

# Mockbusters, “Rip-Offs,” and Tie-Ins: Musings on the Free Use of Ideas on Film and Television from a Justice Philosophy Perspective

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## I. INTRODUCTION

In the 2008 Metro Manila Film Festival, the Filipino movie audience was treated to a revival of the *Iskul Bukol* franchise: *Iskul Bukol 20 Years After* (The Ungasis and Escaleras Adventure).<sup>1</sup> Even as the film successfully staged a

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reunion of sorts for high school classmates, the nerdy Vic Ungasis on the one hand, and the zany Escalera brothers on the other (together with a host of other characters), it openly portrayed the already accomplished former class genius Ungasis as an Indiana Jones-type archaeologist *cum* university professor who recovers the so-called “Kali of (Rajah) Humabon” and is on a quest for the counterpart “Kampilan of Lapu-Lapu,” plus the “Peseta,” supposedly one of the 30 pieces of silver paid over to Judas Iscariot in exchange for the Savior, but for some strange reason bearing a Spanish, and not a Jewish, name.<sup>2</sup>

Renderings inspired by foreign themes, incidents, or characters are admittedly not new to Philippine cinema. Filmgoers who are old enough can easily recall characters such as “Tony Falcon, Agent X-44” (immortalized for the silver screen by action star Tony Ferrer), “James Bandong” (played by the late Augusto V. Pangan, more popularly known as the ace comedian Chiquito), and yes, that odd combo of 1960s fantasy icons “James Batman” (a dual role<sup>3</sup> essayed by Philippine King of Comedy Dolphy<sup>4</sup>) — all of which point to origins beyond Philippine shores. In the

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1. This comedy movie, bannered by veteran Philippine comedians Tito Sotto, Vic Sotto, and Joey de Leon, is the third installment of the *Iskul Bukol* franchise, the first one being the 1977 flick *Iskul Bukol: The Movie*, and the second, the 1980s *Iskul Bukol Freshmen*. Tito Sotto, who is actually former Philippine senator Vicente Sotto III, and Joey de Leon, also a veteran songwriter and television host, appear as the mischievous brothers Tito and Joey Escalera, respectively. Popular television host, singer, and comedian Vic (real name, Marvic) plays the high school academic achiever from the province, Vic Ungasis. See *Iskul Bukol: 20 Years After (The Ungasis and Escaleras Adventure)* (2008), available at <http://www.imdb.com/title/tt1320341> (last accessed Jan. 8, 2010).
2. *Id.* The blog trail, relevantly, indicated an observation of the film’s attempt to depict in Ungasis a “globetrotting Indiana Jones/Lara Croft.”
3. A 1966 motion picture produced by Sampaguita Pictures and directed by the late Artemio Marquez. Cf. *James Batman* (1966), available at <http://www.imdb.com/title/tt0361763> (last accessed Jan. 8, 2010).
4. Rodolfo Vera Quizon in real life. The title “James Batman” is derived from the James Bond and Batman character “reproductions” played by the Philippine comedy king. On the one hand, James Bond (Agent 007) is a fictional character created in 1953 by British writer Ian Fleming, who featured the former in twelve novels and two short story collections. The said super spy character has also been featured in the longest running and most financially successful English language film franchise to date, starting in 1962 with *Dr. No*. See *Dr. No* (1962), available at <http://www.imdb.com/title/tt0055928> (last accessed Jan. 8, 2010);

early 1980s, Filipino movie aficionados were witnesses to “Agent 00” and “For Y’ur Height Only.” These films featured the famous (now deceased) midget Weng Weng and were clearly unabashed ride-ons to the James Bond super spy franchise.<sup>5</sup>

Writing on what he ruthlessly refers to as “Pinoy exploitation films,” that is, flicks riding on foreign movie trends but made on “shoestring budgets for a fast buck,” feature writer Eric S. Caruncho describes the historical success of such flicks:

The late 60s to the early 80s were the golden years for Pinoy exploitation films. Before the advent of multiplexes and the consolidation of production resources in the hands of just a few multimedia conglomerates, small-time independent [film makers] could still book enough theaters to turn a profit of the likes of ‘The Pig, Boss,’ [actor-comedian] Ramon Zamora’s take-off on Bruce Lee’s break-out hit ‘The Big Boss’ ... [o]r on ‘Dirty Hari’ [*Dirty King*, “hari” being the Filipino word for “king”], a Roberto Gonzales [a Filipino martial arts actor] quickie which added *karate* to the Magnum-toting-tough-cop routine.<sup>6</sup>

Even as Caruncho laments the seeming demise of the low-budget Pinoy exploitation movies,<sup>7</sup> the writer may find solace in the fact that Filipino films with higher production costs such as the abovementioned *Iskul Bukol* hit or 33rd (2007) Metro Manila Film Festival Best Picture awardee *Resiklo* — a Ramon “Bong” Revilla, Jr. starrer, about what appeared to be

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James Bond, available at <http://www.imdb.com/character/ch0000007> (last accessed Jan. 8, 2010). On the other hand, *Batman* (“The Batman”) is originally a comic book superhero created by artist Bob Kane and writer Bill Finger appearing in publications by DC Comics. The character, from its first appearance in *Detective Comics* (Issue No. 27) in May 1939, has since appeared in many film and television features. See *Detective Comics #27 — Batman Begins*, available at <http://graphicworlds.wordpress.com/2008/07/04/detective-comics-27-batman-begins> (last accessed Jan. 8, 2010).

5. These films are given prominent treatment by Australian film enthusiast Andrew Leavold in his weblog. See *The Search for Weng Weng*, available at <http://andrewleavold.blogspot.com> (last accessed Jan. 8, 2010). *For Y’ur Height Only* is clearly a spoof of the 1981 James Bond movie (with Roger Moore playing Agent 007), *For Your Eyes Only*. Cf. *BondMovies.com: The Movies: For Your Eyes Only (1981)*, available at <http://www.bondmovies.com/fyeo> (last accessed Jan. 8, 2010). See Eric S. Caruncho, *Pinoy Cult Films: The Cinema that Wouldn’t Die*, available at [http://showbizandstyle.inquirer.net/sim/sim/view/20090704213838/Pinoy\\_Cult\\_Films:\\_The\\_Cinema\\_that\\_Won%92t\\_Die](http://showbizandstyle.inquirer.net/sim/sim/view/20090704213838/Pinoy_Cult_Films:_The_Cinema_that_Won%92t_Die) (last accessed Jan. 8, 2010).
6. Caruncho, *supra* note 5 (emphasis supplied).
7. *Id.*

Transformers-inspired<sup>8</sup> robots made of recycled materials battling evil forces<sup>9</sup> — have nonetheless continued the tradition of producing “inspired” material.

Philippine television has also been accused of resorting to copycat formulas. In 2005, television outfit GMA Network came out with the soap series *Encantadia*, which is billed as a *telefantasya*, (i.e., a tele-fantasy). Notwithstanding its strong effort to drum up interest in Filipino folklore and eye for detail with respect to costume, *Encantadia* has nevertheless been tagged, perhaps rather unfairly, as a “Lord of the Rings” (referring to the Tolkien film adaptation and franchise) rip-off.<sup>10</sup> Of course, at the time of this writing, one can just watch any of the popular local entertainment news (and if you will, “gossip”) programs and discover a good deal of “borrowed” formula from similar shows in the United States (U.S.). Then, going to a little history, memories will be significantly relived at the mention of pre-Martial Law ABS-CBN’s *Codename Apollo*, which featured a Batman and Robin-like tandem going by the names Apollo and *Kidlat*.<sup>11</sup> Or, perhaps the Cleopatra Jones-inspired action comedy *Cleofatra*, which starred Maya Valdez (who later changed her first screen name to “Mitch”) and Jimmy Morato, and was evening fare over RPN Channel 9.<sup>12</sup>

As expected, the matter of churning out recycled material is not unique to the Philippine entertainment industry. In Bollywood, the Hindi-language film industry based in Mumbai, India and one of the largest film producers in

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8. *Transformers* is a 2007 Dreamworks SKG film feature about the battle between two extra-terrestrial robot clans (though possessing human sentiments and qualities): the noble Autobots and the evil Decepticons. See *Transformers* (2007), available at <http://www.imdb.com/title/tt0418279> (last accessed Jan. 8, 2010); see also Synopsis for *Transformers* (2007), available at <http://www.imdb.com/title/tt0418279/synopsis> (last accessed Jan. 8, 2010).
  9. See Metro Manila Film Festival Awards 2008, available at <http://www.altfg.com/blog/film-festivals/metro-manila-film-festival-awards-2007> (last accessed Jan. 8, 2010); see also *Resiklo Movie*, available at <http://www.resiklo.com> (last accessed Jan. 8, 2010).
  10. See IMDb user comments for *Encantadia* (2005), available at <http://www.imdb.com/title/tt0441919/usercomments> (last accessed Jan. 8, 2010).
  11. These characters were played by character actor Charlie Davao and actor-turned floor director Ariston “Aris” Bautista.
  12. See *Cleopatra Jones* (1973), available at <http://www.imdb.com/title/tt0069890/> (last accessed Jan. 8, 2010). The replacement of the letter “p” with the letter “f” in what should be the name *Cleopatra* was meant to insert the word “fat,” an obvious reference to comedienne Valdez being on the heavier side during those days.

the world,<sup>13</sup> the observation was made that “[e]asily 60% of the movies — almost one film that releases every week — is either blatantly copied or inspired by some fairly big American film. In addition to that ... a good 10[%] to 15% are borrowed from non-American foreign films.”<sup>14</sup> An example was given of the Bollywood film *Welcome*, which is a “slapstick story of an average Joe who finds himself engaged to the sister of a mob boss.”<sup>15</sup> Journalist Rico Gagliano noted that while the characters in the film “inexplicably break into song” every 20 minutes in true Bollywood fashion, the storyline simply echoed that of the 1999 American film, *Mickey Blue Eyes*.<sup>16</sup> Going to a more recent U.S. film, the Will Smith-starrer *Hitch*, Gagliano further reports that the same has a virtual copy in the Indian film *Partners*.<sup>17</sup> But before rushing to any conclusion that the American film industry is all-victim regarding this phenomenon, it is revealing that there are also seeming culprits within its ranks as well.

