

PURE FICTION: THE ATTEMPT TO PATENT PLOT

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I. INTRODUCTION

'TIS HARD A NEW-FORM'D FABLE TO EXPRESS,
AND MAKE IT SEEM YOUR OWN. WITH MORE SUCCESS
YOU MAY FROM HOMER TAKE THE TALE OF TROY,
THAN ON AN UNTRIED PLOT YOUR STRENGTH EMPLOY.
YET, WOULD YOU MAKE A COMMON THEME YOUR OWN,
DWELL NOT ON INCIDENTS ALREADY KNOWN;
NOR WORD FOR WORD TRANSLATE WITH PAINFUL CARE;
NOR BE CONFINED IN SUCH A NARROW SPHERE,
FROM WHENCE (WHILE YOU SHOULD ONLY IMITATE)
SHAME AND THE RULES FORBID YOU TO RETREAT.¹

For centuries, the art of storytelling has been one of retelling. The idea that an author may, indeed should, make the old new with his unique interpretation of an existing plot is hardly novel.² Closely imitating or stealing verbatim from another's work has long been circumscribed by "shame and the rules," as described by Horace in an era long before intellectual property laws existed, but innovating upon

1. HORACE, *Art of Poetry*, in THE WORKS OF HORACE 290, 297 (Francis trans., London, Plummer and Brewis 1815).

2. Some literary commentators claim that, at some level of abstraction, there are only a finite number of plotlines such that all fiction involves a retelling. *See, e.g.*, CHRISTOPHER BOOKER, THE SEVEN BASIC PLOTS: WHY WE TELL STORIES (2004); GEORGES POLTI, THE THIRTY SIX DRAMATIC SITUATIONS (1917); WILLIAM FOSTER-HARRIS, THE BASIC PATTERNS OF PLOT (1959) (asserting that only three plotlines exist).

existing stories by altering one or more of the narrative elements is widely accepted.³

Not everyone agrees that new plots cannot be invented, however, and the traditional latitude afforded to authors to retell another's tale has recently come under attack as a symptom of insufficient intellectual property protection for supposed plot-inventors. In November 2004, the Journal of the Patent and Trademark Office Society published an article detailing an entrepreneurial lawyer's argument that storylines can and should be given patent protection.⁴ Andrew F. Knight argues that there is neither a statutory nor a jurisprudential bar to storyline patents.⁵ Given the recent expansions of patent protection to business methods and computer programs, he argues, storylines are now patentable material.⁶ Knight further argues that in order to provide incentives and protection to authors of innovative plots, policy dictates that the Patent Office should extend patent protection to these plots.⁷

Despite the intrigued reaction of the business and legal communities to Knight's proposal,⁸ his attempt⁹ almost certainly will — and should — remain unsuccessful. This Recent Development discusses the various ways in which Knight's argument and the idea of plot patents founder. Part II details Knight's argument for patent protection for innovative storylines. Part III addresses the substantial statutory and jurisprudential hurdles to patenting nontechnology in general, and storylines in particular, that remain despite recent Federal Circuit decisions expanding the realm of patentable material to accommodate

3. Even critics bemoaning unoriginality in Hollywood films distinguish between Georges Polti's idea that "there are no new stories; there are only the stories you haven't already read and, by extension, the movies you haven't already seen" and "institutional plagiarism" in which "writers and producers routinely rip each other off with shameless disregard for their creative reputations." Philip Kerr, *Hollywood Will Eat Itself*, NEW STATESMAN, June 30, 2003, available at <http://www.newstatesman.com/200306300035>. Building upon others' works is in fact much vaunted; the familiar metaphor of intellectual progress teaches that even a dwarf standing upon the shoulders of giants sees farther than can his substrate. For an exegesis of the debate of the origin of the dwarf metaphor, see Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 42–43 (2001).

4. Andrew F. Knight, *A Potentially New IP: Storyline Patents*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 859 (2004).

5. See *id.*

6. See *id.* at 861–70.

7. See *id.* at 871–77.

8. See, e.g., Daniel Fisher, *Box Office Patents*, FORBES.COM, Aug. 15, 2005, http://www.forbes.com/business/2005/08/15/patent-movies-scripts-cz-df_0812script.html (stating that Knight's proposal "isn't as crazy as it sounds"); see also *Patenting a Fictional Storyline?*, PATENT LAW PORTAL, Sept. 18, 2005, http://patentlawportal.com/article/index.php?option=com_content&task=view&id=15&Itemid=37 (calling Knight's proposal "an interesting new twist to patentability").

9. Knight has filed several "U.S. utility patent applications claiming fictional storylines"; none have been published or approved at the time of the writing of this Recent Development. Knight & Associates, About Us, http://www.plotpatents.com/about_us.htm (last visited Oct. 22, 2005).

emerging technologies. Part IV examines the First Amendment violations that would result from patent protection of storylines. Part V explores policy ramifications of patenting plots more generally, arguing that such patents would be fundamentally at odds with the policy goals behind intellectual property law and would fail to properly balance the competing objectives of compensating innovation through the grant of monopoly power and promoting contributions to the intellectual commons.

II. THE PROPOSAL TO PATENT STORYLINES

The proposed legal basis for patenting the idea for a storyline, which has long been excluded from the less stringent protection of copyright,¹⁰ rests on analogy to decisions holding that computer software and software-implemented business methods are patentable subject matter within the constraints of 35 U.S.C. § 101.¹¹ Knight invokes a broad reading of 35 U.S.C. § 101 that the Supreme Court set forth in *Diamond v. Chakrabarty*,¹² which proclaimed that “anything under the sun made by man” is patentable except “laws of nature, physical phenomena, and abstract ideas.”¹³ Knight argues that since a computer program may be both copyrighted for its expression of a method and patented for the method itself, a fictional work should be both copyrightable for its expression of a story and patentable for “refreshingly original storylines” that represent part of the “social value” of the literary or cinematic works that contain them.¹⁴ Knight casts these storylines as method claims,¹⁵ one of the four statutorily permitted types of claims, which allow inventors to patent a series of steps that yields a useful result.¹⁶ Knight posits that a storyline is a type of algorithm that produces the “useful, concrete, tangible result of . . . valuable entertainment.”¹⁷ Assuming that these storylines could constitute valid method claims, Knight also argues that physical media containing

10. Ideas are not protectible under copyright law. *See* 17 U.S.C. § 102(b) (2004) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). While “some courts have said that a plot as such is not protectible,” others have extended copyright protection to a plot if it is defined with a degree of specificity sufficient to make it more than an “abstract idea.” 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1][b] (2005).

