*, Civ. No. 79-1893-WMB (S.D. Cal. Oct. 22, 1979) (protecting "I may not be totally perfect but parts of me are excellent" and "I have abandoned my search for truth and am now looking for a good fantasy").

6. 37 C.F.R. § 202.1(a) (1988). Although "the publication of these views does not have the force of statute, it is a fair summary of the law." *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959). Courts also applied this regulation under the Copyright Act of 1909. 1 M. NIMMER, *NIMMER ON COPYRIGHT*, § 2.01[B] (1988). The view that a literary phrase or slogan is per se unprotectable has been criticized as "inaccurate and unsupportable." 1 J. MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* § 6:5 (2d ed. 1984).

7. 17 U.S.C. § 102(b) (1982). Section 102(b) provides, in pertinent part: "In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Cf. Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting) ("[C]opyright law simply does not create any property interest in information and ideas.").

8. *Narrell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989).

9. This view is derived from the Supreme Court's holding in *Holmes v. Hurst* that "words are the common property of the human race and are as little susceptible of private appropriation as air or sunlight." *Holmes v. Hurst*, 174 U.S. 82, 86 (1899). *See also Signo Trading Int'l, Ltd. v. Gordon*, 535 F. Supp. 362, 365 (N.D. Cal. 1981) ("It is conceivable that anyone could copyright a single word or a commonly used short phrase, in any language."); *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1405 (S.D.N.Y. 1973) ("[C]ommon phrases are generally not susceptible to copyright protection."); *Norman v. Columbia Broadcasting System, Inc.*, 333 F. Supp. 788, 796 (S.D.N.Y. 1971) ("It is clear that mere similarity of phraseology does not amount to an infringement since copyright does not

"checkmate the public"¹⁰ and the purpose of the copyright clause—to encourage creativity¹¹—would be defeated.

Litigation surrounding literary phrases clusters in several situations: (1) One or more phrases are aggregated as proof of substantial similarity; (2) a phrase is appropriated for its associative commercial power; (3) an author asserts a proprietary right to a public domain phrase; (4) an author seeks to protect a singular literary phrase; (5) an author invents a language and then seeks to protect phrases within that language; (6) an author affirmatively defends the appropriation of a phrase or group of phrases as a fair use; or (7) an author affirmatively defends the appropriation of a phrase or group of phrases as a parody. In order to frame each of these caselaw clusters, this Article will utilize a series of hypotheticals based upon the most well-protected literary phrase of the past decade — "E.T. Phone Home."¹²

In conclusion, this survey will prove that the protection of literary phrases is dependent upon the way in which both plaintiff

protect words and phrases as such."); *O'Brien v. Chappel & Co.*, 159 F. Supp. 58, 59 (S.D.N.Y. 1958) ("Such a common phrase [night and noon] in and of itself is not susceptible of copyright, nor of appropriation by an individual.").

10. *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 679 (1st Cir. 1967) ("We cannot recognize copyright as a game of chess in which the public can be checkmated.").

11. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 450 (1984); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

12. The phrase originated in the motion picture, *E.T.—The Extra-Terrestrial* (Universal 1982), a motion picture which has enjoyed "extraordinary popularity." *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. (BNA) 1162, 1164 (S.D. Tex. 1982).

Commentators report that no American film has had an impact similar to *E.T.—The Extra-Terrestrial*. Made for 10.3 million dollars, the movie has grossed over 700 million dollars in worldwide theatrical grosses and millions more in sales of merchandise. The November 1988 videocassette release of *E.T.—The Extra-Terrestrial* was a milestone in U.S. entertainment. The advance orders—eleven million—were twice the number of the previous best-selling film. By the end of 1988, 15 million copies of the videocassette were in the hands of consumers. Schindette, *E.T.*, *PEOPLE WEEKLY*, Dec. 19, 1988, at 149-50.

The phrase, "E.T. Phone Home" and the character, E.T., are important sources of licensing revenues for owners of copyright in the motion picture. "With companies paying Universal a reported average of seven percent of what they take in selling *E.T.* merchandise, product royalties alone could recoup many times the \$10.3 million spent to make the movie." Kanner, *On Madison Avenue: The Selling of E.T.*, *NEW YORK*, Aug. 9, 1982, at 15. The size of the royalty arrangement for E.T. may be higher than seven percent. See *E.T. and Friends are Flying High*, *BUSINESS WEEK*, Jan. 10, 1982, at 77 ("Industry estimates are that MCA's licensing subsidiary exacts about 15 percent in licensing fees."). It is no wonder, therefore, that E.T. is phoning his attorneys, rather than home. See *Universal City Studios, Inc. v. J.A.R. Sales, Inc.*, 216 U.S.P.Q. (BNA) 679 (C.D. Cal. 1982). "This case represents another example of Universal's aggressive protection of its copyright of the 'E.T.' character." *Briefs*, 25 Pat. Trademark & Copyright J. (BNA) 168 (1982) (PTCJ comment on *Universal Studios, Inc. v. Kamar Indus., Inc.*, 25 Pat. Trademark & Copyright J. 35 (BNA) (Nov. 11, 1982)).

and defendant use words. Coincidentally, one who asserts a proprietary right must demonstrate that the phrase, or the way that the phrase is used, is so unique as to justify protection.

II. "YOU CAN'T JUDGE A BOOK BY ITS COVER": USE OF THE PHRASE AS AN ELEMENT OF SUBSTANTIAL SIMILARITY

HYPOTHETICAL

An unknown screenwriter claims that the authors of E.T. infringed her original screenplay about aliens. The works are dissimilar but the defendant has borrowed the phrase "Phone Home."

Infringement requires access¹³ and proof of substantial similarity.¹⁴ Not all similarities, however, amount to an infringement.¹⁵ Separate from the original work, many elements are unprotectable.¹⁶ For example, if two legal publishers use similar subject headings, neither will be able to claim infringement on that basis alone.¹⁷ Therefore, it is not enough to list the similarities, the plaintiff must successfully assert a proprietary right to the similarities.¹⁸

When comparing works, elements of substantial similarity fall into two categories—literal similarities,¹⁹ such as word for word

13. See *Warner Bros., Inc. v. American Broadcasting Cos., Inc.*, 654 F.2d 204, 207 (2d Cir. 1981); *Musto v. Meyer*, 434 F. Supp. 32, 34 (S.D.N.Y. 1977), *aff'd*, 598 F.2d 609 (2d Cir. 1979). See also *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 271 (C.D. Cal. 1945) (explaining that "[a]ccess means that the person who is charged with pirating another's work saw the first person's work.").

14. Substantial similarity means a taking that is "so 'material' or 'substantial' as to constitute unlawful appropriation." *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 (2d Cir. 1946); *Werlin v. Reader's Digest Ass'n., Inc.* 528 F. Supp. 451, 461, (S.D.N.Y. 1981) (substantial similarity is demonstrated when an average lay observer would recognize the alleged copy as "having been appropriated from the copyrighted work.").

15. "[N]o bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity." *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir.), *cert. denied sub nom. Williams v. Baxter*, 108 S. Ct. 346 (1987) (plaintiff alleged that his work had been pirated to create the musical theme for the motion picture, *E.T.—The Extra-Terrestrial*).

16. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (holding that a playwright's copyright, for example, does "not cover everything that might be drawn from her play; its content went to some extent into the public domain.").

17. *State of Georgia v. Harrison Co.*, 548 F. Supp. 110 (N.D. Ga. 1982), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983) (holding statutory title headings to be mere descriptions which could not be copyrighted).

18. When comparing works, a court will seek "sharp and central similarities." *Fristot v. First Am. Natural Ferns Co.*, 251 F. Supp. 886, 888 (S.D.N.Y. 1966).