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13. Originating in the 1970s, the term “Bollywood” is a portmanteau of Bombay (the former name for Mumbai) and Hollywood, California (the center of the American Film Industry). Unlike Hollywood though, Bollywood is not a physical place. Cf. Richard Corliss, Hooray for Bollywood!, *available at* <http://www.time.com/time/magazine/article/0,9171,985129,00.html?internalid=atm100> (last accessed Jan. 8, 2010); Chidanand Rajghatta, Bollywood in Hollywood, *available at* [http://timesofindia.indiatimes.com/Columnists/C\\_Rajghatta\\_Bollywood\\_in\\_Hollywood/articleshow/3201937.cms](http://timesofindia.indiatimes.com/Columnists/C_Rajghatta_Bollywood_in_Hollywood/articleshow/3201937.cms) (last accessed Jan. 8, 2010).
  14. Transcribed from Rico Gagliano’s interview of Indian entertainment editor for CNN/IBN Rajeev Masand. See Bollywood’s copycat film industry, *available at* [http://marketplace.publicradio.org/display/web/2008/03/17/bollywood\\_copycats](http://marketplace.publicradio.org/display/web/2008/03/17/bollywood_copycats) (last accessed Jan. 8, 2010) [hereinafter Bollywood Copycat].
  15. *Id.*
  16. *Id.* This Castle Rock Entertainment-produced film starred Hugh Grant, James Caan, and Jeanne Tripplehorn. In the film, “an English auctioneer proposes to the daughter of a mafia kingpin, only to realize that certain ‘favors’ would be asked of him.” See *Mickey Blue Eyes* (1999), *available at* <http://www.imdb.com/title/tt0130121> (last accessed Jan. 8, 2010).
  17. Bollywood Copycat, *supra* note 14. The 2005 romantic comedy *Hitch*, co-starring Kevin James and Eva Mendes, was about a professional “date doctor” who, while helping his latest client woo the fine lady of his dreams, finds that his approach does not quite work on the gossip columnist with whom he has fallen for. Cf. *Hitch* (2005), *available at* <http://www.imdb.com/title/tt0386588> (last accessed Jan. 8, 2010). See also Sonali Krishna, Partner may face \$30 mn *Hitch*, *available at* <http://economictimes.indiatimes.com/articleshow/msid2264000,prtpage-1.cms> (last accessed Jan. 8, 2010).

## II. THE “MOCKBUSTER” PHENOMENON

In 2006, just as the movies *The Da Vinci Code*<sup>18</sup> and *Snakes on a Plane*<sup>19</sup> were being shown in American theatres, a relatively small production outfit called The Asylum hit video stores with the titles *The Da Vinci Treasure* and *Snakes on a Train*.<sup>20</sup> Then, in 2007, another direct-to-video film called *Transmorphers* — about giant robots fighting humans — was released by the same studio a week before the U.S. theatrical release of Michael Bay’s *Transformers*.<sup>21</sup> Worth quoting is the following account of New York Times contributor Rolf Potts on the emergence into the scene of *Transmorphers* —

[A]round the time Hollywood’s 2007 blockbusters were set to make their debut on the big screen, movie junkies could find a film that might, at first glance, have been confused with the box office hit “Transformers.” Set in a dystopian future that looks suspiciously like an abandoned parking lot, “Transmorphers” tells the story of a war between humans and an evil race of extraterrestrial machines. Unlike its namesake, “Transformers” has no recognizable actors, no merchandising tie-ins and a garbled sound mix. Also unlike “Transformers,” it has cheap special effects and a subplot involving lesbians. In short, though “Transmorphers” features the occasional shape-shifting robot, it bears little resemblance to Michael Bay’s big-screen phenomenon.

Yet “Transmorphers” had its own kind of success, earning back its meager production costs in less than three months. Created by a company called [T]he Asylum, “Transmorphers” was only the latest in a string of cheaply made straight-to-DVD “mockbusters.”<sup>22</sup>

Founded in 1997 by David Michael Latt and David Rimawi, The Asylum produces low-budget, usually direct-to-video, motion pictures. As

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18. Produced by Columbia Pictures, this 2006 motion picture directed by Ron Howard and starring by Tom Hanks is a screen adaptation of the popular, albeit somewhat infamous (for its insensitivity to the Catholic faith and the very person of Jesus Christ), Dan Brown novel. See *The Da Vinci Code* — Official Site, available at <http://www.sonypictures.com/homevideo/thedavincicode> (last accessed Jan. 8, 2010).

19. In this Columbia Pictures’ action thriller, an FBI agent (played by Samuel Jackson) takes on a plane full of deadly and poisonous snakes, deliberately released to kill a witness being flown from Honolulu to Los Angeles to testify against a mob boss. See *Snakes on a Plane* (2006), available at <http://www.imdb.com/title/tt0417148> (last accessed Jan. 8, 2010).

20. Rolf Potts, *The New B Movie*, available at <http://www.nytimes.com/2007/10/07/magazine/07wwln-essay-t.html> (last accessed Jan. 8, 2010).

21. Cf. Direct-to-video “Mockbusters” released by “The Asylum,” available at <http://www.ilxor.com/ILX/ThreadSelectedControllerServlet?boardid=40&threadid=66481> (last accessed Jan. 8, 2010).

22. Potts, *supra* note 20.

described above, the said Hollywood-based studio and distributor comes up with titles which appear to capitalize on productions by major studios.<sup>23</sup> True to form, during the present year, when the second installment of the Transformers franchise, *Transformers: Revenge of the Fallen*<sup>24</sup> was coming out, The Asylum's official website<sup>25</sup> heralded the outfit's latest video feature film *Transmorphers: Fall of Man*. Significantly, unlike the second Transformers, *Transmorphers: Fall of Man* is a "present day *prequel* [under which] robot invaders attack the Earth, forcing a small band of humans to seek refuge below the surface of the planet."<sup>26</sup>

After starting out with cheap horror video flicks, The Asylum hit the jackpot, so to speak, in 2005 when it produced a low-budget adaptation of an H.G. Wells classic, unimaginatively titled *H.G. Wells' War of the Worlds* and directed by Latt himself. This hit the video stores around the same time Academy Award-winning director and producer Steven Spielberg's *War of the Worlds* opened in cinemas.<sup>27</sup> Of note, however, was that home entertainment giant Blockbuster, Inc. ordered 100,000 copies of The Asylum's adaptation, a significantly larger order than any of the outfit's previous releases.<sup>28</sup> The Asylum thus set forth to produce movies inspired by those made by the larger studios. Aside from those mentioned above (and among other similar) releases, the Latt-Rimawi tandem produced *King of the Lost World* vis-à-vis *King Kong* (2005), *AVH: Alien vs. Hunter* as against *Aliens vs. Predator: Requiem* (2007), *Sunday School Musical* versus *High School Musical 3: Senior Year* (2008), *The Day the Earth Stopped* compared to *The Day the Earth Stood Still* (2008), and *The Terminators* alongside *Terminator Salvation* (2009).<sup>29</sup>

While it has been noted that 20th Century Fox Film Corporation was poised to take legal action against The Asylum for what the former saw as a rip-off of its Keanu Reeves starrer,<sup>30</sup> Latt earlier explained to Potts that "his

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23. *Id.*

24. See *Transformers: Revenge of the Fallen*, available at <http://www.transformersmovie.com/> (last accessed Jan. 8, 2010).

25. See *The Asylum*, available at <http://www.theasylum.cc> (last accessed Jan. 8, 2010).

26. *Transmorphers: Fall of Man*, available at <http://www.theasylum.cc/product.php?id=156> (last accessed Jan. 8, 2010).

27. See Potts, *supra* note 20.

28. *Id.*

29. *Id.* See *The Asylum*, *supra* note 25.

