

WHAT'S THE STORY WITH STORYLINE PATENTS—  
AN ARGUMENT AGAINST THE ALLOWANCE OF PROPOSED  
STORYLINE PATENTS AND FOR THE REJECTION OF  
CURRENTLY PENDING STORYLINE PATENT APPLICATIONS

BEN MANEVITZ\*

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\* LL.M., 2006, Benjamin N. Cardozo School of Law; J.D., 1997, *cum laude* (Order of the Coif), University of Pennsylvania School of Law; B.A. (English), 1991, Cornell University School of Arts and Science. Many thanks to Professors David S. Korzenik and Eric Rayman for bringing me to the beginning of this article, and to Stephen Scotch-Marmo, Alexis Weissberger, Brendan O’Malley, Aliza Reicher, and Joan Luu for their time and efforts in helping me get to the end. Of course, the warmest thanks are for my wife, Julie, and family for their love and support as I plodded through the middle. To my parents, who were always worried that the time I spent watching television was wasted, I point to Part IV and say, “so there!”

## I. INTRODUCTION

In November 2004, the legal world took very little notice of an article setting out what is really a rather startling proposition.<sup>1</sup> Andrew F. Knight, in his article *A Potentially New IP: Storyline Patents* proposed

the existence and allowability under Section 101 of ‘Storyline Patent’ claims, which aim to protect not the copyrightable expression of a unique underlying storyline, but the storyline itself—in the form of either the process necessary to implement the unique fictional plot in an entertainment medium, or in terms of the medium itself.<sup>2</sup>

Further, putting his filing fee where his mouth was, Mr. Knight submitted, on November 28, 2003, a patent application for a “process of relaying a story having a unique plot,”<sup>3</sup> and followed that application with three others in May and June of 2004.<sup>4</sup>

It is important to recognize exactly what Mr. Knight seeks to protect, and to understand the significance of seeking that protection in patent. Mr. Knight’s four patent applications (“the ’473 family”) are not seeking coverage of some new mechanism for telling a story in the manner of printing in the age of spoken-word storytelling, audiotapes in the age of phonorecords, or “talkies” in the age of the silent film. Each of those technologies, and technologies like them, were new mechanisms for telling stories independent of the story itself. That is to say, when the Lumière brothers ran the first films in Paris in 1895,<sup>5</sup> the innovation and surprise of the demonstrated technology (film) was not at all connected to, or dependent on, the actual story told by the film. The event of seeing the film was made no more or less significant by the choice of the brothers to show a gardener getting sprayed with a hose rather than workers leaving a factory or a child playing with a cat.<sup>6</sup>

Mr. Knight’s patent applications, on the other hand, seek to

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<sup>1</sup> Andrew F. Knight, *A Potentially New IP: Storyline Patents*, 86 J. PAT. & TRADEMARK OFF. SOC’Y 859 (2004) [hereinafter *Storyline Patents*].

<sup>2</sup> *Id.* at 859.

<sup>3</sup> U.S. Patent Application No. 10/722,473 (filed Nov. 28, 2003), published Nov. 3, 2005 [hereinafter ’473 App.].

<sup>4</sup> U.S. Patent Application No. 10/846,544 (filed May 17, 2004), published Nov. 17, 2005 [hereinafter ’544 App.]; U.S. Patent Application No. 10/861,849 (filed June 7, 2004), published Dec. 8, 2005 [hereinafter ’849 App.]; U.S. Patent Application No. 10/869,082 (filed June 17, 2004), published Dec. 22, 2005 [hereinafter ’082 App.]. Together with the ’473 App., *supra* note 3, I will refer to the patent applications cited in this footnote as the ’473 family.

<sup>5</sup> Chris Dashiell, *The Oldest Movies*, CINESCENE (2000), <http://www.cinescene.com/dash/lumiere.html>. A brief internet search reveals that there is apparently some controversy about who should get the credit for showing the first films; this paper does not pretend to take a position in that debate.

<sup>6</sup> These are all examples of some of the Lumière’s first films. *Id.*

protect for its “inventor” the storyline itself, described as the “process of relaying a story having a timeline and a unique plot involving characters,” and then a description of the plot.<sup>7</sup> The *Storyline Patents* article posits the existence and allowability of such patents. Seeking copyright protection for a plotline at the level of generality described in any of the ’473 family patent applications would be an unlikely endeavor, but at least not entirely unthinkable; seeking such protection under patent is, in the mildest possible terms, audacious and overreaching. This Note argues against Knight’s *Storyline Patents* proposition on three levels.

There is an old joke describing a lawyer who borrows his neighbor’s garden tools, and when pressed after a time for their return replies, “you never lent them to me; they were broken when I got them; and I already returned them to you in perfect condition.” The center of any joke is a small truth. The small truth at the core of that joke might be the relevance of the three different analytical prongs disclosed in this Note: first, the rubric invoked—the return of borrowed items—is entirely inapplicable, in so far as there are no borrowed items to be returned; second, although the rubric is technically relevant—there were borrowed items—as a matter of reason and policy it shouldn’t apply in this type of situation; third, even if the rubric is technically and reasonably applicable in general, the proper application of the rubric to the facts in this particular instance still doesn’t impose liability on the putative borrower. These three prongs could adequately describe the analysis of why the ’473 family of patent applications should be denied patent protection. First, patent law is not applicable to storylines, because storylines are not patentable subject matter. Second, even if storylines are conceivably within the ambit of appropriately patentable subject matter, nonetheless, as a matter of reason and policy, patent law should not be applicable to storylines. Finally, the various applications in the ’473 family should be denied a patent because they fail to comply with well-settled patent doctrine; even in a universe where storylines are appropriately patentable subject matter, drafting a novel and non-obvious storyline patent would be almost impossible, and Mr. Knight’s applications certainly fail to demonstrate otherwise.

In Part II of this Note I will demonstrate how storyline patents fail to constitute patentable material in general because storylines are not within the realm of “useful arts” as that term is understood or was intended. Moreover, a storyline, as described by Mr.

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<sup>7</sup> See, e.g., ’473 App., *supra* note 3, at Abstract, ¶ 17, and claim 1. The specific plots claimed in Mr. Knight’s applications will be discussed briefly.