19. Professor Nimmer, in his treatise, found it necessary to "invent" the terminology—fragmented literal similarity and comprehensive non-literal similarity—in order to dis-

copying, or non-literal similarities,²⁰ such as the appropriation of a distinctive plot or style. A literary work is a mosaic of these literal and non-literal elements and each item that is poached has a value by itself and a value in relation to the rest of the work. The more unique the combination of elements and the more unexpected the placement, the stronger the evidence of similarity.²¹

In *Narrell v. Freeman*,²² the author of a social history of Jewish migration to San Francisco asserted that factual details, historical events, and some phrases were duplicated in the defendant's novel about a wealthy Jewish family. The defendant admitted consulting the plaintiff's work and taking some phrases including "hordes of gold seekers" and "rekindle old memories."²³ The Ninth Circuit affirmed the grant of summary judgment for the defendant,²⁴ concluding that the duplication of similar factual material

tinguish these two "quite different forms of similarity." 3 M. NIMMER, *supra* note 6, at Section 13.03[A][1]-[2]. Literal similarity, is generally an identical, though not "completely word for word," copying. As Professor Nimmer indicated, the difficulty in using literal similarity to prove substantial similarity is that often only fragments of a work, and not the complete work, are literally copied. *Id.* For an application of Professor Nimmer's terminology, see *Werlin v. Reader's Digest Ass'n, Inc.* 528 F. Supp. 451 (S.D.N.Y. 1981) and *Warner Bros. v. American Broadcasting Cos., Inc.*, 720 F.2d 231 (2d Cir. 1983).

20. Although Professor Nimmer coined the phrase "comprehensive non-literal similarity," see *supra* note 19, the underlying concept is based on Judge Learned Hand's "abstractions" theory, advanced in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Id. at 121 (citing *Holmes v. Hurst*, 174 U.S. 82, 86 (1899)). As Judge Hand recognized, a play can be infringed absent any literal similarity of dialogue. "[The play] may often be most effectively pirated by leaving out the speech, for which a substitute can be found." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

21. It is the "particular subjective quality" of the combination of many different elements which may command copyright protection. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1169 (9th Cir. 1977). While one similarity may be trivial, the overall impact and effect of many similar elements can justify a finding of substantial similarity. *Malkin v. Dubinsky*, 146 F. Supp. 111, 114 (S.D.N.Y. 1956).

22. 872 F.2d 907 (9th Cir. 1989).

23. The defendant admitted copying the phrases "'rekindle old memories,' 'staggering network,' 'river wound its way between muddy banks crawling with alligators,' 'hordes of goldseekers,' 'pitched overboard,' 'cow path,' 'shanties and corrugated [iron/steel] shacks . . . were crowded together,' and 'beach was strewn with boxes, bales.'" *Id.* at 911.

24. *Id.* at 915. The Ninth Circuit uses a two part method for determining substantial similarity; an objective extrinsic test and a subjective intrinsic test. *Id.* at 912-13. When analyzing two works of fiction, the Ninth Circuit will separate plot ideas (which are not

and ordinary phrases did not raise a triable issue of fact. The court held that "[b]ecause of the fundamental differences between the works and the insubstantial nature of the copied passages, no reasonable reader could conclude that the works are substantially similar."²⁶

In *Litchfield v. Spielberg*,²⁶ the authors of *E.T.* were sued for infringing an "unknown play" entitled *Lokey From Maldemar*.²⁷ The defendants acknowledged access but denied copying.²⁸ The only similarity was that in both works aliens with powers of levitation and telepathy are stranded on earth; pursued by authoritarian characters; and finally bid their earthly friends farewell.²⁹ The Ninth Circuit held that the plaintiff could not claim copyright protection for these general similarities.³⁰

But what if the plaintiff in *Litchfield* also had used the phrase "Phone Home" or "Lokey, Phone Home?" The character, Lokey, is completely dissimilar to the character E.T.,³¹ and the plot, sequence, theme, mood, setting, and dialogue of defendant's work were all dissimilar from the movie, *E.T.*³² As the Ninth Circuit in-

protected by copyright) from the actual concrete elements that make up the total sequence of events and the relationships between the characters. *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1984), cert. denied, 474 U.S. 826 (1985).

25. *Narrell*, 872 F.2d at 913. In addition, the Ninth Circuit offered additional support for its holding by finding that the taking amounted to fair use, *Id.* at 913-915, and that no protected expression was copied. *Id.* at 910-912.

26. 736 F.2d 1352 (9th Cir 1984), cert denied, 470 U.S. 1052 (1985).

27. *Id.* *Lokey from Maldemar* is a musical play about the adventures of two aliens (Lokey and Fudinkle). The plaintiff described her work as a social satire designed to illustrate the "disunity of man, so divided by egotism and all its manifestations of fear and hate." *Litchfield v. Spielberg*, 26 Pat. Trademark & Copyright J. (BNA) 226, 227 (C.D. Cal. June 13, 1983)(case summary). *E.T.*—*The Extra Terrestrial* is a "children's tale about a boy who finds, befriends and ultimately saves a little lost alien." *Id.*

28. *Id.* at 1355. The plaintiff's screenplay was rejected in 1979 by Universal Studios, which eventually produced *E.T.*

29. *Id.*

30. *Id.* at 1357 (citing *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981)). Writing about an alien temporarily stranded on earth is not a particularly unique or unexpected combination of elements, so as to justify a finding of substantial similarity on that basis alone. The "stranded alien" concept is a popular and re-occurring theme—e.g., the television series *My Favorite Martian* or the motion picture *Man Who Fell to Earth*.

31. The district judge in dismissing the suit, noted that the character E.T. did not infringe the plaintiff's copyright in her characters Lokey and Fudinkle. *Litchfield v. Spielberg*, 26 Pat. Trademark & Copyright J. (BNA) 226, 227 (C.D. Cal. June 13, 1983) (case summary).

32. The court also found that *E.T.* did not employ the "overt and complex symbolism" in *Lokey from Maldemar*. *Id.* There are varying views as to the value of dissimilarity in determining infringement. See *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 241 (2d Cir. 1983). The most appealing "subjective" standard is that advanced by Judge Frankel: "There are differences and differences." *Fristot v. First Am. Natural Ferns Co.*, 251

licated in *Narell*, if the works are dissimilar, the use of identical phrases is not enough to rise to a finding of substantial similarity.³³ A court would probably find the literal duplication to be so fragmented as to be *de minimis*.³⁴ After finding *de minimis* similarities, a court will decline to find infringement.³⁵

Would the determination be affected by the fact that the phrase "Phone Home" was a material part of the defendant Spielberg's work, was featured in advertising, and also was used for merchandising purposes? The courts would answer the question in the negative as the defendant's use of the appropriated phrase is generally irrelevant to the determination of substantial similarity.³⁶

HYPOTHETICAL

What if the parties were reversed? What if the authors of E.T. sued an unknown screenwriter attempting to produce a Litchfield-like screenplay that used "Phone Home" or "Lokey, Phone Home?"

Under this alternative hypothetical the result would probably favor the plaintiffs because they had popularized the phrase. Unlike the *de minimis* taking from an unknown play, taking the phrase after it has been popularized, amounts to a "material" taking.³⁷ Therefore, when the similarity of phrases arises, a plaintiff

F. Supp. 886, 888 (S.D.N.Y. 1966).

33. *Narell*, 872 F.2d at 913.

34. Cf. *Werlin v. Reader's Digest Ass'n., Inc.*, 528 F. Supp. 451, 464 (S.D.N.Y. 1981). Although often mislabeled as a fair use, the *de minimis* taking is excused on the basis of its insubstantiality. 3 M. NIMMER, *supra* note 6, at § 13.03[A][2]. See, e.g., *Salinger v. Random House, Inc.*, 650 F. Supp. 412, 423 (S.D.N.Y. 1986); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 744, n. 7, (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

35. E.g., *Hoehling v. Universal City Studios*, 205 U.S.P.Q. (BNA) 641, 643 (S.D.N.Y. 1979), *aff'd*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) (taking of three minor elements from book about news event for use in movie is *de minimis*); *Rokeach v. Avco Embassy Pictures Corp.*, 197 U.S.P.Q. (BNA) 155, 161 (S.D.N.Y. 1978) (taking of 100 words from a 70,000 word book detailing mental health research for use in the movie *The Ruling Class* is *de minimis*). But see *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 744, (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (taking of four musical notes and words "I Love" is not *de minimis*).

36. *Werlin*, 528 F. Supp. at 464 ("It is of no moment that one of the duplicated sentences ultimately becomes a material part of [the defendant's] article, to wit, the title."). Cf. *Harris v. Miller*, 50 U.S.P.Q. (BNA) 306, 307 (S.D.N.Y. 1941) (appropriated phrases form a "major part of the last scene" of defendant's play). Similarly, the defense that "the part copied was not a substantial part of the defendant's work" is a "much-criticized and abandoned exception." *Walt Disney Productions, Inc. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir.), *cert. denied sub nom. O'Neill v. Walt Disney Productions*, 439 U.S. 1014 (1978).