30. See Film Esq., *The Asylum and The Art of the Movie Knock-Off*, available at <http://www.filmesq.com/2008/12/asylum-and-art-of-movie-knock-off.html> (last accessed Jan. 8, 2010); *The Day the Earth Stood Still* (2008), available at <http://www.imdb.com/title/tt0970416/> (last accessed Jan. 8, 2010).

movies are themselves original stories, even as they tap into the publicity created by their blockbuster namesakes.”<sup>31</sup> In what reads as an apology for the so-called “mockbuster” phenomenon, Latt clarified that “I’m not trying to dupe anybody .... I’m just trying to get my films watched. Other people do tie-ins all the time; they’re just better at being subtle about it.”<sup>32</sup> Interestingly, this type of film model and strategy “aims at a broader and shallower demographic: some viewers have seen the real blockbuster and want more of the same thing, no matter how *lo-fi*; some are genre geeks, interested in low-budget adventure and sci-fi films.”<sup>33</sup>

Mockbusters have thus been defined as low-budget motion pictures that bear a resemblance, however large or small, to bigger studio productions in terms of title, plot, and/or marketing materials.<sup>34</sup> With respect to marketing collaterals in particular, one cannot help, for instance, but notice the similarity in poster design for both *The Day the Earth Stopped* and *The Day the Earth Stood Still*, as well as the unmistakable motif duplication of *Sunday School Musical* versus the Walt Disney Pictures hit *High School Musical 3: Senior Year*<sup>35</sup> — from the sight of jumping toga-clad teenagers to the prominent use of the words “High School.”

Naturally, a perceived rip-off will be received negatively by any more prominent and high-budgeted film production. This, most especially when the mockbuster is able to make money. And yet, there are those who defend *The Asylum*’s tie-ins, saying that the matter is no phenomenon at all. It is nothing new. After all, “[r]emakes, knockoffs and recycled concepts are an integral part of the film industry.”<sup>36</sup> Incidentally, in video circulation on or about the time of this writing is the GoodTimes Home Video release *What’s UP: Balloon to the Rescue*,<sup>37</sup> which clearly rides on the Disney-Pixar 2009 summer release *UP*.<sup>38</sup> Faithful though to the mockbuster scheme, the former

31. Potts, *supra* note 20.

32. *Id.* Latt prefers the term “tie-in” vis-à-vis the somewhat pejorative “mockbusters.”

33. *Id.* (emphasis supplied).

34. Film Esq., *supra* note 30.

35. *Id.* See also *High School Musical 3: Senior Year* (2008), available at <http://www.imdb.com/title/tt0962726> (last accessed Jan. 8, 2010); *High School Musical 3 — Official Site*, available at <http://adisney.go.com/disney/videos/television/highschoolmusical/> (last accessed Jan. 8, 2010).

36. Film Esq., *supra* note 30.

37. See *What’s Up: Balloon to the Rescue!*, available at <http://www.cartoonbrew.com/feature-film/whats-up-balloon-to-the-rescue.html> (last accessed Jan. 8, 2010) [hereinafter *What’s Up*].

38. See *UP: Official Site*, available at <http://disney.go.com/disneyvideos/animatedfilms/up> (last accessed Jan. 8, 2010).



has “two old men” in a fly-to-the air balloon adventure instead of the latter’s solitary cranky senior citizen.<sup>39</sup>

### III. “COMMON STOCK” THEMES AND MATERIALS

It has been quoted often that “in Hollywood, as in the life of men generally, there is rarely anything new under the sun.”<sup>40</sup> Indeed, the *Transformers* franchise cannot lay claim to a monopoly on mechanical robots and humanoids, with the existence too of the *Terminator* series, the *Robocop* adventures, Japanese exports *Power Rangers* and *Astroboy*, and even the wise-cracking unnamed Robot, the metal foil to the nervous wreck Dr. Jonathan Smith in television’s *Lost in Space*.<sup>41</sup> Referring to American television in particular, California-based intellectual property and media litigator Andrew J. Thomas observed in 2005 “[o]nce inundated with [W]esterns, detective shows and police dramas, [television viewers] are now deluged with reality TV programming in the form of game shows, dating shows, judge shows, hidden camera shows, and makeover shows. Producers combine and recombine familiar formulas within the popular genres of the day.”<sup>42</sup>

Recycling media and entertainment formulae is just as prevalent in the Philippines.<sup>43</sup> Crime-busting reality TV has been common fare in Philippine television in recent years — ABS-CBN’s *XXX (Exklusibong Explosibong*

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39. See What’s Up, *supra* note 37. Please take note of the relevant blog posts therein.

40. *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312 (6th Cir. 2004) (citing *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir. 1985)). See also Andrew J. Thomas, MCLE Article: Access Hollywood, available at <http://www.lacba.org/showpage.cfm?pageid=5315> (last accessed Jan. 8, 2010).

41. *Lost in Space* was a Swiss Family Robinson-inspired science fiction TV series created and produced by Irwin Allen, produced by 20th Century Fox Television, and broadcast on CBS. The show ran for three seasons, with 83 episodes airing from 1965 to early 1968. The show starred, among others, a robot designed by Robert Kinoshita, whose other cybernetic claim to fame is as the designer of “Robby the Robot” (a similar-looking metal character which appeared in an earlier MGM film (1956), *Forbidden Planet*). See *Lost in Space* (1965), available at <http://www.imdb.com/title/tt0058824/> (last accessed Jan. 8, 2010). In 1998, a film based on the series *Lost in Space* was released by New Line Cinema. See *Lost in Space* (1998), available at <http://www.imdb.com/title/tt0120738> (last accessed Jan. 8, 2010).

42. Thomas, *supra* note 40.

43. Arguably, in any other part of the world where there are films, television, and video, not to mention radio. Of course, that this occurs in Bollywood, as narrated above, would be an understatement.

Exposé),<sup>44</sup> GMA Network's *Imbestigador*,<sup>45</sup> and Intercontinental Broadcasting Network (IBC) blocktimer *Bitag*<sup>46</sup> are all part of Saturday TV fare as of this writing. In more recent times, the *Pera o Bayong* (cash or [the contents of] a rattan bag) game in a noontime variety *cum* game show in a major television network was tagged as a virtual resurrection of the old *Kuwarta o Kahon* (cash or [the contents of] a box) game in a similar program of the same name popular during the Marcos years. This game format — under which a contestant is required to choose either cash or the contents of a rattan bag (which may be a grand prize or an item of small value) — appeared in the now defunct *Magandang Tanghali Bayan* (MTB) of ABS-CBN. Later it found its way to the present running noon-time variety show *Wowouee*, also in

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44. See XXX, available at <http://www.abs-cbn.com/Weekends/article/59/xxx.aspx> (last accessed Jan. 8, 2010). The ABS-CBN entertainment website describes XXX (*Exklusibong Explosbong Exposé*) as —

A public affairs program that dares to expose illegal activities from the halls of the government down to the streets of the metro. XXX coordinates with local law enforcement agencies to help bring into the light misdeeds that tend to exploit innocent and helpless individuals. Through its team of accomplices armed with hidden cameras, XXX documents the details of certain schemes and modus operandi and use it as evidence to hold any perpetrators responsible for their crimes.

*Id.*

45. See *Imbestigador*, available at <http://www.gmanews.tv/show/imbestigador/show> (last accessed Jan. 8, 2010). The GMA News.TV website, for its part, proclaims *Imbestigador* (Filipino for “Investigator”) as an investigative program “providing a blend of hard-hitting exposes, insightful feature segments and straightforward interviews from the highest-ranking government officials to ordinary citizens crying for justice and equality.” The program further claims that it “deeply probes into the different kinds of gimmickry, hoax, fraudulent activities and deceptions being employed by crooked individuals.” *Imbestigador*, moreover, boasts that “[t]hrough strategic surveillance work, in-your-face confrontations, entrapment operations, follow-up stories and factual exposes [and] with the help of competent authorities, [it] get[s] people arrested, business establishments closed, licenses nullified, and officials sacked from their office.”

*Id.*

46. *Bitag* (“Trap” in English) is an investigative program hosted by Ben Tulfo, one of the Tulfo brothers who are broadcast journalists known for their no-nonsense, in your face, and sometimes overboard approach to crime and corruption. Originally aired over television network Associated Broadcasting Company (ABC) in 2002, the show moved to its present TV network Intercontinental Broadcasting Corporation (IBC) the following year. See Ricardo F. Lo, Ben Tulfo’s “Bitag-Style” of Crime Fighting, available at <http://www.newsflash.org/2004/02/sb/sb005227.htm> (last accessed Jan. 8, 2010)

ABS-CBN, rechristened as the “Ultimate *Pera o Bayong*.”<sup>47</sup> In the same vein, the rival network’s own noontime program *Eat Bulaga!* had its own version called *Laban o Bawi*.<sup>48</sup> With a few minor changes, this game format — choosing between cash and the hidden contents of a container, marked by nerve-wracking haggling between the show host/s and the contestant — was practically the one used in the old game programs hosted by the late veteran TV game show host and comedian Jose “Pepe” Pimentel.

Quite significantly, Pimentel himself admitted in an interview that the said format was actually copied from *Bidding the Box*, an American TV show in the 1950s. The first Philippine inspiration was actually a prime-time radio show entitled *Mahiwagang Kahon* (Magic Box) hosted by Jaime dela Rosa and produced by Alto Broadcasting System (ABS). When Chronicle Broadcasting Network (CBN) bought ABS in 1957, Pimentel was hired to handle the show as host and producer. Basically a quiz show, the show was cancelled after around two years. In 1962, Pimentel then revived and produced the game show itself on radio as *Kwarta o Kahon* for Kanlaon Broadcasting System (KBS).<sup>49</sup> Later, the show resurfaced on television (Channel 9) via the KBS expansion network, Radio Philippines Network (RPN).

