COPYRIGHT AND THE MYTH OF CREATIVITY

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ABSTRACT

Since the Supreme Court's 1991 *Feist* opinion, courts have looked for originality—defined for copyright purposes as independent creation and creativity—as a requirement for copyright protection. This Article argues that, as applied, copyright's creativity requirement ends up protecting works that aren't creative at all. Courts consistently conflate creativity with discretion and skill, for example, and a handful of features of copyright's overall structure—its refusal to consider novelty as a relevant criterion, for example—make an assessment of actual creativity a theoretical cul-de-sac. Using examples that range from photography and software to film and visual art, this Article contends that copyright's creativity requirement is either a misnomer (because even before *Feist* courts never looked for actual creativity), or a failed standard (because courts haven't looked for actual creativity since then). In addition, the Article offers criteria that courts can consider when looking for actual creativity.

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I. INTRODUCTION

Toward the end of its 2023 *Warhol* opinion, the Supreme Court praised copyright's ability to protect and sustain human creativity: "If the last century of American art, literature, music, and film is any indication, the existing copyright law, of which today's opinion is a continuation, is a powerful engine of creativity."[1] But there are good reasons to question that optimism—particularly around copyright's conception of creativity itself. Despite the Supreme Court's confident assertion in 1991 that the "vast majority of works . . . possess some creative spark,"[2] copyright law has consistently arrogated content that isn't actually creative.

Just as most of what we say to each other lacks "'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value),"[3] most of what we say, write, email, photograph, or otherwise fix in a tangible medium is not creative. Copyright's current creativity formulation, however, frequently fails to distinguish creative from noncreative content, and

1. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 550 (2023).
2. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).
3. United States v. Stevens, 559 U.S. 460, 479 (2010).

reaches ordinary speech as easily as it captures actually-creative materials. Maybe no single case makes the fusion of ordinary speech with creative speech as obvious as a district court opinion that elevated documentary-film interview answers to the level of creativity: "Plaintiffs' telling of their personal stories in response to questions designed to elicit material to create a fictional script for a feature film likely includes enough creativity to render the Interviews an original work of authorship."[4] In effect, the opinion converted prosaic answers to factual questions into creative works.

By arrogating content that isn't creative, copyright not only exceeds its imperative to encourage creativity, but, by privatizing ordinary speech, removes from circulation content that should remain freely available for downstream use and adaptation—a result that not only causes free speech harm, but, paradoxically, interferes with downstream creativity, too. In a recent dispute involving the *Tiger King* Netflix series, for example, courts found creativity in a video that the camera operator filmed merely "by placing the camera on a tripod and leaving it running."[5] It's hard to imagine less creative footage—at least in this context, putting a camera on a tripod is no more creative than generating security footage—and the trial court acknowledged that the "video is not a work of fiction or artistry,"[6] but nevertheless reasoned that it exhibited "some elements of originality with respect to angle, lighting, and framing."[7] The Tenth Circuit, in turn, thought the trial court's finding of fair use on summary judgment was premature at best.[8] In effect, copyright "elevated into the realm of protectable creative expression"[9] raw footage that was mechanically recorded by a camera mounted on a tripod and made it inaccessible for downstream adaptation. Another case dealing with a similar scenario acknowledged the lack of creativity in the recorded footage, but nevertheless ruled that the creativity requirement was satisfied for copyright purposes: "The purportedly copyright material is not creative in nature. The City Council Videos are straightforward recordings of public proceedings . . . .

4. Found. for Lost Boys & Girls of Sudan, Inc. v. Alcon Ent., LLC, No. 1:15-CV-00509-LMM, 2016 WL 4394486, at *8 (N.D. Ga. Mar. 22, 2016).

5. Whyte Monkee Prods., LLC v. Netflix, Inc. (*Whyte I*), 97 F.4th 699, 707 (10th Cir. 2024).

6. Whyte Monkee Prods., LLC v. Netflix, Inc. (*Whyte II*), 601 F. Supp. 3d 1117, 1137 (W.D. Okla. 2022).

7. *Id.*

8. *Whyte I*, 97 F.4th at 709 ("With respect to the eighth video, however, we conclude that the district court erred in determining that Defendants were entitled to summary judgment on their fair use defense.").

9. Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998).

Given the barely creative nature of the City Council Videos, and their informational purpose, they enjoy very narrow copyright protection."[10]

In short, despite repeated rhetoric that characterizes creativity as an absolute requirement for copyright protection, in practice courts persistently protect content that, when analyzed more closely, fails to rise to the level of actual creativity. The accuracy of copyright's creativity criteria is particularly pressing in light of the American Law Institute's ongoing Restatement of Copyright Law project, which aims to set creativity standards in stone.[11]

This Article suggests that copyright's creativity requirement is either a misnomer—since courts have never looked for actual creativity—or a failed standard, since courts don't have the theoretical framework for finding actual creativity. If the former is true, and copyright doesn't want to protect only actually-creative content, an updated nomenclature would be more accurate. If the latter is true and copyright does want to protect only content that is actually-creative, a heightened standard would be useful. Either way, copyright shouldn't reach ordinary speech.

In Part II, this Article makes two arguments: first, that current creativity formulations often fail to discriminate between unprotectable ordinary speech and speech that, in a phrase from a 1942 patent case, actually "rises to the dignity of creation,"[12] and, second, that what copyright really protects is the independent generation of content rather than actual creativity. In Part III, the Article proposes categories of content that should be excluded from copyright's reach in order to prevent copyright from abrogating ordinary speech. In Part IV, the Article offers additional criteria that courts can consider if they do want to implement a more discerning creativity standard.

II. COPYRIGHT'S CURRENT CREATIVITY FORMULAE

A. BACKGROUND

Copyright's creativity requirement is an odd doctrinal duck. Despite being a central criterion for copyright protection—courts consistently affirm that "human creativity is the sine qua non at the core of copyrightability," as a recent opinion put it—the requirement has no express basis in the

10. City of Inglewood v. Teixeira, No. CV-15-01815-MWF (MRWx), 2015 WL 5025839, at *9–10 (C.D. Cal. Aug. 20, 2015).

11. For more about this initiative in general, see Jessica Silbey & Jeanne Fromer, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J.L. & ARTS 341 (2021), and, in connection with the originality requirement in particular, Justin Hughes, *Restating Copyright Law's Originality Requirement*, 44 COLUM. J.L. & ARTS 383 (2021).

12. Ray-O-Vac Co. v. Goodyear Tire & Rubber Co., 45 F. Supp. 927, 931 (1942).

Constitution, either the Intellectual Property Clause or elsewhere.[13] Legislative history, in turn, shows that creativity was deliberately—and paradoxically—left out of the Copyright Act of 1976.

The 1961 Report pointed out that "original creative authorship"[14] is a fundamental criterion of copyright protection under the present law, and recommended that this requirement be specified in the statute. Concerns that using the words "creative" and "original" might lead courts to establish a standard of copyrightability higher than the one applied in case law, however, led drafters to omit those words, and section 102 of the bill specifies the subject matter of copyright simply as "original works of authorship"—without further attempt at definition.[15]

In 1991, in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*,[16] the Supreme Court ruled that originality for copyright purposes means that a work be independently created (i.e., not copied) and contain a modicum of creativity. Despite its absence from congressional language, *Feist* made creativity the central copyrightability requirement. Indeed, *Feist* also made it a constitutional requirement: because originality itself is a constitutional imperative,[17] so is the requirement that a work be creative in order to be eligible for copyright protection.

Feist's formulation weaved together existing standards, some of them quite old. An 1888 opinion, for example, had noted that "originality, however, may be of the lowest order,"[18] and in 1951 the Third Circuit wrote that "in order for a map to be copyrightable its preparation must involve a modicum of creative work."[19] The Ninth Circuit anticipated independent creation in 1933 when it separated originality from what it called independent production: "Both works may be entitled to copyright, although identical, if each is an original and independent production."[20] A 1975 Third Circuit opinion foreshadowed *Feist* when it expressly shifted the emphasis away from

13. Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146 (D.D.C. 2023).

14. STAFF OF H. COMM. ON THE JUDICIARY, 89th Cong., REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 12 (Comm. Print 1965) (drafting "original works of authorship" without further definition in Section 102 based on the 1961 Report).

15. *Id.*

16. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 340 (1991).

17. *Id.* at 346 ("Originality is a constitutional requirement . . . . In two decisions from the late 19th century[,] . . . this Court defined the crucial terms 'authors' and 'writings.' In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.").

18. Brightley v. Littleton, 37 F. 103, 104 (E.D. Pa. 1888).

19. Amsterdam v. Triangle Publ'ns, 189 F.2d 104, 106 (3d Cir. 1951); *see also* Bradbury v. Columbia Broad. Sys., Inc., 174 F. Supp. 733, 738 (S.D. Cal. 1959) ("[O]riginality of the slightest degree is sufficient.").

20. Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 17 (9th Cir. 1933).

originality to a modicum of creativity—"[i]t is true that originality is not a prerequisite of copyright, and even a modicum of creativity may suffice for a work to be protected"[21]—but *Feist* made this principle dogma. Before 1991, it may have been accurate to say that "[t]he requirement of creativeness is separate and distinct from authorship or originality,"[22] but after *Feist*, originality expressly subsumed creativity. *Feist* also reaffirmed the old copyright principle that copyright doesn't require novelty: "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[23]

In sum, *Feist* ostensibly stabilized the long search for a definition of originality, which the Eleventh Circuit thought "defies exact definition."[24] Earlier cases had included far-flung, disparate, and ad hoc standards: artistic talent,[25] "a distinctly artistic conception,"[26] uniqueness,[27] evidence of "intellectual labor and judgment,"[28] "intellectual production as the result of thought and conception on the part of the author,"[29] and "exercising intellectual labor."[30] By providing a neatly packaged formula for originality—"independent creation plus a modicum of creativity"[31]—*Feist* dispensed with unsettled criteria.

Since independent creation is a trivial requirement that basically means the author can't copy something; as the Seventh Circuit put it, "[i]ndependent creation is a short hurdle."[32] In practice, *Feist* puts the weight of copyrightability entirely on the element of creativity, which a Second Circuit

21. Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 908 (3d Cir. 1975); *see also* McIntyre v. Double-A Music Corp., 179 F. Supp. 160, 161 (S.D. Cal. 1959) ("[T]he courts have consistently held that 'originality' requires some element of creativity.").

22. Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776, 781 (S.D.N.Y. 1968).

23. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 341 (1991).

24. Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 824 (11th Cir. 1982).

25. Gross v. Seligman, 212 F. 930, 931 (2d Cir. 1914) (highlighting "the exercise of artistic talent, which made the first photographic picture a subject of copyright").

26. *Id.* at 931 ("When the Grace of Youth was produced a distinctly artistic conception was formed[.]").

27. Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986) (arguing that "[venerable and often-recurring themes of police fiction] are not copyrightable except to the extent they are given unique—and therefore protectible—expression in an original creation").

28. Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

29. Falk v. Gast Lithograph & Engraving Co., 54 F. 890, 891 (2d Cir. 1893).

30. Vitaphone Corp. v. Hutchinson Amusement Co., 28 F. Supp. 526, 529 (D. Mass. 1939).

31. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 341 (1991).

32. UIRC-GSA Holdings, LLC v. William Blair & Co., 90 F.4th 908, 913 (7th Cir. 2024).

opinion called "an important ingredient,"[33] and a Seventh Circuit opinion—more accurately—described as "the essence of an original work."[34] While the Supreme Court issued the broad rule that only a "modicum of creativity"[35] is required, the Court provided no formula for assessing that modicum.