37. E.g., *Universal City Studios, Inc. v. Kamar Industries, Inc.*, 217 U.S.P.Q. (BNA)

with a popular work will always have a stronger position than a plaintiff with an unknown work.³⁸ When the exposure is as great as with *E.T.*, the "materiality" of key lines of dialogue is almost a matter of judicial notice.³⁹ Public acceptance of a literary phrase from a larger work, therefore, invests that phrase with an element of materiality that it previously could not possess.

III. "TELL 'EM GROUCHO SENT YA": USING THE PHRASE TO SELL HYPOTHETICAL

Would it infringe the copyright on E.T. if an advertisement for a long distance phone service used a photo of a young boy looking toward outer space with the caption "Phone Home?"

Although there is a tenuous similarity between the phrase and the photograph in the advertisement, a court in such a situation may be influenced by the advertiser's use of the phrase for a promotional rather than a narrative purpose.⁴⁰ In *Dawn Associates v. Links*,⁴¹ the plaintiff co-authored a screenplay, *Night of the Living Dead*, which contained the phrase "When there is no room in hell . . . the dead will walk the earth." The phrase also was used in advertising for the motion picture.

The defendant owned a completely dissimilar film but used the same phrase on movie posters in order to "palm off" his movie as the plaintiff's.⁴² The district court determined that the use of

1162 (S.D. Tex. 1982). In *Kamar*, "I love you E.T." and "E.T. Phone Home" are protectable because they "would be readily recognizable to the lay observer as key lines of dialogue from the copyrighted movie." *Id.* at 1166. Similarly, the phrase "Look! . . . Up in the sky! . . . It's a bird! . . . It's a plane!" is a key line popularized through the exposure of *Superman*. *D.C. Comics, Inc. v. Crazy Eddie, Inc.* 205 U.S.P.Q. (BNA) 1177 (S.D.N.Y. 1979).

38. The plaintiff in litigation such as *Litchfield* must overcome numerous hurdles when litigating against TV and motion picture companies. See Rudell, *Entertainment Law: Copyright Infringement - Hurdles in Litigation*, N.Y.L.J., Jan. 12, 1982 at 1, col. 1, ("[T]he plaintiff faces the substantial out-of-pocket expenses involved in maintaining the action, which must be balanced against the customary insurance protection acquired by defendants against this type of claim.").

39. *Universal Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. (BNA) 1162, 1165-66 (S.D. Tex. 1982).

40. See *infra* notes 49-51 and accompanying text. Court determinations are not the only factors affecting advertising. An advertising campaign based on the "survivability" of a line of luggage prompted the threat of an infringement suit from the owners of *Raiders of the Lost Ark*. An arrangement for payment of a licensing fee was established and the matter was settled out of court. Kanner, *On Madison Avenue: The Soft Side of Luggage*, *NEW YORK*, Oct. 31, 1983, at 22.

41. 203 U.S.P.Q. (BNA) 831 (N.D. Ill. 1978).

42. *Id.* at 833. "Horror aficionados stumbled upon [*Night of the Living Dead*] in run-down theaters on New York's 42nd Street and in drive-ins in the sticks and soon spread the word that they had discovered a masterpiece of the genre." D. PEARY, *CULT MOVIES* 228

the phrase was such an integral part of the plaintiff's film and promotion that, for purposes of a preliminary injunction, appropriating the phrase was a "substantial taking" so as to constitute infringement.⁴³

In *DC Comics, Inc. v. Crazy Eddie, Inc.*⁴⁴ the owner of the copyright in *Superman* sued a chain store owner who had copied the "trailer" to the *Superman* TV show.⁴⁵ The unifying component of this trailer is the phrase, "Look! . . . Up in the sky! . . . It's a bird! . . . It's a plane . . . It's Superman!" The Court found the taking—absent the use of the name Superman—to be "an unjustifiable appropriation of copyrighted material for personal profit."⁴⁶ However, in *Warner Bros., Inc. v. American Broadcasting Companies, Inc.*, the use of the phrase in a television comedy did not result in a finding of infringement.⁴⁷ The Court in the latter decision justified the distinction stating that "[no] matter how well known a copyrighted phrase becomes, its author is entitled to guard against its appropriation to promote the sale of commercial products."⁴⁸

In the traditional copyright infringement case, the infringing work is directly distributed—i.e., the infringing song or novel is offered to the public. But in situations like *Dawn Associates* and *Crazy Eddie*, the phrase was used for its associative power to promote goods.⁴⁹ The appropriation even may be interpreted as an en-

(1981).

43. *Dawn Associates*, 203 U.S.P.Q. at 835. The Court relied more on the fact that the phrase was "an integral part of [plaintiff's] copyrighted advertising" than on the use of the phrase in the plaintiff's screenplay. *Id.* at 835. The status of Romero's claim to the phrase may now be in jeopardy. Apparently an error in the registration has dropped the film into the public domain. Eder, *P.D. Blues: How to Buy A Classic on Cassette*, *VILLAGE VOICE*, Sept. 16, 1986, at 37.

44. 205 U.S.P.Q. (BNA) 1177 (S.D.N.Y. 1979).

45. The *Superman* "trailer" is the segment which introduces both the live action TV series and the animated cartoon series. *Id.* at 1177-78.

46. *Id.* at 1178.

47. *Warner Bros., Inc. v. Am. Broadcasting Cos.*, 720 F.2d 231, 242-43 (2d Cir. 1983).

48. *Id.* at 242.

49. The selling power of phrases or slogans on goods is undisputed in the twentieth century. For this reason, they are protected under trademark law. See J. McCARTHY, *supra* note 6, at § 7:5. However, a slogan used as part of a trade label may not be protected under copyright principles. *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705 (7th Cir. 1972) (phrase "the most personal sort of deodorant" not infringed by the phrase "the deodorant of the most personal kind").

Titles of works, because of their secondary meaning, also may be protected under trademark principles, although they generally are not protected under copyright. J. McCARTHY, *supra* note 6 at §§ 10:1-10:8. See also Angel, *Legal Protection for Titles in the Entertainment Industry*, 52 So. CAL. L. REV. 279 (1979); Netterville & Hirsch, *Piracy and Privilege in Literary Titles*, 32 So. CAL. L. REV. 101 (1959).

dorsement. For example, a movie-goer viewing the posters at issue in *Dawn Associates*, may assume mistakenly that George Romero had participated in the production of the defendant's film,⁵⁰ or a consumer purchasing a bust of Martin Luther King, Jr. based upon advertisements and other printed material containing segments of Dr. King's speeches may assume mistakenly that the endorsement was by Dr. King or his estate.⁵¹

Therefore, if a short phrase is used purely for its promotional or associative commercial effect, as in the hypothetical phone advertisement, the court may accept less significant similarities to justify a finding of copyright infringement.

IV. "POWER TO THE PEOPLE!": TAKING FROM THE PUBLIC DOMAIN

HYPOTHETICAL

What success would the authors of E.T. have asserting a claim of infringement against a songwriter who used the phrase "Phone Home" repeatedly in a country and western song about divorce?

Popularizing a phrase may guarantee copyright protection when the phrase is a key line of the plaintiff's work and is appropriated in connection with other elements from a work.⁵² But separate from any connection with a larger work, literary phrases are often assumed to be in the public domain for copyright purposes.⁵³ For example, if the only similarity between two songs is a similar phrase, such as "night and noon,"⁵⁴ or "there will never be another

50. See *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938) (noting that the use of three sentences from a scientist's work in a promotional cigarette company pamphlet implies consent and is not excusable). This assumption of an author's consent borders on the policies of French *droit de suite* in which the "artistic product manifests the personality and thoughts of the creator. It bears his spirit, embodies his reputation and reflects his views; the personality of the creator remains permanently a part of the work." Hauser, *The French Droit de Suite*, 11 COPYRIGHT L. SYMP. (ASCAP) 1, 14 (1962). But see *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 n. 6, (2d Cir. 1984) (Claiming that the fear that use of a consumer magazine review in a vacuum cleaner advertisement implies endorsement is "exaggerated.").