Going back to Philippine movies, the secret agent genre, as earlier mentioned, has consistently been a favorite choice — with the distinction between spoofs and supposedly “original” characters blurred by the Filipino penchant for good-natured imitation. The 1965 Dolphy films *Dr. Yes* and *Dolphinger* are obvious spins on the popular Sean Connery as Agent 007-starrers of the day, *Dr. No* and *Goldfinger*, respectively.<sup>50</sup> The ace comedian was also at the forefront of the martial arts fever of the 1970s when he starred in the Kung-Fu-inspired, albeit undoubtedly hilarious, *Fung Ku*.<sup>51</sup> DC

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47. See Wowowee, available at <http://www.telebisyo.com/wowowee/php> (last accessed Jan. 8, 2010).

48. The show is actually a blocktimer produced by Television and Production Exponents, Inc. (TAPE, Inc.). See Balita-dot-ph, “Eat Bulaga” and the gang stays with GMA-7, available at <http://balita.ph/2009/11/26/eat-bulaga-and-the-gang-stays-with-gma-7/> (last accessed Jan. 8, 2010).

49. Gypsy Baldovino, Blast from the Past: Pepe Pimentel, the King of Nice, available at <http://www.highbeam.com/doc/1G1-159438921.html> (last accessed Jan. 8, 2010).

50. See Dolphy Filmography: 1965 *Dr. Yes*, available at <http://dolphyfilmography.blogspot.com/2008/03/1965-dr-yes.html> (last accessed Jan. 8, 2010); Dolphy Filmography: 1965 *Dolphinger*, available at <http://dolphyfilmography.blogspot.com/2008/03/1965-dolphinger.html> (last accessed Jan. 8, 2010).

51. See Dolphy Filmography: *Fung Ku*, available at <http://dolphyfilmography.blogspot.com/2008/03/1973-fung-ku.html> (last accessed Jan. 8, 2010). Its title being a humorous play of words in the title of the David Carradine classic TV

Comics and Marvel characters — a good deal of whom have crossed over to cinema — also have their Filipino counterparts: *Darna*, the Mars Ravelo comic creation who found her way to the silver screen may be seen as an amalgam of Wonder Woman and Superman; *Lastikman*, who has similar powers to Richard Reed of the Fantastic Four, has been portrayed in film through time;<sup>52</sup> and *Captain Barbell*, a weakling-turned-superhero with a name obviously inspired by American hero renderings, and played in the movies by various Filipino actors since the 1960s.<sup>53</sup> And then, in the more recent 2009 Metro Manila Film Festival, filmgoers again saw a Clark Kent-like, ordinary-looking Manny Pacquiao (this time, as one observer put it, wearing Ninoy Aquino-like glasses) turn it into a tumbling artist of a superhero answering to the name of *Wapakman*. Nonetheless, it must be said that these comic book characters-turned-film heroes possess enough originality as to separate them from other superheroes like them, regardless of country, planet, galaxy, or even accent.

Characters such as “secret agents,” “super heroes,” and “explorers-adventurers” and themes or ideas like “inter-galactic travel and star wars”<sup>54</sup> are jurisprudentially considered as “common stock.” These products of the human mind are “recurring situations, themes, and characters which have proved successful in the past” and have constituted the stock from which producers draw their basic ideas for film and television features.<sup>55</sup> Anchored on the legal principle that “a copyright does not protect ideas, but only the expression of ideas”<sup>56</sup> — subject to the norm of *originality* and without prejudice to certain exceptions provided by law,<sup>57</sup> common stock are by

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series in the United States, *Fung Ku* featured a bald, Shaolin monk-like Dolphy. In this connection, the writer believes that the David Carradine-led “Kung-Fu” TV series itself was a response to the growing popularity of Asian martial arts and flicks, notably King’s Bruce Lee.

52. In 2007, a well-acclaimed television version, starring comedian and singer-dancer Vhong Navarro, was aired by ABS-CBN.
53. Significantly, *Captain Barbell* is featured in the British International Hero website. Cf. *Captain Barbell*, available at <http://internationalhero.co.uk/k/kapbarbl.htm> (last accessed Jan. 8, 2010). The same is true for the two other Mars Ravelo creations mentioned earlier, *Darna* and *Lastikman*.
54. See VINCENT NELSON, *THE LAW OF ENTERTAINMENT AND BROADCASTING* (1995 ed.).
55. *Id.*
56. *Murray Hill*, 361 F.3d at 318 (citing *Kohus v. Mariol*, 328 F.3d 848, 855 (6th Cir. 2003)).
57. VICENTE B. AMADOR, *COPYRIGHT UNDER THE INTELLECTUAL PROPERTY CODE 27* (1998 ed.). To merit protection from the moment of creation, the work/s of an author “must be original.” “This means that the [work/s] must originate from him [or her]; they must have their origin in the labor of the author.” Hence, “it is not mere ideas, as such, which are protected by

themselves not entitled to copyright protection. In this connection, it has been held that “[n]o one infringes, unless he descends so far into what is concrete [in a work] as to invade ... [its] expression.”<sup>58</sup> The norm is that “an author must use creativity to transform facts and ideas into an expression that displays the stamp of the author’s originality.”<sup>59</sup>

This is plain in Republic Act No. 8293, otherwise known as the Intellectual Property Code of the Philippines (IP Code).<sup>60</sup> Section 175 provides that notwithstanding the copyright protection afforded (from the moment of their creation) literary and artistic works under Section 172 and derivative works under Section 173, “no protection shall extend ... to any idea, procedure, system, method or operation, concept, principle, discovery or mere data as such, even if they are expressed, explained, illustrated or embodied in a work.”<sup>61</sup> The principle is that “ideas [for creating particular works] are relatively few and not worth the social costs of monopoly protection and that, in any event, copyright incentives are not needed for their protection.”<sup>62</sup>

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copyright, but it is the form of expression which is protected.” But then again, statute law can very well provide that even certain expressions can still be excluded from copyright protection.

*Id.*

58. *Murray Hill*, 361 F.3d at 319 (citing *National Comics Publications v. Fawcett Publications*, 191 F.2d 594, 600 (2d Cir. 1951)).

59. David J. Meiselman, et al., *Successfully Defending Copyright Infringement Suits*, available at <http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=November&artYear=2009&EntryNo=9369/> (last accessed Jan. 8, 2010) (citing *Hudson v. Universal Studios, Inc.*, No. 04 Civ. 6997 (GEL), (S.D.N.Y. Oct. 23, 2008)).

60. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act No. 8293 (1997).

61. *Id.* § 175. R.A. 8293 also spells out that similarly excluded from such protection are “news of the day and other miscellaneous facts having the character of mere press information; or any official text of a legislative, administrative or legal nature, as well as any official translation thereof.”

*Id.*

Verily, the basic expression, explanation, or illustration of an idea or principle cannot be considered “original” to the author as to warrant protection from the moment of creation. In another vein, under Article IX of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (adhered to by the Philippines, through the Senate, on Dec. 4, 1994), copyright protection extends to expressions, but not to ideas, procedures, methods of operation, or mathematical concepts. See AMADOR, *supra* note 57 at 246.

62. PAUL GOLDSTEIN, *COPYRIGHT* 76-77 (1998 ed.).

The rationale behind regarding common stock material as unprotected matter, notwithstanding similarities between the work making the challenge and the work challenged, is explained thus:

The film writer who depicts upon the screen love-making in a car or a taxi-cab, or the chase of an evil doer in a phenomenally speedy vehicle, or the ways of the film counterpart of Delilah (the modern ‘vamp’) with a man, has no claim to such copyright in those scenes presented with different dialogue and a different setting. To hold the contrary, would be to give the producer or a novelist not only a monopoly in an idea without merit of novelty.<sup>63</sup>

#### IV. DOCTRINAL DEFENSES: MERGER and SCÈNE À FAIRE

Further to what may be called the “democratization” of ideas, to the end that no one waving a copyright, so to speak, will be able to secure a monopoly thereon, there emerged two doctrines of defense: the merger doctrine and the scène à faire doctrine.<sup>64</sup>

Under the merger doctrine, “if an idea is capable of being expressed in only one way, the expression merges with the idea itself” and is thus immune from infringement action.<sup>65</sup> This doctrine proceeds from the leading U.S. Supreme Court decision in *Baker v. Selden*<sup>66</sup> where the copyright of an author of a book on a new system of bookkeeping was found to extend only to his description of the system, and not to the very system itself. The bookkeeping forms in the book, made up of “ruled lines and blank columns with proper headings,” were considered not entitled to protection. The Court ruled that “[to] give the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made common would be a surprise and a fraud upon the public.”<sup>67</sup> The inseparability of idea and expression<sup>68</sup> make the so-called “building blocks of creative expression” — the theme, plot, stock character, and settings in a work — unworthy of protection. The basis for this denial of protection, it is said, finds its foundation in the very purpose of copyright law — “to stimulate the production of the most abundant possible array of literary, musical, and artistic expression. To give

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63. *Kelly v. Cinema House Ltd.*, (1933) MacG. Cop. Cas. (1928-35), 391.