Defining creativity is a surprisingly difficult task. Just as football players don't necessarily understand the physics of throwing the ball,[36] creators themselves don't necessarily understand the creative process. Picasso, when asked what creativity is, reportedly replied with customary bite: "I don't know, and if I did, I wouldn't tell you."[37] When asked the same question, the psychologist E. Paul Torrance, who had dedicated his entire career to studying the topic, answered: "I have struggled with this question for about 40 years."[38] And it's even more difficult to define—and, therefore, apply—in light of *Feist*'s unintuitive originality definition. Nonlegal concepts of creativity nearly always include the "production of something new or original"[39] in their definitions. When Eudora Welty lovingly reviewed *Nine Stories* in the *New York Times* in 1953, she wrote that "J. D. Salinger's writing is original, first rate, serious and beautiful."[40] Charlie Kaufman's *Synecdoche*, according to one reviewer, "is a surreal, dream-like experience, and one of Kaufman's most original screenplays to date."[41] What these writers meant by "original" is what the ordinary person means when using that word: something novel and unlike the rest.

When artists set out to create something, they typically aim for originality, too. In 1945, Picasso reputedly said that "[a] painter's atelier should be a

33. Kregos v. Associated Press, 937 F.2d 700, 704 (2d Cir. 1991).

34. Am. Dental Ass'n v. Delta Dental Plans Ass'n, No. 92 C 5909, 1996 WL 224494, at *7 (N.D. Ill. May 1, 1996), *vacated*, 126 F.3d 977 (7th Cir. 1997).

35. *Feist*, 499 U.S. at 346.

36. Warren E. Leary, *Physicists See Long Pass as Triumph of 3 Torques*, N.Y. TIMES, Jan. 2, 1996, at B9 ("Dr. David G. Haase, a physicist at North Carolina State University who also studies sports, said many athletes unconsciously understand the physics of sports through practice and playing. 'But they could never explain the forces involved, which is where we come in,' he said. 'What we learn about the physics of football or basketball is fun for the rest of us, especially teachers.'").

37. DAVID BEST, THE RATIONALITY OF FEELING: LEARNING FROM THE ARTS 87 (United Kingdom: Taylor & Francis 2012) (1992).

38. Michael F. Shaughnessy, *An Interview with E. Paul Torrance: About Creativity*, 10 EDUC. PSYCH. REV. 441, 441 (1998).

39. E. PAUL TORRANCE, CREATIVITY 4 (1963).

40. Eudora Welty, *Threads of Innocence*, N.Y. TIMES, Apr. 5, 1953, at B89.

41. Jonny Hoffman, *Every Charlie Kaufman Movie, Ranked*, MOVIEWEB (Jan. 18, 2022), https://movieweb.com/every-charlie-kaufman-movie-ranked/.

laboratory. One doesn't do a monkey's job here: one invents."[42] And virtually all scholarly definitions of creativity recognize the presence of originality and novelty as a *sine qua non* of creativity. In 1953, one scholar identified twenty-five nonlegal definitions of creativity present in a survey of nonlegal literature, including "original or unique organizations," "new combinations," "a new correlate," "[a] novel work that is accepted as tenable or useful or satisfying by a group," "new qualitative content," "power to connect a multitude of assimilated items into a novel, synthetical unity," "new combinations or patterns," and "[b]ringing to society new and original values."[43] A more recent formulation found creativity in the moment "when a person . . . has a new idea or sees a new pattern."[44] Another formulation: "true creativity is defined by the adaptiveness of a response as well as its unusualness."[45]

In the legal context, though, these definitions would fail as creativity standards because they all require looking for something that copyright law renders impermissible—that is, novelty. As a 1927 case put it, "works of art, to be copyrightable, do not, like patents, need to disclose the originality of invention,"[46] and a 1956 Seventh Circuit case reiterated that "the copyright test or 'originality' is not so severe a standard as the patent tests of 'invention' and 'novelty.'"[47] Contrary to Picasso's view of what an artist does in the lab, "this type of creativity—the inventive leap or new idea—is not required for copyrightable expression."[48]

Copyright's prohibition against novelty coupled with *Feist*'s definition of originality puts the copyright concept of creativity at odds with cultural practices. On the non-copyright view, something is creative if it's original, and originality itself is determined by reference to novelty. "For it is central to the

42. SUSAN GRACE GALASSI, PICASSO'S VARIATIONS ON THE MASTERS: CONFRONTATIONS WITH THE PAST 8 (1996).

43. Douglas N. Morgan, *Creativity Today: A Constructive Analytic Review of Certain Philosophical and Psychological Work*, 12 J. AESTHETICS & ART CRITICISM 1, 1–3 (1953).

44. MIHALY CSIKSZENTMIHALYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION 28 (1996).

45. Donald W. MacKinnon, *What Makes a Person Creative?*, 5 THEORY INTO PRACTICE 152, 153 (1966).

46. Gerlach-Barklow Co. v. Morris & Bendien, 23 F.2d 159, 161 (2d Cir. 1927); *see also* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951) ("Originality in this context 'means little more than a prohibition of actual copying.' No matter how poor artistically the 'author's' addition, it is enough if it be his own."); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9th Cir. 1970) ("[T]he originality necessary to support a copyright merely calls for independent creation, not novelty.").

47. McIntyre v. Double-A Music Corp., 179 F. Supp. 160, 161 (S.D. Cal. 1959) (citing Wihtol v. Wells, 231 F.2d 550 (7th Cir. 1956)).

48. Lotus Dev. Corp. v. Borland Int'l, Inc., 831 F. Supp. 202, 218 (D. Mass. 1993).

meaning of the term that to be creative is, precisely, to do something *original*."[49] The formulation goes on to emphasize the significance of novelty: "Creativity is sometimes contrasted to conformity and is defined as the contribution of original ideas, a different point of view, or a new way of looking at problems."[50] On modern copyright's view, though, something is original if it's creative. If we agree that at least one measure of creativity is the presence of originality, and if we agree, moreover, that originality is measured with reference to novelty, then copyright, by attributing originality to all creative efforts rather than attributing creativity to works that exhibit originality, has created an upside-down standard. Saying anything creative is original presumes the very thing (creativity) that the latter (originality) is supposed to prove. A key—arguably, an indispensable—measurement of creativity is lost. In its wake, what courts end up protecting is creation rather than creativity, and copyright's creativity requirement is either a misnomer (courts don't look for actual creativity), a failed standard (courts can't look for actual creativity), or both (courts neither try to find nor can find actual creativity).

B. CURRENT FORMULAE

The Section below briefly reviews the principal standards used to assess creativity and argues that lower courts have fallen back on homemade formulae that often fail to accurately identify actual creativity.

1. Choices and Discretion

An expressive work that exhibits complexity is typically the result of many authorial choices, which courts often interpret as self-evident indicia of creativity: "copyright law protects not only the individual elements themselves, but the creative choices made in selecting and arranging even uncopyrightable elements."[51] As another opinion put it, "an author must imbue the work with a visible form that results from creative choices."[52] The standard has been

49. BEST, *supra* note 37, at 87.
50. TORRANCE, *supra* note 39, at 4.
51. Keeling v. Hars, 809 F.3d 43, 50 (2d Cir. 2015).
52. SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 308 (S.D.N.Y. 2000).

widely applied in case law—from design[53] and software development[54] to photography,[55] data collections,[56] and even color selection.[57]

The choice to include or exclude something is seen as a sign of creativity outside of works that are historically seen as creative, too. The Ninth Circuit, for instance, detected "some minimal creative effort" in an email message "insofar as Plaintiff selected the particular evidence to cite when asking whether his fellow listserv members thought it constituted churning or overbilling,"[58] and discretionary choice is at the heart of the principle that mere arrangements and collections are creative.[59] The Second Circuit, for example, thought that choosing content based on what might be relevant to an anticipated audience was evidence of creativity: "In assembling the directory, Ms. Wang had to select from a multitude of businesses in New York and elsewhere those of greatest interest to her audience—the New York City Chinese-American community."[60]

In short, copyright cases frequently equate discretion with creativity. Below, I argue that the presumption goes too far. Discretion is creative not merely if it's exercised, but only if it's exercised creatively. The choices/discretion approach has intuitive appeal and provides a useful framework, but it easily confuses discretion with creativity. While "[s]election implies the exercise of judgment in choosing which facts from a given body of data to

53. Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 136 (2d Cir. 2003) ("[T]he plaintiff seems to have engaged in a selective and particularized culling of a leaf here, a complex of leaves and flowers there, and so forth.").

54. *See, e.g.*, Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 697 (2d Cir. 1992).

55. Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1074–75 (9th Cir. 2000) ("Courts today continue to hold that such decisions by the photographer—or, more precisely, the elements of photographs that *result* from these decisions—are worthy of copyright protection.").

56. Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc., 893 F.3d 1176, 1182 (9th Cir. 2018) ("The Supreme Court in *Feist* went on to recognize that a little creativity in the selection or arrangement of facts would make a big difference.").

57. Boisson v. Banian Ltd., 273 F.3d 262, 271 (2d Cir. 2001) ("[E]ven though a particular color is not copyrightable, the author's choice in incorporating color with other elements may be copyrighted.").

58. Stern v. Does, 978 F. Supp. 2d 1031, 1043 (C.D. Cal. 2011), *aff'd sub nom.* Stern v. Weinstein, 512 F. App'x 701 (9th Cir. 2013).

59. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) ("The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data . . . . These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.").

60. Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., 945 F.2d 509, 513 (2d Cir. 1991).

include in a compilation,"[61] the exercise of judgment is not inherently creative. If I don't include every copyright case that occurs to me while writing this paper, for example, it's because those cases are not relevant to my argument, not because I'm being creative. If I don't add spinach to my shopping list, it's because I don't like spinach, or because it's not part of the recipe I'm using, not because I'm being creative. Cases that find creativity on the theory that the creator has exercised discretion simply go too far; if exercising basic discretion—such as choosing content based on relevance—is creative, then we are all creative all the time, and the creativity standard is effectively meaningless. As the Supreme Court noted in 1986, "*all* speech inherently involves choices of what to say and what to leave unsaid."[62]

Nor does expertise turn discretion into creativity. If a client asks me whether leaving a rusted car in a fenceless backyard that neighbors a playground full of curious and adventurous kids creates any legal risk, I can quickly give a reasoned opinion about attractive nuisance, but the opinion isn't creative—it's the mere application of expertise to a particular set of facts. In other words, a lawyer issuing a rudimentary legal opinion in response to a specific fact pattern isn't being creative by virtue of applying expert knowledge to relevant facts. This, after all, is what expert witnesses do, and courts rely on their factual accuracy not creativity.

MacLean[63] is a good example of a case that finds creativity in expert discretion rather than creativity. At issue was "a compendium of . . . projections of used car valuations."[64] The trial court wasn't persuaded that generating a list of used car values was sufficiently creative, but the appellate court disagreed.[65] Two arguments in the Second Circuit's opinion stand out. First, the Second Circuit found creativity in part on expert discretion: "these predictions were based not only on a multitude of data sources, but also on professional judgment and expertise."[66] Second, the opinion found creativity in the application of logic: "The fact that an arrangement of data responds *logically* to the needs of the market for which the compilation was prepared does not negate originality. To the contrary, the use of logic to solve the problems of how best to present the information being compiled is

61. *Id.*

62. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n., 475 U.S. 1, 11 (1986).

63. *See* CCC Info. Servs. v. MacLean Hunter Mkt. Reps., Inc., 44 F.3d 61 (2d Cir. 1994).

64. *Id.* at 63.

65. *Id.* at 66–67 ("The district court gave several reasons for its ruling that the Red Book failed the test for originality . . . . We find that the selection and arrangement of data in the Red Book displayed amply sufficient originality to pass the low threshold requirement to earn copyright protection.").

66. *Id.* at 67.

independent creation."[67] But applying logic should yield predictable results, and it should yield the same results for everyone who applies the same logic to the same datasets. Moreover, someone who is an expert in the field should generate the right—rather than creative—answers to particular problems. This is the very opposite of creativity, which involves the generation of unexpected and individualized outcomes.