51. *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981). The court was unsympathetic to claims of fair use. *Id.* at 861. See also *Salinger v. Random House, Inc.* 811 F.2d 90, 99, n. 6 (2d Cir. 1987) (plaintiff Salinger contended that defendant's use of phrases inserted among close paraphrases would confuse and deceive the public creating a cause of action for unfair competition).

52. See *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. (BNA) 1162, 1165-66 (S.D. Tex. 1982).

53. See *supra* text accompanying note 6.

54. *O'Brien v. Chappel & Co.*, 159 F. Supp. 58, 59 (S.D.N.Y. 1958) (refusing to recognize an exclusive right to use the phrase "night and noon" in any and all contexts).

you,"⁵⁵ it will not be enough to justify a finding of substantial similarity.

In *Pendleton v. Acuff-Rose Publications, Inc.*,⁵⁶ the plaintiff's country and western song contained the phrase, "I like to gamble, I like to smoke. I like to drink and tell a dirty joke."⁵⁷ The defendant's song contained the phrase "She don't drink. She don't smoke. She can't stand a dirty joke."⁵⁸ The district court, acknowledging that the phrases were not subject to copyright protection, granted a summary judgment for the defendants. The court noted that "the perfect country and western song has been described as including drinking, mother, prisons, trains and trucks. This Court can add to that list without reservation smoking, gambling, loving, and telling dirty jokes."⁵⁹

In *Stratchborneo v. Arc Music Corp.*,⁶⁰ the plaintiff's copyright was for a musical composition, *Mojo Workout*, in which the phrase "got my mojo working" was used repeatedly in variations.⁶¹ The plaintiff also designed a dance, *Do the Mojo*, which aided in the popularization of the composition.⁶² The defendant's copyright was for a song entitled *Got My Mojo Working*.⁶³ The music was dissimilar. The notable similarity was the phrase "got my mojo working."

The district court dismissed the plaintiff's claims of infringement⁶⁴ and noted that the defendants had known of the phrase prior to the plaintiff's use.⁶⁵ "As a figure of speech, the concept of having, or not having, one's mojo working is not something in

55. *Gingg v. Twentieth-Century Fox Film Corp.* 56 F. Supp. 701 (S.D. Cal. 1944) (refusing to find the presence of a similar phrase in both works to be significant proof of similarity).

56. 225 U.S.P.Q. (BNA) 935 (M.D. Tenn. 1984).

57. *Id.* at 939.

58. *Id.*

59. *Id.*

60. 357 F. Supp. 1393 (S.D.N.Y. 1973).

61. *Id.* at 1397-98, nn. 3-5. "Mojo is . . . one or more talismanic objects believed to have power intrinsic to their nature, and believed able to impart power, or ward off evil or misfortune . . ." *Id.* at 1396. The court acknowledged the ritual origins of "Mojo working" in the rural South and determined that "MOJO is a commonplace part of the rhetoric of the culture of a substantial portion of the American people." *Id.*

62. *Id.* at 1397 n.3. ("Wiggle and turn and away you go. That's the way you do the mojo.")

63. *Id.* at 1400. This song, written by Preston (Red) Foster in 1956, has become the more popular version, recorded by Muddy Waters, Jimmy Smith, Art Blakey, Johnny Rivers, Sam the Sham and the Pharoahs, Manfred Mann, Conway Twitty, and others. *Id.* at 1400-02.

64. *Id.* at 1407.

65. *Id.* at 1403.

which any one person could assert originality, or establish a proprietary right."⁶⁶

In *Gingg v. Twentieth-Century Fox Film Corp.*,⁶⁷ two songs shared the same lyric lines — "There will be [many] other nights like this" and "There will never be another you."⁶⁸ The latter line was also the title of both works. The plaintiff, who had less success with her work, conceded that the phrase-title was not original with herself and that there were "fourteen or fifteen songs entitled *There Will Never Be Another You*, or at least substantially similar."⁶⁹

The court determined that "this element of similarity between the two works has no significance."⁷⁰ Asserting the public's right to common romantic phrases, the court determined that "where the title of a song deals with a romantic subject, it would be most unusual not to find the lyrics thereof including such works as 'nights,' 'moons,' 'lips,' 'kisses,' 'caresses,' and the like."⁷¹

A defendant, in some circumstances, may be liable for taking a public domain phrase from another work.⁷² "[T]hough the 'ordinary' phrase may be quoted without fear of infringement, a copier may not quote or paraphrase the sequence of creative expression that includes such a phrase."⁷³ Similarly, if a lyrical phrase and its underlying musical accompaniment is borrowed, this may justify a finding of substantial similarity.⁷⁴

66. *Id.* at 1396.

67. 56 F. Supp. 701 (S.D. Cal. 1944).

68. *Id.* at 706. The chorus of the plaintiff's song started with the line "There'll be other nights like this" and ended with the line "But there'll never be another you." The defendant's chorus started with "there will be many other nights like this" and ended with "There will never be another you." The last line of each composition also was found in the middle of each chorus. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. "[The public] domain is open to all who tread it; not to those who invade the closes of others, however similar." *Fisher v. Dillingham*, 298 F. 145, 150 (S.D.N.Y. 1924). Although finding that the defendant's musical accompaniment was substantially similar to the plaintiff's, Judge Learned Hand refused to assess damages in *Fisher*, labeling the damages issue as "a mere point of honor, of scarcely more than irritation . . . Except that it raises an interesting point of law, it would be a waste of time for everyone concerned." *Id.* at 152.

73. *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.), cert. denied, 108 S.Ct. 213 (1987).

74. *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d. Cir. 1980) (two words and a four note sequence are the "heart of the composition."); *Boosey v. Empire Music Co.*, 224 F. 646, 647 (S.D.N.Y. 1915) (combination of five-word phrase and music creates "the kind of sentiment . . . that causes the audiences to listen, applaud, and buy copies in the corridor on the way out of the theater.").

However, as the decisions in *Stratchborneo*, *Pendleton* and *Gingg* demonstrate, absent any other similarities, the presence of a public domain phrase in both works is not enough to prove substantial similarity. A defendant will still avoid liability by demonstrating a familiarity with the phrase, prior to accessing the plaintiff's work.⁷⁵

V. "EUCLID ALONE HAS LOOKED ON BEAUTY BARE": PROTECTION FOR A SINGULAR PHRASE

A. *When the Phrase is Used in Conjunction with a Character*

HYPOTHETICAL

Could the authors of E.T. prevent the copying of the phrase "E.T. Phone Home" on a poster?

In an almost identical situation in *Universal City Studios, Inc. v. Kamar Industries, Inc.*,⁷⁶ use of the phrases "E.T. Phone Home" and "I Love E.T." on drinking mugs, pencil sharpeners, and other merchandise was held to be an infringement.⁷⁷ One of the two premises upon which the district court based its holding was that the inscriptions on the defendant's products would be "readily recognizable to the lay observer as key lines of dialogue from the copyrighted movie."⁷⁸

Equally important, however, the court determined that the plaintiff would have prevailed on its copyright claim simply by reason of the defendant's unauthorized use of the E.T. character and name.⁷⁹ The district judge ruled that copyright of the movie ex-

75. See *supra* notes 5, 6, 37 and 39 and accompanying text. This same approach was followed in *Life Music, Inc. v. Wonderland Music Co.*, 241 F. Supp. 653 (S.D.N.Y. 1965), where the defendant demonstrated familiarity with the word "Supercalifragilisticexpialidocious" prior to publication of the plaintiff's song.

76. 217 U.S.P.Q. (BNA) 1165 (S.D. Tex. 1982).

77. *Id.* at 1166. Kamar's president testified "that he never applies for merchandising rights licenses because obtaining such licenses would be too expensive." *Id.* at 1165.

78. *Id.* at 1166. It is more probable that the protection stemmed from the use of the character name, rather than the taking of dialogue. This would explain the Court's lack of concern that the dialogue from the movie was "I love you, E.T." *Kamar*, 217 U.S.P.Q. (BNA) at 1165, 1166. A second report of the case states that the defendant used the phrase "I Love E.T." with the word love "symbolized by the picture of a heart." *Copyright on Motion Picture Extends to E.T. Character*, 25 PAT. TRADEMARK & COPYRIGHT. J. (BNA) 35 (1982).

