

Once Upon an Infringer: What Similarity Analysis Can Learn From Structural Folkloristics

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INTRODUCTION

Few things can reveal more about a culture than the stories it chooses to tell. From the epics of Greece and Mesopotamia to the comedies gracing modern televisions, narratives are unparalleled in their ability to both reflect and capture the human mind. Because of this universal social significance, the study of narratives and their appeal is a time-honored academic tradition. Efforts to break stories down into their constituent elements have especially proliferated within the area of folkloristics, where indexing systems are used to trace the historical lineages and permutations of familiar stories and characters. It is precisely the universality, both cultural and temporal, of the elements identified by folklorists which indicates that the methodology employed in that discipline need not be limited to the study of traditional myths and fairy tales but might also be extended to the more contemporary modes of storytelling driving the creative economy.

The centrality of storytelling to human culture is naturally reflected in the economic activity surrounding the media industries: For example, the global box office generated an estimated 33.9 billion dollars in 2023,¹ and the domestic publishing industry made a revenue of 29.9 billion dollars that same year.² While the financial success possible to creators is secured in part by robust copyright laws, this possibility makes it all the more enticing to attempt to bypass those laws and profit from another's creative effort. This infringement need not be literal: As Judge Hand recognized in *Nichols v. Universal Pictures Corp.*, without some extension of protection beyond the verbatim level, "a plagiarist would escape by immaterial variations."³ This need for extended protection must be balanced with copyright law's idea/expression dichotomy: Only expressions, not the ideas underlying them, are afforded legal protection. Where that line is to be drawn is a question which has perplexed courts, as evinced by the myriad analytical frameworks developed across the circuits and the often vague and conclusory decisions in cases involving narrative comparisons.

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1. Nancy Tartaglione, *Global Box Office Reaches \$33.9B in 2023, Up 31% on 2022—Analysts*, DEADLINE (Jan. 4, 2024), <https://deadline.com/2024/01/global-box-office-2023-total-barbie-super-mario-bros-oppenheimer-international-china-1235694955/> [<https://web.archive.org/web/20241225085824/https://deadline.com/2024/01/global-box-office-2023-total-barbie-super-mario-bros-oppenheimer-international-china-1235694955/>].

2. Jim Milliot, *Publishing Revenue Fell Slightly in 2023, but Unit Sales Dropped 5.7%*, PUBLISHERS WEEKLY (Aug. 22, 2024), <https://www.publishersweekly.com/pw/by-topic/industry-news/financial-reporting/article/95788-publishing-industry-sales-fell-slightly-in-2023.html> [<https://web.archive.org/web/20241230181358/https://www.publishersweekly.com/pw/by-topic/industry-news/financial-reporting/article/95788-publishing-industry-sales-fell-slightly-in-2023.html>].

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

Scholarship in the area of structural narratology, along with developments in analysis for software infringement, may offer valuable guidance in this realm. By applying a rigorous categorical methodology to narratives and their elements, scholars have provided courts with tools to examine stories at different levels of abstraction, therefore making it easier to distinguish universal structures and elements from protectable creative expression. Such a methodology would offer greater predictability for parties and creators, decisions less likely to be clouded by personal and cultural biases, and greater transparency as to which elements of a narrative copyright law is actually designed to protect.

This Note proposes that through an understanding of structural folkloristics, specifically the Aarne-Thompson-Uther (ATU) index and the *Motif-Index of Folk-Literature*, courts can modify the abstraction-filtration-comparison (AFC) test originally developed within the software infringement context to narrative works.⁴ Part I will provide an overview of structural narratology as an intellectual tradition, with special attention to its application in folkloristics and the methodologies used within that discipline. Part II will examine the state of narrative comparisons in copyright law, with *Funky Films, Inc. v. Time Warner Entertainment Co.* and *Nichols* as examples, as well as the more structure-based AFC test for software infringement.⁵ Part III will present a model informed by work in structural folkloristics for applying that test to narrative works, and will re-analyze *Funky Films* and *Nichols* through that proposed lens. The Note will conclude with insights into the roles of judges, juries, and narrative scholars in applying the ideas articulated here. As the scholarship reveals, the study of narrative is very much the study of copying and retelling, which makes it an appropriate ally for the copyright system.

I. BACKGROUND TO NARRATOLOGY

A. OVERVIEW AND MAJOR IDEAS

1. General History

Narratology is the study of narrative structures and how such structures convey meaning. Its central justification is the vast, lofty axiom that narrative is the universal means through which the human mind constructs and articulates meaning.⁶ However, the emphasis within the discipline on structure and the identification of constituent narrative elements tends to give rise to granular, detail-dependent theories. The discipline's central ethos, that every narrative has a discernable structure which encompasses its aesthetic appeal, has served as a valuable guiding principle for literary theorists and social scientists.

4. STITH THOMPSON, MOTIF-INDEX OF FOLK-LITERATURE (1955–58).

5. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072 (9th Cir. 2006); *Nichols*, 45 F.2d 119.

6. See, e.g., HAYDEN WHITE, THE CONTENT OF THE FORM 1 (1982).

Ideas akin to narratology can be identified in writings as early as Aristotle's *Poetics*, which extolled rules for the construction of a tragic poem,⁷ but its genesis as a strand of modern literary criticism is generally attributed to the school known as the Russian Formalists.⁸ This movement, which flourished from the 1910s to 1930s, emphasized the study of literature as its own product of human life divorced from other disciplines such as philosophy and psychology.⁹ In analyzing literature without the intermediary lens of another discipline from the humanities or social sciences, these theorists embraced a methodology which viewed a text as a hierarchal set with its own internal structure, and they viewed these structures as all that were needed to fruitfully delineate genres and compare texts.¹⁰

In the twentieth century, the most prominent theorists to work within the narratology tradition include Roland Barthes, who used semiotic theories to analyze the structure of an Honoré de Balzac novella,¹¹ Claude Lévi-Strauss, known for his work on the conceptual oppositions across various mythology systems,¹² and Tzvetan Todorov, who coined the term "narratology" and employed a methodology akin to formal logic or linguistic syntax in his analysis of the tales in Boccaccio's *Decameron*.¹³ Central to this scholarship was the underlying tenet that narratology identifies and examines naturally occurring features of human storytelling of which the storyteller might not be consciously aware.