The exercise of expert discretion is evident in software development, too. The creative insight in software development—in the sense of providing a novel solution to an existing problem or to a newly-identified technical opportunity—is more likely to occur at the level of algorithm than implementation. The regular-expressions algorithm, for instance, which allows wildcard-based searches through alphanumeric data sets, was an innovative leap (and received a patent in 1971).[68] Whereas the algorithm itself was the product of creativity, however, its implementation in 2024 is primarily an operational choice, a matter of leveraging existing resources to achieve a desired result, rather than finding an original way of doing something. Put another way, its application is a matter of expert discretion rather than creativity.

Parallel scenarios are common in software development. I can put together a website that returns results for the query "copyright infringement" from major search engines. I would need to select a web framework, existing libraries, and APIs, and make choices about what language to write in, which IDE to code in, how to structure and organize my class files, which database to use, how to organize tables and the relationships among them, and of course how to code the individual functions. But virtually all these choices would be primarily technical. Most of what I'd code, moreover, would leverage existing functionality rather than create that functionality from scratch. My code may or may not have the hallmarks of good code, and be or not be "beautiful code: compact, elegant, efficient, and useful."[69] But it wouldn't require creativity as much as it would require the expert application of knowledge to effect a particular outcome. Discretion without something more is not creativity; it's just a method—often very basic method—for arranging or applying information. Yet the choices methodology would virtually automatically render

67. *Id.*

68. U.S. Patent No. 3,568,156 (issued Mar. 3, 1971) (disclosing a "general purpose computer program and special purpose apparatus for matching strings of alphanumeric characters"). For more about this algorithm's history, see Brian Kernighan, *A Regular Expression Matcher*, *in* BEAUTIFUL CODE (Andy Oram & Greg Wilson eds., 2007).

69. BEAUTIFUL CODE, *supra* note 68, at 2.

my code creative simply by virtue of my discretionary choices, whatever their nature (e.g., pure functionality) or basis (e.g., industry standards).

Put another way, creativity is exercising discretion creatively, rather than merely exercising discretion. Kurt Schwitters aggregated content and assembled it in collages with a very specific meaning in mind—to create "new art forms out of the remains of a former culture"[70] destroyed by World War I—and Duchamp's *Fountain* was a creative and revolutionary moment in art history because he challenged the very notion of art: "Whether Mr. Mutt with his own hands made the fountain or not has no importance. He CHOSE it. He took an ordinary article of life, placed it so that its useful significance disappeared under the new title and point of view—created a new thought for that object."[71] Indeed, the alphabet itself, even though it wasn't good enough as an organizing principle for a phonebook in *Feist*, could easily be creative, as is the case with *Artificial Typography*, a book that shows the entire alphabet from the perspective of fifty-two artists, including Picasso.[72]

These examples conflate ideas with expression, two dimensions that copyright steadfastly keeps separate (while extending protection only to the latter), but this is to illustrate a point that I pick up later—namely, that meaning—i.e., our reason for doing something—is a highly-relevant criterion for creativity assessment, and merely having a reason isn't the same thing as having a creative reason.

In the context of collections specifically, in order to be creative information needs to be aggregated according to a nontrivial organizing principle. But even in this context, the principle that discretion equals creativity is too open ended to be trustworthy as a determinant of actual creativity. Is the discretionary aggregation of information always creative simply because I have some rudimentary idea unifying various photographs? If I travel through England and, along the way, happen to take snapshots of manors, am I doing something creative? Does it matter if the photos are terrible? Is it enough that I call the whole thing "English Manors" and publish them online? What if, instead of photos, I make a list of locations and publish the coordinates online under the title "Manors I Found in England"? Does the mere assembly of prosaic information automatically rise to the level of creativity simply because there is some simple basis for that organization? Does it matter if they're photos rather than text? How is this different from numismatics or collecting

70. JOHN ELDERFIELD, KURT SCHWITTERS 12 (1985).

71. Marcel Duchamp, *The Richard Mutt Case*, 2 THE BLIND MAN 1, 5 (1917) ("The Blind Man" was a short-lived Dadaist journal.).

72. *See* ANDREA TRABUCCO-CAMPOS & MARTÍN AZAMBUJA, ARTIFICIAL TYPOGRAPHY (Vernacular 2022).

stamps? If I limit my coins to pre-war Europe and my stamps to post-war Europe, have I engaged in a creative act because there is a discretionary basis for each collection? How is either different from fifth graders making a list of their favorite flowers? Especially in the context of expressive works, the principle's utility quickly disappears as it starts to gobble up ordinary speech and ordinary discretion. If copyright elevates to the level of creativity discretion that's basic to any human communication, we will all be "creative" all the time, and copyright will continue to arrogate ordinary content. If the goal is to limit protection to creative works, the mere exercise of discretion can't be an adequate basis for copyright protection. It's too much to say that "[c]lassification is a creative endeavor,"[73] and more accurate to say that it might be a creative endeavor if the discretion behind it is itself creative.

The choices/discretion approach takes a particular form in the context of photography cases, which further reveal its limitations. In *Burrow-Giles*, the 1884 case in which the Supreme Court sealed photography's eligibility for copyright protection, the Court's reasoning was grounded in the photographer's choices. Sarony, the Court reasoned, created the image by making a series of significant choices: posing Oscar Wilde himself, choosing the costume, and "arranging and disposing the light and shade."[74] The photograph deserved protection, in other words, because to use the catchy phrase in *Thaler*,[75] the Court found Sarony's "guiding human hand"[76] in his arrangement of the photograph's subject matter.

Subsequent cases identified additional choices that authors make in connection with photographs and film. One opinion considered timing: "It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc."[77] Others considered the configuration of the camera gear. When confronted with the question of whether Zapruder's video of the assassination of JFK was copyrightable, for example, a New York district court thought the images were creative because of Zapruder's choice of camera, film, lens, as well as location and timing.[78] A more recent formulation added other elements to the creativity

73. Am. Dental Ass'n v. Delta Dental Plans Ass'n, 126 F.3d 977, 979 (7th Cir. 1997).

74. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54–55 (1884).

75. Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023).

76. *Id.* at 146.

77. Pagano v. Chas. Beseler Co., 234 F. 963, 964 (S.D.N.Y. 1916).

78. Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968) ("The Zapruder pictures in fact have many elements of creativity. Among other things, Zapruder selected the kind of camera (movies, not snapshots), the kind of film (color), the kind of lens

calculus: "Selection of a fast shutter speed freezes motion while a slow speed blurs it. Filters alter color, brightness, focus and reflection. Even the strength of the developing solution can alter the grain of the negative."[79]

In effect, sources of photographic creativity (including video) have been broken into three tiers: front of camera (e.g., set arrangement), behind the camera (e.g., timing of the photo, angle), and camera configuration (e.g., lens, film, aperture). Today, courts apply these in a single breath:

> The necessary originality for a photograph may be founded upon, among other things, the photographer's choice of subject matter, angle of photograph, lighting, determination of the precise time when the photograph is to be taken, the kind of camera, the kind of film, the kind of lens, and the area in which the pictures are taken.[80]

The formulation has become shorthand for creativity in photography,[81] and photography's status as an inherently creative medium is taken as a given: "It is well recognized that photography is a form of artistic expression, requiring numerous artistic judgments."[82]

First, because it's virtually impossible to take a photograph—even one that is painfully banal and uncreative—without making many of the choices outlined by the courts, the methodology is empty. "A simple viewing of the Photographs demonstrate that they are creative, involving creative decisions related to, *inter alia*, subject matter, angle of the photograph, lighting, and pose. These creative decisions are sufficient to meet the relatively low bar for

(telephoto), the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated.").

79. SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000).

80. E. Am. Trio Prods. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 417 (S.D.N.Y. 2000), *dismissed*, 243 F.3d 559 (Fed. Cir. 2000).

81. There are many examples of this principle being applied over the years. *See, e.g.*, United States v. Hamilton, 583 F.2d 448, 452 (9th Cir. 1978) ("[T]he courts have carefully delineated selection of subject, posture, background, lighting, and perhaps even perspective alone as protectible elements of a photographer's work."); *SHL Imaging*, 117 F. Supp. 2d at 311 ("What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection."); Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1230 (11th Cir. 2010) ("Latimer made all decisions regarding lighting, appropriate camera equipment and lens, camera settings and use of the white background, which was consistent with the industry practice he had noted in studying other advertising photographs."); Harney v. Sony Pictures TV, Inc., No. 10-11181-RWZ, 2011 WL 1811656, at *1 (D. Mass. May 12, 2011) ("Harney selected the lens, camera settings, flash lighting, and camera angle so that the church would be present and in-focus in the background and later edited the photograph on his computer.").

82. Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1073 (9th Cir. 2000).

originality."[83] But how can anyone take a photo that doesn't include subject matter, isn't taken from a particular angle, doesn't involve light, and, if it's of a person or people, doesn't capture someone's pose? The choices standard, in connection with photographs, is no more useful than saying a text is creative because it contains words, makes an argument, and takes a position, a formula that would capture "I think spinach tastes bad" and "I think the world is flat" just as easily as it would capture a Tolstoy novel. The formulation renders virtually all photographs creative, even those vernacular images (i.e., snapshots) that, when measured by more robust, nonlegal standards, are not creative at all. As Professor Subotnik put it, "courts ultimately rely on proxies for originality rather than provide in each instance a robust accounting of what makes the particular constellation of choices embedded in a photograph original."[84] But the proxies often fail.

The inadequacy of the choices approach is made clear in two recent cases, each involving a supermodel who, without permission, posted a paparazzo photo of herself on her social media account. Judges in both disputes relied on the argument that, "[a]s with almost any photograph, the photographs at issue here reflect myriad creative choices, including, for example, their lighting, angle, and focus."[85] Despite identifying "myriad creative choices,"[86] however, the opinions list a meager three, none of which, individually or in the aggregate, reveal creativity:

a) Inescapable Choices

Lighting. There is rarely a possibility of controlling lighting when you're chasing a celebrity to take a photograph on the street. That particular choice, while relevant to studio work and some non-studio work, simply doesn't apply to this genre of photography. Moreover, most of the cameras used by photographers are likely set to adjust for lighting conditions automatically, precisely in case conditions unexpectedly change; to the extent varied lighting conditions are addressed, they're done by the machine, not the human holding it.

Angle. Every photo has an angle, just like almost every book has words, so this choice is utterly meaningless as a sign of creativity in itself. Moreover, the

83. Wareka v. JW Sanders PLLC, No. 1:23-CV-246-RP, 2024 WL 1978076, at *4 (W.D. Tex. May 3, 2024).

84. Eva Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1529 (2011).

85. Sands v. CBS Interactive Inc., No. 18-CV-7345 (JSR), 2019 WL 1447014, at *3 (S.D.N.Y. Mar. 13, 2019). The second case, O'Neil v. Ratajkowski, 563 F. Supp. 3d 112, 125 (S.D.N.Y. 2021), adopted this argument verbatim.

86. *Ratajkowski*, 563 F. Supp. 3d at 125.

choice of angle is likely dictated by access rather than creative and aesthetic criteria. Paparazzi photos are usually taken when each photographer is competing with others trying to get the shot. These photos rarely—if ever—convey creative angles.

Focus. Focus is one of those operational choices you must make to use a camera, so this is simply not a creative choice, and certainly doesn't raise the photograph to the dignity of creation. As a standard, this is as meaningless as saying a book was written in English or some other human-readable language.

b) Technical/Operational Choices

The choices-based methodology frequently fuses technical and creative choices, and attributes creativity to choices that very often are merely operational. The vast majority of the criteria listed in connection with photographic creativity are unavoidable technical aspects of taking a photograph. Sports and wildlife photographers couldn't take pictures without telephoto lenses and converters, for example, and I might use a certain film or increased ISO setting because I need increased light sensitivity, not because of the appearance either choice generates. I might set the aperture wide open or use a slow shutter speed for the same reasons, too. This is no different than setting up a microscope or a telescope for purely optical reasons. Choices required to utilize a particular technology simply shouldn't be considered part of the work's creativity, yet they typically are.