11. *See, e.g.,* *Diamond v. Diehr*, 450 U.S. 175 (1981); *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998).

12. 447 U.S. 303 (1980) (holding that genetically modified bacteria that did not occur in nature were patentable subject material).

13. *Id.* at 309.

14. Knight, *supra* note 4, at 860.

15. *Id.* at 867.

16. *See* 1 DONALD S. CHISUM, CHISUM ON PATENTS § 1.03 (2005).

17. Knight, *supra* note 4, at 867 (quotation marks omitted).

these “storyline method claim[s]” should be patentable as articles of manufacture.¹⁸

The proposed policy rationale behind offering this new protection to storylines rests on Knight’s claim that it is only fair to reward the “spark of ingenuity” and “flash of inspiration” that give rise to innovative storylines, just as the patent system currently rewards inventors of new technologies, such as car or rocket engines.¹⁹ Knight continues his policy argument and analogy to technology by hypothesizing that, just as good engineers who are poor designers could be given patent protection for a great engine in an ugly car, inventors of “refreshingly original” plots who may not be good writers should still be incentivized to disclose their brilliant plot innovations without fear that a “skilled, experienced Hollywood writer” could steal them and “embody the unique plot[s] in a far superior story.”²⁰ Among the virtues of patenting a storyline, Knight counts the fact that any expression of the plot, despite changes in characters, setting, or point of view, would infringe the storyline patent, regardless of the medium of expression.²¹

III. STATUTORY AND JURISPRUDENTIAL HURDLES

Not all inventions can be patented. Congress has laid out various criteria that an invention must satisfy to merit a patent in 35 U.S.C. §§ 101–105 and has specified further requirements for the patent application itself in §§ 111–121. Eligible subject matter is specified in § 101, which requires the invention to be a “new and useful process, machine, manufacture, or composition of matter.”²² Inventors must also describe the invention and the “manner and process of making and using it” in their patent applications “in such full, clear, concise, and exact terms as to enable any person skilled in the [relevant] art” to make or use the invention.²³

Assuming that Knight is correct in asserting that there is a subset of plots so innovative that they meet the nonobviousness and novelty requirements of §§ 102 and 103,²⁴ there are still substantial statutory

18. *Id.* at 867.

19. *Id.* at 872.

20. *Id.* at 873.

21. *Id.* at 870 (noting that the expression can take the form of a book, movie, script, advertisement, or television program).

22. 35 U.S.C. § 101 (2000).

23. *Id.* § 112.

24. *See id.* at §§ 102–103 (excluding from patent protection those inventions already “known or used” in the United States or “patented or described in a printed publication” in a foreign country, and those inventions that would have been obvious at the time of patenting). Knight acknowledges that these sections narrow the field of potentially patentable storylines, even under his rationale. *See Knight, supra* note 4, at 870. Knight fails to provide any reasoned limiting principle for the level of detail required to make the plot description patentably novel.

hurdles standing between a storyline and a patent certificate. Storyline patents would likely fail the subject matter requirements of § 101, especially since courts expanding the traditional scope of patentable materials in recent decades have explicitly and consistently attributed such expansion to the need to protect emerging technologies and their inventors. Even if not foreclosed on nontechnology grounds, the proposed storyline patents would not meet the enablement requirement of § 112.

A. Subject Matter Requirements for Patentability

Congress has defined four classes of patentable subject matter: processes, machines, compositions of matter, and articles of manufacture.²⁵ These statutory classifications are generally considered to “limit patent protection to the field of applied technology, what the United States [C]onstitution calls ‘the useful arts.’”²⁶ While courts have interpreted these statutory categories of patentable subject matter broadly,²⁷ they have also repeatedly reiterated the ban on patenting “laws of nature, natural phenomena, and abstract ideas”²⁸ and have confined their liberal views to the realm of technology.²⁹

In recent decades, courts have made clear that § 101 is broad enough to afford patent protection to new technologies, most notably in the areas of computer software and software-enabled business methods. Though initially wary of computer programs as patentable processes, the Supreme Court tempered its rejection of a digital computer program patent in *Gottschalk v. Benson*³⁰ with a statement that its intention was not to “freeze process patents to old technologies, leaving no room for the revelations of the new, onrushing technology.”³¹ The Supreme Court started to make such room in *Diamond v. Diehr*, in which it deemed patentable a process for making synthetic

25. 35 U.S.C. § 101 (2000).

26. CHISUM, *supra* note 16, § 1.01 (“Theoretical or abstract discoveries are excluded as are discoveries, however practical and useful, in nontechnological arts, such as the liberal arts.”).

27. *See* J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc., 534 U.S. 124, 130 (2001) (noting that “the language of § 101 is extremely broad”).

28. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980). Knight quotes the Supreme Court in *Diamond v. Chakrabarty* as support for the proposition that “anything under the sun made by man” is patentable. Knight, *supra* note 4, at 859. The *Chakrabarty* decision did not, however, enlarge the statutory classifications to encompass truly “anything under the sun” so much as it enlarged the definition of “made by man” to include genetically-modified bacteria. Though living, these bacteria do not occur in nature, but must be created by human invention. *Chakrabarty*, 447 U.S. at 303.

29. “[S]ubject matter terms have been interpreted broadly to evolve with developments in science and technology.” *J.E.M. Ag Supply*, 534 U.S. at 137 (emphasis added).

30. 409 U.S. 63, 68 (1972) (holding that the computer program claimed in the respondent’s patent was “so abstract and sweeping as to cover both known and unknown uses” and that therefore the respondents were trying to patent an idea rather than a process).

31. *Id.* at 71.

rubber that included the use of a mathematical algorithm and a programmed digital computer, stating that “an application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”³² Later courts followed the Supreme Court’s initial reluctance in this area only loosely, interpreting the Court’s early rulings on computer programs as simply cautioning against the patentability of purely mathematical algorithms.³³ Indeed, the Federal Circuit later held that the Supreme Court had “placed the patentability of computer-aided inventions in the mainstream of the law” in its decisions after *Benson*.³⁴

Similarly, the vitiation of the “business method” exception to patentability has not expanded the scope of patent protection beyond the realm of technology-mediated applications. In *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, the Federal Circuit laid to rest the “judicially-created, so-called ‘business method’ exception to statutory subject matter,” which courts had used to invalidate otherwise statutorily satisfactory patents on public policy grounds.³⁵ The *State Street* court made business methods “subject to the same legal requirements for patentability as [those for] any other process or method.”³⁶ Under this standard, the court upheld the validity of a patent that transformed “data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price” because it “constitute[d] a practical application of a mathematical algorithm, formula, or calculation.”³⁷ In doing so, the court modified the test of eligible subject matter from an inquiry about physical or industrial processes to one that seeks merely a “useful, tangible and concrete result.”³⁸ The *State Street* court was “surprisingly vague”³⁹ as to whether its holding was predicated on computer-based implementation of the business method, and the decision has

32. 450 U.S. 175, 187 (1981).