In the mainstream consciousness, however, ideas resembling structural narratology have proliferated as prescriptive models designed to help writers, especially screenwriters, craft compelling and profitable stories by following rules regarding plot points and character archetypes (a trend instigated, perhaps, by George Lucas's admission that he modeled the plot of *Star Wars* on Joseph Campbell's work in comparative mythology).¹⁴ In light of the profit motive for successful creators, the appeal of a theory which attempts to identify and describe the core of narrative aesthetic appeal is quite obvious. It is this impact on the stories told by the contemporary entertainment industry that warrants an examination of the theory and how its goal of an objective methodology might be relevant in infringement analysis.

2. Modern Thought and Applications

By taking inspiration from more structural disciplines within the humanities, an idea exemplified by Todorov's work, modern scholars have begun to catalog the iterative nature of narratives. Todorov's line of thought has been continued by

7. ARISTOTLE, *POETICS* (Malcolm Heath trans., 1996).

8. See generally PETER STEINER, *RUSSIAN FORMALISM* (1984).

9. *Id.* at 22.

10. *Id.* at 32.

11. ROLAND BARTHES, *S/Z* (Richard Miller trans., 1975).

12. Claude Lévi-Strauss, *The Structural Study of Myth*, 68 J. AM. FOLKLORE 428 (1955).

13. TZVETAN TODOROV, *GRAMMAIRE DU DÉCAMÉRON* [GRAMMAR OF THE DECAMERON] (1969).

14. See, e.g., BLAKE SNYDER, *SAVE THE CAT!* (2005); JOSEPH CAMPBELL, *THE HERO'S JOURNEY* 186–87 (Phil Cousineau ed., 3rd ed. 2003).

Henri Wittmann, who used the term “narreme” to describe the smallest discernible unit of narrative structure.¹⁵ Central to this concept is a linguistic metaphor; the narreme is analogous to the morpheme (smallest linguistic unit with independent meaning) and phoneme (smallest possible phonetic unit). In Wittmann’s paradigm, narremes are constituents of “narrative algorithms” in a hierarchical system which resembles generative grammar as developed by Noam Chomsky.¹⁶

When narratives are understood as being comprised of hierarchically structured elements such as narremes and algorithms, their similarities and differences become more readily visible. This feature of the methodology has proven especially useful in the area of folkloristics, as these constituent elements, and their levels of centrality to the narratives in question, can allow researchers to determine the evolutionary paths taken by folktales. When certain elements are compared, they might reveal when and where related tales branched off from each other, and how these differences might reflect the cultures and time periods in which they emerged. For example, phylogenetic research into variations of the “Little Red Riding Hood” story suggest that East Asian versions of the tale may represent a hybrid form of two distinct European tale types, and this may reflect a consistent pattern of local modification associated with “specific ecological, political, or religious variables.”¹⁷ In this way, structural narratology illuminates the ways in which stories are copied and retold, and the process by which a seemingly new narrative can owe its origin to a distant ancestor. That similarity exists on a spectrum is an axiom underlying the project of comparative folkloristics.

B. FOLKLORISTICS AND THE ATU INDEX

Folkloristics is the branch of anthropology concerned with folklore, a culture’s shared traditional body of expression and belief. It emerged as an academic discipline in nineteenth century Europe with publications of oral narratives collected through field research, such as those of the Brothers Grimm.¹⁸ Perhaps due to its lineage as a social science rather than as a pure branch of the humanities, there has long been an emphasis within the discipline on objective methodology and categorization, an emphasis which naturally opens the field to influence from work in structural narratology.

15. Henri Wittmann, *Topics in the Theory of Narrative Algorithms*, 3 TRAVAUX LINGUISTIQUES 1 (1974).

16. Henri Wittmann, *La Structure de Base de la Syntaxe Narrative dans les Contes et Légendes du Créole Haïtien* [The Basic Structure of Narrative Syntax in Haitian Creole Tales and Legends], in POÉTIQUES ET IMAGINAIRES: FRANCOPLYPHONIE LITTÉRAIRE DES AMÉRIQUES [POETICS AND IMAGINARIES: LITERARY FRANCOPLYPHONY OF THE AMERICAS] 207 (Pierre Laurette & Hans-George Ruprecht, eds., 1995).

17. Jamshid J. Tehrani, *The Phylogeny of Little Red Riding Hood*, 8 PLOS ONE 1, 9 (2013).

18. Jack Zipes, *How the Grimm Brothers Saved the Fairy Tale*, 36 HUMANITIES (2015), <https://www.neh.gov/humanities/2015/marchapril/feature/how-the-grimm-brothers-saved-the-fairy-tale> [https://web.archive.org/web/20241226181851/https://www.neh.gov/humanities/2015/marchapril/feature/how-the-grimm-brothers-saved-the-fairy-tale#expand].

An early figure exemplifying the drive within folkloristics towards objective methodology was the Soviet scholar Vladimir Propp, a member of the Russian Formalist school. In his 1928 book *Morphology of the Folktale*, Propp analyzed one hundred Russian fairy tales and attempted to deconstruct them into their simplest constituent elements.¹⁹ In so doing, he identified thirty-one narrative elements, or “functions,” which consistently occur in a specific order, although any given tale need not include all thirty-one.²⁰ Seven character archetypes, such as the “donor” and the “false hero” are also identified.²¹ While this project was rather narrow in scope, the ethos of trying to map the metaphorical narrative genome of a specific culture’s output was invaluable in establishing the possibility of evaluating similarity between works descended from the same generic tradition.