64. See Thomas, *supra* note 40.

65. *Id.* (citing *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954)).

66. *Baker v. Selden*, 101 U.S. 99 (1879).

67. *Id.* at 102. See AMADOR, *supra* note 57, at 246-47; see also Lewis R. Clayton, *The Merger Doctrine* available at [http://www.paulweiss.com/files/tbl\\_s29Publications/FileUpload5679/5645/MergerDoct.pdf](http://www.paulweiss.com/files/tbl_s29Publications/FileUpload5679/5645/MergerDoct.pdf) (last accessed Jan. 8, 2010).

68. Clayton, *supra* note 67. (The author borrows Clayton’s observation in his article).

creators a monopoly over such fundamental elements would effectively stunt the efforts of their creators to elaborate on these elements.”<sup>69</sup> Moreover, granting the creator of a work a monopoly [consistent with what has already been stated] over these “basic elements” will only frustrate or “stunt the efforts of other creators to elaborate [or improve] on these elements in the production of their own works.”<sup>70</sup>

The *scène à faire* doctrine is more expansive. Under this doctrine, expressions that are naturally associated with the treatment of a given idea, i.e., “common to a particular subject or medium,” are regarded or treated as ideas and thus, are not entitled to copyright protection.<sup>71</sup> These expressions or elements flow naturally “from the work’s theme, rather than the author’s creativity.”<sup>72</sup> *Scène à faire* — French for “scenes which must be done”<sup>73</sup> — are “those incidents, characters or settings which are as practical matter indispensable, or at least standard, in the treatment of a given topic.”<sup>74</sup> Thus, it has been held that “[e]lements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about ... policemen in the South Bronx”<sup>75</sup> and are, as such, “not protectible.”<sup>76</sup> Now, in a clash between Dinosaur World books and the Jurassic Park works, it was determined that while the two indeed “share a setting of a dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers, these settings are classic *scène à faire* that flow from the uncopyrightable concept of a dinosaur zoo.”<sup>77</sup>

If only to underscore how the *scène à faire* doctrine leaps, as it were, over the obstacles of substantial similarity, an October 2008 ruling in the Northern District of California on the challenge of the MKR Group, Inc.<sup>78</sup>

69. AMADOR, *supra* note 57, at 247.

70. *Id.*

71. Thomas, *supra* note 40 (citing *Satava v. Lowry*, 323 F.3d 805, 809 (9th Cir. 2003); *Berkic*, 761 F.2d at 1293).

72. *Murray Hill*, 361 F.3d at 319 (citing *Kohus v. Mariol*, 328 F.3d 848, 856 (6th Cir. 2003); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [F] [3] (1997 ed.)).

73. Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 738 (2004) (citing *Schwarz v. Universal Pictures Co.*, 85 F.Supp. 270, 275 (S.D. Cal. 1945)).

74. *Murray Hill*, 361 F.3d at 319 (citing *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1295 (D.C. Cir. 2002)).

75. *Id.* (citing *Walker v. Time Life Films*, 784 F.2d 44, 50 (2d Cir. 1986)).

76. *Id.*

77. *Id.* at 320 (citing *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996)).

78. The MKR Group is the owner of the various copyrights and trademarks pertaining to the horror film (George A. Romero’s) *Dawn of the Dead*. See Reuters, Producers, game firm in rights battle over zombies, *available at*

against Capcom Co., Ltd.,<sup>79</sup> over the alleged emergence of supposedly protected elements of the movie that have found their way into the game is worth visiting. MKR complained that some aspects of *Dead Rising* were “substantially similar” to certain aspects of the motion picture — including plot, theme, setting, characters, as well as total concept and feel. Going through both works, the Northern California court found that: (a) the matter of having a male journalist as one of the main characters, which is common to both works, is unprotected common stock; (b) the idea of having “zombies in a mall,” which was the basis for the setting in the two works, is *scène à faire*; and (c) despite the palpable common theme of “zombies in a mall,” there were actually two distinct underlying themes in this case.<sup>80</sup>

Manifestly then, the holy grail of copycat litigation is the finding of “substantial similarity.” One approach in this regard is the “audience” or “observer” test, which requires the court “to gauge the similarities of the [compared] works on the basis of [its] ‘net impression’ and without relying on any expert analysis or dissection.”<sup>81</sup> This is similar to the “intrinsic” test developed under American entertainment law jurisprudence. Actually, one of two tests in a “two-part” test (the other being the “extrinsic” test), the intrinsic test “focuses on whether the ‘ordinary, reasonable audience’ would recognize the defendant’s work as a ‘dramatization’ or ‘picturization’ of the plaintiff’s work.”<sup>82</sup> Upon the other hand, under the extrinsic test, an objective analysis of concrete expressive elements is made and focus is made on “‘articulable similarities’ between the plot, themes, dialogue, mood,

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<http://www.reuters.com/article/entertainmentNews/idUSN2526490820080226?feedType=RSS&feedName=entertainmentNews> (last accessed Jan. 8, 2010).

79. Capcom Co., Inc. is the developer of the zombie video game *Dead Rising*. See *Dead Rising*, available at <http://www.capcom.com/deadrising/> (last accessed Jan. 8, 2010).

80. Sarah L. Bruno, et al., *Stealing Zombies: Copyright Infringement Case Demonstrates Importance of Copyright Clearance for Video Games*, available at [http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content\\_id=1950](http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=1950) (last accessed Jan. 8, 2010) (citing *Capcom Co., Ltd., et al. v. The MKR Group*, No. C 08-0904 (N.D. Calif. Oct. 10, 2008)). The court found that the movie’s underlying theme was the message of anti-consumerism, and for the video game, the simple killing of zombies in the process of unlocking the cause of the zombie infestation.

81. *Murray Hill*, 361 F.3d at 317 (citing *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999); *Kohus*, 328 F.3d at 854).

82. Thomas, *supra* note 40 (citing *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977); *Berkic*, 761 F.3d at 1292).



setting, pace, characters, and sequence of events in the respective works.”<sup>83</sup> Unlike the intrinsic test, the extrinsic test can avail of expert testimony aside from an analytic dissection of the works.<sup>84</sup> In both tests though, it may be said that the corollary principle of *de minimis non curat lex*, that is “the law does not concern itself with trifles,”<sup>85</sup> comes into play. Under the said principle, no finding of copyright infringement will be made if the similarities are too trivial in character.<sup>86</sup>

A good illustration of the “two-part” test is the 2002 case of *Metcalf v. Bochco*.<sup>87</sup> In that case, the husband-and-wife writing team, Jerome and Laurie Metcalf, sued television producer Steven Bochco<sup>88</sup> claiming that Bochco’s urban hospital drama, *City of Angels*,<sup>89</sup> infringed on the urban hospital drama screenplays they previously submitted to Bochco (who gave them the

83. *Id.* (citing *Berkie*, 761 F.3d at 1292; *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994); *Narell v. Freeman*, 872 F.2d 907, 912 (9th Cir. 1989)).

84. *Murray Hill*, 361 F.3d at 317 (citing *Kohus*, 328 F.3d at 854).

85. BLACK’S LAW DICTIONARY 443 (Bryan A. Garner ed., 7th ed. 1999).

86. See Meiselman, et al., *supra* note 59.

Actually, in copyright infringement cases, there is no better basis for finding against the defendant than direct evidence of *copying* (*Wickham v. Knoxville Int’l Energy Exposition*, 739 F.2d 1094, 1097 (6th Cir. 1984)).

However, “where there is no direct evidence of copying, a plaintiff may establish ‘an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) substantial similarity between the two works at issue (*Murray Hill*, 361 F.3d at 316 (citing *Kohus*, 328 F.3d at 853-54; *Ellis*, 177 F.3d at 506)). Access, which has been defined as having at least reasonable opportunity to hear, view, or copy the allegedly-infringed work is primarily a matter of evidence though. Hence, its further discussion in this paper will not exactly be appropriate or productive. See *Murray Hill*, 361 F.3d at 316 (citing *Tree Publishing Co. Inc. v. Warner Bros. Records*, 785 F.Supp. 1272, 1274 (M.D. Tenn. 1991); *Sid*, 562 F.2d at 1163)).

87. *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002). This case was extensively discussed by Andrew J. Thomas. Cf. Thomas, *supra* note 40.

88. Steven Bochco is the man behind television hits such as *Hill Street Blues*, *L.A. Law*, *NYPD Blue*, and *Doogie Howser, M.D.* See Ursula Ganz-Blattler, Steven Bocho, available at <http://www.museum.tv/eotvsection.php?entrycode=bochcosteve> (last accessed Jan. 8, 2010).