33. “Later lower court decisions suggested that *Benson* should be restricted and that a patent may claim a novel and nonobvious programming method unless it is for a mathematical algorithm in the abstract.” CHISUM, *supra* note 16, § 1.01 (citing *Arrhythmia Research Tech., Inc. v. Corazonix Corp.*, 958 F.2d 1053 (Fed. Cir. 1992)).

34. *Arrhythmia Research Tech.*, 958 F.2d at 1057.

35. 149 F.3d 1368, 1375 (Fed. Cir. 1998).

36. *Id.*

37. *Id.* at 1373.

38. *Id.* at 1373; see Michael J. Meurer, *Business Method Patents and Patent Floods*, 8 WASH. U. J.L. & POL’Y 309, 312 (2002) (“One approach limits patents to industrial processes, while another approach limits patents to processes that manipulate artifacts or cause physical effects. A new standard . . . expands patentable subject matter to include processes that produce a ‘useful, concrete and tangible result.’”) (quoting *State Street*, 149 F.3d at 1373).

39. Meurer, *supra* note 38, at 331–32.

sparked much academic debate about whether non-software-enabled business methods are eligible subject matter under § 101.⁴⁰

Whatever the scope of the decisions endorsing the patentability of computer software and software-enabled business methods may be, the decisions have *not* implied that nontechnology, let alone a work of fiction, is now fair game for patent protection.⁴¹ No court has yet upheld a patent for a business method not implemented with computer technology. Rather, the authoring courts have consistently and explicitly linked their departure from the traditionally circumscribed realm of patentable material to technological progress. The Federal Circuit stated that it had “struggled to make our understanding of the scope of § 101 responsive to the needs of the modern world” and noted that its announcement of “more expansive principles” was “formulated with computer technology in mind”:

Since the process of manipulation of numbers is a fundamental part of computer technology, we have had to reexamine the rules that govern the patentability of such technology. The sea-changes in both law and technology stand as a testament to the ability of law to adapt to new and innovative concepts, while remaining true to basic principles.⁴²

40. See, e.g., John Kasdan, *Obviousness and New Technologies*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 159, 162 (1999) (noting Judge Rich’s references to pre-computer cases and stating, “it is arguably the case that Rich was suggesting that even business methods which are implemented without the use of a computer should be eligible for patent protection (although it appears that, under current practice, the PTO would reject such applications)”); Francisc Marius Keeley-Domokos, Recent Case, *Business Models: State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 14 BERKELEY TECH. L.J. 153, 168 (“The type of business methods that are likely to benefit from the *State Street* decision, however, are probably more material than just general functional operating schemes. . . . [I]t would probably be difficult for a company to prove that a general operating business plan developed by that company deserves patent protection.”); Meurer, *supra* note 38, at 331–32 (“A narrow reading treats [*State Street*] as [a] software case[] holding that there is no reason to discriminate against software merely because it has a business purpose.”).

41. *But see* John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. REV. 1139 (1999). While Thomas does acknowledge that the “patent system now seems poised to impact callings ranging from the arts, to the social sciences,” he does so only as a cautionary note to advocate circumscribing the realm of patentable subject matter in the wake of decisions such as *State Street*, perhaps via adding an “industrial application,” which Thomas argues “provides an apt way to limit the patent system to what we understand to be technological.” Thomas, *supra* at 1185, 1178. Thomas criticizes even the patenting of business methods, arguing that they “do not comprise technology and should not be within the grasp of the patent system.” *Id.* at 1181. Knight, however, cites Thomas’s article for the proposition that “[s]cholars have for years suggested the patentability of art and entertainment.” Knight & Associates, Applications, <http://www.plotpatents.com/Value.htm> (last visited Nov. 22, 2005).

42. AT&T Corp. v. Excel Commc’ns, Inc., 172 F.3d 1352, 1356 (Fed. Cir. 1999).

The assumption that patents cover technology, and only technology, is unsurprising, given the Constitution's empowerment of Congress to protect the "useful arts," a phrase conventionally assumed to be "synonymous with the contemporary concept of technological arts."⁴³ Judicial rationales for the recent expansions of patentable subject matter — expansions so far limited to software-mediated processes — are rooted in a desire to protect emerging technologies.

A fictional storyline, unlike software, is neither established technology nor emerging technology. The Federal Circuit's policy rationale in the decisions cautiously upholding patents of traditionally nonpatentable subject matter does not support extending patent protection to fictional plots. In his dissent in *In re Alappat*, Chief Judge Archer expressly criticized the possibility that decisions upholding software patents would conflate creative works with patentable technologies:

Consider for example the discovery or creation of music, a new song. Music of course is not patentable subject matter; a composer cannot obtain exclusive patent rights for the original creation of a musical composition. But now suppose the new melody is recorded on a compact disc. In such case, the particular musical composition will define an arrangement of minute pits in the surface of the compact disc material, and therefore will define its specific structure. . . . Through the expedient of putting his music on known structure, can a composer now claim as his invention the structure of a compact disc or player piano roll containing the melody he discovered and obtain a patent therefor? The answer must be no.⁴⁴

Chief Judge Archer clearly assumes that creative works cannot be patented; he holds up the mere possibility that creative works could be patented as ludicrous, violating some unspecified gospel of patent law. The majority's rationale was not incompatible with this assumption — there is no indication that the other judges on the Federal Circuit considered such a conflation a desirable, or even plausible, outcome of *Alappat*.⁴⁵ Indeed, Judge Newman associated the court's

43. CHISUM, *supra* note 16, at Glossary; *see also* Thomas, *supra* note 41, at 1164 (arguing that there is "good reason to doubt whether such innovations [in nontechnological fields such as sociology and liberal arts] lie within the 'useful Arts,' the constitutional stricture concerning patentable subject matter").

44. *In re Alappat*, 33 F.3d 1526, 1553–54 (Fed. Cir. 1994) (Archer, C.J., dissenting).