In contemporary folkloristics, the most widely used system for cataloging folktales is the Aarne-Thompson-Uther (ATU) index, which summarizes thousands of narrative types and groups them together according to their similarity. The index as it exists today is the result of a series of expansions dating back to its initial German publication in 1910 by Antti Aarne.²² Throughout the twentieth century, it was translated, revised, and expanded by Stith Thompson,²³ and was most recently expanded in 2004 by Hans-Jörg Uther.²⁴ It is used in tandem with Thompson’s *Motif-Index of Folk-Literature*, which catalogues thousands of common motifs and stock characters; categories of motifs include such things as “deceptions” and “identity tests.”²⁵ While Propp initially criticized this project as overlooking underlying narrative functions in favor of more salient plot motifs, its strength is in its applicability across different cultures and time periods as well as in its flexibility.²⁶ This flexibility of contemporary folkloristics combined with the structured methodology of a social science makes this discipline a relevant lens through which to analyze contemporary narratives and their similarities, a task demanded by copyright law.

In demonstrating how these resources function, it is helpful to examine part of the ATU entry for a familiar tale, “Cinderella” (it is located at ATU 510A and is a subtype of the more general “Persecuted Heroine” narrative type).²⁷ The bracketed citations are to entries in the *Motif-Index*, and parentheticals refer to alternative motifs:

19. VLADIMIR PROPP, *MORPHOLOGY OF THE FOLKTALE* (Laurence Scott trans., 2d ed. 1968).

20. *Id.* at 25.

21. *Id.* at 79–81.

22. Antti Aarne, *Verzeichnis der Märchentypen [List of Fairy Tale Types]*, 3 FOLKLORE FELLOWS COMM’NS 1 (1910).’’

23. See, e.g., Stith Thompson, *The Types of the Folktale: A Classification and Bibliography*, 74 FOLKLORE FELLOWS COMM’NS 1 (1927); Stith Thompson, *The Types of the Folktale: A Classification and Bibliography*, 184 FOLKLORE FELLOWS COMM’NS 1 (1961).’’

24. Hans-Jörg Uther, *The Types of International Folktales: A Classification and Bibliography, Based on the System of Antti Aarne and Stith Thompson*, 284–286 FOLKLORE FELLOWS COMM’NS (2004).’’

25. STITH THOMPSON, *MOTIF-INDEX OF FOLK-LITERATURE* (rev. ed. 1955–1958).

26. PROPP, *supra* note 19, at 5.

27. Uther, *supra* note 24, at 293–94.

A young woman is mistreated by her stepmother and stepsisters [S31, L55] and has to live in the ashes as a servant. When the sisters and the stepmother go to a ball (church), they give Cinderella an impossible task (e.g. sorting peas from ashes), which she accomplishes with the help of birds [B450]. She obtains beautiful clothing from a supernatural being [D1050.1, N815] or a tree that grows on the grave of her deceased mother [D815.1, D842.1, E323.2] and goes unknown to the ball. A prince falls in love with her [N711.6, N711.4], but she has to leave the ball early [C761.3]. The same thing happens on the next evening, but on the third evening, she loses one of her shoes [R221, F823.2].

The prince will marry only the woman whom the shoe fits [H36.1]. The stepsisters cut pieces off their feet in order to make them fit into the shoe [K1911.3.3.1], but a bird calls attention to this deceit. Cinderella, who had first been hidden from the prince, tries on the shoe and it fits her. The prince marries her.

Combinations: This type is usually combined with episodes of one or more other types, esp. 327A, 403, 480, 510B, and also 408, 409, 431, 450, 511, 511A, 707, and 923.²⁸

The index's utility in comparing tales is evident if the entry for "Cinderella" is compared with that of "Peau d'Asne" [Donkey Skin], a related story at ATU 510B:

A king promises his wife on her deathbed [M255] only to marry another woman who is as beautiful as she is (whom a particular ring fits). Because she is the only one who meets this condition, the king wants to marry his grown daughter. In order to delay the wedding, the young woman asks him to give her dresses like the sun (gold), the moon (silver), and stars (diamonds), and a coat made of many different kinds of fur (a covering of wood). After he provides all these, the daughter runs away from her father [T311.1] and, disguised in the ugly skin [K521.1, F821.1.3, F821.1.4], works as a kitchen maid (goose-girl) in another castle. Cf. Types 706, 706C.

When a series of feasts is held in the castle where she works, the young woman secretly puts on her splendid dresses. The prince falls in love with her [N711.6] but does not recognize her as the kitchen maid [R255]. On the following days he treats the kitchen maid badly. During the feasts he asks the beautiful woman where she comes from, and she gives cryptic answers that refer to how he had treated the kitchen maid [H151.5]. He gives her a ring. Then the prince becomes lovesick. In her character as kitchen maid, she slips his ring into his soup (bread). He finds her [H94.2, H94.4] and marries her.

Sometimes the young woman is discovered while she is bathing or dressing instead of being recognized through a token.²⁹

These tales are similar in that both follow a noblewoman forced into humble labor by parental oppression, who must then be identified by her princely lover. However, they differ notably in their more granular motifs, as evinced by the *Motif-Index* citations. These differences, despite the similar narrative appeal, illuminate the multiple levels at which similarities between narratives can be analyzed, as well

28. *Id.*

29. *Id.* at 295.

as the utility of specifically delineated elements. While a level of subjectivity was certainly employed in the cataloging and identifying of tales and motifs, the result is a clear and reasonable methodology which could inspire new analytical methods in contemporary copyright law.³⁰

II. THE COPYRIGHT LANDSCAPE

A. CURRENT APPROACHES TO NARRATIVE INFRINGEMENT

1. The Issue

The method of narrative classification and delineation exemplified by structural folkloristics has not yet reached copyright law, a discipline often concerned with comparing narrative works in a visible, meaningful way. While judges across different circuits have articulated principles as to how narrative comparisons should be done, and have sometimes even alluded to examining works across different levels of abstraction, their approaches have often been subjective and are seldom thoroughly explained.³¹

In illustrating this problem, this Note will analyze the reasoning, and attempts to set forth standards for narrative comparisons, in two cases from the Second and Ninth Circuits. As is evinced by dicta in these cases as well as by precedent in the software context, copyright law is open to more structured, objective methodologies in determining similarity, and, as demonstrated below, many of the issues this Note will identify could be mollified if such an approach were employed in narrative cases.