In a recent dispute, the court was open to the argument that a photograph of a football coach may well be creative in part because the photographer used a professional camera.[87] A comparison illustrates the difference between operational and creative choices. In the nineteenth century, photographers took photos of the Civil War using daguerreotypes;[88] in the twenty-first century, Chuck Close made a series of portraits using daguerreotypes.[89] For Chuck Close, the decision to use that particular technology was elective. For Civil War photographers, it was the only technology available. Does that choice elevate Close's work to creative work? Probably not; anyone can take a

87. Campbell v. Gannett Co., No. 4:21-00557-CV-RK, 2023 WL 5250959, at *6 (W.D. Mo. Aug. 15, 2023) (acknowledging a range of artistic choices, "including use of a high-resolution, professional camera with a particular type of telephoto lens").

88. *See generally* MARY PANZER, MATHEW BRADY AND THE IMAGE OF HISTORY (2004).

89. With considerable hyperbole, one article characterized the series as reinvention of photography. Jonathon Keats, *See How Chuck Close Reinvented Photography in This Groundbreaking Museum Retrospective*, FORBES (Nov. 18, 2016), https://www.forbes.com/sites/jonathonkeats/2016/11/18/see-how-chuck-close-reinvented-photography-in-this-groundbreaking-museum-retrospective/.

daguerreotype, after all. But it clearly wasn't a creative choice for Civil War photographers, for whom it was merely a technical choice.

That isn't to say technological choice is never creatively relevant or itself creative. It was a creative choice for the straight photography movement, which relied on the specific technical aspects of photography in order to embrace the medium's essence, and for John Hilliard's *Camera Recording its Own Condition*,[90] which is a series of photos that utilize every shutter speed and aperture setting available on his 35mm camera. Another example of technological choices that reflect creativity comes from Stephen Pippin, who converted washing machines into cameras and took photos of himself in a laundromat[91] in order to reference Eadweard Muybridge's early photos of animal locomotion. All are examples of creative technical choices made in the service of conveying specific meaning. When the choice is purely operational, though, its creative contribution is nil, yet virtually all camera-configuration arguments in case law miss this distinction. Knowing how to use a camera is no more creative than knowing how to use a photocopier. Particularly when it comes to vernacular photography, moreover, cameras are often set to automatic, and configured simply to record whatever is in front of the lens, not to engage in meta-discourse about methods of production, or to generate particular aesthetic or conceptual results.

c) Historical Context

The choices methodology misses critical historical change. In the 1980s, a court reasoned that "[a] speeded-up video game is a substantially different product from the original game. As noted, it is more exciting to play and it requires some creative effort to produce."[92] But today, increasing speed can be a matter of changing the value of a variable in software,[93] which hardly requires "some creative effort." Video game technology has changed significantly, and a mechanical application of the choices methodology misses that fact. The same is true with photography. In the words of *The Tin Drum*'s main protagonist: "and now the turn-of-the-century art photo degenerates into

90. *Camera Recording Its Own Condition (7 Apertures, 10 Speeds, 2 Mirrors)*, TATE, https://www.tate.org.uk/art/artworks/hilliard-camera-recording-its-own-condition-7-apertures-10-speeds-2-mirrors-t03116 (last visited Mar. 8, 2025).

91. *See* Steven Pippin, *New Work: Stephen Pippin—Laundromat/Locomotion*, SFMOMA (1998), https://www.sfmoma.org/exhibition/new-work-steven-pippin-laundromat-locomotion/.

92. Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1014 (7th Cir. 1983).

93. @PlasmaFarmer, *How Do I Increase Speed of Player Over Time?*, REDDIT, https://www.reddit.com/r/gamedev/comments/18eco6c/how_do_i_increase_speed_of_player_over_time/ (last visited Mar. 8, 2025).

today's commercial photo . . . . Simply place Grandfather's sepia portrait side by side with the glossy passport of Klepp, just crying out for a rubber stamp, and it's easy to see where advances in photography have brought us."[94] *Burrow-Giles*[95] was formulated before portable cameras were available (the Kodak Brownie was released only a few years after the decision), at a time in the medium's history when taking even a basic portrait was an involved, studio-based process. A century and a half later, the same dated standard continues to be applied mechanically, despite the fact that the technology and the practice of taking photographs have changed drastically. Today, taking even complex photos can be achieved with remarkable ease, and often with no creative effort.

d) Inconsistent Application

The application of the choices methodology in connection with photography is inconsistent. The content of a photograph is open to challenge. For example, one court reasoned that "[t]he photographer there did not orchestrate the pose and, even if he had, the pose is so commonplace as to be part of the public domain."[96] But the choices approach allows courts to ignore the content of photographs and find creativity solely on the grounds that the photographer made requisite choices. In *Friedman*,[97] for example, which turned on a photograph of Run-DMC, the defendant argued that the band's pose was generic, and the photo shouldn't be deemed creative. The court bypassed the argument altogether: "Here, it is undisputed that Plaintiff selected and arranged the subjects. Although the court believes that no more is required, the court also notes that Plaintiff made related decisions about light and shadow, image clarity, depth of field, spatial relationships, and graininess that were all represented in the copyrighted Photograph."[98] In "slavish copy" cases,[99] two photographs resemble each other so much that the later photo is deemed unoriginal—despite the fact that its production requires the photographer to make choices that courts otherwise consider creative. In other words, in slavish copy disputes, courts consistently flip things upside down and, instead of looking at choices, look at the photograph's content to reach the conclusion that the photo isn't creative. It's an entirely discretionary

94. GÜNTER GRASS, THE TIN DRUM 38–39 (1st ed. 1959).

95. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884).

96. Rentmeester v. Nike, Inc., 883 F.3d 1111, 1119 (9th Cir. 2018).

97. Friedman v. Guetta, No. CV 10-00014 DDP (JCx), 2011 WL 3510890, at *3 (C.D. Cal. May 27, 2011).

98. *Id.*

99. *See, e.g.*, Bridgeman Art Libr. v. Corel Corp., 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) ("But 'slavish copying,' although doubtless requiring technical skill and effort, does not qualify" as sufficiently original.).

approach; courts have no principled basis for sometimes choosing to find creativity in the presumption of choices that were made and, in others, in the content itself. More important, how can those very same choices render one photo creative and render another ineligible for protection?

e) Unreliability

Finally, the choices approach is not a reliable standard. Even some ostensibly creative choices often aren't always actually creative. Consider the use of a shallow aperture for close-up portraits. Chuck Close used a wide-open lens, creating a very shallow depth of field. But this approach is widespread.[100] Just as "[t]he choice of locale for a story does not, necessarily, spell originality,"[101] neither does the choice to use common lens settings, especially since the number of aperture settings on any lens is limited to very few options.

Indeed, it's a well-established copyright principle that protection should automatically be weaker where only a few choices are available. "A copyrighted work is entitled to thin protection when the range of creative choices that can be made in producing the work is narrow."[102] There's a sound policy basis behind the principle—if only a few choices are available, copyrighting one or all of them would impact downstream creativity by prohibiting other creators from making the same choices.[103] Aperture settings, which are inherently limited to only a handful, easily fit into this category.

It's also worth noting, though, that even if the selection of a choice when only a few are available is not itself copyrightable, in many cases, it would be wrong to say that choice is not creative. In other words, copyright's principle that fewer choices always indicate less creativity sometimes misses the mark. The most famous cartoon mouse in the history of copyright was designed with round features primarily to facilitate animation and high output: "The Mouse

100. *See* Chris Vognar, *'Seinfeld' Star Michael Richards is More Than the Worst Thing That Ever Happened to Him*, L.A. TIMES (May 26, 2024), https://www.latimes.com/entertainment-arts/books/story/2024-05-26/michael-richards-racist-tirade-apology-book-seinfeld-kramer?utm_source=pocket-newtab-en-us (featuring photography by Marcus Ubungen); *see also* Cheyenna Roundtree & Nancy Dillon, *Bad Boy for Life: Sean Combs' History of Violence*, ROLLING STONE (May 28, 2024), https://www.yahoo.com/entertainment/bad-boy-life-013248759.html (featuring photography by Martin Schoeller).

101. Bradbury v. Columbia Broad. Sys., Inc., 174 F. Supp. 733, 738 (S.D. Cal. 1959).

102. Rentmeester v. Nike, Inc., 883 F.3d 1111, 1120 (9th Cir. 2018).

103. Carmichael Lodge No. 2103 v. Leonard, No. CIV. S-07-2665 LKK/GGH, 2009 WL 2985476, at *11 (E.D. Cal. Sep. 15, 2009) ("The above factors may preclude a finding of creativity even when they reduce the range of options to very few, but not a single, choice for selection or arrangement. In such a scenario, affording copyright protection to the choice may make it impossible for future authors to avoid infringement. When options are so constrained, the choice of any one option is not creative.").

was very much a product of the then-current conventions of animation, which held that angular figures were well nigh impossible to animate successfully and that clearly articulated joints were also too difficult to manage, at least at the speed of drawing demanded by the economics of the industry."[104] John Hilliard's *Camera Recording its Own Condition*,[105] mentioned earlier, exploits every choice available in a small array of choices to convey meaning in a creative way. Or consider this vignette regarding a Chuck Close work:

> An enormous 1993 print of the artist Alex Katz is a prime example of the often improvisational and experimental nature of Close's printmaking. Originally intended as reduction linoleum cut, a form of relief printing, the project was plagued by a series of technical setbacks, ingeniously solved by transforming the image into a multi-toned silkscreen. Close considers the result—startling in its corporeal verisimilitude—superior to anything he could have achieved through relief printing.[106]

If you've seen the first Indiana Jones film, you likely remember Harrison Ford shooting his enemy rather than engaging in a swordfight—an adjustment to production that was primarily a function of the actor and crew suffering from dysentery in Tunisia: "The sequence where Harrison is battling the swordsman and pulls out the gun, and shoots the swordsman, was a compromise that I made on the day that Harrison wasn't feeling too well."[107] The choice not to show Alfie's replacement in the final scene of the remake was the result of the producers not being able to find a suitable actor, but that, too, is a creative choice, and a more effective ending. Or consider this album-cover drawing:[108]

104. RICHARD SCHICKEL, THE DISNEY VERSION: THE LIFE, TIMES, ART AND COMMERCE OF WALT DISNEY 66 (Simon & Schuster, 3d ed. 2019).

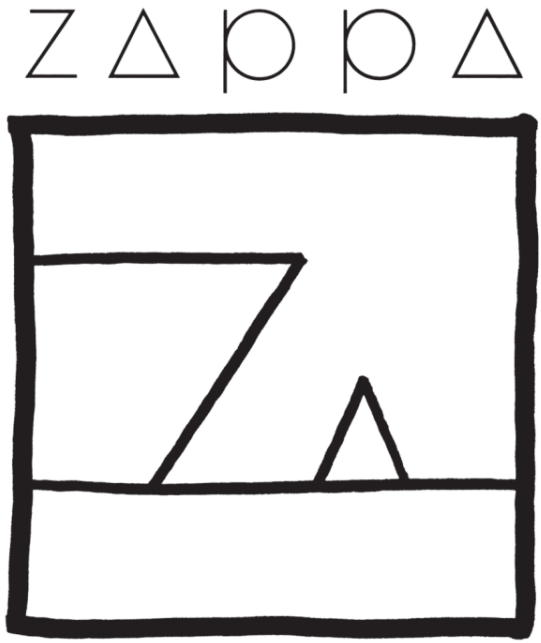
105. *See* TATE, *supra* note 90.

106. Press Release, Metropolitan Museum of Art, Chuck Close Prints: Process and Collaboration (Dec. 7, 2003), https://www.metmuseum.org/press-releases/chuck-close-prints—process-and-collaboration-2003-exhibitions.