45. Rather, the majority focused on the means-plus-function claim, finding that the claims recited a machine for implementing the signal digitizing method via a means-plus-function analysis. *See id.* at 1541–42 (majority opinion).

expansion of patentable subject matter with technology, noting that “[m]athematics is not a monster to be struck down or out of the patent system, but simply another resource whereby technological advance is achieved.”⁴⁶

Knight does not attempt to use the *Alappat* court’s logic about emerging technologies to defend his proposed storyline patents. He makes no compelling argument that fictional plots are a form of technology that must be afforded patent protection lest modern-day innovation be stymied. Rather, his argument seems to be that as a side effect of the Federal Circuit’s accommodating interpretation of § 101, plot patents now fall within statutorily approved subject matter. The U.S. Patent and Trademark Office (“PTO”), however, has specifically excluded creative works from being monopolized through the patent regime. When proposing guidelines for patent examiners dictating the presumption that computer programs were statutory subject matter under § 101, the PTO explicitly stated that “a known machine-readable storage medium that is encoded with data representing creative or artistic expression (e.g., a work of music, art or literature)” was *not* statutory subject matter.⁴⁷

The PTO’s exclusion of creative works may stem in part from the courts’ longtime stance that ideas within fiction can never be protected, even by the less stringent copyright regime:

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.⁴⁸

A similar bar on patenting abstract ideas is well-established. The Supreme Court has made it clear that “[a]n idea . . . itself is not patentable,”⁴⁹ and the Federal Circuit has added that “taking several

46. *Id.* at 1570 (Newman, J., concurring).

47. Request for Comments on Proposed Examination Guidelines for Computer-Implemented Inventions, 60 Fed. Reg. 28,778, 28,779 (June 2, 1995).

48. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

49. *Diamond v. Diehr*, 450 U.S. 175, 185 (1981) (quoting *Rubber-Tip Pencil Co. v. Howard*, 87 U.S. (20 Wall.) 498, 507 (1874)).

abstract ideas and manipulating them together” does not render those ideas patentable.⁵⁰

Knight’s proposed storyline patents are just the sort of combination of abstract ideas that courts have consistently held do not qualify as patentable subject material. Knight’s exemplar storyline patent⁵¹ lists ideas for plot points combined to form what he calls a unique storyline, but no matter how unique the combination of plot points may be, it is nonetheless simply a combination of abstract ideas. Knight even acknowledges as much, stating that “[a] court might competently reason that a story in the abstract is just that: an unpatentable abstract idea.”⁵² His only response to the undeniably abstract nature of stories is his argument that the printed matter doctrine, which prohibits the patent of printed matter unless there is a functional relationship between the printing and its substrate,⁵³ is dead and that “a novel could be, in a very real sense, a patentable computer program embodied in a tangible medium — thus, a patentable article of manufacture.”⁵⁴ This argument misses the point. To be patentable, the proposed method must produce a useful, concrete, and tangible result — such as determining a stock price or allowing consumers to buy a product with a single mouse click.⁵⁵ Mere embodiment in a tangible medium is insufficient.⁵⁶

50. *In re Warmerdam*, 33 F.3d 1354, 1360 (Fed. Cir. 1994).

51. Knight offers an example of a “storyline method claim” based on what such a patent for the plot of the movie *Memento* would have looked like:

A process of relaying a story having a unique plot, the story involving characters and having a timeline, comprising: indicating that a first character has an inability to retain long-term memories after a time in the timeline; indicating that said first character trusts notes written by said first character; indicating that said first character believes that said first character has been wronged by a perpetrator; indicating that said first character desires to perform an act of retribution against said perpetrator; indicating that said first character believes that attempting to perform said act is a futile endeavor; and indicating that said first character writes a note to said first character indicating that a second character, whom the first character believes is not the perpetrator, is the perpetrator.

Knight, *supra* note 4, at 867.

52. *Id.*

53. *See In re Ngai*, 367 F.3d 1336, 1338 (Fed. Cir. 2004) (siding with the PTO’s assertion that “printed matter must be functionally related to the underlying object”).

54. Knight, *supra* note 4, at 867.

55. *See State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998); *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343 (Fed. Cir. 2001).

56. Computer programs are patentable not only as methods but also, when committed to tangible media, as “articles of manufacture.” *See In re Beauregard*, 53 F.3d 1583 (Fed. Cir. 1995) (dismissing the case as moot since the Patent Commissioner had reversed his position that a tangible medium, such as a floppy diskette, encoded with a computer-implemented method was not patentable subject matter). No court has suggested that a set of instructions that does not amount to statutory subject matter can be encoded on a tangible medium and then patented as an article of manufacture. Knight’s argument that storylines committed to tangible media are patentable as articles of manufacture therefore depends on his argument that storylines are patentable subject matter as methods.

Moreover, Knight's analysis does not acknowledge that even when validating the patenting of "practical applications" relating to computer technology, courts have reiterated that the ideas behind those applications, such as mathematical algorithms, cannot be patented, nor can their use in other applications be forestalled.⁵⁷ Even if the formation of stories were a practical application, the idea behind that story — the plot "algorithm" — could not be patented and guarded from future use in different applications. Whereas Knight might define the relevant application as the formation of *any* story, courts have consistently defined "useful result" much more specifically. The result in *State Street* was not simply "determining a number" or "increasing stock sales," it was "the transformation of data, representing discrete dollar amounts . . . into a final share price momentarily fixed for recording and reporting purposes and even accepted and relied upon by regulatory authorities and in subsequent trades."⁵⁸ The number arrived at through the application of a mathematical principle in *AT&T Corp. v. Excel Communications, Inc.* represented "information about the call recipient's PIC, a useful, non-abstract result that facilitates differential billing of long-distance calls made by [the customers of different long-distance carriers]."⁵⁹

B. Incomplete Enablement

Even if storylines were deemed statutory subject matter through an extraordinarily liberal interpretation of § 101 jurisprudence, Knight's proposed patents would fail the utility and enablement requirements of § 112. Inventors do not receive monopolies on their inventions without offering the public quid pro quo.⁶⁰ A patentee must adequately disclose an invention with "substantial utility" and "specific benefit . . . in currently available form."⁶¹ As part of "the patent bargain, the applicant's specification must enable one of ordinary skill in the art to practice the full scope of the claimed invention."⁶²

Given that Knight claims storyline patents are processes that produce stories, it is doubtful that Knight's patents could fulfill the § 112 enablement requirement. "Patent protection is granted in return for an enabling disclosure of an invention, not for vague intimations of general ideas that may or may not be workable. . . . Tossing out the mere

57. See, e.g., *AT&T Corp. v. Excel Commc'ns, Inc.*, 172 F.3d 1352, 1358 (Fed. Cir. 1999) (stating that although the accused infringer argued "correctly, that the [primary interchange carrier] indicator value is derived using a simple mathematical principle," that argument was "not determinative because [the patentee] does not claim the Boolean principle as such or attempt to forestall its use in any other application").

58. *State St.*, 149 F.3d at 1373.