Knight, can never satisfy the constitutionally grounded utility requirement of the patent statute. Connected to the discussion of storyline as subject matter, I undertake a brief digression into the printed matter doctrine. Part III of this Note addresses the failure of storyline patents as a matter of policy; first because allowing such patents would do violence to the reward structure of the patent/copyright “bargain” that is hard-wired into the Constitution, and second because an enormous burden would be placed on the courts and the Patent and Trademark Office (PTO) in exchange for only the slimmest possible benefit. Part IV will briefly discuss Mr. Knight’s storyline patents applications as filed, and demonstrate their failure because they are neither novel nor nonobvious as required by statute.

## II. YOU NEVER LENT THEM TO ME— STORYLINES ARE NOT PATENTABLE SUBJECT MATTER

### A. *A Storyline Is a “Science,” Not a “useful Art”*

The system of intellectual property protection described in the Constitution contemplates that a thing will be subject either to copyright, patent,<sup>8</sup> sometimes neither, but in no cases both. This is clear in the language of the constitutional clause itself, which sets up the two fields by means of a parallel structure,<sup>9</sup> and more readily so, in the statutory provisions empowered by that constitutional language.

The Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>10</sup> This clause is written in parallel form: patent applies to the “useful Arts,” protecting Inventors and their Discoveries, while copyright applies to “Science,” protecting Authors and their Writings.<sup>11</sup> In this context, the term “Science” is understood to have its eighteenth-century meaning of knowledge or learning, subsuming the entire worlds of art, literature, and

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<sup>8</sup> I disregard, for these purposes, design patents. The interface between design patents and copyrights is complex, subtle, beyond the scope of the current inquiry, and, most happily, not relevant to Mr. Knight’s claims.

<sup>9</sup> See *Infodek, Inc. v. Meredith-Webb Printing Co.*, 830 F. Supp. 614, 621-22 n.8 (N.D. Ga. 1993) (“The Intellectual Property Clause [of the Constitution] employs a parallel structure that both grants and limits copyrights and patent rights.”).

<sup>10</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>11</sup> See *Infodek*, 830 F. Supp. at 621-22 n.8 (“[T]he use of the term ‘science’ relates to copyrights and is generally given its eighteenth century meaning of knowledge or learning.”); *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5 (1966) (“[I]t must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress ‘To promote the Progress of . . . useful Arts . . .’”).

expression.<sup>12</sup>

Turning to the statutes derived from the Constitution's promotion of progress clause, patent protection is extended only to a "new and useful process, machine, manufacture, or composition of matter"<sup>13</sup> that satisfies the other statutory requirements. Copyright protection extends to "original works of authorship,"<sup>14</sup> but in no case to any "procedure, process, system, method of operation, . . . or discovery."<sup>15</sup> Copyright protection is also denied to any "idea, . . . concept, [or] principle."<sup>16</sup> The patent and copyright statutes interlock, mapping out a sort of Venn diagram of available protection. A process, for instance, is clearly excluded from copyright, but might possibly be included in patent. A literary work, on the other hand, is clearly covered by copyright law. What is important to understand is that from the fact that copyright protects the work, it can be logically deduced that the work is not a procedure, etc., and so it is not subject to patent protection. A work is "Science" subject to possible protection by copyright; a work, however, is not, and can not be an invention, which is a "useful Art," possibly protected by patent.

The landmark case of *Baker v. Selden* is instructive in understanding the separation between what is protected by copyright and patent law.<sup>17</sup> The complainant in *Baker* had invented a system of book-keeping, described it in a book, and obtained a copyright in the book, but he obtained no patent in the invented system.<sup>18</sup> The defendant had copied a part of the book, but his copying was not an infringement since the copied parts were unprotectable in copyright under the merger doctrine.<sup>19</sup> The *Baker* Court made very clear the exclusivity of the two fields:

The description of the [useful] art in a book, though entitled to

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<sup>12</sup> *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1564 n.4 (Fed. Cir. 1988) ("The power to grant patents to inventors is for the promotion of the useful arts, while the power to grant copyrights to authors is for the promotion of 'Science,' which had a much broader meaning in the 18th Century than it does today."). See *Satellite Broad. & Comm. Ass'n v. FCC*, 275 F.3d 337, 367 n.10 (4th Cir. 2001) ("In the language of the day, 'science' included works of authorship."); *Infodek*, 830 F. Supp. at 621-22 n.8.

<sup>13</sup> 35 U.S.C. § 101 (2006).

<sup>14</sup> 17 U.S.C. § 102(a).

<sup>15</sup> *Id.* § 102(b).

<sup>16</sup> *Id.*

<sup>17</sup> 101 U.S. 99 (1879).

<sup>18</sup> It is not entirely clear that complainant Selden could have obtained a patent on his devised system of bookkeeping at the time. See *id.* at 104 ("Whether the art might or might not have been patented, is a question which is not before us.").

<sup>19</sup> *Id.* at 104-05. Under the merger doctrine, if an idea can only be expressed in only one or a small number of ways, copyright law will not protect the expression because it has "merged" with the idea. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983).

the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.<sup>20</sup>

An objection could be raised that it seems incorrect to conclude, as does this line of reasoning, that a copyright and a patent cannot protect the same thing. However, that is exactly the conclusion mandated by *Baker*, and, on reflection, the correct conclusion. Copyright and patent can apply in some measure to the same chattel, but it is necessary to conceptually separate the protected thing from the chattel embodying that thing. Copyright protects the “work” while patents protect the “invention.” Both a work and an invention are sometimes embodied in a given chattel, and so reproduction of that chattel can involve infringement under both doctrines. Because, however, the doctrines apply not to the chattel but to the things therein embodied, the two different types of infringement do not overlap.<sup>21</sup>

Both copyright and patent recognize a spectrum ranging from an abstract idea on the one hand to a concrete representation on the other. In copyright, the distinction is acknowledged quite explicitly: “It is a fundamental premise of copyright law that an author can protect only the expression of an idea, but not the idea itself.”<sup>22</sup> Although the patent system is sometimes seen as protecting the ideas not protected by copyright,<sup>23</sup> that is an unsubtle analysis. Similarly, the distinction is recognized in patent law. Patents do not protect naked ideas, and avoid that protection in two ways: (1) abstract ideas alone are not proper subject matter for patent,<sup>24</sup> and (2) the statutory

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<sup>20</sup> *Baker*, 101 U.S. at 105.