2. *Funky Films*

The Ninth Circuit case *Funky Films, Inc. v. Time Warner Ent. Co.* exemplifies the “extrinsic” and “intrinsic” tests, which respectively pertain to objective similarity as decided by the judge and to an ordinary viewer’s observations.³² The latter asks the jury to consider “the response of the ordinary reasonable person” based on the works’ “total concept and feel,” while the former may be applied at summary judgment.³³ As this is an appeal from summary judgment, only the extrinsic test is applied, and in doing so the court alludes to structuralism in identifying particular

30. The methodology used by folkloristics is similar to ones already present in the legal setting: consider, for example, the West Key Number System, which identifies elements through which to classify cases and identify similarity. See THOMSON REUTERS, *Efficient Legal Research: Why You Need the West Key Number System* (May 20, 2025), <https://legal.thomsonreuters.com/blog/why-you-need-the-west-key-number-system> [<https://web.archive.org/web/20251006111709/https://legal.thomsonreuters.com/blog/why-you-need-the-west-key-number-system/>].

31. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

32. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072 (9th Cir. 2006).

33. *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985).

elements to compare.³⁴ However, the court seems to disregard any sense of hierarchy or relative centrality within the elements of a narrative, and the reasoning seems to rely too much on the court's own conclusions about which elements are and are not protectable.³⁵ As such, this analysis might have benefited from a more clearly delineated methodology with expert input, which might have alleviated some of the inherent problems in asking any individual to discern "objective" similarity.

The works at issue undoubtedly bear some resemblance in their premises. Plaintiffs/appellants are owners of *The Funk Parlor*, a screenplay about brothers who inherit their father's funeral home, one of whom becomes romantically involved with a woman who, unbeknownst to him, is a serial killer.³⁶ The allegedly infringing work is *Six Feet Under*, an HBO series which similarly deals with the personal lives of brothers who inherit a funeral home, but which includes additional family members and lacks the murder plotline.³⁷ The appellants allege multiple similarities across different levels of granularity, from minor gags to the overarching idea (although not verbatim plagiarism).³⁸

In applying the extrinsic test, meant to entail an observation rooted in more objectivity than the reaction of an ordinary audience member, the court acknowledges that any narrative can be examined for its constituent elements:

The extrinsic test focuses on "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events" in the two works. In applying the extrinsic test, this court "compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters."³⁹

The court sets out six domains across which to compare elements of both works: plot, characters, themes, setting/mood/pace, dialogue, and sequence of events.⁴⁰ In affirming summary judgment for the defendant, the court concludes that the extrinsic test is failed because "[t]he similarities recounted throughout appellants' brief rely heavily on *scènes à faire*—not concrete renderings specific to 'The Funk Parlor'—and are, at best, coincidental. Consequently, the two works are not substantially similar."⁴¹

In identifying those specific domains within which to compare specific elements, the court approaches an analytical methodology inspired by narratology, and implicitly acknowledges that if its analysis can have any claim to objectivity, some sort of methodology must be visibly employed. However, the domains chosen lack the sort of hierarchical relationship which the ATU index and Wittmann's

34. *Funky Films*, 462 F.3d at 1076–77.

35. *Id.* at 1078–81.

36. *Id.* at 1075.

37. *Id.* at 1075–76.

38. *Id.* at 1077–78.

39. *Id.* at 1077 (internal citations omitted).

40. *Id.* at 1078–81.

41. *Id.* at 1081.

scholarship have shown to be a useful framework through which to understand and compare narratives. The court's analysis could also be made clearer if it provided more guidance as to which elements are the most central to the work's expressive quality.

Lessons from structural folkloristics would be relevant here in that the ATU index's organization of similar tales establishes a hierarchy based on the centrality of certain elements, and the motifs/*scènes à faire* are identified by experts. Because the works at issue in this case are both dark comedies in a contemporary setting, the *Motif-Index* itself would be of limited utility in identifying elements, but it would be able to serve as a model for similar expert-driven indexing projects for different genres, media, and time periods.

A more structured methodology would also reduce the subjectivity inherent in even the supposedly objective extrinsic test. There has long existed in copyright law a desire for judges to abstain from making aesthetic judgments, which an unguided evaluation of the significance of certain narrative elements might consciously or subconsciously prompt.⁴² There is even some evidence of this phenomenon in the *Funky Films* opinion, which describes some characters as being "less developed" and others as possessing greater "complexity."⁴³ This opinion exemplifies the current lack of methodological standards in narrative comparison analysis, despite the implicit awareness that some methodology is necessary.

3. *Nichols*

The Second Circuit opinion *Nichols v. Universal Pictures Corp.* clearly invokes the idea of narrative elements being situated within different levels of abstraction, but the court is rather conclusory in its application of the theory it posits.⁴⁴ Also palpable in this opinion is the court's disdain for literary analysis having any place in the courtroom, especially as it pertains to the use of expert witnesses.⁴⁵ However, the court overlooks the possibility that experts in narratology and specific genres might *aid*, rather than hinder, an analysis using the abstractions theory upon which the court relies.

The plaintiff alleged that her play, *Abie's Irish Rose*, was infringed by the film *The Cohens and the Kellys*.⁴⁶ Both works deal with a couple, one of whom is Jewish and the other Irish Catholic, who fall in love despite disapproval from their families, and whose families abandon their feud after children are born to the couple.⁴⁷ The court affirms a finding for the defendant, as the works have distinct high-level themes

42. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

43. *Funky Films*, 462 F.3d at 1079.

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

45. *Id.* at 123 ("We hope that in this class of cases such evidence [from expert witnesses] may in the future be entirely excluded, and the case confined to the actual issues; that is, whether the defendant copied it, so far as the supposed infringement is identical.").

46. *Id.* at 120.

47. *Id.* at 120–21.