59. 172 F.3d at 1358.

60. See *Brenner v. Manson*, 383 U.S. 519, 534–35 (1966).

61. *Id.*

62. *AK Steel Corp. v. Sollac*, 344 F.3d 1234, 1244 (Fed. Cir. 2003).

germ of an idea does not constitute enabling disclosure.”⁶³ A plot does not a story make. Just as the applicant in *In re Glass* was denied a patent because he failed to describe the conditions (such as temperature and pressure) necessary to produce the crystals that were the object of his process,⁶⁴ Knight’s patents fail to describe the narrative methods necessary to achieve the stories that are the object of his claimed “process.” Knight’s patents do not teach how to tell stories, which certainly do have the entertainment value Knight claims when replete with the usual narrative elements such as point of view, setting, theme, or characters. Knight’s patents teach only how to build a plot. That they do not enable the process that yields the result they claim — a story — is obvious when Knight notes that inventors of these plots may be poor writers who are unable to turn their brilliant plot ideas into stories. Were patents granted to such individuals, it would lead to the nonsensical result that the inventor could not execute the very process over which he claims a monopoly.

IV. THE FIRST AMENDMENT AND INTELLECTUAL PROPERTY PROTECTIONS

Even if patent protection stretched beyond the current statutory limits and extended far beyond the technical arts to cover fictional plots, such protection would likely run afoul of the First Amendment. Copyright, the form of intellectual property already well-established to protect literary works, seeks to strike the balance between the competing goals of the First Amendment and the Copyright Clause through the idea-expression dichotomy and the fair use doctrine.⁶⁵ Since neither judicial nor statutory First Amendment protections have been built into patent law, both the initial grant and the enforcement of storyline patents in specific instances would almost certainly violate the First Amendment’s free speech guarantee.

63. *Genentech, Inc. v. Novo Nordisk A/S*, 108 F.3d 1361, 1366 (Fed. Cir. 1997); *see also Brenner*, 383 U.S. at 536 (“[A] patent is not a hunting license. It is not a reward for the search, but compensation for its successful conclusion.”).

64. 492 F.2d 1228 (C.C.P.A. 1974).

65. Nimmer notes the possible argument that the First Amendment could be read to prohibit Congress from establishing any law that would abridge the freedom of speakers who would express themselves in ways that might be copyright-protected. This reading has no traction in either historical or current jurisprudence, but it does serve to highlight the competing goals of the Copyright Clause and the First Amendment. *See* 1 NIMMER, *supra* note 10, § 1.10.

A. First Amendment Protections Built Into Copyright Law: Idea-Expression Dichotomy and Fair Use

Copyright law protects an author's expression of an idea, but not the idea itself.⁶⁶ The Supreme Court has endorsed the widely-held position that this idea-expression dichotomy provides a "definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."⁶⁷ Even the idea-expression balance does not make "copyrights categorically immune from challenges under the First Amendment," but where "Congress has not altered the traditional contours of copyright protection," the Court has decided that "further First Amendment scrutiny is unnecessary."⁶⁸

Though commentators appear somewhat conflicted about the relationship between copyright's fair use doctrine and the First Amendment,⁶⁹ the Supreme Court has called fair use "a traditional First Amendment safeguard" that provides "considerable 'latitude for scholarship and comment' and even for parody."⁷⁰ The fair use doctrine allows use of copyrighted works for the purposes of free speech activities such as comment, criticism, and news reporting.⁷¹ Though

66. *See id.*

67. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d. Cir. 1983)); *see also Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd sub nom. Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) ("The first amendment objection . . . was misplaced '[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.'") (quoting *Harper & Row*, 471 U.S. at 560); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263–64 (11th Cir. 2001) (stating that "the balance between the First Amendment and copyright is preserved, in part, by the idea/expression dichotomy" and that "[h]olding an infringer liable in copyright for copying the expression of another author's ideas does not impede First Amendment goals because the public purpose has been served — the public already has access to the idea or the concepts"); 1 NIMMER, *supra* note 10, § 1.10 ("[T]here would certainly be a serious encroachment upon First Amendment values. The market place of ideas would be utterly bereft, and the democratic dialogue largely stifled, if the only ideas that might be discussed were those original with the speakers.")

68. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (quoting *Eldred v. Reno*, 239 F.3d at 375).

69. "[F]ree speech is analytically separate from fair use By examining whether the First Amendment expands or contracts the copyright fair use concept, the Court blends the two concepts. . . . [F]uture cases may wish to distinguish the two concepts in order to find permitted uses under the First Amendment, even though such uses fall outside the traditional equities of fair use." 1 NIMMER, *supra* note 10, § 1.10 n.45.17 (internal citations and quotations omitted). *But see id.*, § 1.10 ("Instead, [a court] applied traditional fair use analysis, albeit informed by First Amendment values (as all rulings should be).")

70. *Eldred v. Ashcroft*, 537 U.S. at 220 (quoting *Harper & Row*, 471 U.S. at 560).

71. *See* 17 U.S.C. § 107 (2000).

"Notwithstanding the provisions of sections 106 and 106A [17 U.S.C. §§ 106 and 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment,

originally a judicial creation, Congress codified the doctrine in 1976, leaving its application largely at the discretion of the judiciary by naming only non-exclusive factors “to be considered.”⁷² This flexibility allows courts to ensure that copyright law is not enforced to the detriment of the public interest or the First Amendment.

B. Storyline Patents and the First Amendment

Patent law, of course, does not eschew granting monopolies on all ideas; rather, it is devoted to the protection of nonabstract ideas with practical applications.⁷³ Assuming for the moment that storylines are indeed useful inventions that could be afforded patent protection, granting a monopoly on a specific plotline would prevent the public from using that storyline in any way.⁷⁴ Patent law has no doctrine equivalent to fair use that strikes the balance between intellectual property protection and the First Amendment.⁷⁵ Patent protection is stringent, allowing the patent owner exclusive rights against the public to the patented inventions, regardless of any public interest in free speech to the contrary.⁷⁶

news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

Id.

72. *Id.*

73. “An idea of itself is not patentable, but a new device by which it may be made practically useful is.” *Rubber-Tip Pencil Co. v. Howard*, 87 U.S. (20 Wall.) 498, 507 (1874).

74. *See Knight*, *supra* note 4, at 870.

75. Some have called for the creation of a fair use doctrine in patent law, thus far to no avail. *See, e.g.,* Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1180 (2000). Moreover, the current regime of claim construction also leaves speech-encompassing patents on a collision course with the First Amendment:

No particular doctrine of claim interpretation is directed toward determining what might or might not be expressive, so one would have to be fashioned from whole cloth. Additionally, although courts in patent cases have some degree of latitude in claims interpretation, claims are not to be treated like a nose of wax which may be turned and twisted in any direction. At some point, claims interpretation will be cabined by the description of the invention, the prosecution history, and the language of the claim itself. That limit likely falls well short of the license necessary to expunge unpatentable expression.

Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99, 147 (2000) (internal quotations omitted).

76. Patent law may yield to the public interest in narrowly limited circumstances unrelated to free speech concerns, such as when disclosure of the invention could be detrimental to national security pursuant to the Invention Secrecy Act. *See* 35 U.S.C. §§ 181–188

Knight's proposed patents, unlike those that provide holders with a monopoly on a computer program or an element of a car engine, are directed at what is unmistakably speech. His example of a storyline patent is directed at "a process of relaying a story."⁷⁷ Knight's principal concern, fictional storytelling through books or film,⁷⁸ is protected speech.⁷⁹ Moreover, the breadth of his phrasing could plausibly encompass plot summaries by reviewers, descriptions of a movie's plot to a friend, storytelling around a campfire, or even Knight's own recounting of the plot of the movie *Memento* in his article. If they involved relaying the patented plot in any way, all of these exercises of free speech would be patent infringement if such patents were allowed. Even reciting the claim language of a storyline patent could itself be "relaying a story" with that protected plot. Indeed, Knight enthusiastically notes that the proposed form of storyline patents is "aimed broadly" so that:

A director infringes it at least when she makes a movie implementing the implicitly claimed storyline (and possibly at other times, such as a showing of the movie); an actor infringes it at least when he plays his part as the first character; an owner of a movie theater infringes it at least when he shows the movie; the consumer infringes it at least when she plays a DVD containing the movie; and so forth.⁸⁰

Knight's proposed patents would cordon off certain information — a plot — from public discussion, heavily burdening many would-be

(2000). Some courts also excuse experimental, not-for-profit uses as noninfringing. *See, e.g., De Graffenried v. United States*, 20 Cl. Ct. 458, 488 (Cl. Ct. 1990) (stating in dictum that "experimental use may not constitute infringement"). *See generally* Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017 (1989).

77. *See* Knight, *supra* note 4, at 867.

78. *See id.* at 860 (stating that Knight's goal is to "convince the reader that for those literary or cinematic works containing refreshingly original storylines," the value lies in the storylines as well as the expression of them).

79. Fictional books and movies are unambiguously within the First Amendment's protection. *See Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 690 (1959) (recognizing the expressive functions of and the advocacy of ideas within a film version of *Lady Chatterly's Lover*). Indeed, some justices suggested that interfering with fictional works was a particularly insidious form of censorship. Justice Douglas implied that censorship's champions go after works of fiction as a first means of achieving censorious ends, citing Socrates' statement that "the first thing will be to establish a censorship of the writers of fiction, and let the censors receive any tale of fiction which is good, and reject the bad." *Times Film Corp. v. Chicago*, 365 U.S. 43, 79 (1961) (Douglas, J., dissenting).

80. *See* Knight, *supra* note 4, at 868.

speakers' rights. Such patents might thus be voidable as an entire category, if not first denied by the Patent Office as unconstitutional.⁸¹

Even if storyline patents are not entirely invalid for their broad speech-foreclosing effects, their enforcement in specific instances would be constitutionally suspect. Knight clearly intends his proposed patents to ban any retelling of the storylines they describe, no matter what other narrative elements a second author might change:

Every possible expression of the storyline — whether involving five characters or ten, whether set in Amsterdam or Chicago, whether told in the first person by a Nigerian heroine or in the third person by a Chinese hero, whether embodied in a novel, a script, a movie, an advertisement, a television program, or a radio show — would require infringement of the claimed method or article of manufacture.⁸²

Thus, storyline patents would likely bar storyline parodies.⁸³ However, in granting the fair use defense to parodies of copyrighted works, courts have recognized that “parody . . . [is] deserving of substantial freedom — both as entertainment and as a form of social and literary criticism.”⁸⁴

Knight might argue that as long as a parodist refrained from using every plot point, he or she could proceed to parody without fear of

81. The executive branch no less than the judicial branch has a responsibility to uphold the Constitution and execute statutes constitutionally. Since patents, unlike copyrights, are reviewed *ex ante* by part of the executive branch, it would certainly be acceptable for the PTO to deny such patents altogether — even if the statute makes them theoretically possible — on the grounds that they were interpreting the statute to avoid conflict with the First Amendment. Indeed, the PTO has already tried to avoid such issues with its proposed 1995 regulations, which allowed examiners to grant computer programs patents but excluded digitized media that encoded music, films, or literature from patent protection. *See* Request for Comments on Proposed Examination Guidelines for Computer-Implemented Inventions, 60 Fed. Reg. 28,778, 28,779 (June 2, 1995).

82. Knight, *supra* note 4, at 870.

83. Parody is characterized by its “need[] to mimic an original to make its point.” *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580 (1994).

84. *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964). *See also* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996) (calling parodies the “most penetrating of criticisms” and “a vital commodity in the marketplace of ideas”) (internal citations and quotation marks omitted); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997) (stating that parody enjoys “significant value as free speech under the First Amendment”). The Supreme Court ruled on parodies in *Campbell*, stating:

Suffice it to say now that parody has an obvious claim to transformative value, as [the plaintiff] itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.

510 U.S. at 579.

infringement. Yet the shift from examining a copyrighted work to examining a patented plot probably violates the First Amendment because it significantly reduces the degree of similarity a new work may have to a protected work before constituting wholesale appropriation. Under copyright law, courts compare a defendant's work to the original work as a whole in order to determine the extent of appropriation.⁸⁵ Courts then decide whether the fraction appropriated is part of a proper exercise of First Amendment rights or an improper abrogation of the copyright-holder's intellectual property.⁸⁶ With storyline patents, however, courts would have to compare a defendant's work solely to the original work's plot and then determine whether the defendant's work entirely appropriated the mechanical plot points alone.⁸⁷ Storyline patents would in effect reduce the denominator used to determine how much of an original work a would-be parodist has utilized, thus sharply truncating the First Amendment protection that courts have consistently afforded parodists.