107. Joe Bergen, *'Indiana Jones': Why Harrison Ford Pitched 'Raiders of the Lost Ark's Famous Gun vs Sword Scene (Flashback)*, ENTERTAINMENT TONIGHT (June 30, 2023), https://www.etonline.com/indiana-jones-why-harrison-ford-pitched-raiders-of-the-lost-arks-famous-gun-vs-sword-scene.

108. Photograph of album art, *in* FRANK ZAPPA, SHIP ARRIVING TOO LATE TO SAVE A DROWNING WITCH (Barking Pumpkin Records 1982).

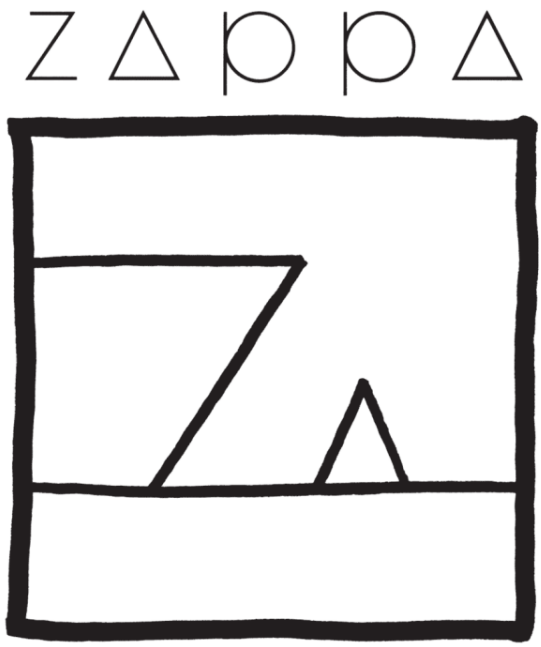
Figure 1: Photograph of Album Art



And then again look at it with the caption:[109]

109. *Id.*

Figure 2: Frank Zappa, "Ship Arriving Too Late to Save a Drowning Witch"



The second one, by virtue of an unexpected and unpredictable description that made unexpected sense of just a few lines, is undoubtedly creative, despite its minimal expression. Roger Price's 1953 *Droodles* offers many parallel examples.[110]

A narrow range of choices should limit copyright protection only when the speaker falls back on one of those obvious—i.e., noncreative—choices, not because there is a narrow number of options to begin with. Doing more with less often requires greater rather than lesser creative insight; indeed, sometimes choices based on a limited range of options yield the strongest examples of creativity. As Chuck Close put it: "when you have very strict limitations, you have to be . . . very creative to figure out a way of getting them to work for you."[111] Or, as a Central District of California opinion put it, even a "single sentence may be singular."[112]

110. *See generally* ROGER PRICE, DROODLES (1953).

111. Corcoran Gallery of Art, *Corcoran Presents Chuck Close Prints: Process and Collaboration*, PR NEWSWIRE (June 3, 2010), https://www.prnewswire.com/news-releases/corcoran-presents-chuck-close-prints-process-and-collaboration-95528369.html.

112. Stern v. Does, 978 F. Supp. 2d 1031, 1041 (C.D. Cal. 2011).

In sum, the mere presence of choices is meaningless as a criterion unless we analyze the individual nature of each choice. A mechanistic formula that equates creativity with discretion often finds creativity where there is none.

2. Uniqueness

Another theory suggests that a work's creativity inheres in its uniqueness, which itself is the inescapable function of the author's individuality: "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."[113] Subsequent courts have embraced the personality perspective: "no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike."[114] Because the work is the expression of the unique author, in other words, it's inherently creative, and a but-for creativity analysis is easy: We need only to find the source of the expression rather than analyze its actual quantum of creativity. If that source is human, some degree of creativity might as well be presumed. Other photographers might take a photo of the same subject, in other words, "but none of them will be exactly like this. He is, and no one else can be, the author of this."[115] More recently, the Second Circuit fused the personality theory with a finding of uniqueness: "Thus, in terms of his unique expression of the subject matter captured in the photograph, plaintiff has established valid ownership of a copyright in an original work of art."[116]

But this is another standard that promises much yet delivers little, particularly in connection with photographs. Every photo is unique, of course, but this is mostly by virtue of the fact that no two photos can be taken from the same place at the same time rather than differences in the photographers' personalities. Think of a hundred Jets fans next to each other at a game, taking photos of the game while waiting (and waiting and waiting) for their team to score. The absolute uniqueness of each photograph is the result of physics, not creativity, and no matter how different their personalities, each photo will look roughly the same—despite being unique in the sense that each was taken from a slightly different angle, at a different time, by a different person with a different personality.

In sum, a work's uniqueness doesn't make it creative any more than a sneeze is creative because it's different from other sneezes. Indeed, if

113. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).
114. Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 274 F. 932, 934 (S.D.N.Y. 1921).
115. Falk v. Brett Lithographing Co., 48 F. 678, 679 (S.D.N.Y. 1981).
116. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).

everything were unique, the standard would be useless, and everything would be creative. One thinks of the Monty Python scene where everyone repeats "Yes, we're all individuals!" and "Yes, we're all different!" and "Yes, we've got to work it out for ourselves!"[117] If uniqueness were enough, then *ipso facto* no photo could infringe on another since each would be inescapably different. But uniqueness simply isn't inherently creative. It may certainly be an aspect of creativity, but by itself, it doesn't indicate creativity. Put another way, being unique is not enough; something has to be unique in a specific way in order to qualify as creative.

3. Skill

Another case-law trend finds creativity in the exercise of skill. Skill, of course, is highly relevant to creativity, but technique in and of itself is not creativity. Forgeries require skill, after all, but lack creativity, which is precisely why photographs that are merely slavish copies don't receive protection. Photography, according to Walker Evans, "is a non-stop bull-session on the art of seeing. Photography isn't a matter of taking pictures. It's a matter of having an eye."[118] The comment separates the ability to see a photo from the ability to execute it. The former is the creative step; the latter is merely a step in generating that outcome. Skill, in other words, may be required to generate the creative outcome, but by itself, it's not creativity.

117. MONTY PYTHON'S LIFE OF BRIAN (HandMade Films 1979).
118. SVETLANA ALPERS, WALKER EVANS: STARTING FROM SCRATCH 1 (2020).

Figure 3: Berenice Abbott, *Grand Central Station* photograph

What makes this 1929 photo of Grand Central compelling is the particular combination of formal elements: the shape and pattern of the light beams, the orderly distribution of the silhouettes, and the organized framing.[119] Skill is necessary in order to effect the particular outcome—this looks like a long exposure that required the photographer to consider choice of film and shutter speed—but the creative aspect of this image is in its content and the photographer's ability to visualize the aesthetic.

Moreover, while in many cases it may be true that "photography . . . certainly involves skill,"[120] advanced camera technology makes it easy to take a photo without exercising much—if any—skill at all. If, for instance, the camera is set to fully automatic, all I need to do is point it in the general direction of something I find interesting. Apart from choosing the subject matter, I haven't exercised any skill or creative judgment. Choosing subject matter, in turn, is no more inherently creative than choosing an entrée from a restaurant menu. It could be creative—e.g., it's what could give the work meaning that reflects

119. Berenice Abbott, *Grand Central Station* (photograph).
120. Barcroft Media, Ltd. v. Coed Media Grp., 297 F. Supp. 3d 339, 354 (S.D.N.Y. 2017).

creativity. The photo might also be creative by virtue of framing, timing, and narrative content. But in both cases it will be something other than my ability to operate the camera that will make the photo creative.

Technical skill connects to the creative process in the sense that it makes the creative process possible. But, except in outlier situations, it's not inherently creative. Connecting my printer to Wi-Fi is not part of the creative process, even if the actual printing may be. It's a meaningless and purely technical step in the chain of events, one that makes the creative process possible but doesn't add to the work's creative quotient. The Tenth Circuit recognized the difference nearly a century ago:

> Mechanical skill is but the display of the expected skill of the calling; it involves only the exercise of the ordinary faculties of reasoning, aided by the special knowledge and the facility of manipulation which is acquired through habitual and intelligent practice of the art; and it is in no sense the creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward.[121]

4. Genre-Based Presumptions

Courts have a long tradition of basing copyright eligibility on a work's genre rather than its specific creative features. In 1891, for example, the Southern District of New York wrote that "[t]he amount of labor or skill in the production does not seem to be material if the proper subject of a copyright is produced, and the producer copyrights it."[122] A New York District Court applied a similar genre-based presumption in 1921 with regard to photography; the opinion mused that essentially all photographs ought to be copyrighted: "The suggestion that the Constitution might not include all photographs seems to me overstrained."[123] More recently, a New York district court reasoned that "much, perhaps almost all, photography is sufficiently original to be subject to copyright."[124]

Courts have applied the genre-based presumption across genres and media. In a 1939 case, for instance, the copyrightability of short films was challenged on the grounds that "the photoplays in question showed works so trivial, vulgar and of such little artistic value that they did not merit the

121. Callison v. Boyle, 95 F.2d 575, 576 (10th Cir. 1938).

122. Falk v. Brett Lithographing Co., 48 F. 678, 679 (S.D.N.Y. 1981).

123. Jewelers' Circular Pub. Co. v. Keystone Pub. Co., 274 F. 932, 935 (S.D.N.Y. 1921).

124. Bridgeman Art Libr., Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998), *on reconsideration*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

protection of the copyright laws."[125] The court was not persuaded, but short films qualified for protection anyway; the opinion simply tethered itself to earlier cases that found movies in general worthy of copyright protection: "it has been decided that motion picture photoplays of the type here in question are entitled to protection under the provisions of the Copyright Act."[126] A 1951 Third Circuit case attached a presumption of originality to yet other forms of expression: "The presentation of ideas in the form of books, movies, music and other similar creative work is protected by the Copyright Act."[127] In 1985, the Supreme Court reasoned that nonfiction is automatically creative: "Creation of a nonfiction work, even a compilation of pure fact, entails originality."[128] And two years before *Feist*, a Second Circuit opinion concluded that "[m]ovies, plays, books, and songs are all indisputably works of artistic expression and deserve protection."[129]

Courts have continued to apply genre-based presumption after *Feist*. A New York district court found portrait photography to be inherently creative: "Grecco has also met the second prong for 'originality' because the Xena Photograph is clearly an example of portrait photography, reflecting the artistic choices of Grecco, its author."[130] In 2012, the Ninth Circuit took the position that virtually *all* photographs are creative: "Photos are generally viewed as creative, aesthetic expressions of a scene or image and have long been the subject of copyright."[131] Courts have made parallel assessments with regard to novels and plays,[132] music,[133] humorous works,[134] and video games.[135]

In short, without a working definition of creativity, courts find copyrightability based on the work's genre rather than its content. Before *Feist*, this approach likely reflected the view that a work should be copyrighted mostly by virtue of being the type of work that copyright protects. But if we

125. Vitaphone Corp. v. Hutchinson Amusement Co., 28 F. Supp. 526, 528–29 (D. Mass. 1939).

126. *Id.* at 529.

127. Amsterdam v. Triangle Publ'ns, 189 F.2d 104, 106 (3d Cir. 1951).

128. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

129. Rogers v. Grimaldi, 875 F.2d 994, 997 (2d Cir. 1989).

130. Golden v. Michael Grecco Prods., 524 F. Supp. 3d 52, 60 (E.D.N.Y. 2021).

131. Monge v. Maya Mags., Inc., 688 F.3d 1164, 1177 (9th Cir. 2012).

132. Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1444 (9th Cir. 1994) (distinguishing graphical user interfaces from "purely artistic works such as novels and plays").

133. Elvis Presley Enters. v. Passport Video, 349 F.3d 622, 630 (9th Cir. 2003) (stating it is undisputed that "original musical compositions are inherently creative").

134. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 598–99 (1994) ("If a work targets another for humorous or ironic effect, it is by definition a new creative work.").

135. Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1014 (7th Cir. 1983) ("A speeded-up video game is a substantially different product from the original game. As noted, it is more exciting to play and it requires some creative effort to produce").

want to protect actual creativity, generating a certain type of content by itself isn't enough. The fact that I get up on stage during open mic doesn't mean everything I say is poetry (I might just be introducing myself or someone else, after all), nor is everything one writes literature or an academic paper by virtue of addressing particular subject matter—poets making shopping lists, too, and the fact that I used a typewriter doesn't mean I've written literature. "The Supreme Court in *Feist* made clear that the originality requirement is constitutional, and that no work is per se protectible,"[136] but genre-based presumptions come very close to having precisely that effect. Just as "not everything that communicates an idea counts as 'speech' for First Amendment purposes,"[137] not everything that is a certain kind of speech counts as creative speech. The medium needs a message, and the message itself needs to be creative.

5. Mental Conception

In *Burrow-Giles*, the Court emphasized that Napoleon Sarony, the New York City photographer who took the portrait of pre-fame Oscar Wilde, created the image "entirely from his own original mental conception,"[138] a standard that, verbatim or paraphrased, has been in use ever since. In 1905, for example, a circuit court in New Jersey concluded that a film is "an expression of an idea, or thought, or conception of the" photographer.[139] In 1982, the Second Circuit fixed originality at the moment of mental conception: "Someone first conceived what the audiovisual display would look like and sound like. Originality occurred at that point. Then the program was written."[140] As another court put it, the photographer "had something in mind when he took the pictures."[141]

136. SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000).
137. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1058 (9th Cir. 2010).
138. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54–55 (1884).
139. Am. Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262, 265 (D.N.J. 1905).
140. Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 856 (2d Cir. 1982).
141. Pohl v. MH Sub I LLC, 770 Fed. Appx. 482, 489 (11th Cir. 2019); *see also* M. B. Fahey Tobacco Co. v. Senior, 247 F. 809, 816 (E.D. Pa. 1917) (evaluating a photograph as artwork involving "originality of thought and conception"); Nat'l Tel. News Co. v. W. Union Tel. Co., 119 F. 294, 297 (7th Cir. 1902) ("Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind."); Kisch v. Ammirati & Puris Inc., 657 F. Supp. 380, 382 (S.D.N.Y. 1987) ("The copyrightable elements of a photograph have been described as the photographer's 'original' 'conception' of his subject, not the subject itself."); Latimer v. Roaring Toyz, Inc., 550 F. Supp. 2d 1345, 1355 (M.D. Fla. 2008) ("Elements of originality include all elements that involve the author's subjective judgments in giving visual form to his own mental conception of the product.").

But this principle, too, has limited reach. First, the suggestion that there is a single, rigid, persistent, fixed concept that guides all decisions in all creative processes is unrealistic. As anyone who's written a law school paper knows, the process is not nearly as linear as the "mental conception" standard suggests. Michael Richards, the actor who played Kramer on *Seinfeld*, commented that it took him multiple episodes to figure out aspects of Kramer's wardrobe, mannerisms, and personality.[142] Moreover, the start is often nothing more than an intuition that takes shape only once the work begins. There is, in other words, no mental conception, and the conception forms only as the work begins. "It is important to note that making an artwork does not involve rendering a prethought idea; rather, making an artwork involves a process of negotiation between the artist and the developing work."[143] This is often the Edisonian method of trial and error, of testing what fits and what doesn't, not as a matter of brute force, but as a product of adjusted expectations. Any complex creative effort almost inevitably moves away from—and often entirely abandons—the conceptual seed as new options present themselves and new limitations become obvious. One scholar highlighted this part of the creative process by saying that "[a]t each stage there must be a perception of deficiencies in what now exists, plus the sense of unrealized possibilities of improvement."[144] Rick Rubin, the record producer, wrote that "[t]he work reveals itself as you go."[145] Jerry Saltz, an art critic, wrote that "[a]rtists must also reckon with the uncanny feeling that by the time we've finished a new work, we've often ended up creating something different from what we set out to do."[146]

The process, in short, is fluid. The mental conception itself, to the extent there was one, changes, or shatters into multiple mental conceptions, some of which get thrown away, some of which survive. Creative effort is a process of stitching together various insights rather than the steady realization of a fixed

142. Nick Hilden, *"I'll Admit I Blew It": Michael Richards Talks Kramer, Vietnam, and That Racist Outburst*, ROLLING STONE (June 1, 2024), https://www.rollingstone.com/culture/culture-features/michael-richards-memoir-racist-outburst-cancer-1235030531/ ("It took probably about 13 episodes of wandering about in the putting together of that character. The right clothes and brooding over this and that, and thinking of ways in which to build an entire character. The voice. The look. The mannerisms. All the ticks. It's all carefully calculated, but it takes a lot of wandering to get there.").

143. Mary-Anne Mace & Tony Ward, *Modeling the Creative Process: A Grounded Theory Analysis of Creativity in the Domain of Art Making*, 14 CREATIVITY RSCH. J. 179, 185 (2002).

144. Monroe C. Beardsley, *On the Creation of Art*, 23 J. AESTHETICS & ART CRITICISM 291, 299 (1965).

145. RICK RUBIN, THE CREATIVE ACT: A WAY OF BEING 146 (2023).

146. Jerry Saltz, *How to Be an Artist*, VULTURE (Nov. 27, 2018), https://www.vulture.com/2018/11/jerry-saltz-how-to-be-an-artist.html.

idea. The work itself is a moving target; finding the way, losing the way, and finding the way again is part of the process. "Always something goes wrong. Always, always. And there is always a solution. It just may not be the preconceived route."[147]

Second, the mental conception basis doesn't say anything about creativity per se. A recent opinion suggested that "[e]lements of originality include all elements that involve the author's subjective judgments in giving visual form to his own mental conception of the product,"[148] echoing the *Burrow-Giles* principle that "the ideas in the mind of the author are given visible expression."[149] But this formulation applies to noncreative content as easily as it does to creative content. If I tell you about my trip to Paris, I have a mental conception of the story I want to relay to you, or I will form one as soon as I start talking and memories come back to me. Mental conception is a requisite for expression, but that expression isn't creative simply because there is a mental conception behind it. Just as uniqueness fails as a determinant of creativity simply because lots of things are unique without being creative, mental conception as a basis for creativity fails because lots of expression has a mental conception without being creative.

C. DEFINITIONAL TRAP

The unreliability of the foregoing standards as determinants of creativity is underscored by the fact that they reach ordinary speech just as easily as they reach creative speech.[150]

- *Choices and Discretion.* Most non-compelled speech reflects the discretion to speak in the first place, as well as the discretion to choose subject matter and viewpoint ("I hate spinach."). As the Supreme Court put it: "all speech inherently involves choices of what to say and what to leave unsaid."[151]

147. June Lambla, *Chuck Close: Prints and Process*, RESOURCE LIBRARY MAGAZINE, https://www.tfaoi.org/aa/4aa/4aa278.htm (last accessed Mar. 10, 2025).

148. Latimer v. Roaring Toyz, Inc., 550 F. Supp. 2d 1345, 1355 (M.D. Fla. 2008).

149. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

150. The other major flaw with each formulation is that it ends up being all encompassing. If taken at face value, each standard reaches just as far as the presumption that a work is creative by virtue of its genre rather than its specific content. Any intentional act, right down to the lowly selfie, will have some kind of mental conception, which means all photos are creative. Taking a selfie requires some skill since it requires that we frame the photo and know how to use the smartphone, which means all photos are creative. It reveals personality: we might hold the phone a certain way, include a certain person, use a certain background, which means all photos are creative. And it requires choices: where to take it, when to take it. Again, all photos are creative.

151. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n., 475 U.S. 1, 11 (1986).

- *Genre-Based Presumption.* If the speech is photography, unless it's a slavish copy, it will be automatically deemed creative, no matter how uncreative it actually may be: "To be sure, much, perhaps almost all, photography is sufficiently original to be subject to copyright."[152] A boring photo of spinach would likely qualify for protection.

- *Uniqueness.* In a metaphysical sense, each moment is unique, so every exchange is unique, even if the words are repeated. Saying "I hate spinach" is a different event each time, even if the words are the same in each instance.

- *Skill.* How we say something may be a matter of skill. "I appreciate that spinach has many nutritious ingredients critical for long-term health, but in my estimate the flavor simply isn't palatable" may be a more skillful and artful phrase than "Man, I hate spinach," but it's hardly creative just because it's the more-skillful alternative.

- *Mental conception.* Any time we speak, we have an idea of what we will say. Mental conception as a principle applies to ordinary and creative speech. I likely have a lot of memories of spinach dishes when I express my dislike of it.

The fact that standards used to assess creativity apply with equal strength to noncreative content likely explains why "there is no bright line separating minimally-creative works from works lacking a sufficient quantum of creativity to warrant copyright protection."[153]

Feist's formulation of originality and the regime's prohibition against novelty as a standard make copyright's abrogation of ordinary speech virtually inevitable. If we set aside copyright formulations for a moment, we can conceive of originality in three ways. The first is what we can call world originality, which is actual originality (i.e., as conceptualized outside the legal system), or originality in the sense that there is something unique and novel in the work when that work is compared to all existing content. In 1845, for instance, a Massachusetts district court appears to embrace world originality as the lodestar when it asks "whether the plaintiff's book contains any thing new

152. Bridgeman Art Libr., Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998).

153. PrimeSource, Inc. v. Pers. Res., Inc., No. 97-CV-0400E F, 1998 WL 543366, at *3 (W.D.N.Y. Aug. 20, 1998); *see also* Sadhu Singh Hamdad Tr. v. Ajit Newspaper Advert., Mktg. & Commc'ns, Inc., 503 F. Supp. 2d 577, 588 (E.D.N.Y. 2007) ("There is no 'bright line' separating a work with this requisite slight amount of creativity from a work so deficient of creativity that it is not copyrightable.").

and original, entitling him to a copy-right."[154] This formulation is presumably what another court had in mind when making the comment that "absolute originality" is impossible in connection with maps,[155] or, some 80 years later, another court commented that a "plaintiff claims absolute originality for name, words and music."[156] It's also what art critics and movie and book reviewers generally have in mind when they say a work is original. One scholar called this type of idea historical creativity: "no one else, in all human history, has ever had it before."[157]

There is also an attenuated version of world originality, which we can call context originality, or the situation where a work is compared to a recognized subset of preexisting works or even a single preexisting work. This is the approach adopted in infringement cases, which requires courts to compare the challenged work with known predecessors, including the one that's ostensibly being infringed.

Finally, there is creator originality, or originality in the sense that the work is new to the creator rather than being new in the world. If I am thinking through a concept and come up with some insight, it might be new to me, even if it's not new in the world. An historical example would be calculus, which was developed independently by Isaac Newton and Gottfried Leibniz. In the 1950s, a professor at the Rochester Institute of Technology's Department of Photography wrote that the program encourages "the student . . . to explore his world—the visual world—with fresh eyes, seeing familiar things with new insights, discovering the world of light, form, shape, texture, and color, finding myriad kinds of relationships and meanings, tangible and intangible, lasting and ephemeral amongst visible things."[158] In other words, it encouraged creator originality by encouraging the student to seek insights that are novel to the individual. The Second Circuit put it this way: "Originality sufficient for copyright protection exists if the 'author' has introduced any element of novelty as contrasted with the material previously known to him."[159] Margaret A. Boden called this type of content generation psychological creativity: "the person in whose mind it arises could not have

154. Emerson v. Davies, 8 F. Cas. 615, 618 (C.C.D. Mass. 1845).

155. Chapman v. Ferry, 18 F. 539, 542 (C.C.D. Or. 1883).

156. Walters v. Shari Music Publ'g Corp., 185 F. Supp. 408, 410 (S.D.N.Y. 1960).

157. MARGARET A. BODEN, *What Is Creativity?*, *in* DIMENSIONS OF CREATIVITY, 76 (1994).

158. C. B. Neblette, Hollis N. Todd & Ralph M. Hattersley Jr., *The Department of Photography at the Rochester Institute of Technology*, 5 APERTURE 33, 33–38 (1957).