<sup>21</sup> Imagine, for instance, a given widget, made in compliance with the directions set forth in a patent. This widget has a particular (and for the sake of this example, particularly beautiful) shape and is decorated with a sketch made by the manufacturer’s child. The particularly elegant shape is dictated by the function and purpose of the widget, and the sketch is purely decorative. The widget embodies both the patented invention that defines the shape and function of the widget and the artistic work that embellishes it. A third party exactly reproducing the widget (including the sketch) would be infringing the patent on the invention and the copyright on the sketch. The manufacturer would find redress only in infringement under the patent against the third party’s copying of the particularly beautiful shape, because the merger and useful articles doctrines in copyright would exclude the shape from coverage, to the extent that the shape is dictated by the function of the widget.

<sup>22</sup> *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 208 (3d Cir. 2005). See *Attia v. Soc’y of N.Y. Hosp.*, 201 F.3d 50, 54-55 (2d Cir. 1999) (discussing thoroughly the “fundamental principle of our copyright doctrine that ideas, concepts, and processes are not protected from copying”).

<sup>23</sup> See, e.g., *Infodek, Inc. v. Meredith-Webb Printing Co.*, 830 F. Supp. 614, 622 (N.D. Ga. 1998) (“Ideas are protected by patents.”).

<sup>24</sup> *Diamond v. Diehr*, 450 U.S. 175, 185 (Fed. Cir. 1995) (“Excluded from . . . patent protection are laws of nature, natural phenomena, and abstract ideas.”). That an idea

requirements under section 112 of the patent statutes require that the invention be more concrete and specific than merely an idea.<sup>25</sup>

More importantly, the distinction between work and invention is in play with regard to this analysis as well. It is not the case, as might be imagined, that patents and copyrights protect different rungs on the ladder from concrete expression to abstract idea, such that when a particular thing becomes too abstract to be a protectable work in copyright, it is transformed into a protectable invention under patent law.<sup>26</sup> Rather, patent and copyright look at the same distinction along two entirely different axes.

Mr. Knight's article makes reference to Elise Cohen's Patent No. 6,213,778.<sup>27</sup> That patent serves as an excellent illustration of precisely the distinction that Knight would elide in his analysis. Ms. Cohen's idea, in the abstract, is a process of painting using a baby's behind.<sup>28</sup> Ms. Cohen's patent demonstrates that the idea has been made sufficiently concrete as to merit protection under patent law. In no way is the patent contingent on any of the specific paintings made by Ms. Cohen using her patented system.<sup>29</sup> On the other hand, an artist, even Ms. Cohen herself, might have another idea, namely, the idea to indicate an emotion, and (using the patented method) express that idea in a form concrete enough to warrant protection under copyright law. But the protections afforded by the doctrines do not intersect; stretching from abstract idea to concrete expression, patent and copyright speak to different kinds of expression.

In light of the exclusivity and the distinction between patent and copyright, a determination that a storyline is the type of idea contemplated in the Constitution by "Science" leads inescapably to the conclusion that a storyline was not the type of idea contemplated in the Constitution by "useful Art." It takes no

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standing alone is not subject to patent is old and well settled law. See *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 507 (1874) ("An idea of itself is not patentable . . .").

<sup>25</sup> See UNITED STATES PATENT AND TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING AND PROCEDURE §§ 2137.01, 2138.04-2138.06 (2005) [hereinafter MPEP] (addressing the conception and reduction-to-practice aspects of a patentable invention). While it is true that conception is the hallmark of the inventor, in order to be eligible for patent protection the idea so conceived must be reduced to practice. In fact, a first conceiver but second reducer may be trumped in his or her rights to patent protection by a later conceiver who reduces the invention to practice first, depending on the diligence of the first conceiver. All of which serves, in this context, to support the proposition that the idea alone is not enough to garner protection under patent law, and this limitation is by design.

<sup>26</sup> See, e.g., *Storyline Patents*, *supra* note 1, at 876.

<sup>27</sup> *Id.*; U.S. Patent No. 6,213,778 (filed Dec. 14, 1999) (issued Apr. 10, 2001).

<sup>28</sup> *Id.* at Abstract.

<sup>29</sup> Note, however, that figure 3 in the '778 patent is an example of a painting made by the method, and that painting is protectable in copyright.

imagination at all to understand that the storylines proposed by Mr. Knight in both his paper and the patent applications speak directly to copyrightable works. In fact, a blueprint for the kind of abstraction Mr. Knight engages in can be found in textbook case law dealing with the idea-expression dichotomy in copyright.<sup>30</sup>

It is this essential difference between copyright and patent that Mr. Knight obscures, and that causes his analysis to go so far awry.<sup>31</sup> Mr. Knight envisions the difference between copyright and patent as speaking only to the level or type of application of a given unitary idea; he says as much in his paper.<sup>32</sup> That understanding underpins Knight's proposition that an idea that speaks to copyright—an idea, in fact, that standing alone is insufficient to actually trigger copyright protection—might somehow speak to patent as well, and might be sufficient to trigger protection under the rubric of patent law. That understanding is a gross error, and that error taints the entirety of Mr. Knight's proposition.

Mr. Knight's error becomes apparent upon examination of any of the '473 family of patent applications, each of which claims "a process of relaying a story," but then proceeds to describe, in the patent applications, the story itself. The story, to be protectable under patent law, should be the object of the process, as opposed to the process itself; but because Mr. Knight is attempting to shoehorn the story into the process, he is forced to make essentially circular and meaningless claims. Imagining simpler examples in the same vein as Mr. Knight's applications will make this point more clearly. The circularity becomes clearer if the claim is for "a process of relaying a message comprising relaying the letters 'S,' 'O,' and 'S,' seriatim;" the meaninglessness is obvious if the claim is for "a process of relaying a message comprising relaying the parts of the message."<sup>33</sup>

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<sup>30</sup> *Nichols v. Univ. Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (wherein Judge Hand elaborated on his understanding of "abstractions": "Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out."); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936). In both of these cases, Judge Hand engaged in that abstractions analysis in comparing two plays.

<sup>31</sup> *Storyline Patents*, *supra* note 1, at 876.

<sup>32</sup> *Id.* ("[T]he defining criterion [separating the subject matter of patents from copyrights] is whether the subject matter is a broad concept practically applied or used (in which case a patent is appropriate), or a particular instance, embodiment, expression, or performance of the broad concept (in which case a copyright is appropriate).")