(religion in the plaintiff's, and class in the defendant's) and the shared characters are too underdeveloped to be protectable.⁴⁸ The case is less relevant for its factual analysis and more so for its theory of abstractions (as the court gives little insight into how it applies the principles it delineates). The opinion reflects an understanding of narratives as layered, hierarchal structures, and also recognizes a spectrum of protectability of the elements along those layers. Such an understanding naturally invites a more detailed methodology:

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. Nobody has ever been able to fix that boundary, and nobody ever can.⁴⁹

Despite recognizing that narratives are composed of elements from multiple levels along the idea/expression spectrum, the court criticizes the length of the record, including the use of expert witnesses.⁵⁰ However, an abstraction analysis of the type implicitly proposed in the opinion would require expert input, or at least attention to published scholarship, if it is to be as consistent and objective as possible. While judges might believe that their knowledge of copyright doctrine entitles them to attempt to fix the boundary of protection independently, they risk imposing underinformed judgments when they neglect scholarly insight into narrative structures and common elements of a genre. While absolute objectivity may be ultimately impossible, the Second Circuit's abstraction analysis, which was eventually developed for software comparison cases, reflects a methodology from which judges seeing narrative cases could take inspiration.

B. ABSTRACTION-FILTRATION-COMPARISON (AFC) IN SOFTWARE

1. *Altai* and Software Infringement Context

In the context of software infringement, a specifically delineated methodology has developed which lends similarity analyses the sense of transparency and objectivity that is often lacking in narrative comparisons. Software is considered an "expressive work" like novels and films, and is therefore protected by copyright law.⁵¹ Despite the obvious differences between software programs and more traditional expressive works, that they are grouped together in this way suggests

48. *Id.* at 121-22.

49. *Id.* at 121.

50. *Id.* at 123.

51. *See, e.g.,* Google LLC v. Oracle Am., Inc., 593 U.S. 1, 22 (2021) (noting that computer code has both expressive and functional qualities).

that an analytical methodology developed for the former might also be relevant in cases involving the latter.

In *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, the plaintiff, Computer Associates, created a job scheduling program (a program which automatically controls a computer's background tasks), which included a component designed to allow it to run on different operating systems.⁵² Altai, in creating its own job scheduler, recruited a former Computer Associates employee who extensively copied from the compatibility component.⁵³ In response to an earlier lawsuit, Altai rewrote its program without the copied material, and Computer Associates alleged that its non-literal expression was still being infringed.⁵⁴ While the court acknowledged that software infringement need not be literal, it found that in this case, there was no non-literal infringement either through application of the test it developed in the opinion.⁵⁵

2. The AFC Test

While the Second Circuit formulated this test within the software, rather than the narrative, context, the structural methodology developed within folkloristics invites the possibility of modifying this test so that narrative cases can be more clearly and easily analyzed. In fact, the *Altai* court cites *Nichols* for originating the idea of abstraction levels in copyright law.⁵⁶ Despite its specific technical context, this test is descended from a wider tradition of copyright similarity analysis and could be reapplied in a more expansive range of cases.

In applying the test, the court first identifies a software program's characteristics at each level along a spectrum of increasing abstraction, from the written code itself (most protectable) to the software's ultimate function (an unprotectable idea).⁵⁷ The program is therefore understood as having a hierarchal structure, with each element being a constituent of some higher-level structure. A layer's abstraction level is inversely correlated with its protectability: "A program has structure at every level of abstraction at which it is viewed. At low levels of abstraction, a program's structure may be quite complex; at the highest level it is trivial."⁵⁸

After identifying the levels of abstraction, the court then "filters out" unprotectable material.⁵⁹ This includes elements dictated by practical considerations (for example, hardware specifications), elements which any program of that nature must carry (a sort of *scènes à faire* doctrine as applied to software, which serves as further evidence of this test's ultimate descent from

52. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 698–99 (2d Cir. 1992).

53. *Id.* at 699–700.

54. *Id.* at 698–701.

55. *Id.* at 702, 715.

56. *Id.* at 706.

57. *Id.* at 706–07.

58. *Id.* at 707.

59. *Id.* at 707–10.

narrative analysis), and anything taken from the public domain.⁶⁰ When these elements are excluded from the analysis, the structure which remains will retain its hierarchical nature, but it will be leaner and restricted to only those few, less abstract levels which copyright law seeks to protect. This facilitates an easier comparison between the two works.

The final step of this analysis is to compare what remains of each program after filtration, described by the *Altai* court as the “golden nugget” of protectable expression.⁶¹ In comparing these expressions, the court focuses not only on if copying appears to have occurred, but also its significance: “At this point, the court’s substantial similarity inquiry focuses on whether the defendant copied any aspect of this protected expression, as well as an assessment of the copied portion’s relative importance with respect to the plaintiff’s overall program.”⁶² The hierarchical understanding upon which the AFC test, as well as much structural narratology, rests aids in the significance analysis. An especially significant element is likely to strongly influence the character of the higher-level structure of which it is a constituent.⁶³

When the standard for analysis in software infringement cases is compared with the analytical tradition in narrative infringement cases, it might be seen that the former is easier to apply consistently and depends less on opaque, subjective judgments. While software’s technical nature as opposed to the more traditionally creative media likely explains courts’ ready adoption of a structure-dependent methodology, the existence of a rigorous and continually updated cataloging system for folktales demonstrates that such a methodology might also be possible in the narrative context.

III. ABSTRACTION-FILTRATION-COMPARISON FOR NARRATIVE WORKS

A. THE ADAPTED TEST

1. Abstraction

In applying a version of the AFC test to narrative works, a hierarchy of increasingly abstract layers must be established analogous to that which exists for software. While *Nichols* and *Funky Films* both mention elements of a narrative which might be relevant, no court has laid out any sort of workable hierarchy. Such a hierarchy, then, may be informed by the arrangement of cataloging systems such as the ATU index, as well as by narratological work inspired by generative grammar’s hierarchies (such as that of Wittmann). A workable abstraction hierarchy for narrative works, from most to least protectable, might look like this:

60. *Id.*

61. *Id.* at 710.