159. Puddu v. Buonamici Statuary, Inc., 450 F.2d 401, 402 (2d Cir. 1971).

had it before; it does not matter how many times other people have already had the same idea."[160]

Copyright's structure doesn't leave room for either world originality or creator originality. By prohibiting novelty as a requirement, copyright makes world originality impermissible as a standard. Creator originality, in turn, has been reduced to mere generation. According to copyright, a work is original simply by virtue of being created by the creator, without any question as to its novelty vis-à-vis the world or its creator. "'Original' in reference to a copyright work means that the particular work 'owes its origin' to the 'author.'"[161] On that view, it simply doesn't matter if a work is actually creative—it only requires a human source: "the work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another."[162]

It's not hard to see how the current copyright creativity formulation prevents judges from detecting actual creativity. When creativity basically just means non-copied speech—rather than speech with an element of novelty that indicates originality and, therefore, creativity—there isn't a material difference between *Feist*'s requirements of independent creation and creativity. The two variables collapse into one another, and, instead of $o=ic+c$ (i.e., originality equals independent creation plus creativity), the formula, as applied, is actually $o=ic+ic$. "Establishing originality implicates only a light burden"[163] in large part because the creativity standard is nothing more than independent creation repeated. After *Feist*, all we need is non-copied speech, however ordinary, which inescapably leads copyright to capture ordinary speech. If the goal is to identify actual creativity, copyright's current creativity approach is a theoretical cul-de-sac.

D. BANALITY

Nineteenth-century copyright case law consistently referred to genius as the source of creativity, a perspective that aligned with contemporary cultural emphasis on the highly idealized, imaginative (and, arguably, largely imaginary)

160. BODEN, *supra* note 157, at 76.

161. N. Coast Indus. v. Jason Maxwell, Inc., 972 F.2d 1031, 1033 (9th Cir. 1992); *see also* Stuff v. La Budde Feed & Grain Co., 42 F. Supp. 493, 495 (E.D. Wis. 1941) ("To entitle a work to copyright protection, it must be (1) *original*, in that the author has created it by his own skill, labor, and judgment."); Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959) ("[T]he work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another.").

162. *Alva*, 177 F. Supp. at 267.

163. Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc., 618 F.3d 417, 430 (4th Cir. 2010).

creative hero. Critics looked for works "indicative of genius,"[164] and Beethoven, confident in his own status, reportedly broke social convention while strolling with Goethe in a public garden by refusing to step aside for a group of aristocrats—a symbolic gesture meant to illustrate the superiority of genius to artificial social status and titles: "They could make a privy councilor or a minister but they could not make a Goethe or a Beethoven."[165] As a matter of doctrine, though, this was more metaphor than measurement, more mindset than methodology. Courts typically tempered references to genius with more earthly standards, such as intellect: "the exclusive right of a man to the production of his own genius or intellect." A 1908 Supreme Court case echoed this dual standard: "the reward of genius or intellect in the production of his book or work or art."[166] Despite the rhetoric, in other words, copyright never required genius, terribilita, *furor poeticus*—that rare, extraordinary, and nearly-mythical talent and ability that Beethoven celebrated in himself; if it had, very few things would have passed muster.

In practice, it seems that copyright's creativity requirement is purely symbolic, too. Maybe no aspect of the law reveals copyright's indifference to actual creativity than the regime's consistent protection of banality. In the late 90s, for instance, an Illinois district court suggested "imaginative deviation from the ordinary"[167] as a creativity standard, which plainly lines up with earlier research on divergent thinking, or what today we might call thinking outside the box. The Seventh Circuit reversed.[168] Notably, in a later case the Seventh Circuit itself reached for imagination as a relevant criterion: "While it is possible that something other than an arrow could have been used to indicate direction, use of an arrow is hardly imaginative or creative in this situation."[169] More recently, a Massachusetts district court refused to see creativity in a work that was "aggressively vapid—hundreds of pages filled with generalizations, platitudes, and observations of the obvious."[170] The First Circuit reversed.[171] At least one commentator has argued for nonobviousness as a heightened

164. JOHN RUSKIN, PRE-RAPHAELITISM 45 (1851).

165. PAUL JOHNSON, THE BIRTH OF THE MODERN: WORLD SOCIETY 1815–1830, at 118 (HarperCollins 1991).

166. Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347 (1908).

167. Am. Dental Ass'n v. Delta Dental Plans Ass'n, No. 92 C 5909, 1996 WL 224494, at *12 (N.D. Ill. May 1, 1996), *vacated*, 126 F.3d 977 (7th Cir. 1997).

168. Am. Dental Ass'n v. Delta Dental Plans Ass'n, 126 F.3d 977, 981 (7th Cir. 1997).

169. Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007, 1014 (7th Cir. 2005).

170. Situation Mgmt. Sys. v. ASP Consulting Grp., 535 F. Supp. 2d 231, 239 (D. Mass. 2008).

171. Situation Mgmt. Sys., Inc. v. ASP Consulting LLC, 560 F.3d 53, 60 (1st Cir. 2009).

originality standard.[172] Not only doesn't copyright see banality as failure of creativity, however, but it rewards banality as keenly as it rewards actual creativity.

Moreover, a structural aspect of copyright law—the idea/expression dichotomy—actually encourages the production of banal content. It's a long-standing principle in copyright that it protects only expression while the idea embedded in that expression remains free.[173] Put another way, the idea/expression dichotomy liberates the ideas embedded in expression, and allows others to use them, so long as the secondary expression isn't a copy or a trivial alteration of the original expression. Ideas, in short, can be freely adapted by anyone who likes them, so long as they are expressed differently in each instance.

Copyright exempts recurring archetypes from claims of infringement either on the grounds that they're simply ideas, or, in some cases, on the grounds that they're inevitable components of certain narrative structures (a concept christened *scène à faire* by a 1942 opinion).[174] In the early twentieth century, for instance, in connection with two other plays, a New York district court found that "the unexpected discovery of the title character in a place where she should not be" was "an old device . . . . It was common property of all playwrights."[175] A later case reasoned that "[f]oot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop, are venerable and often-recurring themes of police fiction. As such, they are not copyrightable except to the extent they are given unique—and therefore protectible—expression in an original creation."[176] In 1980, a Second Circuit opinion alluded to a structural archetype: "The Gidding screenplay follows what is known in the motion picture industry as a 'Grand Hotel' formula, developing a number of fictional characters and subplots involving them. This formula has become standard fare in so-called 'disaster' movies, which have

172. Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 494 (2009) ("We can hoist originality by analogy to nonobviousness, protecting an expressive work insofar as the author can show that the work departed from routine, typical, or conventional expression in the pertinent genre at the time he or she authored the work.").

173. Baker v. Selden, 101 U.S. 99, 105 (1879) ("The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.").

174. Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942) ("[S]imilarities and incidental details necessary to the environment or setting of an action are not the material of which copyrightable originality consists.").

175. Hubges v. Belasco, 130 F. 388, 388 (C.C.S.D.N.Y. 1904).

176. Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986).

enjoyed a certain popularity in recent years."[177] In short, the novel expression establishes an archetype that later works adopt and adapt.

The free reusability of ideas increases speech and, often, creativity, as existing archetypes are reshaped into new stories. *Star Wars* and *Star Trek*, to take two well-known and obvious examples, both liberally leverage archetypes.[178] But extensive reuse inevitably drains ideas of their novelty, and their mere reapplication yields humdrum, noncreative outcomes. In 1868, for example, a New York district court issued an injunction against a play that utilized what subsequently became a recurring trope—the "railroad scene" depicting a person tied to the train tracks as a good Samaritan struggles to free the victim while a locomotive quickly approaches.[179] While the first instance of this scene was novel, it eventually turned into an unprotectable old trick that surfaced in subsequent productions.

When the archetypes are open ended, there is room for creativity to flourish; it's not difficult to see how the Grand Hotel structure allows for creative implementations. A talking robot, to take another example, is broad enough as a premise to accommodate *Wall-E*, *RoboCop*, and *The Terminator*. As the archetype narrows, though, so does the possibility of creative implementation. Consider one photographer's drone images of South African cities that show "the gulf in living conditions for the poor and the wealthy in South Africa"[180] by taking dramatic drone photos of the borders between adjacent poor and wealthy neighborhoods. If I take similar photos in another city, my photo might convey valuable information—it shows, for instance, that the same pattern is widespread—but is it actually creative? Or am I now just applying an archetype? Or consider the dispute between the photographer Annie Leibovitz and Paramount,[181] which centered on a nude photo of a pregnant actress. The image received a lot of attention after appearing on the cover of *Vanity Fair*,[182] and Paramount, in a tongue-in-cheek way, capitalized on its popularity: The poster for its *Naked Gun 33 1/3* film parodied the *Vanity Fair* cover by featuring Leslie Nielsen, an actor, as a pregnant man. In effect,

177. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 976 (2d Cir. 1980).

178. *See, e.g.*, Lincoln Geraghty, *Creating and Comparing Myth in Twentieth-Century Science Fiction: "Star Trek" and "Star Wars"*, 33 LITERATURE/FILM QUARTERLY 19 (2005).

179. Daly v. Palmer, 6 F. Cas. 1132, 1139 (C.C.S.D.N.Y 1868).

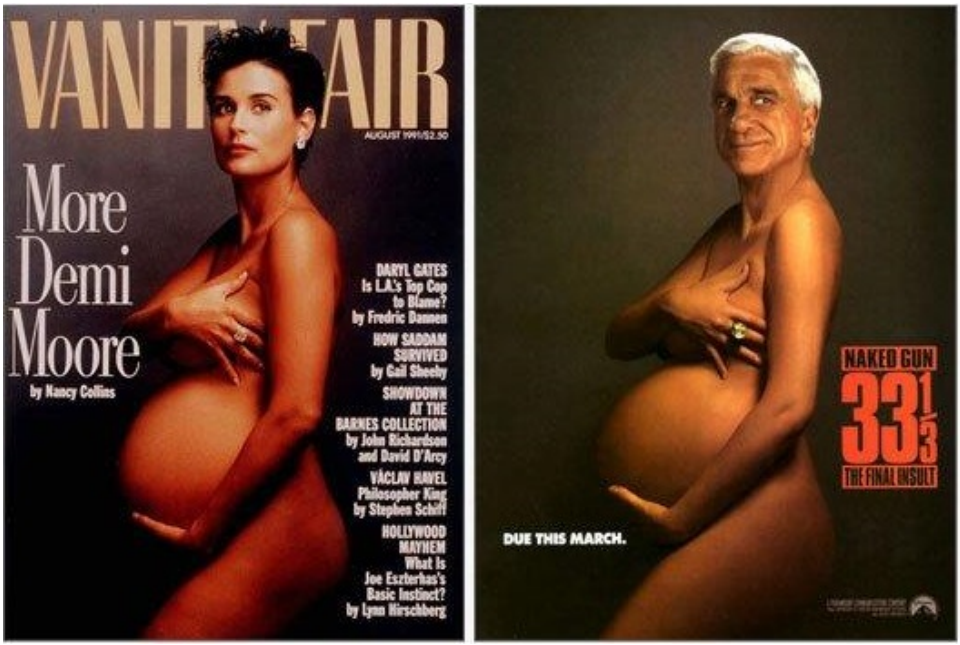
180. *Divided Cities: South Africa's Apartheid Legacy Photographed by Drone*, GUARDIAN (June 23, 2016), https://www.theguardian.com/cities/gallery/2016/jun/23/south-africa-divided-cities-apartheid-photographed-drone.

181. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 111 (2d Cir. 1998).