<sup>33</sup> This circularity is not obviated by Mr. Knight seeking shelter under the doctrine allowing Business Methods to be patented. *Storyline Patents*, *supra* note 1, at 867. The indications in a business method must lead to some useful result more than merely indicating that the method exists. See *In re Alappat*, 33 F.3d 1526, 1543 (Fed. Cir. 1994) ("[M]athematical subject matter, standing alone, represent[s] nothing more than *abstract ideas* until reduced to some type of practical application . . .") (emphasis added). The



B. *Storylines Are Not Useful as Required for Patent Protection*

“Our starting point is the proposition, neither disputed nor disputable, that one may patent only that which is ‘useful.’”<sup>34</sup> Although most often dealt with as a statutory requirement for patent protection, utility in this sense is actually a constitutional mandate rooted in the addition of the adjective “useful” to “Arts” in that document. The utility requirement has evolved over time. At first, utility was a “socio-economic concept anchored on puritanical notions,” disallowing patent protection to inventions that were deemed “mischievous to the state . . . or the hurt of trade, or generally inconvenient.”<sup>35</sup> Eventually, utility evolved into a “technical concept with an eye on a secular notion of social usefulness.”<sup>36</sup> In its current incarnation, utility is given a more technical interpretation, essentially looking to the question of whether or not the invention does what it purports to do, as disclosed in the application and surrounding documents.<sup>37</sup>

Defining precisely what qualifies as useful, however, is a more subtle and complicated task than it might seem. The “simple, everyday word [useful] can be pregnant with ambiguity when applied to the facts of life.”<sup>38</sup> It is beyond the needs of this inquiry to define a comprehensive theory of usefulness for patent purposes; it is sufficient to understand what does not constitute utility under section 101, and apply that test to the storylines proposed by Mr. Knight.

There are some signposts in the relevant legal authority aiding a determination of what does not constitute utility for the purpose of patent law. First and foremost, the Supreme Court, in 1966, rejected<sup>39</sup> as failing in utility a process for producing a chemical that was similar to other chemicals that were known to be useful and that claimed for itself the usefulness of being interesting to researchers.<sup>40</sup> Similarly, the Patent Office has explicitly stated that utility must be “specific, substantial, and

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indications must do something or be used for something outside themselves, leading to a “useful, concrete, tangible result.” *AT&T v. Excel*, 172 F.3d 1352, 1357 (Fed. Cir. 1999) (citing *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1373 (Fed. Cir. 1998)).

<sup>34</sup> *Brenner v. Manson*, 383 U.S. 519, 528-29 (1966).

<sup>35</sup> Ikechi Mgbefoji, *The “Terminator” Patent and Its Discontents: Rethinking the Normative Deficit in Utility Test of Modern Patent Law*, 17 ST. THOMAS L. REV. 95, 102, 106 (2004).

<sup>36</sup> *Id.* at 102.

<sup>37</sup> *Id.* at 96, 102-03.

<sup>38</sup> *Brenner*, 383 U.S. at 529.

<sup>39</sup> More precisely, the Supreme Court reversed the decision of the Court of Customs and Patent Appeals which had overturned a rejection by the Patent and Trademark Office (PTO), thus affirming the PTO’s rejection of the patent.

<sup>40</sup> *Brenner*, 383 U.S. at 531-34.

credible,”<sup>41</sup> which “excludes ‘throw-away,’ ‘insubstantial,’ or ‘nonspecific’ utilities, such as the use of a complex invention as landfill.”<sup>42</sup>

Also relevant, though not precisely on point, is a Federal Circuit case discussing the subject matter propriety of inventions involving mathematical functions.<sup>43</sup> The court there required claims involving mathematical algorithms to produce a “useful, concrete, and tangible result.”<sup>44</sup> Although the court examined subject matter under section 101, the analysis therein smacks of utility, and the juxtaposition of the term “useful” with “concrete and tangible result” is informative.

From these cases it can be understood that utility seems to require that the invention do something, anything, more than merely exist. Where an invention does not do that minimal “something,” it is not considered useful under section 101, and is not appropriately patented.

This definition of usefulness, ironically, is laid out most elegantly in the Copyright Act.<sup>45</sup> In copyright law, there is a doctrine curtailing protection for items that have even a partial functional utility.<sup>46</sup> Copyright only protects the non-utilitarian aspects of an item, and even then only protects those non-utilitarian aspects if the graphic, pictorial, or sculptural elements are “physically or conceptually separable” from the functional and utilitarian elements.<sup>47</sup> Section 101 of the Copyright Act defines a useful article as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”<sup>48</sup> In other words, an article that does nothing more than portray the appearance of itself is not a useful article under that definition.

That definition from copyright could serve well as a baseline negative definition for utility in patents. Here again, Mr. Knight’s

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<sup>41</sup> MPEP, *supra* note 25, § 2107(I)(A)(3)(iii).

<sup>42</sup> *Id.* § 2107(II)(B)(1)(i).

<sup>43</sup> *In re Alappat*, 33 F.3d 1526 (Fed. Cir. 1994).

<sup>44</sup> *Id.* at 1544.

<sup>45</sup> 17 U.S.C. § 101 (2006) (“A ‘useful article’ is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”).

<sup>46</sup> *See, e.g.*, *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 416 (5th Cir. 2005) (“If an item qualifies as a ‘useful article’ under the Copyright Act . . . it is entitled to copyright protection only to the extent that its artwork or creative design is separable from the utilitarian aspects of the work.”).

<sup>47</sup> *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980). *See* 17 U.S.C. §§ 101, 113. Before the 1976 revisions, the useful article definition required that the sole function of the article be utilitarian. It is not difficult to understand this doctrine as an accommodation of the exclusivity between copyright and patent, as discussed above.

<sup>48</sup> 17 U.S.C. § 101 (emphasis added).

storylines will fail the test. The storyline does nothing more in the world than exist; it serves only to portray itself. Recast in terms of a general rule, a storyline *per se* can not satisfy the utility requirement of section 101 of the patent statute.<sup>49</sup> Looking at that requirement through the lens of the Constitution's "useful" language, it is not impossible to make the rule stronger by claiming that a storyline is not a "useful Art" per that document.

### C. *The Printed Matter Doctrine Misunderstood*

In the *Storyline Patents* article, Mr. Knight clearly implies that the "printed matter doctrine" would serve to exclude the storyline from the subject matter of patent; he then spills a lot of ink to proclaim the death of that doctrine.<sup>50</sup> Mr. Knight, however, misunderstands the printed matter doctrine; the doctrine, correctly understood, is not an obstacle for storyline patents to overcome. Even if it were an obstacle to storyline patents, the proposition that the doctrine is all but dead is based on a sloppy analysis of the relevant cases.