89. Tagged as an American network television’s first predominantly Afro-American medical drama, this 2000 Bochco project starred Blaire Underwood (of L.A. Law fame), Vivica A. Fox, and Michael Warren (who was a co-defendant in the case, having been identified as a go-between of the Metcalfs and Bochco). It ran for only two seasons on CBS (Capitol Broadcasting Network). See *City of Angels* on TV.com, available at <http://www.tv.com/city-of-angels/show/243/summary.html> (last accessed Jan. 8, 2010).

impression that while he liked the concept, he had no time to develop any project based on the screenplays). Despite the striking similarities between the screenplays and the television drama — among them, having as a setting an overburdened county hospital in inner Los Angeles with mostly black staffs, having as main characters “young, good-looking, muscular black surgeons” who grew up in the community and are faced with the dilemma of choosing between financial success in practice and the emotional reward of serving in the community, and the themes of “poverty, race relations, and urban blight”<sup>90</sup> — Bochco and his fellow defendants reasoned that common elements such as “a love triangle between young professionals, or a young doctor choosing between financial and emotional rewards” were “stock literary devices not protected by copyright law.”<sup>91</sup>

The court in *Metcalf* found that when considered *individually*, the similarities charged by plaintiffs were not protectable for being too generic or admittedly, *scènes à faire*.<sup>92</sup> Nevertheless, without analyzing the dialogue, mood, setting, pace, and other so-called traditional extrinsic factors, the court nonetheless granted summary judgment, concluding that “plaintiffs satisfied the extrinsic test because the generic similarities were numerous and arose in ‘common patterns’ and ‘arrangements’ in the two works.”<sup>93</sup>

The treatment as copyright protectable of what would ordinarily be considered as common stock is actually echoed in British jurisprudence. In *Corelli v. Gray*,<sup>94</sup> it was held that the common stock ideas incorporated in the plaintiff’s novel were not entitled to protection since they were of such complexity that it was practically impossible that it should have been arrived at independently by a second individual. More to the point, *Dagnall v. British and Dominion Film Corporation Ltd.*<sup>95</sup> ruled that the test of whether common stock elements are entitled to protection is whether they are so combined as to produce some original dramatic situation or situations of a “substantial character.” Commenting on the above, British entertainment lawyer and author Vincent Nelson opined that “when common stock themes, ideas, or characters have been so combined as to arrive at a ‘degree of complexity,’ such that they produce an original story or a novel new (sic) twist to the common theme or idea, the said elements become entitled to copyright protection.”<sup>96</sup>

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90. *Metcalf*, 294 F.3d at 1073–74.

91. *Id.* at 1072–73.

92. *Id.* at 1074.

93. Thomas, *supra* note 40; *Cf. Metcalf*, 294 F.3d 1069 (emphasis supplied).

94. *Corelli v. Gray*, 29 T.L.R. 570 (1913), cited in NELSON, *supra* note 54, at 108.

95. *Id.* (citing *Dagnall v. British and Dominion Film Corporation Ltd.*, MacG. Cop. Cas. 391 (1928–35)).

96. NELSON, *supra* note 54, at 108.

While admittedly better than a toss-coin approach, divining notions such as “common patterns and arrangements” and “degree of complexity” for the purpose of sifting through what is alleged common stock material will time and again be problematic. What to do with phenomena such as the mockbuster extravaganza spearheaded by *The Asylum* will arguably be just a legal mystery, unless the legal thinker discovers a definitive fulcrum. This fulcrum, the writer submits, will have to be anchored on what is fair, or more poignantly, plain and simple justice.

#### V. IS THERE FAIRNESS IN SCÈNE À FAIRE?

Coming, as it were, from the inner recesses of the human mind and formed into being by a decision of the will, the “idea” is something that would naturally be desired, kept, and protected by its source. And yet, there are certain ideas which by their very nature (for example, the notion of romantic love, the passion for justice, and the longing for happiness) or through some measure of socio-historical development (for instance, amazement at the exciting lifestyle of a secret agent or super spy, high-flying interest in intergalactic travel and warfare, and the rather morbid fascination over the dead springing back to life) bear a sense of *universality*. The idea is simply open to all for exploration and exploitation. This notwithstanding, it still cannot be denied that the conventional filmmaker or television producer will feel violated if, after spending considerable time, manpower, and money to generate an idea into an audio-visual feature, he or she will discover that another person (with less resources and/or worse, with less sacrifice) will produce a similar presentation. And things would be far worse indeed if the latter would play around with the title, character, and/or theme of the former’s work (not to mention toy around with the former’s play date).

Palpably, the mainstream film or television producer<sup>97</sup> does not stand on equal footing with the creator of the mockbuster — assuming the existence of a clear case of common stock elements — in terms of any entitlement to copyright protection. In this case, David clearly puts one over Goliath. But then, legal history shows that *inequality* does not necessarily mean injustice.

Given that justice has been classically defined as “a habit whereby a [person] renders to each one his [or her] due by a constant and perpetual will,”<sup>98</sup> the matter of “due-ness” does not necessarily translate on all-out

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97. The writer qualifies that his use of the word “producer” or any equivalent term is for convenience’s sake, and is not meant to exclude any other owner of the work or any aspect thereof, such as the scriptwriter who may, by arrangement or contract, be also an owner of the work. The same is true, say, in the case of own who did the musical soundtrack of the work.

98. 2 THOMAS AQUINAS, SUMMA THEOLOGIAE Q.58, AA. 1 [hereinafter 2 AQUINAS, ST II-II]. Cf. THOMAS AQUINAS, ON LAW, MORALITY, AND

equality. Referring to distributive justice (i.e., the appropriate distribution of good,<sup>99</sup> belonging otherwise to the community, to each single person<sup>100</sup>) in particular, St. Thomas Aquinas clarified that in such a case, “the mean is observed, *not according to equality between thing and thing but according to proportion between things and persons*, in such a way that even as one person *surpasses another*, so also that which is given to one person surpasses that which is allotted to another.”<sup>101</sup> Verily, Aquinas’ notion of distributive justice recognizes that persons come from uneven planes. In true medieval fashion, the great philosopher proclaimed that,

In distributive justice a person receives all the more of the common goods according as he holds a more prominent position in the community<sup>102</sup> ... [which] prominence in an aristocratic community is gauged according to virtue, in an oligarchy according to wealth, and in various ways according to various forms of community.<sup>103</sup>

Now, in more recent times, John Rawls developed a theory of justice which acknowledges and even permits inequalities under certain conditions in order to achieve authentic justice perceived as “fairness.”<sup>104</sup> It has been noted that Rawls’ idea of justice requires the following principles:

1. the maximization of liberty, subject only to such constraints as are essential for the protection of liberty itself;
2. equality for all, both in the basic liberties of social life and also in the distribution of all other forms of social goods, subject to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality (‘the difference principle’); and

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POLITICS 105-106 (William P. Baumgarth & Richard J. Regan, S.J., eds., 2d ed. 2002) [hereinafter AQUINAS, ON LAW].

99. MICHAEL FREEMAN & DENNIS LLOYD, LLOYD’S INTRODUCTION TO JURISPRUDENCE 523 (7th ed. 2001).

100.2 AQUINAS, ST II-II, *supra* note 98, at Q.61, AA. 2. Cf. AQUINAS, ON LAW, *supra* note 98, at 127.

101. *Id.* (emphasis supplied).

102. *Id.*

103. *Id.*

104. Concerned, as it is, with the distribution of benefits to all the members of society, Rawls’ notion of justice essentially focuses on distributive justice. See FREEMAN & LLOYD, *supra* note 99.

3. fair equality of opportunity and the elimination of all inequalities of opportunity based on birth or wealth.<sup>105</sup>

Rawls' first principle abovementioned, known as the "equal maximum liberty principle," is premised on the thinking that there are certain rights and freedoms that every political system must respect and which cannot be sacrificed to increase the aggregate welfare level of society.<sup>106</sup> In this light, Rawls sees benefits and goods in terms of what he calls "primary goods"—liberty and opportunity, income and wealth, and the bases of self-respect. These "primary goods," under Rawls' worldview, "need not be considered desirable in themselves, but they give persons the opportunities rationally to further their own autonomy."<sup>107</sup> On the side, it must be said that for all of Rawls' positivist inclinations, his idea of "primary goods" tremendously echoes the concept of "basic goods" developed by modern-day natural law thinker John Finnis. In his 1980 work *Natural Law and Natural Rights*, Finnis wrote of what he called "basic goods" — for instance, life and health, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness, and religion.<sup>108</sup> Unlike Rawls, however, Finnis defined such goods as "things one values for their own sake."<sup>109</sup>

Going back to Rawls, although he later clarified that his idea of justice is basically a political conception,<sup>110</sup> it is undeniable that its basic postulates necessarily point to a basic understanding of distributive justice, and also of inequality. In a paper presented some years after the release of the first

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105. *Id.* at 523-24 (citing JOHN RAWLS, A THEORY OF JUSTICE (1999 ed.) [hereinafter RAWLS, JUSTICE]; JOHN RAWLS, POLITICAL LIBERALISM (1993 ed.) [hereinafter RAWLS, POLITICAL LIBERALISM]) (emphasis supplied).

106. *Id.* at 524. Examples of such rights are "freedom of speech and association, the right to vote and stand for public office, liberty of conscience and freedom of thought, freedom of the person and the right to hold personal property, [and] freedom from arbitrary arrest."

*Id.*

107. *Id.*

108. BRIAN BIX, NATURAL LAW THEORY: A COMPANION TO PHILOSOPHY AND LEGAL THEORY 228 (Dennis Patterson ed., 1999) (citing JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980 ed)).