62. *Id.*

63. For example, the specific character of the wicked stepmother contributes strongly to the more abstract structure of Cinderella as “persecuted heroine.”

- a. The literal text/images of the work.
- b. The “narremes,” to adopt the term used by Wittmann.⁶⁴ It is likely that a precise definition would be somewhat challenging, and it might be easiest to define this level in relation to those between which it sits. For the sake of this Note, narremes will be defined as the most granular non-literal elements to carry any narrative function. An example from “Cinderella” would be the “tree that grows on the grave of her deceased mother” in certain versions of the story.⁶⁵
- c. The “narrative algorithms,” a level to which the generative grammar metaphor is particularly relevant.⁶⁶ The subtypes of the ATU index (for example, the structural differences which place “Cinderella” and “Peau d’Asne” under the same number but different entries in the index)⁶⁷ would lie between this level and the next one, depending on their level of delineation. Narrative algorithms would be most analogous to the motifs (both characters and events) identified in the *Motif-Index*.
- d. Broader plot structure. This would identify the interactions between the most salient motifs. For example, a plot structure in which a prince falls in love with a persecuted heroine.
- e. Overarching theme, abstractly stated. For example, love, religion, deception.

While the task of dissecting a narrative, especially a lengthy or complex one, in this way may appear daunting, a court need not delineate every element across every level of abstraction. It could instead identify only those levels and elements alleged to be copied, as well as any significant differences which weigh against a finding of infringement. For example, the *Funky Films* court appropriately compares the works only across those elements appellants claim are similar, while still noting significant points of difference (such as the mother in *Six Feet Under*, “a strong-willed woman who struggles to overcome her lingering maternal instincts over her now-grown children” who lacks an analog in *The Funk Parlor*).⁶⁸ That *Six Feet Under* is comprised of sixty-three episodes also underscores the practicality of a targeted rather than thorough abstraction analysis.⁶⁹

2. Filtration

In the next step of the analysis, unprotectable elements are to be identified and extracted from consideration. While some levels of abstraction are obviously

64. Wittmann, *supra* note 15, at 2.

65. Uther, *supra* note 24, at 293.

66. Wittmann, *supra* note 16.

67. Uther, *supra* note 24, at 293–295.

68. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1078-79 (9th Cir. 2006).

69. *Six Feet Under*, IMDB, <https://www.imdb.com/title/tt0248654/> [https://web.archive.org/web/20250223192235/https://www.imdb.com/title/tt0248654/] (last visited Feb. 23, 2025).

protectable or unprotectable (such as the verbatim level and the overarching theme level), others present more of a challenge in discerning the protectability of their elements.

Narremes, and to a lesser extent algorithms, might be either unprotectable tropes or protectable units of expression depending on their delineation. As such, narremes might be viewed not only as the smallest non-verbatim unit of narrative meaning, but also as the most broadly defined unit of “expression” as opposed to “idea.” However, it is not beyond the realm of possibility that a narrative algorithm might be a unit of protectable expression if it represents an especially original combination of narremes.⁷⁰

At this stage, the idea of a motif cataloging system is relevant in identifying which elements are so commonplace as to belong to the public domain. The *Motif-Index* itself, despite its history of updates and the universality of many of the elements it identifies, would be of limited utility in many cases involving niche genres, more contemporary settings, or non-Western cultures. This is why analogous cataloging projects and research into all forms of narrative art, regardless of traditional social stature, should be essential scholarly aims, and why courts should be open to expert input in narrative analyses.⁷¹

3. Comparison

The court is then tasked with comparing the metaphorical “golden nuggets” of protectable expression.⁷² Regardless of the methodology used to reach this point, this is one area of the analysis in which subjectivity is difficult to reduce. As the *Nichols* court noted, there is no bright-line point at which similarity becomes infringement short of verbatim copying.⁷³ However, the inherently subjective nature of this final stage is mitigated by the structured, scholar-informed methodology underlying the abstraction and filtration stages.

As the court compares the protectable elements of the works at issue, two guiding principles can be identified. First, the higher the level of abstraction, the more tolerant the court should be of similarity, and second, the relative importance of a copied element within the plaintiff’s work should be considered (as was noted in *Altai*).⁷⁴ Any comparison must be carried out in a transparent and fully informed

70. While it is likely theoretically possible, it must be conceded that an example of a protectable narrative algorithm is exceedingly difficult to derive. Such an algorithm would likely be so novel as to be tied to the genesis of an entirely new genre. Even though this type of speculative narratology is outside the scope of this Note, it should be noted that user-driven “new media” and artificial intelligence are worthy of attention in this regard. See generally Dan L. Burk, *Copyright and Hypernarrative*, 31 L. & LITERATURE 1 (2019) (exploring the rise of interactive texts, such as video games, which challenge the conventional notions of narrative and authorship underlying copyright law).

71. It should be noted that cataloging projects similar to the kind proposed here are already used in the legal field. See THOMSON REUTERS, *supra* note 30.

72. *Computer Assocs. Int’l, Inc. v. Altai*, 982 F.2d 693, 710 (2d Cir. 1992).

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

74. *Altai*, 982 F.2d at 710.

manner, and as further illustration of how the AFC test might be adapted to the narrative context, this Note will now re-analyze *Funky Films* and *Nichols* through this proposed lens.

B. APPLYING THE TEST

1. *Funky Films*

As this analysis will show, the similarities between the works are mostly confined to the higher, and less protectable, levels of abstraction. Although the works at issue here take place in contemporary settings and are therefore comprised of many elements not found in traditional folklore, this analysis demonstrates that the principles embodied by structural folkloristics are relevant to infringement analysis even if not the substantive elements.