The printed matter doctrine explains that printed matter alone cannot be given patentable weight, but that such printed matter can have patentable weight only when functionally connected to some underlying invention.<sup>51</sup> The doctrine is most easily understood when considered in the context of the cases that discuss and apply it. For instance, an applicant who simply includes novel instructions for the use of an otherwise known art, cannot rely on those instructions for patentability, because the printed matter has nothing to do with the invention itself.<sup>52</sup> At the same time, where the invention itself is the printing and arrangement of the printed matter in question, that invention can be patented.<sup>53</sup> For example, even though a set of mathematical principles can not be patented, a novel and non-obvious arrangement of numbers and hashes on a set of connected sliding rings such that manipulation of the rings will allow a user to exploit those unpatentable mathematical principles for whatever end, is patentable, such as in the case of *In re Gulack*.<sup>54</sup>

Seen in this context, the doctrine appeals to common sense. It makes perfect sense that an otherwise infringing object can not be made non-infringing by the mere addition of some text irrelevant to the invention. This is what the *Gulack* court meant

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<sup>49</sup> 35 U.S.C. § 101.

<sup>50</sup> *Storyline Patents*, *supra* note 1, at 863-66.

<sup>51</sup> Chisum on Patents § 1.02[4]; MPEP § 706.03(a)A.

<sup>52</sup> *In re Ngai*, 367 F.3d 1336 (Fed. Cir. 2004).

<sup>53</sup> *In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983).

<sup>54</sup> *Id.* at 1381.

when reciting that “[w]here the printed matter is not functionally related to the substrate, [it] will not distinguish the invention from the prior art in terms of patentability.”<sup>55</sup> By the same token, it makes sense that where text or the placement of text is at the heart of an invention—such as the placement of numbers and hash marks on a slide rule in *Gulack*—the fact that the text is printed on some underlying matter will not bar patentability and will allow the invention to be distinguished over prior art.<sup>56</sup> If Mr. Knight’s analysis demonstrates anything about the printed matter doctrine, it is that the doctrine was stated in overbroad terms by early courts, not that the doctrine has been “whittled away,” as Mr. Knight claims.<sup>57</sup>

Mr. Knight points to the case of *In re Lowry*<sup>58</sup> to support the proposition that the printed matter doctrine is, moreover, limited to printed matter, “useful and intelligible only to the human mind,” as distinguished from a machine,<sup>59</sup> and then points out that such a distinction is less and less valid as technology progresses. It is not entirely clear, but Mr. Knight seems to be arguing that since (on his reading of *Lowry*) the printed matter doctrine has been abrogated as to machine-readable printed matter, and the distinction between machine-readable and human-readable matter has decayed or is decaying, the doctrine must necessarily be abrogated as to human-readable matter. As a matter of simple logic, Knight fails to present any compelling reason that even accepting those premises the proof shouldn’t proceed in the other direction, leading to the conclusion that the doctrine is becoming applicable to machine-readable matter, as opposed to Knight’s conclusion that the doctrine is inapplicable to human-readable matter. More importantly, however, Knight’s argument proceeds from a fundamental misreading of *Lowry*. *Lowry* should be read to reinforce the *Gulack* holding, standing for the proposition that where the printed matter actually has a function with respect to the invention, the printed matter should be considered as much a part of the invention—as would any gear or pulley or widget.<sup>60</sup> Where the printed matter has no such functional relationship, the PTO should disregard that printed matter.<sup>61</sup>

Mr. Knight cites to *In re Beauregard*<sup>62</sup> as the case that “put the

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<sup>55</sup> *Id.* at 1385.

<sup>56</sup> *Id.*

<sup>57</sup> *Storyline Patents*, *supra* note 1, at 860.

<sup>58</sup> 32 F.3d 1579 (Fed. Cir. 1994).

<sup>59</sup> *Storyline Patents*, *supra* note 1, at 865.

<sup>60</sup> *In re Lowry*, 32 F.3d at 1584.

<sup>61</sup> *Id.*

<sup>62</sup> 53 F.3d 1583 (Fed. Cir. 1995).

printed matter doctrine . . . to rest.”<sup>63</sup> Knight’s proposition is a significant misreading of *Beauregard*, particularly as the decision in *Beauregard* was that no case or controversy existed and so the Federal Circuit could not actually rule on the printed matter doctrine at all. More importantly, the main point of the *Beauregard* case is not that the printed matter doctrine is defunct.<sup>64</sup> Rather, the point of the case is that even though, as a purely technical matter, software is matter separate from the underlying computer storage medium, the legal fiction of *In re Alappat*<sup>65</sup>—that software code changes the structure of the computer itself—makes software, by definition, functionally related to the underlying matter.<sup>66</sup> *Beauregard* applies the *Alappat* fiction to establish a general rule that the printed matter doctrine isn’t applicable in that context.<sup>67</sup>

Mr. Knight’s proclamation of the death of the printed matter doctrine seems particularly disingenuous in light of more recent cases, such as *In re Ngai*,<sup>68</sup> *Bloomstein v. Paramount Pictures Corp.*,<sup>69</sup> and *In re Levin*,<sup>70</sup> each of which was decided, at least in part, under the printed matter doctrine. Reports of the death of the doctrine by Mr. Knight appear to have been greatly exaggerated.

### III. THEY WERE BROKEN WHEN I GOT THEM— POLICY DICTATES THAT STORYLINES ARE NOT PATENTABLE

#### A. *Protecting a Storyline in Patent Would Betray the Intellectual Property Bargain*

It is not controversial or particularly insightful to identify in the constitutionally mandated intellectual properties a *quid pro quo*. The public gives a limited monopoly to an author or inventor, and receives in exchange more and better works and inventions. The premise underlying both copyright and patent is that the limited monopoly, and the concomitant ability to more fully exploit the work or invention, will be a greater incentive to create the work or invention, and moreover to create additional works or inventions after the first. Knight himself acknowledges this as a guiding rationale in the patent system,<sup>71</sup> and in this one point he is

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<sup>63</sup> *Storyline Patents*, *supra* note 1, at 865.

<sup>64</sup> *In re Beauregard*, 53 F.3d at 1583.

<sup>65</sup> 33 F.3d 1526 (Fed. Cir. 1994).

<sup>66</sup> *Beauregard*, 53 F.3d at 1583.

<sup>67</sup> *Id.*

<sup>68</sup> 367 F.3d 1336 (Fed. Cir. 2004).

<sup>69</sup> 215 F.3d 1351 (Fed. Cir. 1999).

<sup>70</sup> 107 F.3d 30 (Fed. Cir. 1997).

<sup>71</sup> *Storyline Patents*, *supra* note 1, at 872-73.

correct.