109. *Id.* Rawls, quite expectedly, appears to have deliberately introduced a convenient divide between the moral and the metaphysical, on the one hand, and the politico-legal, on the other. See RAWLS, JUSTICE, *supra* note 105, at 398.

110. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223-51 (1985). This paper was also presented beginning November 1983 at New York University, Yale Law School, the University of Illinois, and the University of California at Davis.

edition of the seminal *A Theory of Justice*, Rawls had the opportunity to restate his two principles of justice, to wit:

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.<sup>111</sup>

Evidently, inequalities are thus recognized and even "tolerated" if these will result in the greatest benefit to the disadvantaged of society, and provided that the "non-negotiable" rights and freedoms identified by Rawls are not infringed. Bare inequality can thus co-exist with, and even be an essential component, of a legal system which is founded justice-wise on equal opportunity. After saying that "every lawyer ought to seek an understanding of economics," Justice Oliver Wendell Holmes in fact commented that "for everything we have to give up something else, and we are taught to set the advantage we gain against the advantage we lose, and to know what we are doing when we elect."<sup>112</sup> Hence, in approaching what appears to be a mix of unbalanced relations in the mockbuster phenomenon,<sup>113</sup> the "Kaldor-Hicks test" will naturally come to mind.

A form of analysis which is meant to justify government actions even if some persons or sectors are left worse off, the Kaldor-Hicks test requires that "no one be made worse off by a change in the allocation of resources, but only that the increase in value be sufficiently large that the losers be fully compensated."<sup>114</sup> Quite ironically, the Kaldor-Hicks test has been criticized, among other negative comments, as unrealistic in that it assumes that compensation is to be given without cost, and yet the fact remains that there will be transaction costs. If so, the question asked was "why [should] losers

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111. RAWLS, JUSTICE, *supra* note 105, at 53. The phrase "a fully adequate scheme of equal basic liberties" in the first principle of justice replaced the original "the most extensive scheme" in the earlier edition of *A Theory of Justice*. Cf. RAWLS, POLITICAL LIBERALISM, *supra* note 105, 5-6. This rephrasing was observed in the 1993 edition.

112. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897). This was reprinted in THE (JUSTICE) HOLMES READER 79 (Julius J. Marke ed., 1955).

113. That is, the free-going "rip-off" artist versus the helpless big budget producer who has to contend with the common stock doctrine, in one vein, and the equally unequal situation between the big-time, resource-laden moviemaker versus the struggling small player, who has to endure the stigma for being a copycat "crook," on the other.

114. FREEMAN & LLOYD, *supra* note 99, at 558 (citing Nicholas Kaldor, *Welfare Propositions in Economics*, 49 ECON. J. 549 (1939); J.R. Hicks, *The Foundations of Welfare Analysis*, 49 ECON. J. 696 (1939)).

be happy with an explanation that they could have been compensated but were not[?]"<sup>115</sup> Worse, it has been concluded that notwithstanding its objective of achieving the efficient allocation of resources [as in the case of every economic theory in this regard], the test is actually "capable of generating quite drastic, capricious and inequitable distribution of wealth."<sup>116</sup> With this, justice is not achieved.<sup>117</sup>

While it is not the intent of this Article to engage in an extensive discussion of economic legal theories, a brief statement on the relatively popular *Coase Theorem* is nonetheless in order. Formulated by Nobel Prize laureate Ronald Coase, the theorem basically posits that —

Where no obstacles to bargaining exist between the parties involved, resources will be allocated efficiently regardless of who is initially assigned the rights to the resources and regardless of what form of legal protection those rights are provided. [W]here parties can contract with each other without cost, all accident costs will be internalized.<sup>118</sup>

What is significant in this regard is the value of the relevant activity to each party. That is, of course, subjective and admittedly more acceptable when allocations are *indeed* done according to contract.<sup>119</sup> But what happens when there is conflict, as in the case of the big budget movie producer and the upstart film outfit who sees an uncontracted "tie-in" as his only chance for a big break? The law necessarily comes in with a notion of *entitlement*. In the seminal article "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," Guido Calabresi and Douglas Melamed remarked that "once the legal system has defined and assigned an entitlement — a legal right — it still must decide what form of protection to provide the entitlement."<sup>120</sup> When entitlement does not change hands by contract, the protection in this regard is by means of a liability rule under which a non-holder can take entitlement as long as he or she is willing to pay *ex post* a state-determined price.<sup>121</sup> But then, even before one succumbs to the temptation to go deeper on what appears to be a rather formulaic way of approaching a real world conflict, it is reasonably appropriate to stop here. The use of money by economic models, inherently artificial as they are, has

115. *Id.* at 558.

116. *Id.* at 523-24 (citing RAWLS, JUSTICE, *supra* note 105; RAWLS, POLITICAL LIBERALISM, *supra* note 105).

117. *Cf.* FREEMAN & LLOYD, *supra* note 99, at 559.

118. A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 319 (Dennis Patterson ed., 1996) [hereinafter COMPANION].

119. *Id.* at 320.

120. Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

121. *See* COMPANION, *supra* note 118, at 320.

been frowned upon as overly simplistic, forgetting that human beings do not limit the value of goods to plain monetary terms.<sup>122</sup> Parenthetically then, it is not surprising that included in the provision outlining the original jurisdiction of the Regional Trial Court (RTC) are actions incapable of pecuniary estimation.<sup>123</sup> Suffice it to say, incongruencies in legal protection are not necessarily unjust.

Now, the initial key to solving the justice puzzle may lie in what has been mentioned above: *entitlement*. Weinrib explains that —

A central aspect of the idea of justice is the application of a determinate rule to a case to which the rule applies. [P]rovided that the rule is as stated and without reservation and that it applies to a particular case, it is necessary and sufficient for justice to be done that the rule be applied, whatever its specific content.<sup>124</sup>

If a person's situation is such that he is to be given or say, allowed to do, something under a given rule, then entitlement arises. "[A] person has an entitlement if he has a right to whatever is in question," as distinguished from simply having "expected or hoped-for benefits."<sup>125</sup> Speaking in positivist fashion, Weinrib cautions against concluding unqualifiedly that a right is such that it has a corresponding duty. There can be no injustice, he posits, with respect to the non-fulfillment of so-called "moral" duties.<sup>126</sup> This, however, may logically lead to the conclusion, which Weinrib himself admits, that "entitlement is a not a matter of justice at all but strictly a matter of law."<sup>127</sup>

No wonder Weinrib is constrained to introduce another way of looking at justice: justice as desert,<sup>128</sup> i.e., that quality or fact of deserving reward or

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122. *Id.* at 329. The work quotes Calabresi & Bobbitt who noted that "[v]aluing human life in dollar terms is said to offend and compromise the fundamental social norm of valuing human life infinitely." See GUIDO CALABRESI & PHILLIP BOBBITT, *TRAGIC CHOICES* (1978). Leading law-and-economics exponent Richard Posner, in turn, commented (as regards the issue of selling babies for adoption) that "economists like to think about the unthinkable." See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1986).

123. An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and for Other Purposes [JUDICIARY REORGANIZATION ACT OF 1980], *Batas Pambansa Blg. 129*, § 19 (1980).

124. Lloyd L. Weinrib, *The Complete Idea of Justice*, 51 *U. CHI. L. REV.* 752, 754 (1984).

125. *Id.* at 757.

126. *Id.*

127. *Id.*

128. *Id.* at 764.



punishment.<sup>129</sup> This alternative is justified by the possibility that one may still resist the application of a rule, even while admitting its existence and the fact that all the conditions for its application are present, on the ground that the person affected by the rule “does not deserve whatever the consequences of its application, beneficial or harmful.”<sup>130</sup> This approach looks at the very person who is affected by the rule, and not the rule itself. Even as it implies a judgment on the part of the one who beholds such person as to what “ought to happen”<sup>131</sup> to him or her, the notion of desert easily expands to a more objective plane when consideration is had as to “who [or what the person] is” — as compared to merely what he or she has done.<sup>132</sup> In this regard, Weinrib concedes that this necessarily involves the making of a “moral” judgment. Even so, the said legal thinker quickly qualifies that there may be cases when justice is rendered based on desert, and yet there is no necessary referral to moral considerations — as when one applauds an acrobat for well-done somersaults or gives the best clarinetist the place in an orchestra without going through the moral qualities, personal virtues and all, of the two.<sup>133</sup>

Be that as it may, it is indisputable that justice, as earlier mentioned, recognizes a matter of *due*-ness to another. This *due*-ness necessarily compels and seeks the good of the other — whether this good be founded on the delivery of a thing, the conferment of a status or a desired state of things, the redress of a grievance, the making of restitution, or the imposition of punishment upon an offender. It is so compelling that it creates a right on the part of the other (and logically, a corresponding duty on the one who beholds the other — and here, the writer submits, the duty must perforce exist even at its most basic in the moral plain). Quoting Isidore, Aquinas instructs that “a man is said to be just because he respects the right (*jus*) of others.”<sup>134</sup>

It can therefore be said that if the mockbuster creator possesses that *jus* to common stock themes and characters, to the end that no person would have any monopoly of such ideas, then justice is done when he goes unobstructed in his exploitation of *scène à faire* material. The same is true for the viewing public which can lay a claim on the right to enjoy various genre of entertainment, echoing thus Finnis’s notion of aesthetic experience as a basic good and fundamental norm.