79. *Kamar*, 217 U.S.P.Q. (BNA) at 1166. The Court first distinguished the protectability of the E.T. character and then extended that protection to include the name. *Id.* The E.T. character also was protected separately in *Universal City Studios, Inc. v. J.A.R. Sales, Inc.*, 216 U.S.P.Q. (BNA) 679 (C.D. Cal. 1982) (protecting E.T. likeness on dolls). For a more thorough discussion on character protection in copyright law, see 1 M. NIMMER, *supra* note 6, at § 2.12 and Marks, *The Legal Rights of Fictional Characters*, 25 COPYRIGHT

tends to the character name because it is central to the story.⁸⁰ "The name 'E.T.' itself is highly distinctive and is inseparable from the identity of the character. The use of the name . . . conjures up the image and appeal of the E.T. character."⁸¹ In so ruling, E.T. joined the company of a select group of character names protected under copyright.⁸²

It is sensible to protect a phrase attached to a protected character.⁸³ "Certain verbal tags also conjure up, by association, the idea of specific characters: "It's a bird, it's a plane . . ."; "Elementary"; "Number One Son"; "Play it, Sam"; "Me Tarzan"; "Have Gun Will Travel"; "Licensed to Kill"; "Keemosabee."⁸⁴

The phrase "Phone Home," severed from the character name, is unprotectable as a common idiom of language. When it is attached to the name, however, the copyright of the motion picture stretches, not only to protect the character, but to protect the character-phrase association.⁸⁵

B. When the Phrase is the Complete Work.

To the extent that a phrase is combined with other phrases, the assembly or compilation of these phrases may effectuate copyright protection. For example, in *University of Minnesota v. Applied Innovations, Inc.*,⁸⁶ the court protected short declarative questions and statements used in a psychometric personality test, holding that the authors had used "sufficient intellectual labor in

L. SYMP. (ASCAP) 35 (1975).

80. *Kamar*, 217 U.S.P.Q. (BNA) at 1166.

81. *Id.* at 1165.

82. *See, e.g., Edgar Rice Burroughs, Inc. v. Manns Theatres*, 195 U.S.P.Q. (BNA) 159 (C.D. Cal. 1976) (protecting Tarzan, Jane, Boy, and Cheeta, or "any colorable imitation"); *Patten v. Superior Talking Pictures, Inc.*, 8 F. Supp. 196 (S.D.N.Y. 1934) (protecting "Frank Merriwell"). Because of the use of character names on merchandise, protection of character names is more prevalent in trademark law. *See generally* Olin, *The Administration of a Character Program*, 59 TRADEMARK REP. 76, 80-81 (1969) (documenting the difficulties of foreign trademark registration when a resident of that country is named Donald Duck).

83. For example, "Me Tarzan, You Jane" is probably protectable under the ruling in *Edgar Rice Burroughs, Inc. v. Manns Theatres*, 195 U.S.P.Q. (BNA) 159 (C.D. Cal. 1976), although the line occurs neither in the novel nor the MGM movies. Davidow, *Copyright Protection for Fictional Characters: A Trademark-Based Approach to Replace Nichols*, 8 COLUM. J.L. & ARTS 513, 551 (1984).

84. *Id.* at 559 (1984).

85. Professor Nimmer states that the issue of whether a character is protectable apart from the story is "more properly framed as relating to the degree of substantial similarity required to constitute infringement rather than in terms of copyrightability per se." However, the increased use of characters in completely new works "renders it appropriate to consider the copyrightability of a character . . ." 1 M. NIMMER, *supra* note 6, at § 2.12.

86. 5 U.S.P.Q. 2d (BNA) 1689 (D. Minn 1987).

assembling and revising or rewriting the test statements."⁸⁷ Similarly, in *Raffoler, Ltd. v. Peabody & Wright, Ltd.*,⁸⁸ slogans such as "Why are we giving away SOLEX Electric Toothbrush Sets For Only \$3?" and "This is NOT a misprint" were protected to the extent of their arrangement and selection in plaintiff's advertisements.⁸⁹

But what if a phrase is not derived from a larger work? Will copyright ever protect it?⁹⁰ The possibility has been explored most notably by Judge Frank in *Heim v. Universal Pictures Co., Inc.*⁹¹ In *Heim*, the issue arose as to whether the copying of a musical phrase would be enough to justify infringement.⁹² Judge Frank determined that lack of originality, not brevity, is what would prevent the separate copyrightability of a musical/literary phrase.⁹³ This originality could be demonstrated by a phrase that was so idiosyncratic that its appearance in another work would preclude coincidence.⁹⁴ Phrases such as "Euclid alone has looked on beauty bare"⁹⁵ or "Twas brillig and the slithy toves"⁹⁶ exemplify this standard.

As Judge Frank recognized in *Heim*, the degree of originality required to protect a literary phrase differs from the degree of originality needed to validate a copyright.⁹⁷ Reflecting on the decision

87. *Id.* at 1696.

88. 671 F. Supp. 947 (E.D.N.Y. 1987).

89. *Id.* at 951.

90. In an age of licensing, this question is largely irrelevant. The merchandisable elements of a work, such as characters and phrases, demand exposure in a "narrative" setting to sell licensed goods. "How much is a daily comic strip worth to Snoopy, a never-ending series of movies to Star Wars, 90 minutes of TV time on Saturday morning to Smurfs? Plenty." Green & Spragins, *Smurfy to the Max*, FORBES, Nov. 8, 1982, at 70. The need for a popular movie or TV show to launch a merchandising campaign aimed at children is especially crucial for characters such as E.T. because "the boundary between reality and imagination in children is loose." Merchandise based on elements of a movie such as E.T. "may permit the child to carry the fantasy of the show to reality permitting the child to become part of the show." Grimes & Battersby, *The Protection of Merchandising Properties*, 69 TRADEMARK REP. 431, 434 (1979) (citing the opinion of a psychiatrist, Dr. George Serban).

91. 154 F.2d 480 (2d. Cir. 1946).

92. *Id.* at 485.

93. *Id.* at 488. "Judge Frank was not discussing copyrightability but rather the extent of copying necessary to establish an infringement." 1 M. NIMMER, *supra* note 6, at § 2.01[B] n. 41.

94. *Heim*, 154 F.2d at 488.

95. *Id.* at 487 n.8.

96. *Id.* See *infra* notes 110-111 and accompanying text.

97. *Heim*, 154 F.2d at 488 n.17. Five years later, Judge Frank was to write the "classic statement on the degree of 'originality' required for copyright." J. MCCARTHY, *supra* note 6, at § 6.5. Judge Frank said, "[a]ll that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation,

in *Heim*, Professor Nimmer has written: "It appears then, that there is a reciprocal relationship between creativity and independent effort. The smaller the effort (e.g. two words) the greater must be the degree of creativity in order to claim copyright protection."⁹⁸

Obviously, terse statements such as "Contents Require Immediate Attention" or "Gift Check Enclosed" do not exhibit sufficient originality.⁹⁹ But do statements of advertising copy, haikus, or jokes,¹⁰⁰ all of which rely on brevity and simplicity, rise to the necessary level of originality?

One example of the higher degree of creativity necessary for copyright protection is evident in *Brilliant v. W.B. Productions, Inc.*¹⁰¹ Ashleigh Brilliant is the author of literary phrases sold on postcards.¹⁰² The defendant copied two phrases—"I may not be totally perfect, but parts of me are excellent" and "I have abandoned my search for truth and am now looking for a good fantasy"—and altered a third phrase, all for sale on t-shirt transfers.¹⁰³

The court accepted the plaintiff's contention that the phrases were epigrams,¹⁰⁴ whose distinguishing features are conciseness,

something recognizably 'his own'." *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

98. 1 M. NIMMER, *supra* note 6, at § 2.01[B].

99. *E.g.*, *Magic Marketing, Inc. v. Mailing Services of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986).

100. For an excellent discussion of the protection of jokes, see Herman, *The Copyrightability of Jokes: "Take My Registration Deposit . . . Please!"* 6 COMM/ENT. L.J. 392 (1984).