The question must be asked, then, whether patenting storylines would encourage or discourage innovation in the field of storylines. It is this author's contention, despite Mr. Knight's sound and fury to the contrary, that such patents will not enhance, but rather stifle creativity. Consider, for example, the following storyline wherein:

- (1) an orphan boy is living in an out-of-the-way backwater locale with his uncle and aunt;
- (2) that boy feels stifled and restless, upon which
- (3) he is rescued from some adversity by a wise, bearded individual who is a member of a special caste;
- (4) that individual informs the orphan boy that his father was also of that caste, as well as having an ancillary superlative talent, and
- (5) in fact the boy himself is of that caste;
- (6) the boy is instructed in the implements of his caste, as he trains to become a full member, and it is also revealed that the boy shares the ancillary talent of the father;
- (7) the boy has many adventures, particularly involving his two new friends, a male and female, who will eventually become romantically linked, etc.<sup>72</sup>

Depending on the context and life situation of the reader, the above storyline is pretty quickly identified as the beginning of either *Star Wars: A New Hope*<sup>73</sup> or *Harry Potter and the Sorcerer's Stone*.<sup>74</sup> Ms. Rowling, the author of the *Harry Potter* series, was famously close to destitute when she published the first book in her series, and it is not difficult to imagine that she would not have been able to pursue or afford a license for the storyline from Lucasfilm. Far from fostering creativity, a storyline patent would have squashed it.

More generally, the storyline patent does violence to the copyright bargain because the copyright and patent systems are designed to reward different aspects of the creative endeavor. While patent rewards excellence in conception and implementation of a broad and practically useful idea, copyright rewards excellence in a narrower and less immediately practical expression. The protections offered by the different doctrines are shaped by the thing being protected. The treatment of the idea-expression dichotomy in copyright serves the competing interests of the author in his or her own work on the one hand and the

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<sup>72</sup> Justin Hughes, Copyright Final Exam (Fall 2005), at 8 (on file with author).

<sup>73</sup> STAR WARS: EPISODE IV—A NEW HOPE (20th Century Fox 1977).

<sup>74</sup> J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1998).

public's interest in the unimpeded access to ideas on the other, implicating the First Amendment as well as the constitutional objective described above.<sup>75</sup> The Storyline patent seeks to sidestep the copyright bargain by applying the balance struck under patent law, and in the process short-circuits all the considerations and evolutions of copyright.

Mr. Knight sees an imbalance in the failure to reward someone who conceives of a clever storyline, but can not execute that storyline with sufficient skill, while someone who conceives of a clever machine or composition of matter is rewarded regardless of their skill. However, it is precisely because storylines are different from machines and compositions of matter that there are different rules for storylines. Mr. Knight claims that he wants to save our nation from “mind numbing movies and dime-a-dozen boy bands,”<sup>76</sup> an admirable goal. But this goal will not be accomplished by stifling creativity by patenting storylines.

B. *The Negatives Will Far Outweigh the Positives for the Courts and the PTO if Storylines Can Be Patented*

Mr. Knight dismisses concerns as to the practicality of examining and litigating storyline patents if they were to be allowed.<sup>77</sup> Knight makes a comparison between the allowance of storyline patents and the allowance of business method patents.<sup>78</sup> Here, again, Mr. Knight gets it wrong. The practical concern connected to a storyline patent is not the mere difficulty of adequate vetting of the patent applications, but the impossibility of it. In order to even conceive of patenting storylines, it must be Mr. Knight's premise that there are a vast number of storylines available in the world to be exploited. It is not unreasonable to contend that in the long history of published storytelling, some significant part of that vast reservoir has already been exploited, and those storylines are the prior art over which any application must be judged. Just as an examiner reviewing an application in the field of chemistry must have at least some mastery of that general field, an examiner reviewing a storyline application would have to have a mastery of plots, generally. It is inconceivable for any one person—or even a small group of people working in

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<sup>75</sup> *Infodek, Inc. v. Meredith-Webb Printing Co.*, 830 F. Supp. 614, 621-22. I note here, without extensive discussion, a related First Amendment concern with regard to the fair use doctrine. The fair use doctrine is a mechanism by which copyright can accommodate the free speech values of the First Amendment, allowing, *inter alia*, commentary and parody. There is no equivalent doctrine in patent law, and allowing storyline patents would likely impinge upon First Amendment rights.

<sup>76</sup> 473 App., *supra* note 3, ¶ 15.

<sup>77</sup> *Storyline Patents*, *supra* note 1, at 871.

<sup>78</sup> *Id.*

tandem—to have the breadth and depth of knowledge necessary to vet storyline patents for novelty and obviousness over the prior art.<sup>79</sup>

Courts will suffer, on the other hand, from a deluge of litigation. Under the patent laws, infringement can be inadvertent and unintentional, done without knowledge or intent.<sup>80</sup> There already exists any number of cases addressing the theft of story ideas, mostly under the rubric of contract law.<sup>81</sup> Imagine the burgeoning of that sort of claim where a plaintiff will no longer have to prove access by the defendant to the plaintiff's ideas, or even some disconnected awareness of them. The prospective litigation that would arise as a result of allowing patents of storylines would be absolutely nightmarish.

Moreover, precisely this low bar to litigation will further disincentivize the creation of new storylines. It must be conceded that even on the conceit that novel and nonobvious storylines have yet to be invented, the only possible source of such storylines must be authors. But under the scheme proposed by Mr. Knight, every author would operate under a cloud of uncertainty; the mere act of putting pen to paper would subject that author to potential liability for patent infringement.

Recognizing storyline patents confers essentially no benefit with regard to the furtherance of the “Useful art” of storyline development, otherwise known as the “Science” of writing, and imposes instead significant procedural costs. As a policy matter, the storyline patent should not be allowed.

#### IV. I ALREADY RETURNED THEM—

##### THE '473 FAMILY OF PATENT APPLICATIONS SHOULD BE REJECTED

Even without the broader concerns addressed above, the '473 family of applications should be rejected as failing under the section 102 and 103 requirements of the Patent Act for novelty and non-obviousness.<sup>82</sup>

##### A. *The '473 Application—A Plot that Can Be “Totally Recalled”*

The only independent claims made in the '473 patent are

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<sup>79</sup> It is no counterargument to note that the author was able to vet (in Part IV) Mr. Knight's applications over the prior art with only the breadth and depth of knowledge gained by a profligate childhood squandered on cable television. It is to be assumed that not all storyline patent applications will be as subtly derivative as those propounded by Mr. Knight.