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129. Cf. The Merriam-Webster Dictionary: International Edition 195 (3d ed. 2002).

130. See Weinrib, *supra* note 124, at 764.

131. *Id.* at 765.

132. *Id.*

133. *Id.* at 767.

134. 2 AQUINAS, ST II-II, *supra* note 98, Q. 58, AA. 1; AQUINAS, ON LAW, *supra* note 98, at 106.

VI. ARRIVING AT A JUSTICE-BASED FOUNDATION FOR THE  
MOCKBUSTER PHENOMENON

A superspy clad in a bullet-proof tuxedo; a superspy driving a fast car, which turns into a rocket-propelled plane or a mini-submarine at the touch of a button; a superspy “talking” to his shoe, which turns out to be a two-way radio device — which is pure and unadulterated unprotected idea in these cases? Which is “original?” Which is protected expression? In a way, the discernment process here is like entering a humungous warehouse-type toy store as it opens in the morning — one simply does not know where to start.

It is essentially economics, as earlier said. Legal scholar and former Harvard Law School Dean Roscoe Pound noted the need to acknowledge scarcity and/or competition as a starting point in resolving conflicting or divergent claims,<sup>135</sup> to wit:

We all have a multiplicity of desires and demands which we seek to satisfy. There are many of us but there is only one earth. The desires of each continually conflict with or overlap those of his neighbors. So there is one might say, a great task of social engineering. There is a task of making the goods of existence, the means of satisfying the demands and desires of men living together in a politically organized society, if they cannot satisfy all the claims that men make upon them, at least go round as far as possible. This is what we mean when we say that the end of law is justice.

We mean such an adjustment of relations and ordering of conduct as will make the goods of existence the means of satisfying human claims to have things and do things, go round as far as possible with the least friction and waste.<sup>136</sup>

In gist, Pound taught that in resolving divergent claims — meaning what claims are secured and allowed, and what are not — the following ways may be followed: (1) resort to prior resolutions or precedent, i.e., previously used ways of settling conflicts; (2) recourse to what he called *jural postulates*, i.e., those goals that all legal orders desire to achieve;<sup>137</sup> and (3) reference to “the

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135. JOHN J. BONSIGNORE, *BEFORE THE LAW: AN INTRODUCTION TO THE LEGAL PROCESS* 63–66 (4th ed. 1989).

136. *Id.* at 64–65 (citing ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* (1942 ed.)).

137. Quite significantly, these postulates carry a natural law tone and are not far from the basic goods outlined by Finnis. Some of them are (which Pound posits to be essential features of civilized society): people must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order; people must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence, among others, will carry out their undertakings according to the expectations which the moral sentiments of the

overall ethos, directions, and goals of society.” Evidently, in one’s search for a more basic fulcrum for the plight of the tie-in artist as well as for the entertainment audience and the big budget producer (who, ironically, may also be a claimant at one time or another to common stock material), the last two ways are relevant. Truly, in this regard, the ideal approach would be to extract one’s self to get a good view of the forest, so to speak, lest one be so close to the timbers of litigation where one can easily be cowed by the angry and whining voices of self-interest.

What are the fundamentals, the so-called basic postulates of society, which contain its primordial values and sentiments in regard to the arts and entertainment? The 1987 Philippine Constitution provides that “[t]he State shall give priority to ... arts [and] culture ... to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development,”<sup>138</sup> and “foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.”<sup>139</sup> Going to what the community of nations believe in, the Universal Declaration of Human Rights mandates that “[e]veryone has the right of freedom of opinion and expression,” which includes the freedom to “seek, receive, and impart [ideas] through any media and regardless of frontiers”<sup>140</sup> and that “[e]veryone has the right to rest and leisure.”<sup>141</sup> Then, under the International Covenant on Economic, Social, and Cultural Rights, the following rights are assured of every man and woman: “rest [and] leisure”<sup>142</sup> and “[t]o take part in cultural life” as well as “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>143</sup> With regard to the abovementioned rights, it will be stating the obvious that *scène à faire* material is owned by all in common, meaning that all of humanity is the author of any such themes, incidents, and characters. Therefore, each and every individual has the right (which right, each and very individual has

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community attaches to them; and, people must be able to assume that those who are engaged in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others. See JOHN J. BONSIGNORE, *supra* note 135, at 64.

138. PHIL. CONST. art. II, § 17.

139. PHIL. CONST. art. XIV, § 14.

140. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

141. *Id.* at 72.

142. International Covenant on Economic, Social, and Cultural Rights, art. 7 (d), Dec. 16, 1966, 993 U.N.T.S. 3.

143. *Id.* at art. 15 (a) & (d).

a duty to respect and protect) to enjoy and exploit, whether as artist or audience, common stock elements.

The ruling in *Morrissey v. Procter & Gamble Co.*<sup>144</sup> hit the nail on the head when it emphasized that copyright was not “a game of chess in which the public can be checkmated.”<sup>145</sup> The entertaining world of creeping reptiles in a public vehicle, of the living dead wandering in streets and malls, of spandex-clad superhumans fighting villains both alien and subterranean, of inter-planetary conflicts as to who would rule the galaxy, and of adolescents singing, dancing, and romancing in a school is therefore something which is *due* to the public. *Due*-ness in this case does not fundamentally pertain to the filmmaker or to the television producer alone, whether mockbuster or not. It pertains to each and every person on this planet (or may be even beyond, granting any discovery by Robby the Robot) who may be, and will always be, a potential member of the audience. Dominion is universal for all in regard to those “scenes which must be done.”<sup>146</sup> Given this, “it is virtually impossible to write about certain historical eras or fictional themes without sometimes employing standard characters and motifs.”<sup>147</sup> Hence, the protection given to the often-maligned mockbuster or tie-in artist is not so much really for the former, but is more, very much more, to ensure universal dominion for what is common stock — to the end that people are free to enjoy not only what is aesthetically sublime, but also to have good and clean fun (a rare commodity at times in a fast-paced and complicated world).

Sadly, modern-day materialism may have obscured this universality. Psychologically, the author or owner of any artistic or literary work is conditioned to think that he or she owns the entire work absolutely and must thus be compensated for any form of exploitation of the work. This, forgetting that it is only the expression — given this to be truly unique to him or her (and which is actually a matter of evidence) — that can be owned, and not the ideas which provide its foundation. In this regard, the writer recalls with much admiration a renowned educator in a state-run Philippine university who has made it his policy to encourage the “pirating” of his own works on special education so that it may reach even the poorest of the poor who otherwise would have no access to the said works. The tie-in artist or spoof maker must then, as a *matter of justice*, be protected to the extent he or she is a vanguard of those universal ideas and sentiments that

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144. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-69 (1st Cir. 1967).

145. Weinrib, *supra* note 124, at 679. Cf. Lichtman, *supra* note 73.

146. Lichtman, *supra* note 73.

147. *Id.* (citing *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980)).

will always be the seed for art and entertainment for as long as there are audiences in this world. The seeming imbalance between the former and those who consider themselves victimized by alleged piggy-backing is more than offset, consistent with Rawlsian thought, by the basic fact that the latter themselves, as co-owners of all that is common stock, are benefitted by this social arrangement. Indeed, to be convinced of this truism, the latter will only have to reflect on the reality that they, quite ironically, may find themselves exploiting common stock in their next projects and will naturally want to go unobstructed in said regard. Respect for common stock is thus essential to preserve the raw material for copyrighted expression. It is a “farm” of ideas, the produce of which is for everybody to pick — a fine exponent then of distributive justice.

This is not to say that any form of legal naughtiness will always go unpunished. Obviously excluded from the fruits of this discussion are those who, by clear and convincing evidence, have snatched unique expressions of art and entertainment which do not fall under the merger and *scène à faire* doctrines. Granting that refuge can be sought under these doctrines, if the manner of exploitation of common stock or the way the work is marketed is so brazenly taunting and offensive, or is systematically high-handed and oppressive, theoretically there can be actionable abuse of right<sup>148</sup> at the very least. It is as if the tie-in artist is saying to the big-time movie producer: “Hey, we look alike in many ways, but what are you going to do about it?” But then again, any accusation in this regard will naturally have to go through the gauntlet of constitutionally protected freedom of expression.<sup>149</sup>

## VII. CONCLUSION

Jurisprudentially, the critics of mockbusters, tie-in artists, and good-natured “rip-off” artists actually turn against their very selves every time they attack the latter. Forgetting that common stock material is, by its very adjective, shared by all in common, they actually fall prey to the potion of bitterness concocted by individualistic materialism. If only they can just learn to laugh. After all, as Filipino Jesuit Guido Arguelles once put it: “Laughter is a sign that one takes life seriously.” Even a small dose of cheerfulness will be enough to make anyone realize that the apparent legal incongruity that marks the so-called mockbuster phenomenon is nothing but a spiked aperitif to that common, yet sumptuous, meal of art, entertainment, friendship, and goodwill.

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148. See An Act to Ordain and Institute the Civil Code of the Philippines, [CIVIL CODE], Republic Act No. 386, arts. 19, 20, 21, & 28 (1950).

149. Quite obviously, this merits a separate study altogether in the realm of constitutional law.