101. Civ. No. 79-1893-WMB (S.D. Cal. Oct. 22, 1979).

102. Titled *Brilliant Thoughts*, the author illustrated, published, and separately copyrighted these works (registered as composite works because they included illustrations). As of 1979, Brilliant had 1,400 works in print (over 50,000,000 cards). The works also are collected in book form. The author followed certain rules of style when creating his work. No epigram was longer than 17 words. "[T]he words must be simple, easily understood, easily translatable . . . [and their effect] must not in any way depend upon rhyme, rhythm, puns or any other kind of cultural word-play." A. BRILLIANT, *I MAY NOT BE TOTALLY PERFECT* 12 (1979).

103. Judgment, *Brilliant v. W.B. Productions, Inc.*, Civ. No. 79-1893-WMB (S.D. Cal. entered Oct. 22, 1979). Brilliant also successfully asserted his rights against Universal City Studios (E.T.'s copyright owner) when "I May Not Be Perfect . . ." appeared on a t-shirt worn in a television movie of the week. For tales of his other legal battles see A. BRILLIANT, *supra* note 102.

104. The plaintiff and his counsel had referred to the works as epigrams in order to demonstrate that there was a tradition and art involved in literary phrases. Brilliant had established a continuing craft in these short works. "[V]ery few writers in our language (apart from the pitiable hacks of the greeting card industry) have ever devoted themselves to creating an extended series of such works." A. BRILLIANT, *supra* note 102, at 11. Labelling the works epigrams also helped distinguish the works from ideas, which are unprotectable. 17 U.S.C. § 102(b) (1982).

cleverness, and a pointed observation. The Court determined that the defendant had infringed the plaintiff's copyright in two instances.¹⁰⁵ By fulfilling the higher creative standards of an epigram, the literary phrases in *Brilliant* also satisfied the inverse relationship between originality and length discussed by Judge Frank and Professor Nimmer.¹⁰⁶

VI. "T'WAS BRILLIG AND THE SLITHY TOVES": PROTECTING THE INVENTED PHRASE

HYPOTHETICAL

If a college student created a new language and popularized it among other students, could she then sell t-shirts bearing a translation of "Phone Home" in that language?

In *Brilliant*, the clever arrangement of a small group of words established the required degree of originality. However, arrangement of words is not the only means of demonstrating originality in a short phrase. Evidence of creativity also is demonstrated by the use of inventive words or language.¹⁰⁷ This is exemplified by Judge Frank's citation from *Jabberwocky*—"T'was brillig and the slithy toves."¹⁰⁸ A similar style of nonsense "code words" prompted Judge Learned Hand to write, "Conceivably there may arise a poet who strings together words without rational sequence—perhaps even coined syllables—through whose beauty, cadence, meter and rhyme he may seek to make poetry."¹⁰⁹

105. Judgment at 13, *Brilliant v. W.B. Productions, Inc.*, Civ. No. 79-1893-WMB (S.D. Cal. entered Oct. 22, 1979). A third epigram, *Brilliant's* "I'm in search of myself - Have you seen me anywhere?" had been altered to "I'm trying to find myself . . . Have you seen me lately?" This work was not protected, perhaps indicating that actionable copying requires exact literal duplication.

106. See *supra* notes 97-98 and accompanying text. "With so limited a format, the challenge was to pack the most possible insight, amusement, intelligence, and feeling into the fewest possible words." Cf. A. BRILLIANT, *supra* note 102, at 12.

107. "[T]hey may be the productions of high ingenuity or even genius." *Reiss v. National Quotation Bureau, Inc.*, 276 F. 717, 719 (S.D.N.Y. 1921). See also *Life Music, Inc. v. Wonderland Music Co.*, 241 F. Supp. 653, 656 (S.D.N.Y. 1965) (copying an inventive word "conceivably" could create liability); and *Exxon Corp. v. Exxon Ins. Consulting Int'l, Ltd.* [1981] 2 All E.R. 495, 504 (although refusing to protect 'Exxon' under copyright, the British court indicated a willingness to protect inventive words in certain contexts).

The protection of invented languages has become a particularly important issue for authors of computer software, an industry in which computer languages and their phrasing are "essential to man-machine communication." *Wiegner & Heins, Can Las Vegas sue Atlantic City*, FORBES, Mar. 6, 1989, at 130.

108. *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 n. 8 (2d Cir. 1946).

109. *Reiss v. National Quotation Bureau, Inc.*, 276 F. 717, 718 (S.D.N.Y. 1921) (protecting a book of meaningless code words).

Lewis Carroll's highly inventive Jabberwocky language was also cited in the British case, *Exxon Corp. v. Exxon Ins. Consulting Int'l Ltd.*¹¹⁰ Hypothesizing that Lewis Carroll recently had written the poem, the British court concluded that the author would be able to protect against the copying of the word "Jabberwocky" by another. However, "the judge observed that if Carroll had merely invented the word and had never written the famous poem which contained it, it would be questionable whether he could have successfully contended that he had copyright in the word alone."¹¹¹

Based upon these decisions, the creator of an original language would be able to protect original expressions using that language. Absent the language, it would be more difficult to protect a single invented word. However, determining whether a translation of the phrase "E.T. Phone Home" into an invented language is protectable requires examining a second issue, namely, whether such translations are non-infringing. A common factor in both "Jabberwocky" and the "code word case"¹¹² was that the words in both had no "meaning."¹¹³

Once the words of an invented language have a translatable meaning, using that language to express a copyrighted work becomes an infringement because "[t]he translation may not lawfully come into being without the consent of the copyright owner of the work to be translated."¹¹⁴ Therefore, the hypothetical college student who creates a new language may be able to protect against others copying the language, but will not be able to use the language to shield against infringement when translating protected works such as "E.T. Phone Home."

110. [1981] 2 All E.R. 495, 504.

111. Bigger, *Notes From Other Nations*, 71 TRADEMARK REP. 170, 172 (1981).

112. *Reiss v. National Quotation Bureau, Inc.*, 276 F. 717, 718 (S.D.N.Y. 1921).

113. "These words have a prospective meaning, but as yet they have not received it, like an empty pitcher." *Reiss v. National Quotation Bureau, Inc.*, 276 F. 717, 718 (S.D.N.Y. 1921).

114. 2 M. NIMMER, *supra* note 6, at § 8.09[B][1]. See *Grove Press, Inc. v. Greenleaf Publishers Co.*, 247 F. Supp. 518 (E.D.N.Y. 1965) (holding that the copying of a work by Jean Genet indirectly through copying a translation of the original is an infringement). In another case, the transliteration of Arabic words (creating a phonetic spelling with roman letters) does not possess sufficient originality to merit copyright protection. *Signo Trading Int'l, Ltd. v. Gordon*, 535 F. Supp. 362 (N.D. Cal. 1981).

VII. "TEACHER'S PET": THE FAIR USE DEFENSE

HYPOTHETICAL

Would the use of the phrase, "E.T. Phone Home" in a book of film quotations qualify as a fair use?

Copying a phrase for purposes such as criticism, comment, news reporting, teaching, scholarship, or research commonly qualifies as a fair use.¹¹⁵ In determining whether the reproduction qualifies as a fair use, several factors are considered.¹¹⁶

The first factor is the "purpose and character of the use."¹¹⁷ A profitable use does not prevent a fair use defense from succeeding.¹¹⁸ "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is a monetary gain but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price."¹¹⁹

The second factor is the "nature of the copyrighted work."¹²⁰ Certain types of works, typically those involving more of diligence than of originality or inventiveness require less copyright protection than other original works.¹²¹ In addition, the fact that a work is unpublished is a critical element of its nature.¹²²

The third factor in determining fair use is the substantiality of the portion used in relation to the copyrighted work.¹²³ In *Salinger*

115. 17 U.S.C. § 107 (1988). "[S]ome idea of the sort of activities the courts might regard as fair use under the circumstances: quotations of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work . . ." H.R. REP. NO. 1476, 94TH CONG., 2D SESS. 65 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5678 [hereinafter 1976 HOUSE REPORT].

116. See 17 U.S.C. § 107 which states:

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

Id. This set of criteria is not "definitive or determinative," but merely "some gauge for balancing the equities." 1976 HOUSE REPORT, *supra* note 115, at 65.

117. 17 U.S.C. § 107(1) (1988). "The intent of this section is to encourage users to engage in activities the primary benefit of which accrues to others." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 496 (1984) (Blackmun, J., dissenting).

118. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987).

119. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

120. 17 U.S.C. § 107(2) (1988). See generally 3 M. NIMMER, *supra* note 6, at § 13.05[A][1].

121. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 496 (1984) (Blackmun, J., dissenting). If the statutory factor were phrased as a question it might ask: is the plaintiff's work "primarily informational rather than creative?"

122. *Harper & Row*, 471 U.S. at 564.

123. 17 U.S.C. § 107(3) (1988).

v. Random House, Inc.,¹²⁴ the Second Circuit measured this factor quantitatively and qualitatively.¹²⁵ Although many "ordinary phrases" appeared within the plaintiff's letters, the court nevertheless determined that each passage as a whole satisfied the threshold of required creativity. Therefore, the paraphrasing of the letters constituted infringement.¹²⁶

The fourth and "single most important element of fair use"¹²⁷ is the effect of the use upon the potential market¹²⁸ or the value of the copyrightable work.¹²⁹ In *Salinger*, for example, the court determined that an appreciable number of readers of the defendant's book would have the impression "that they have read Salinger's words, perhaps not quoted verbatim, but paraphrased so closely as to diminish interest in purchasing the originals."¹³⁰

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹³¹ the Supreme Court grappled with the pre-publication appropriation of President Ford's memoirs. The actual number of words and phrases borrowed were small,¹³² but the fact that the defendant's work was timed to "scoop" the plaintiff's publication seriously

124. 811 F.2d 90 (2d Cir. 1987).

125. *Id.* at 99 (noting that quoted or paraphrased portions of the plaintiff's unpublished letters were featured in forty percent of the defendant's book's 192 pages).

126. *Id.*

127. *Harper & Row*, 471 U.S. at 566.

128. In *Salinger*, the fact that the author had disavowed any intention to publish the letters during his lifetime did not lessen the potential market. The court stated that Salinger was entitled to protect his *opportunity* to sell his letters, an opportunity estimated to have a value in excess of \$500,000. *Salinger*, 811 F.2d at 99.

129. 17 U.S.C. § 107(4) (1988). This factor is "aimed at the copier who attempts to usurp the demand for the original work." *Consumers Union of U.S. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983). This also includes consideration of the effect of the use on the "potential market" for the copyrighted work. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 496 (1984) (Blackmun, J., dissenting). In making this determination, a court also may consider whether or not the plaintiff's work is still "in print" and available. See *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1265 (2d Cir. 1986).

130. *Salinger*, 811 F.2d at 99. In addition, the court took offense as to how inadequately the defendant paraphrased Salinger's expression. For example, Salinger's statement about how an editor rejected his story, "She's a beautiful girl, except for her face," was rephrased by defendant as "How would a girl feel if you told her she was stunning to look at but that facially there was something not quite right about her?" *Id.* at 99 n.5.

On this basis, the Second Circuit determined that the factors weighed against the defendant, despite the recognizable scholarly purpose of the defendant's use. By preventing the use of his unpublished letters, Salinger secured a right "that many writers would rather not have - the right not to publish." Hoban, *The Salinger File*, *NEW YORK MAGAZINE*, June 15, 1987, at 36, 42.

131. 471 U.S. 539 (1985).

132. The defendant produced a 2,250 word article. Approximately 300 to 400 words of it consisted of verbatim quotes taken from the plaintiff's manuscript. *Id.* at 539.

damaged the marketability of the first serialization rights.¹³³ The Supreme Court held that "isolated instances of minor infringements when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."¹³⁴

In analyzing the *E.T.* hypothetical, a factor by factor analysis of all potential fair uses is necessary. As to the first factor—purpose of the use—considerations would weigh in favor of the defendant as a film quotation book would qualify as a scholarly, although commercial, work.

The second factor—nature of the copyrighted work—would weigh in favor of the authors of *E.T.* as the film is a work of originality or inventiveness, rather than one simply involving diligence.

The third factor—amount and substantiality of the portion used—requires a threshold determination. How is a derivative but copyrightable phrase like "E.T. Phone Home" measured in relation to the motion picture? If the phrase is measured against the motion picture screenplay, the phrase would amount to a material, but proportionately small, part of a larger work.¹³⁵

But if the phrase is considered as a separately copyrightable work, the taking of three words would be substantial. Like the defendants in *Brilliant v. W.B. Productions, Inc.*¹³⁶ or *Sony Corporation of America v. Universal City Studios, Inc.*,¹³⁷ the defendant in the hypothetical would be in the position of justifying the taking of a complete work.¹³⁸

As for the fourth factor—effect on the market—the use of this key line of dialogue in a film quotation book would not displace the potential market for the motion picture.

Therefore, the taking of a derivative phrase like "E.T. Phone Home" offers the court an option in fair use. Although separately copyrightable for purposes of cups, posters, and pencil sharpeners, the phrase still can be considered a segment, albeit material part,

133. *Id.*

134. *Id.* at 569.

135. The taking would amount to an excerpt or quotation, excusable if used for scholarly purposes. See 1976 HOUSE REPORT, *supra* note 115, at 65. Even the use of 29 material words for a non-scholarly, promotional purpose can be excused as a fair use. *Consumers Union of U.S. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983).

136. Judgment, *Brilliant v. W.B. Productions, Inc.*, Civ. No. 79-1893-WMB (S.D. Cal. Oct. 22, 1979).

137. 464 U.S. 417 (1984).

138. "[C]omplete duplication . . . might alone be sufficient to preclude a finding of fair use." *Id.* at 496 (Blackmun, J., dissenting). See also *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554, 560 (D.D.C. 1981) ("The admitted reprinting of approximately 92 percent of plaintiff's story precludes the fair use defense under prior law.").

of a larger work.

The use of small but important segments of works poses a dilemma for the user. A conservative approach would require the payment of "user fees" for small segments that might, under actual judicial scrutiny, be considered a fair use.¹³⁹ A less conservative approach would be to "cite and fight."¹⁴⁰ Because fair use is based upon a "concept of reasonableness"¹⁴¹ the use of "E.T. Phone Home" in a film quotation book therefore should be excused as a fair use.¹⁴²

VIII. "HE WHO LAUGHS LAST, LAUGHS BEST": THE PARODY DEFENSE

HYPOTHETICAL

*Would it be justifiable under a fair use defense, for an artist to sell postcards with a photo of Idi Amin and the phrase, "Idi Phone Home?"*¹⁴³

The parody defense, although considered a branch of the fair use doctrine,¹⁴⁴ has acquired its own factors and characteristics.¹⁴⁵ By its nature, parody demands some taking from an original

139. Some readers may wonder whether E.T.'s proprietor would oppose a scholarly or otherwise critical use of the phrase or character. However, the use of the E.T. character for traditional fair use purposes such as political cartoons and copy has caused one representative of Universal to gripe, "We're flattered by the imitation, but that's pirating, not licensing." Kanner, *On Madison Avenue: The Selling of E.T.*, NEW YORK, Aug. 9, 1982, at 15, 16.

140. *Rolling Stone Magazine* faced such a dilemma in its use of song lyrics in feature articles and reviews. "The law is very vague . . . [s]o we made up some rules . . . a lyric of four lines or over but under one-fifth of a song must be cited, but permission need not be asked, defining under one-fifth of a song as a fair use . . ." Over one-fifth of the song lyrics requires obtaining permission from the copyright owner. Belz, *Unwriting the Story of Rock*, in *FAIR USE AND FREE INQUIRY* 36, 41-42 (Lawrence & Timberg, eds.) (1980) (citing letter, Sara Lazin, Associate Editor, *ROLLING STONE*, April 6, 1978).

141. *Quinto v. Legal Times of Washington, Inc.*, 506 F. Supp. 554, 560 (D.D.C. 1981).

142. This result would not necessarily follow if an author wanted to use one frame of a motion picture. Although a single frame would be 1/172,800 of a two hour movie, the visual aspect of a film poses copyright problems. The author of a scholarly work on films may find it difficult to understand why a fee must be paid. The request for such fees often "has little to do with [copyright] principles and everything to do with finance. [Film owners] reason that because they own the film, they are entitled to a 'piece of the action' . . ." Mast, *Film Study and Copyright Law*, in *FAIR USE AND FREE INQUIRY* 72, 77 (Lawrence & Timberg eds. 1980).