<sup>80</sup> See 5 DONALD S. CHISUM, CHISUM ON PATENTS, § 16.02[2] (2006), and cases cited therein.

<sup>81</sup> Brian Devine, *Free as the Air: Rethinking the Law of Story Ideas*, 24 HASTINGS COMM. & ENT. L.J. 355 (2002).

<sup>82</sup> 35 U.S.C. §§ 102, 103 (2006).



claims one and seventeen, which are substantively identical, except that claim seventeen speaks of a storyline as “a storage medium containing information of a story . . . .”<sup>83</sup> It is not necessary to repeat the claims here in detail. The abstract describes the invention as a

process of relaying a story . . . indicating a character’s desire at a first time in the timeline for at least one of the following: a) to remain asleep or unconscious until a particular event occurs; and b) to forget or be substantially unable to recall substantially all events during the time period from the first time until a particular event occurs; indicating the character’s substantial inability at a time after the occurrence of the particular event to recall substantially all events during the time period from the first time to the occurrence of the particular event; and indicating that during the time period the character was an active participant in a plurality of events.<sup>84</sup>

It is enough to note that the movie *Total Recall*, released in 1990, completely anticipates every single element of the claim made in claim seventeen of the ’473 patent application.<sup>85</sup> Moreover, *Total Recall* was based loosely on Phillip K. Dick’s *We Can Remember it for You Wholesale*, which might then serve as an even earlier example of prior art.<sup>86</sup>

The non-obviousness requirement of the Patent Act<sup>87</sup> looks to the combination of prior art references to see if a person having “ordinary skill in the art” would deem it obvious to combine these preexisting elements into something that merely incorporates all of the preexisting elements. Obviousness is necessarily a particularized inquiry, and it is difficult, if not impossible, to predict a court’s take on the question. Such a prediction, however, is aided by the presence in the prior art of significant and well-known references that share elements of claims made in an application or otherwise might go to obviousness. One such prior art reference is the 2001 film *Vanilla Sky*<sup>88</sup> (itself a remake of the 1997 Spanish film *Open Your Eyes*<sup>89</sup>), in which the main character David Aames (a) expresses a desire to remain asleep or unconscious and (b) forgets substantially all events during the

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<sup>83</sup> ’473 App., *supra* note 3, at claim 17. This claim ties the method to an apparatus. Before naked method patents were allowed under the holding of *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), it was necessary to claim methods in this fashion. Patent lawyers, a fairly conservative cohort, have maintained the form despite the availability of naked method claims.

<sup>84</sup> ’473 App., *supra* note 3, at Abstract.

<sup>85</sup> TOTAL RECALL (Lions Gate 1990).

<sup>86</sup> PHILLIP K. DICK, WE CAN REMEMBER IT FOR YOU WHOLESAL (1990).

<sup>87</sup> 35 U.S.C. § 103.

<sup>88</sup> VANILLA SKY (Artisan Ent. 2001).

<sup>89</sup> ABRE LOS OJOS (Canal+ Espana 1997).

time period beginning a little before he expresses that desire. David later wakes up (albeit only partially) and is unable to remember those events that occurred after the time he indicated, but it slowly becomes clear to him that he was involved actively in a plurality of events. *Vanilla Sky* does not completely anticipate the '473 Application, but speaks strongly to the obviousness of the claims therein. Also going to obviousness is the prevalence and notoriety of the *Rip Van Winkle* stories and their ilk, going back at least some 2000 years.<sup>90</sup> Again, no single one of those stories might anticipate the '473 Application in all of its particulars, but taken together, the genre almost certainly does, and the '473 Application must fail for obviousness.

The '473 Application should be rejected as not presenting proper subject matter for patent, as discussed above. Even setting aside broader questions of law and policy, however, the '473 application should be rejected in any case for lack of novelty and for obviousness.

B. *The '544, '849, and '082 Applications—“By Grabthar’s Hammer,”<sup>91</sup>  
These Plots Are All Anticipated!*

The '544 Application discloses a storyline, briefly summarized, in which a character is afraid of a particular task, is provided with a virtual reality environment in which the character performs the task without the attendant fear, and then the character performs substantially the same task in the “real world” while operating under the false understanding that the character is still in the virtual reality environment.<sup>92</sup>

The novelty of the '544 Application is defeated most directly by the 1999 movie *Galaxy Quest*, which entirely anticipates the proposed storyline, except perhaps with regard to the fear motivation.<sup>93</sup> Jason Nesmith (played by Tim Allen) is a selfish and self-centered actor who is most famous for his role as Peter Quincy Taggart—a character suspiciously evocative of James T. Kirk. He is used to moving in and out of the “virtual reality” of television acting and special appearances on fan-constructed sets and real life.<sup>94</sup> So when real aliens transport him to a real starship, Taggart believes that he is in the virtual world of personal appearance, acts in accordance with that belief, and only later realizes that he was

<sup>90</sup> Washington Irving, *Rip Van Winkle*, in THE SKETCH BROOK OF GEOFFREY CRAYON (1819); TALMUD, *Tractate Taanis*, folio 31A.

<sup>91</sup> “By Grabthar’s Hammer” is a phrase used a number of times in *Galaxy Quest*, a movie described below. GALAXY QUEST (Dreamworks 1999).

<sup>92</sup> '544 App., *supra* note 4, at Abstract.

<sup>93</sup> GALAXY QUEST (Dreamworks 1999).

<sup>94</sup> *Id.*

not in the virtual world but in the real one.<sup>95</sup> Similarly, the plot described in the '544 Application further fails for obviousness in light of prior art including the plots of any number of movies or books that the author can conjure up, such as (again) *Total Recall*,<sup>96</sup> the 1990 film *Joe Versus the Volcano*,<sup>97</sup> and even the 1979 made-for-TV movie *Mazes and Monsters*.<sup>98</sup>

The '849 Application discloses a storyline which includes indicating that a first character voluntarily enters a virtual reality, indicating a belief by the first character that he or she first character is not in virtual reality, and indicating that an interaction in virtual reality between the first character and a second character, while the first character has the belief, causes the first character to labor for, at most, a compensation substantially lower than a market value of the first character's labor.<sup>99</sup>

Later in the application, Mr. Knight makes it clear that the belief under which the first character labors, and because of which the first character accepts lower-than-market compensation, can involve the identity of the employer or the cause served.