In delineating the levels of abstraction across which the two works are structured, a table is provided. The least abstract level, literal text and images, is excluded in the interest of space and especially because literal copying was not alleged in this case. The narreme level is limited to only those elements most relevant to the analysis:

	<i>The Funk Parlor</i> ⁷⁵	<i>Six Feet Under</i> ⁷⁶
Narremes	<ul style="list-style-type: none"> • Suicide of father. • Deteriorating funeral parlor. • Love interest: aspiring nun by day, serial killer by night who murders protagonist's brother. 	<ul style="list-style-type: none"> • Father killed in hearse accident.⁷⁷ • Dead father as ghostlike mentor, resolves problems he was unable to in his lifetime. • Love interest: massage therapist met on a plane. • Love interest: gay police officer met at church.

75. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1075 (9th Cir. 2006).

76. *Id.* at 1075–76.

77. *SIX FEET UNDER: Pilot* (HBO television broadcast, aired Jun. 3, 2001).

Algorithms	<ul style="list-style-type: none"> • Death of father. • Two brothers. • Prodigal son. • Revival of the family business. • Rival business causing problems. • Relationship with childhood crush/"girl next door." • "Wolf in sheep's clothing" figure. • Death of the brother. • A character must kill his own love interest. • The protagonist returns home after defeating the villain. 	<ul style="list-style-type: none"> • Death of father. • Two brothers. • Prodigal son. • Gay brother who struggles with his orientation. • Mother and sister. • Rival business causing problems. • Dead father returns as ghostlike presence.
Broader structure	Rags to riches + dark love story.	Family drama + coping with grief.
Overarching themes	Family, death, sexuality.	Family, death, sexuality.

The next step of the analysis is to filter out all unprotectable ideas and *scènes à faire*, a task in which a scholar-prepared index of tropes common to contemporary dark comedies would be helpful. Even in the absence of such an index, one can discern that all elements more abstract than the narreme level are unprotectable, as well as some of the less delineated narremes (in this specific comparison, those would likely be the fathers' respective deaths, the deteriorating funeral home, and probably also the ghostly mentor character). What is left (in addition, of course, to the literal words and images) are the narremes delineating specific characters, such as the love interests. However, it must be considered that the guidance of an expert in the conventions of this genre might dictate that these characters too should not warrant any protection, or that narremes too widespread in the broader culture to inherently warrant protection might be so striking in this specific context to deserve some protection.

In comparing the protectable expression, it is evident that the court was correct that no infringement can be found. This analysis reveals that features of narratives which cause them to appear similar are very often too abstract to be of any legal significance, and ordering abstractions in this way makes it easier to deconstruct the intuition on which judges seem to rely and conclusively find non-infringement.

Abstract themes and broad plot structures are undeniably aesthetically significant, but it is this same significance which allows them to be so distracting in analyzing which features of a work copyright law actually seeks to protect.

2. *Nichols*

Examining these works in *Nichols* is especially illuminating in that the court alluded to an abstraction-based methodology similar to the one proposed here, but provided little elaboration as to its application to the facts at issue. In revealing the type of analysis which might have animated the court's decision in *Nichols*, I hope to provide a workable model as to how courts can reach conclusions as to infringement as transparently and objectively as possible. Because the works at issue here are older and deal with more traditional stock characters and incidents, the case is also useful in illustrating the utility to courts of structural narratology scholarship.

The analysis begins by mapping the elements across the levels of abstraction. As in the *Funky Films* analysis, I will exclude the verbatim level from my illustration because no copying was alleged there, and I will limit the narremes to the most relevant ones:

	<i>Abie's Irish Rose</i> ⁷⁸	<i>The Cohens and the Kellys</i> ⁷⁹
Narremes	<ul style="list-style-type: none"> • Wealthy Jewish family in New York. • Father is a widower with one son. • Son is in love with an Irish Catholic woman. • Son introduces wife to father, pretending she is Jewish. • Father likes the woman, insists on Jewish wedding. • Woman's father is also a widower, lives in a different state. • The fathers meet and fight. 	<ul style="list-style-type: none"> • Poor families, one Jewish and one Irish, are neighbors in New York. • Mothers, lovers' brothers, and dogs also hate each other. • Jewish woman, Irish man. • Jewish family inherits wealth, moves to a better house. • Jewish father flees the state after a confrontation with son-in-law. • Irish family visits Jewish family's house. • Lawyer as jealous suitor. • It is revealed that the Irish

78. *Nichols*, 45 F.2d at 120.

79. *Id.* at 120–21.

	<ul style="list-style-type: none"> • Priest and rabbi are friendly, approve of the match. • Couple have boy-girl twins. • Both fathers arrive at Christmas with baby gifts. 	<p>family is actually entitled to the inheritance.</p> <ul style="list-style-type: none"> • Lawyer blackmails Jewish father. • Jewish father shares wealth with Irish father; families reconcile.
Algorithms	<ul style="list-style-type: none"> • Religious antagonism. • Secret marriage. • Multiple wedding ceremonies. • Fathers try to break up the marriage. • Children disowned. • The couple have children. • Fathers bring gifts. • Reconciliation. 	<ul style="list-style-type: none"> • Religious antagonism. • Secret marriage. • Inheritance. • Woman's father fends off her lover. • Father absconds. • Birth of a child. • Daughter disowned. • A jealous suitor. • Mistaken identity. • Blackmail. • Reconciliation.
Broader structure	Forbidden love → families reconcile.	Forbidden love → families reconcile.
Overarching themes	Religion, forbidden love, enmity.	Greed, class, forbidden love, enmity.

In filtering out unprotectable elements, the algorithm, structure, and theme levels fall out of consideration, as do many of the more general narremes (such as the twins and the widower father in *Abie's Irish Rose* and the blackmailing lawyer in *The Cohens and the Kellys*). In addition to the verbatim texts, it is likely that multiple narrative beats remain from both works.

Even after abstraction and filtration, there appear to be more similarities between these works than between the works at issue in *Funky Films*. However, it is worth noticing that the similarities between several of these narremes are accounted for in more abstract levels—when two works are similarly structured and deal with common themes, it would of course be expected that some of their more granular elements would also be similar, and this perspective further evinces the value of a hierarchical understanding of narrative structure. In addition to this explanation for the similarities, enough significant differences at the narreme level exist to justify a finding of non-infringement. This analysis illustrates the diversity of motifs which can exist within the same general plot structure, and how these

differences can lead to distinct aesthetic appeals or overarching themes. Exploring differences of this type are part of the project of structural folkloristics and tend to reflect natural permutations in storytelling rather than malicious infringement.