143. Parody is considered a fair use defense. 1976 HOUSE REPORT, *supra* note 115 at 65.

144. "The 'parody' branch of the 'fair use' doctrine is itself a means of fostering the creativity protected by the copyright law." *Warner Bros., Inc. v. Am. Broadcasting Co., Inc.*, 720 F.2d 231, 242 (2d Cir. 1983).

145. See 1 M. NIMMER, *supra* note 6, at 13.05[C] for a discussion of the approaches developed in the Second and Ninth Circuits.

work.¹⁴⁶ A "more extensive use of another's copyrighted work"¹⁴⁷ is permitted, therefore, in order to "conjure up" the original.¹⁴⁸ Professor Nimmer, in his treatise, indicates that satire "may justify the defense of fair use even where substantial similarity exists."¹⁴⁹ The key to determining a successful parody defense is whether the defendant's result had "neither the intent nor the effect of fulfilling the demand for the original."¹⁵⁰

In *Elsmere Music, Inc. v. National Broadcasting Co.*,¹⁵¹ a late-night TV comedy show parodied the musical phrase "I Love New York" using the words "I Love Sodom."¹⁵² Only the words "I Love" and four musical notes were taken from the plaintiff's work, yet the court recognized the musical-lyrical phrase as the "heart of the composition"¹⁵³ and considered such a taking as "capable of rising to the level of a copyright infringement."¹⁵⁴ Having determined this, the court examined whether the defendant's use "tended to interfere with the marketability of the copyrighted work."¹⁵⁵ The court determined that "the defendant's version of

146. The taking of phrases is often necessary to create a parody. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), cert. denied, 379 U.S. 822 (1964). Similarly, the taking of a small amount of dialogue also is permitted for purposes of burlesque. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 350 (S.D. Cal. 1955).

147. *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 745 (S.D.N.Y.), aff'd, 623 F.2d 252 (2d Cir. 1980).

148. One test of infringement in parody is whether the defendant has taken more than necessary to "recall or conjure up" the original. *Berlin*, 329 F.2d at 544. The court in *Elsmere* recognized that the ability to conjure up the original was necessary because a "parody frequently needs to be more than a fleeting evocation of an original . . ." *Elsmere*, 623 F.2d at 253 n.1. See also *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (noting that when conjuring up the original, a parodist can do more than evoke an initial recognition in the listener).

149. 1 M. NIMMER, *supra* note 6, at § 13.05[C].

150. *Berlin*, 329 F.2d at 545.

151. 482 F. Supp. 741 (S.D.N.Y. 1980), aff'd, 623 F.2d 252 (2d Cir. 1980) (per curiam).

152. The plaintiff's work had been created as part of a promotional campaign to encourage tourism in New York State. *Id.* at 745.

153. *Id.* at 744.

154. *Id.* The plaintiff in *Elsmere* argued that the parody defense was invalid because the TV song did not satirize the subject matter of the original, i.e., the TV show did not parody the song *I Love New York* or its subject matter. *Id.* The TV skit satirized the problems of a modern city like New York by hypothesizing a promotional campaign for the biblical city of Sodom. The song *I Love New York*, however, promoted the state of New York, not the city. *Id.* at 745-46. Although finding identity, the court disagreed with the requirement, maintaining that a lack of identity does not preclude a finding of fair use. *Id.* at 746. This argument is often accepted in sexually explicit parodies. See *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976), modified and affirmed, 677 F.2d 180 (1981); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975).

155. *Elsmere*, 482 F. Supp. at 747. Parody, as a form of fair use, shares similar statutory concerns. See 17 U.S.C. § 107(4) (1988).

the jingle has not competed in the least with or detracted from the plaintiff's work."¹⁵⁶

In *Fisher v. Dees*,¹⁵⁷ the composers of the song *When Sunny Gets Blue* claimed that their song was infringed by *When Sonny Sniffs Glue*, a twenty-nine second parody which altered the original lyric line¹⁵⁸ and borrowed six bars of the plaintiff's music.

In analyzing whether the defendant's use interfered with the marketability of the plaintiffs' work, the court noted that:

[T]he economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original—any bad review can have that effect—but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it.¹⁵⁹

Finding the facts similar to those in *Elsmere*,¹⁶⁰ the court weighed the parodist's license against the rights of the copyright holder and determined that the "balance tips in the parodist's favor."¹⁶¹

Applying a similar standard, the use of "Idi Phone Home", despite its phonetic literal similarity, should not amount to an infringement. Initially, its deviation from the separately protectable "E.T. Phone Home" might be enough to excuse the copying. The defendant could argue that all that was literally copied was the public domain phrase "Phone Home." The plaintiff would have to prove either that "Idi Phone Home" was a phonetic literal similarity or that the copyrighted work was comprehensively copied, rather than literally.¹⁶²

Second, even if a substantial similarity existed, the taking would be excused because the work is only interposing that which is free to all with something incongruous.¹⁶³ The parody had "neither the intent nor the effect of fulfilling the demand for the original."¹⁶⁴ Despite the "stranded character"¹⁶⁵ analogy, the come-

156. *Elsmere*, 482 F. Supp. at 747.

157. 794 F.2d 432 (9th Cir. 1986).

158. The plaintiffs' song used the phrase, "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall." Defendant's composition used the phrase, "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.* at 434.

159. *Id.* at 438.

160. *Id.* at 439 n.5.

161. *Id.* at 439.

162. The latter argument is difficult to make with literary phrases. See *supra* note 104.

163. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

164. *Id.* "Infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is or has reasonable potential to become, com-

dic objective of the Idi Amin postcard is unrelated to the motion picture. Finally, "Idi Phone Home" would not compete with or detract from the motion picture copyright. Within such cramped quarters, therefore, a separately copyrightable phrase can be parodied.

IX. CONCLUSION

Judge Frank's observation in *Heim v. Universal Pictures Co., Inc.*¹⁶⁶ remains the most insightful guideline for the protection of short phrases—a literary phrase must be so idiosyncratic that its appearance in another work would preclude coincidence.¹⁶⁷ What produces this idiosyncrasy? In parody, it is the interposition of something familiar with something incongruous. In a character phrase, such as "E.T. Phone Home," it is the inseparable association between the words and the fictional personality. In an epigram, it is the demonstration of a highly structured creativity.¹⁶⁸

"There's a great power in words," wrote one observer, "if you don't hitch too many of them together."¹⁶⁹ This power is one of suggestion rather than explanation. It manifests itself as humor, character, insight,¹⁷⁰ or as in the poetry of Keats or the great Japanese haiku writers—beauty.¹⁷¹

The courts are prepared to reward the authors of these works, but in order to protect them, the question must be asked, as in the protection of characters: Has enough development gone into the work so that a line can be drawn separating the author's expression from that which is in the public domain?¹⁷² Wherever this line is

mercially valuable." *Fisher v. Dees*, 794 F.2d 437, 438 (9th Cir. 1986).

165. Both E.T. and Idi were separated from their native homes and both sought to return.

166. 154 F.2d 480 (2d Cir. 1946).

167. *Id.* at 488.

168. "The casual reader of [my] works is not usually aware of the high degree of discipline upon which they are based." A. BRILLIANT, *supra* note 102, at 12.

169. QUOTATION DICTIONARY 38 (1969) (quoting Josh Billings).

170. Often that insight is into the creative process itself. By searching for "the happy phrase, that will give expression to the thought, . . . the thought itself is transfigured by the phrase when found." B. CARDOZO, *GROWTH OF THE LAW* 89 (1924).

171.

[H]aiku poems with a whole world of meaning all shut up in seventeen syllables, - just the flash of a picture as if a window has been suddenly opened upon some beautiful scene and then as suddenly closed again, - just a flash, and all the rest left for him who hears, to imagine and to feel.

LITTLE PICTURES OF JAPAN 163 (1952) (O.B. Miller ed.).

172. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir.) (Hand, J.), *cert. denied*, 282 U.S. 902 (1931).

drawn, it will seem arbitrary, but “that is no excuse for not drawing it . . .”¹⁷³ If an author has created a uniquely suggestive work, such as “E.T. Phone Home,” then the courts will protect it under copyright. But if an author’s literary phrase is merely a trivial variation on that which already belongs to the public, copyright may not extend.

173. *Id.*