Even if the Ninth Circuit's original "conjure up" test dictated the upper limit on First Amendment-protected expropriation of original works,⁸⁸ storyline patents would still prohibit too much and thus face free speech challenges. Proponents of storyline patents might argue that under this standard, parodists can "conjure up" a patented plot without using it in its entirety, and that such use by definition will not

85. See 17 U.S.C. § 107(3) (2000).

86. See 4 NIMMER, *supra* note 10, § 13.05.

87. There is thus a sharp distinction between the analysis done in a copyright infringement suit compared with that done in a patent infringement suit. Courts have only extended copyright protection to plots in conjunction with other narrative elements. See *Grove Press, Inc. v. Greenleaf Publ'g Co.*, 247 F. Supp. 518, 525 (E.D.N.Y. 1965) (stating that a novel's copyright included not just "the form of communication or the mechanism employed" but also "the pattern of the story," because "the essence of a novel or any other story for that matter, is the plot, plan, arrangement, characters and dialogue therein contained and not simply its form of articulation"); see also *supra* note 10 (discussing the debate about copyrighting plots).

88. Courts have diverged as to the appropriate balance between a parodist's need to appropriate elements of an original work and a copyright-holder's property interests. The Ninth Circuit initially indicated that a parodist's ability to appropriate an original work would be strictly limited to the extent "necessary to recall or conjure up the object of his satire." *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978) (internal quotation marks omitted). The Ninth Circuit has since relaxed its decision in *Air Pirates*. See *Fisher v. Dees*, 794 F.2d 432, 438-39 (9th Cir. 1986) (finding fair use where a parody "takes no more from the original than is necessary to accomplish reasonably its parodic purpose"). Other courts have been yet more liberal in their assessment of how much a parody may take from a copyrighted work. See, e.g., *Elsmere Music, Inc. v. NBC*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam) (deeming a parody protected by fair use as long as it "builds upon the original[,] . . . contributing something new for humorous effect or commentary"). Noting that the *Fisher* decision examines the roots of the "conjure up" test and casts it as a minimum, rather than a maximum, standard, Nimmer opines that the *Fisher* standard "brings the Ninth Circuit roughly in conformity with the Second Circuit" and "extends the 'conjure up' test to embrace, at least in an appropriate case, a high degree of similarity, that nonetheless falls short of wholesale appropriation." 4 NIMMER, *supra* note 10, § 13.05.

be patent infringement.⁸⁹ The original work the Ninth Circuit allowed parodists to “conjure up” was, again, a work as a whole, not merely a work’s plot, which is just one literary element among many. Many courts have held the “conjure up” test affords insufficient First Amendment protection in the copyright context,⁹⁰ and applying it in the patent context would offer even more minimal protection. Furthermore, the Ninth Circuit’s reinterpretation of its “conjure up” test strongly implies that parodists can use as much of a protected work as is necessary to achieve their parodic purpose.⁹¹ When that parodic purpose is to take a set of fictional events and show how retelling them from a different perspective or in a different context illustrates something new, then storyline patents come into conflict with jurisprudence insulating parody from intellectual property protection measures.

The current balance between free speech and intellectual property rights does not make it impossible for an author to appropriate an entire plot (especially at the level of generality in Knight’s exemplary claim language) and reframe it in such a way as to make it new and fresh, in part because the value of the work does not lie primarily in mere plot.⁹² Alice Randall’s *The Wind Done Gone* is an example of such plot appropriation. Randall retold the plot of Margaret Mitchell’s famous *Gone With the Wind* from the point of view of the plantation master’s illegitimate daughter of mixed race, a slave on the plantation, in order “to rebut and destroy the perspective, judgments, and mythology” of *Gone With the Wind*.⁹³ In *SunTrust Bank v. Houghton Mifflin Co.*, the Eleventh Circuit reversed the district court’s injunction against publication of *The Wind Done Gone*. The court found that the plaintiffs had failed to establish likelihood of success on the merits in a copyright infringement action. The court also reviewed Randall’s work, which appropriated characters and settings as well as plot,⁹⁴ and went so far as to state that “based upon our analysis of the fair use factors we find, at this juncture, [*The Wind Done Gone*] is entitled to a fair-use defense.”⁹⁵ By explicitly linking its fair use rationale to First

89. Every element of a claim must be present to constitute infringement. *See Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997) (holding that “each element contained in a patent claim is deemed material to defining the scope of the patented invention”).

90. *See supra* note 88.

91. *See id.*

92. *See supra* note 87.

93. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270 (11th Cir. 2001).

94. The court agreed that *The Wind Done Gone* is largely “an encapsulation of [*Gone With the Wind* that] exploits its copyrighted characters, story lines, and settings as the palette for the new story.” *Id.* at 1267.

95. *Id.* at 1276. The case settled in 2002 when Houghton Mifflin agreed to donate an unspecified amount to Morehouse College and label the book “an unauthorized parody.” *See* David D. Kirkpatrick, *Mitchell Estate Settles ‘Gone With the Wind’ Suit*, N.Y. TIMES, May 10, 2002, at C6.

Amendment protection for parodies, the *SunTrust* court indicated that intellectual property rights could not abrogate that protection. Randall's work almost certainly would have infringed any sort of patent *Gone With the Wind's* plot could have had.⁹⁶ Enforcing a patent against *The Wind Done Gone* would change the balance between free speech and intellectual property rights that, according to the courts, the First Amendment demands. To preserve this balance, storylines should be denied patent protection even if they were deemed to overcome the statutory hurdles previously discussed.

V. POLICY RATIONALE FOR STORYLINE PATENTS

The object of patent law is not only to “foster and reward invention,” it also “promotes disclosure of inventions to stimulate further innovation and to permit the public to practice the invention once the patent expires.”⁹⁷ The ultimate intended beneficiary of patent law is not the inventor, but the public.⁹⁸

Knight's rationale about the fairness of rewarding a plot-inventor's “flash of genius” considers only the first aim of patent law. Offering patent protection to storylines would indeed “foster and reward” the innovation of some authors,⁹⁹ but it is unclear that this would be necessary to promote invention or disclosure. Unlike the inventor of synthetic rubber, who could conceal her formula and still benefit from it, an author could hardly keep the storyline a secret and still tell his tale. The incentives to disclose a storyline are inherent in the form.

Knight argues that plot-inventors must be economically rewarded, but his arguments rest on questionable assumptions and contradict the very evidence to which he points. Knight cites the recycling of plots in hackneyed Hollywood movies as evidence that economic rewards are necessary. Yet his conclusion assumes that retelling plots with new characters, settings, perspectives, and themes is an end our intellectual property law should discourage. Given the ubiquity and antiq-

96. Though Knight argues that only a small class of non-obvious storylines should be granted patents, the First Amendment analysis remains the same as in the *Gone With The Wind* example: any would-be parodist would be foreclosed from First Amendment-protected speech were such a patent enforced.

97. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

98. *See Mazer v. Stein*, 347 U.S. 201, 209 (1954) (claiming that “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare”) (emphasis added). The focus on the public, rather than an individual, as the intended beneficiary of intellectual property law appears in copyright law as well. *See Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (noting that “the primary object in conferring the monopoly [of copyright] lie[s] in the general benefits derived by the public from the labors of authors”).

99. While Knight's proposed patents would undoubtedly benefit some authors, they would also considerably burden others who sought to retell their predecessors' tales.

uity of the practice of retelling stories, this assumption is questionable indeed. Furthermore, the very successes of the movies Knight cites as examples of innovative plots¹⁰⁰ stand as evidence that there is already a market-based reward for those who do come up with unusual plots. Even if “an experienced Hollywood writer” could deprive the inventor of a unique plot of some of its potential economic benefits by retelling it in a “far superior story,”¹⁰¹ the Supreme Court has repeatedly proven to be unconcerned with such an outcome. The Court has refused to preserve the commercial gains of artistic inventors whose creations have been outclassed or fallen prey to legitimate criticism via retelling. In *Campbell v. Acuff-Rose Music, Inc.*, Justice Souter stated that “parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically.”¹⁰²

Furthermore, plot patents seem just as likely to hinder innovation in fiction as to stimulate it. A move to allow storyline patents would privatize, for the period of patent protection, storylines that currently enter the public domain. Any argument that the public would benefit by this move is predicated on two assumptions: (1) that a greater number of innovative storylines will be invented and shared with the public if their inventors have the incentive of patent protection, and (2) that the benefit of more innovative storylines outweighs the public costs. Public costs accrue both with the loss of storylines that used to be placed immediately in the public domain and with the decreased retelling of plots due to licensing or litigation costs.¹⁰³ Some commentators argue that even the less stringent protection offered by copyrights dampens creativity,¹⁰⁴ and anecdotal evidence already exists that fear of litigation keeps publishers from printing works that might infringe copyrights.¹⁰⁵ Uncertainty about application of the doctrine of

100. See Knight, *supra* note 4, at 866 (citing the plot of Christopher Nolan’s film *Memento* as an example of a potentially patentable storyline); see also Knight & Associates, Applications, <http://www.plotpatents.com/applications.htm> (last visited October 22, 2005) (citing the plots of the movies *The Thirteenth Floor*, *Being John Malkovich*, *The Butterfly Effect*, *The Game*, *Fight Club*, *The Matrix*, *Total Recall*, *The Truman Show*, *Minority Report*, *The Village*, *Groundhog Day*, and *Eternal Sunshine of the Spotless Mind* as potentially patentable in a plot patent regime).

101. See Knight, *supra* note 4, at 873.

102. 510 U.S. 569, 592 (1994).

103. An uncharitable interpretation might attribute the legal community’s interest in plot patents to the desire not to secure authors more protection of their work, but rather to secure increased fees over what would surely be a much-litigated addition to the patent regime.

104. See Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785 (2004).

105. See, e.g., Jasper Rees, *The Cheek of It*, THE DAILY TELEGRAPH, Apr. 24, 2004 (examining the resurgence of literary parodies but observing that “[p]arody has lately fared less well in the idol-worshipping, increasingly litigious America” and that a popular parody of the *Harry Potter* books was declined by several American publishers on the advice of lawyers); see also Patrick T. Reardon, *Chicago Humorist Conjures Up A Seamy Harry Potter Parody*, CHI. TRIB., Jan. 4, 2002 (reporting that “fear of legal action was a reason [a publishing] company ultimately turned down” a parody of the *Harry Potter* books).

equivalents might stop cautious publishers or producers from creating works with plot structures similar to patented ones.¹⁰⁶ It is far from clear that there would be any net benefit to the public from granting and enforcing storyline patents.

The first assumption above — that a greater number of more innovative storylines will be invented if they can be patented — requires the further assumption that patenting plots will yield greater economic benefits for inventors than simply expressing them under the current copyright system. Plot patents would only yield economic benefits if there were a group of would-be infringers willing to pay for licenses. Since a method patent is infringed only when all steps of the method are performed in order, however, possible infringers could retell most of the claimed plot and dodge infringement simply by changing one of the claimed plot elements.¹⁰⁷

Proponents of plot patents, of course, may use this point as an argument in favor of these patents. What harm, they might ask, lies in protecting plots from only the most blatant, wholesale thievery? The potential harms are myriad: the abrogation of First Amendment-protected parodies, the chilling effects of the threat of litigation, the withdrawal of ideas from the intellectual commons, and the possibility of imposing inequitable infringement liability on innocent users of patented plots.¹⁰⁸ The more elusive answer lies in the question, what good?

VI. CONCLUSION

Incentivizing authors to innovate and create is a laudable goal, and protecting their storyline ideas specifically has found favor in some states.¹⁰⁹ The machinery of patent law, however, is ill-equipped to offer such protection. No matter how unique the combination of plot points may be, it is nonetheless a combination of ideas, and no alchemical mantra about how man-made the combination might be can render it technological, patentable gold. Fictional plots are not the

106. To avoid infringement under the judicially created doctrine of equivalents, “an accused product or process . . . must include ‘substantial and not merely colorable’ differences from the patent claims.” *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1517 (Fed. Cir. 1995) (quoting *Singer Mfg. Co. v. Cramer*, 192 U.S. 265, 286 (1904)).

107. As noted above, uncertainty about how the doctrine of equivalents would apply to storyline patents could create a host of court cases, and might not even yield actual benefits to plot-inventors.

108. Knight notes that not only could authors be guilty of plot patent infringement under his proposed method patents, but also that “directors, actors, and producers; a theater’s owners and employees; a movie seller’s owners and employees; a novel’s authors, publishers, and printers; a bookseller’s owners and employees; consumers of the movie, novel, or other products; and so forth” could be held liable. See Knight, *supra* note 4, at 867.

109. See Brian C. Devine, *Free As The Air: Rethinking the Law of Story Ideas*, 24 HASTINGS COMM. & ENT. L.J. 355 (2002) (examining the various protections offered to story ideas by some states through contract or property law).

emerging technology that has instigated the liberalization of patentable subject matter in recent decades, nor can patents outlining fictional plots enable the formation of a story, which, after all, is so much more than the mere recitation of mechanical plot points. If the breadth of the language in recent Federal Circuit decisions has indeed made storyline patents possible, as Andrew Knight argues, perhaps an ill-advised grant of such a patent will spur future limitation of that dangerous language. With their subversion of the boundaries of traditional patent law, their almost certain violation of the First Amendment, and their doubtful policy rationale, it is hard to see how storyline patents could be anything other than a dangerous and misguided addition to an arsenal of intellectual property protection that is supposed to protect the public's best interests.