The plot disclosed in the '849 Application is not novel. The television show *Alias*, which began airing in 2001, is premised on exactly the described storyline.<sup>100</sup> The only distinction that might be drawn is that the "virtual reality" environment into which the character enters is not electronically created, but is instead the product of careful acting, prevarication, and manipulation of the environment by individual human beings.<sup>101</sup>

Mr. Knight's '849 App. is also evocative of a part of *Total Recall*,<sup>102</sup> in one segment of which the Quaid character realizes that he may have been acting on behalf of the characters whom he

<sup>95</sup> *Id.*

<sup>96</sup> TOTAL RECALL (Lions Gate 1990). During one segment of *Total Recall* the "bad guy" characters try to convince the protagonist that he is, in fact, still in the virtual world even though he thinks he is in the "real" world. *Id.*

<sup>97</sup> JOE VERSUS THE VOLCANO (Warner Bros. 1990). Joe, living a sub-par life, is falsely informed that he has a fatal "brain cloud." Under the misconception about the consequences of his actions, he behaves differently and better, and gets the girl. At the end of the movie, it becomes clear that the "brain cloud" was a falsehood. *Id.*

<sup>98</sup> MAZES AND MONSTERS (Warner Bros. 1982). The protagonist's psychotic break leaves him thinking he is "in game," but acting in the "real" world. *Id.*

<sup>99</sup> '849 App., *supra* note 4, at Abstract.

<sup>100</sup> *Alias* (ABC television series).

<sup>101</sup> *Id.* The protagonist of *Alias*, Sydney Bristow, is recruited into SD-6, which she believes is a covert arm of the CIA, but later finds out that in fact she has been working for a terrorist organization against the interests of the United States. The SD-6 offices in which she has been working are, in truth, an elaborate ruse—a virtual reality if you will. Since she would not, under any circumstances, have worked against the interests of the United States, she is laboring under false pretenses, for substantially less than market compensation.

<sup>102</sup> TOTAL RECALL (Lions Gate 1990). Mr. Knight, consciously or not, seems to have been strongly influenced by this film.

thought he was acting against, by dint of the virtual reality deception. In any event, the relevant segments of that film certainly go towards defeating non-obviousness, if not to defeating novelty.

The '082 Application discloses a storyline wherein a given character experiences “déjà vu” to mask certain actual events, which would cause the character some sort of emotional trauma.<sup>103</sup> The application also considers a “second character exploit[ing] the first character’s déjà vu to commit a crime . . . or frame the first character . . . .”<sup>104</sup>

Reading the “déjà vu” term in this application for something broader than what déjà vu really is, such as “an impediment to perceiving a contemporaneous experience,”<sup>105</sup> the invention disclosed in the '082 App. is nonetheless anticipated by various scripts. The 1987 film, *Angel Heart*,<sup>106</sup> comes to mind as one that would anticipate the '082 Application and defeat any claim of novelty therein. In *Angel Heart*, the protagonist private detective, hired to find a missing person, keeps finding his contacts dead. Only at the end of the movie does the protagonist learn that he is the missing person, and that he has been doing the killing (during an approximate fugue state) in order to prevent him from finding himself.

The “*Family*” episode of *Buffy the Vampire Slayer*, originally aired in November 2000, similarly recounts a plot that would at least speak to the obviousness of the '082 Application, if not directly to the novelty question.<sup>107</sup> In that episode, it is disclosed that the family of a character named Tara has fooled her into thinking that all female members of her family mature into demons, such that the only safe recourse is a life of humble servitude to the men in the family. Also, that episode surrounds events whereby most of the other major characters are ensorcelled by Tara so that they will not perceive her demonic nature and she can continue as a part of the group.

### C. *The '082 Application—Nonsensical and Not Enabling*

The '082 Application suffers an additional defect. The description of the invention is simply not enabling per the statutory requirements, which in this context means that the plot is nonsensical as described. 35 U.S.C. section 112 requires that a

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<sup>103</sup> '082 App., *supra* note 4, at Abstract.

<sup>104</sup> *Id.*

<sup>105</sup> The broad reading is required because of the enablement problem that would arise if déjà vu is read closely, as discussed below.

<sup>106</sup> ANGEL HEART (Live/Artisan 1987).

<sup>107</sup> *Buffy the Vampire Slayer: Family* (WB television broadcast Nov. 7, 2000).

patent describe the invention therein, such that when the patent expires others can “practice” the invention claimed.<sup>108</sup> However, the plot described in the ’082 Application relies on *déjà vu* to “mask an actual event,”<sup>109</sup> such that the *déjà vu* prevents a person from experiencing a particular contemporaneous event.<sup>110</sup> *Déjà vu*, however, does not work that way; the term only describes the feeling that one has witnessed or experienced a new situation previously.<sup>111</sup> A person experiences *déjà vu* during or immediately after actually and consciously experiencing a contemporaneous event. An application that discloses using *déjà vu* to mask an event is nonsensical, discloses what amounts to nothing, and certainly does not enable future practitioners of the so-called invention.

#### V. CONCLUSION: SOME JOKES ARE FUNNY, AND SOME IDEAS ARE JOKES

This analysis of storyline patents in this Note has been hung, loosely, on the framework of a joke, which may or may not seem funny depending on the individual reader’s taste. Even though sometimes a joke can have truth at its core, the analysis herein presented should make it clear that where there is no substantive core, an idea that pretends to be serious<sup>112</sup> will be revealed to be a farce.

The farce here turns on a failure of imagination. On the most pragmatic level, the plots suggested by Mr. Knight fail to be imaginative enough to satisfy the novelty and non-obviousness requirements of patent law, even setting aside questions of eligibility as a matter of doctrine or theory. On the more abstract level, no matter how imaginative the attempts to force doctrine to comply with desire, that imagination cannot but fail; storylines are beyond the scope of patent protection. Plots are not patentable subject matter, nor should they be.

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<sup>108</sup> 35 U.S.C. § 112 (2006) provides:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention . . . .

*Id.*

<sup>109</sup> ’082 App., *supra* note 4, at claim 1.

<sup>110</sup> *Id.* at Description ¶ 0022.

<sup>111</sup> MERRIAM-WEBSTER ONLINE, *déjà vu*, <http://www.m-w.com/dictionary/deja%20vu> (last visited Sept. 2, 2006).

<sup>112</sup> See Knight & Associates, Q&A, <http://www.plotpatents.com/Q&A.htm> (last visited Aug. 28, 2006) (“Q. Are you serious? A. Yes. Q. Really? A. Yes. Q. This isn’t a joke? A. No.”).