C. IN PRACTICE

1. The Role of Experts

For courts to reap the full benefits enabled by a modified AFC test for narrative infringement cases (that is, greater transparency and predictability and less subjectivity), they would need some input from experts in narratology as well as specific genres and media. However, the history of using experts in such cases is not without controversy.⁸⁰ While an in-depth exploration of evidence issues regarding experts in the humanities is beyond the scope of this Note, it is worth noting that experts are routinely employed in copyright cases regarding visual art forms—therefore, evaluation of aesthetic endeavors is not considered inherently problematic.⁸¹

In applying the AFC test to narrative works, experts would be useful in the abstraction and filtration stages: They could break down a work along the different levels and then identify which elements are common to that genre. Experts need not venture into the comparison stage, which is most analogous to the “unlawful appropriation” analysis in which *Arnstein v. Porter* restricts the use of experts.⁸² Their role would instead be to provide background for the factfinder to make an informed decision. Expert guidance would be particularly useful in cases involving genres and settings with which factfinders are less familiar, especially considering the relative lack of demographic diversity in the federal judiciary.⁸³

If copyright litigation is to be more informed by narratology, new research directions could be prompted within literary and film studies with relevance beyond the needs of individual lawsuits. New indices, analogous to the *Motif-Index* used in

80. See, e.g., *id.* at 123 (“[Literary expert testimony] cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naïve, ground of its considered impressions upon its own perusal.”)

81. See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 545 (2023) (describing the testimony of an art expert who spoke as to how Warhol’s print differs from the photograph on which it was based in meaning and aesthetic impact).

82. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

83. See *Diversity of the Federal Bench*, AM. CONST. SOC’Y, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> [<https://web.archive.org/web/20250119154003/https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/>] (last visited Jan. 19, 2025) (showing that of federal judges confirmed since 2009, approximately 66% have been white and 59% have been male). For an example of the implications for copyright law, see Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 L. & LITERATURE 20 (2013) (introducing the female-dominated culture of “fan vids,” which set clipped material from television shows to music in order to create a new narrative or commentary, and arguing that judges should afford some deference to the understandings of the intended audiences of such works in assessing fair use).

folkloristics, could be developed to map the conventions of contemporary genres. TV Tropes, a crowdsourced website which catalogs common media tropes and cites examples, might resemble a project of this nature.⁸⁴ The *Motif-Index* has already served as a model to scholars in cataloging certain historical genres as well as the folklores of specific cultures, which shows the viability of this methodology in diverse contexts.⁸⁵

2. The Role of Juries

It is worth revisiting the Ninth Circuit's inherently subjective "intrinsic test," which asks the jury to respond to the works at issue based on "the response of the ordinary reasonable person" and their "total concept and feel."⁸⁶ Perhaps because this test is animated by an interest in the ultimate consumer of popular media, expert testimony and "the comparison of individual features of the works" are expressly disallowed in its application.⁸⁷ Such a prohibition, however, overlooks the motivating question behind much work in narratology: *why* audiences respond to and resonate with stories in the ways that they do. Analyses of the type proposed here might be able to lay out similarities between works, but the jury would still be essential in determining the extent to which the similarities and differences matter (that is, the comparison prong). If courts find some subjectivity valuable in narrative similarity analysis (and the existence of the intrinsic test suggests that many do), an expert-informed structural methodology need not totally eliminate it. Experts would be able to help the jury discern what is and is not protectable in each work, but the centrality of protectable and unprotectable elements to the work's "total concept and feel" could still be subject to the jury's discretion. Thus, the ultimate conclusion would be better informed by copyright's goal of protecting expression, not ideas.

IV. CONCLUSION

While courts have always accepted that the line between idea and expression must protect more than just the verbatim level, the issue of where exactly to draw it has been marked by vagueness and excessive subjectivity. While narrative comparison decisions do often allude to discernable methodologies, such as the theory of abstractions posited in *Nichols* or the six domains in which the works at issue in *Funky Films* are compared, these methodologies are limited in that they are informed only by the judge's knowledge of how narratives function, and as such are prone to opaque, conclusive reasoning and a lack of predictability.

84. TV TROPES, <https://tvtropes.org/> [https://web.archive.org/web/20241229154449/https://tvtropes.org/] (last visited Oct. 6, 2025).

85. See, e.g., BACIL KIRTLEY, A MOTIF-INDEX OF TRADITIONAL POLYNESIAN NARRATIVES ('1971); ANN TRACY, THE GOTHIC NOVEL 1790–1830: PLOT SUMMARIES AND INDEX TO MOTIFS (1981).

86. See, e.g., *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985).

87. *Id.*

However, the tradition of software infringement offers a more structured, transparent methodology. The abstraction-filtration-comparison test developed in *Altai* asks a court to delineate a program's elements across increasingly abstract hierarchical levels, filter out unprotectable elements, and then compare the remaining expression of both programs. This test, inspired by the abstractions theory alluded to by the *Nichols* court, could be readapted to the context from which it is descended with the aid of structural folkloristics, a discipline whose interest in identifying constituent elements and *scènes à faire* renders narratives especially amenable to this sort of analysis.

Applying a version of the AFC test to narrative works would make decisions more transparent and predictable, as well as easier to reach. An alliance between courts and scholars would be central to this project, as the increasingly diverse and inventive genres becoming popular today demand attention to their conventions, patterns, and structures. While expert input would be indispensable in delineating narratives and identifying those elements which are too commonplace to warrant copyright protection, the ultimate task of comparison would lie with the factfinder, now better informed. As narratologists have demonstrated, the study of narrative structure is also the study of how stories are transformed, borrowed, and developed across cultures and time periods. When a structured methodology is able to distinguish time-honored narrative ideas from truly original expressions, copyright law is better able to carry out its goal of balancing protection for creators with cultural access for all.