182. Roberta Smith, *Critic's Notebook; Through Annie Leibovitz's Lens, A Celebration of the Celebrated*, N.Y. TIMES, (July 25, 1991), at C15 ("[P]hotograph of the actress Demi Moore, discreetly naked and seven months pregnant, is playing on the cover of the August issue of Vanity Fair, setting off a small firestorm of reaction.").

Paramount added the proverbial (creative) twist that elevated its image to the level of parody.[183]

Figure 4: Vanity Fair Photograph of Demi Moore side-by-side a *Naked Gun 33 1/3* Movie Poster



In the process, Paramount also generated its own, creative archetype—the nude pregnant male. Are future photos of pregnant women and pregnant men creative? Paramount's archetype could be used in creative ways—if, for instance, a movie studio releases a poster of a pregnant male robot to advertise a comedy sequel to one of the films mentioned above. In fact, *Junior* was released before *Naked Gun*,[184] and the poster featured a pregnant Arnold Schwarzenegger wearing a suit and flanked by two characters from the film. If a photographer replicates *Junior* with another actor wearing different clothing, will the photo be creative? Or has the creativity run its course? A photo of your favorite three copyright professors, one of them a pregnant male wearing a suit, might require lighting, choice of lens, and so on, but it wouldn't require

183. *See* Annie Leibovitz, Photograph of Demi Moore, *in* VANITY FAIR (August 1991), side-by-side a Movie Poster of *Naked Gun 33 1/3* (Paramount Pictures 1993), as described in *Leibovitz*, 137 F.3d at 111.

184. Thanks to Professor Tushnet for pointing out *Junior*'s relevance as well as the chronology.

that fundamental insight which makes the expression valuable, interesting, and creative in the first place.

The vast majority of pregnancy photos that have appeared on magazine covers since the Demi Moore *Vanity Fair* image, in turn, have adopted the same basic formula.[185] Is it reasonable to consider them creative? Or are they the collective application of photographic skill to generate formulaic content? Or let's go back to the railroad scene example. Is every photo of a person tied to a train track creative because the expression is different? Imagine someone lying on the train tracks sipping a martini as an advertisement for alcohol with a one-liner that says "It's never too late for a good cocktail." The concept might be creative, but is the photo itself? Even if it "be aesthetically pleasing,"[186] isn't it merely applying the same tired formula?

Finally, is there anything really creative about the portrait photos on our respective law school biographies? Or are they merely a traditional way of presenting basic visual information? *Feist* itself seemed to take the position that predictability is antithetical to creativity: "Rural's white pages are entirely typical . . . . The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity."[187] The Court also commented that "arranging names alphabetically in a white pages directory . . . is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course."[188] The same argument can be made about basic portraits that convey simple information in a traditional, generic, and deliberately predictable way.

On the copyright view, though, even banal variation in expression will usually equal creativity, even when the changes are superficial, and no more creative than a minor change[189] or "the facile use of scissors"[190] designed to dodge an infringement claim. As the Ninth Circuit put it, "the fact that two original photographs of the same object may appear similar does not eviscerate their originality or negate their copyrightability."[191] In 2009, the Seventh Circuit

185. There is one notable exception, and that's *Time*'s October 4, 2010, cover photo, which is black and white, and shows a pregnant woman who herself appears to be floating in the womb. *How the First Nine Months Shape the Rest of Your Life*, TIME (Oct. 4, 2010), https://content.time.com/time/covers/0,16641,20101004,00.html.

186. Am. Dental Ass'n v. Delta Dental Plans Ass'n, 126 F.3d 977, 979 (7th Cir. 1997).

187. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).

188. *Id.* at 340.

189. Ideal Toy Corp. v. Fab-Lu, Ltd., 261 F. Supp. 238, 242 (S.D.N.Y. 1966) ("To allow the defendant to escape legal liability because of a minor change or because of crude craftsmanship, which did not destroy the substantial similarity of its copies to the authentic, would permit unfair use of plaintiff's copyrighted work.").

190. Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

191. Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1077 (9th Cir. 2000).

reasoned that "the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the underlying work in some meaningful way,"[192] which echoes its argument from a few years earlier that "the only 'originality' required for the new work to be copyrightable (the very term is a misnomer) is enough expressive variation from public-domain or other existing works to enable the new work to be readily distinguished from its predecessors."[193] So long as the expression is not copied, the later work will be deemed creative, and the fact that the underlying idea is stale and the implementation lacks actual creativity is immaterial. But the presence of a nontrivial variation does not *ipso facto* reveal creativity; it reveals only variation. If I simply put a filter on a photo, it's nontrivial in the sense that it affects the presentation of the image, but it's entirely trivial in the sense that it just changes things superficially. To be creative, a variation has to satisfy some creativity criterion. Mere variation, however small or big, is meaningless if it's not infused with actual creativity.

In sum, the idea/expression dichotomy combines with copyright's invisibly low threshold for creativity to protect works that, when judged with more meaningful standards, aren't actually creative. In effect, courts reward reuse rather than creative reuse. In those instances, what copyright appears to protect isn't creativity per se, as much as the creation of certain types of content.

E. CREATION VERSUS CREATIVITY: CULTURAL PRODUCTION

Banality may be "creative" if by "creative" we mean something far more literal—namely, the mere generation of content. Notably, this is how nineteenth-century non-copyright cases used the word. In 1854, for instance, the Supreme Court of Michigan used the word "creative" to describe legislation: "it remains quiescent until the events contemplated and provided by the legislature stir it into motion; and when set in motion, it operates by force of the 'energy of life,' infused into it by its creator. Legislative power is a creative power."[194] In 1855, the Supreme Court emphasized that "[t]he legislative is the only creative element in our government."[195] That same year, the Supreme Court discussed creative energy in connection with a will: "There must be some creative energy to give embodiment to an intention which was

192. Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 521 (7th Cir. 2009).

193. Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 929 (7th Cir. 2003).

194. People v. Collins, 3 Mich. 343, 406 (1854).

195. United States *ex rel.* Goodrich v. Guthrie, 58 U.S. 284, 296 (1855); *see also id.* at 299 ("[N]ot only is it philosophically true that the legislative, which is the only creative, originative department of the government, has the power to define and fix that which it creates.").

never perfected."[196] The "creative energy" identified by the nineteenth-century Supreme Court is not the creative energy that Rick Rubin, the record producer, had in mind when, a century and a half later, he said, "I feel like there's some creative energy behind it. We have help. When we're making something beautiful, we have help. We're not working alone."[197] The word "creative" did occasionally occur in art-related cases. Here is a fragment from the Trade-Mark Cases: "it is only such as are *original*, and are founded in the creative powers of the mind."[198] But this was a rare instance. Even then it could fairly be argued that it designated independent generation and not copying rather than artistic expression per se (a reading that lines up with Sir Sidney's use of the word when describing poetry, which he thought was "the one creative art. Astronomers and others repeat what they find").[199] Outside the law, the word "creative" didn't necessarily mean artistic, either. Samuel Johnson's 1783 dictionary offered these two definitions: "1. Having the power to create. 2. Executing the act of creation."[200] (Notably, the same dictionary lacks an entry for originality. Instead, it defines "originalness" as "the quality or state of being original," which, in turn, means "primitive, pristine, first").[201]

Creative, in other words, didn't mean what it means today; it denoted, more prosaically, the act of bringing something into existence—or, as another nineteenth-century Supreme Court case put it, the power to originate:

> [L]egislature, the only branch of the Government on which anything like a faculty to originate measures was conferred; much less could it be claimed by functionaries who have not, and rightfully cannot have, any creative faculties, but whose capacities and duties are restricted to an interpretation of the Constitution and laws as they should have been fairly expounded at the times of their enactment.[202]

Feist's reading of creativity in the modern sense into the word "author" is arguably anachronistic. In practice, moreover, modern courts ignore creativity in the nonlegal sense and provide protection to works that are merely

196. Fontain v. Ravenel, 58 U.S. 369, 386 (1855).

197. Rachel Martin, *Rick Rubin on Taking Communion with Johnny Cash and Not Rushing Creativity*, NPR (Dec. 10, 2023), https://www.npr.org/2023/12/10/1217613273/rick-rubin-book-johnny-cash-religion-creativity-spirituality.

198. *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879).

199. SIR PHILIP SIDNEY, A DEFENCE OF POESIE AND POEMS 25 (1891).

200. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, EXPLAINED IN THEIR DIFFERENT MEANINGS, AND AUTHORIZED BY THE NAMES OF THE WRITERS IN WHOSE WORKS THEY ARE FOUND vols. 1–2 (1783).

201. *Id.*

202. Jackson v. S.B. Magnolia, 61 U.S. 296, 318–19 (1858).

independently generated. In this sense, the modern concept of copyright creativity has more in common with nineteenth-century cases that required generation than it does with the modern, nonlegal sense of the word.

The current standard effectively forces judges to look for something less than actual creativity. It's difficult to imagine a methodology that enables courts to assess actual creativity if they can look neither to novelty nor to banality as a gauge. In practice, the actual target of copyright's protection seems to be cultural production, or the production of content that is historically and institutionally recognized as capable of being creative. Copyright protects content generated in connection with particular types of creative efforts,[203] whether or not those efforts lead to actually-creative outcomes—which explains why, for example, genre-based presumptions that assume something is creative by virtue of being a certain type of work. Put yet another way, copyright protects actual creativity along with pseudo-creativity or attempted creativity. On this view, tired and formulaic photos can still be deemed creative for copyright purposes not because they actually are, but because they are independently generated, and fit into a cultural category of content that copyright recognizes as capable of sustaining creativity. Despite the rejection of the sweat of the brow basis for copyrightability, what the regime protects is still labor—albeit is a certain type of labor.

In sum, copyright's creativity requirement is either a misnomer (because courts never looked for creativity in the first place), or a failed standard (because courts don't look for actual creativity), or both. Either way, the claim that creativity is the *sine qua non* of copyrightability simply isn't accurate. What courts look for is something more literal—namely, the generation of content. Or, to put it in copyright terms, what the law protects is independent creation rather than creativity, and the creativity part of *Feist*'s "independent creation plus creativity" formula is a symbolic rather than an actual requirement.

III. PROTECTING ORDINARY SPEECH FROM COPYRIGHT PROTECTION

Whether copyright protects cultural production or actual creativity, it shouldn't reach ordinary speech. Differentiating noncreative speech from creative content—whether actually creative or copyright creative—is therefore a threshold step.

203. The phrase "creative effort" is lifted from case law. *See, e.g.*, Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1260 (2d Cir. 1986) (suggesting "an inquiry into the infringer's creative effort"); Stern v. Does, 978 F. Supp. 2d 1031, 1043 (C.D. Cal. 2011) (recognizing that the Plaintiff's arguments possessed "some minimal creative effort").

A. ORDINARY SPEECH

Truman Capote once distinguished writers from typists: "But yes, there is such an animal as a nonstylist. Only they're not writers. They're typists. Sweaty typists blacking up pounds of Bond with formless, eyeless, earless messages."[204] Capote—brutally and famously—included Jack Kerouac in the typist category when he learned that Kerouac wrote *On the Road* in just over three weeks.[205] More recently, in an echo of Kodak's late nineteenth-century "You press the button, we do the rest"[206] marketing campaign, a well-known fashion photographer made a parallel comment about the state of creativity in his profession: "Photography becomes a button and that is so normal now. It's the end of everything and all the photographers will slowly disappear. In 10 years, there will be no photographers left any more."[207] These comments are hyperbole, of course, but they highlight the fact that certain types of content, whether text-based or photographic, simply aren't creative.

There are two categories of speech that I think should be excluded from copyright's creativity calculus so that ordinary speech is not swept up in the law's net: informational expression and subjective expression.

1. Informational Expression

Consider this frequently utilized archetype of a LinkedIn post: "I'm so [honored] [excited] [flattered] to announce that I will become [X] at [Y] starting at [Z]! I can't wait to do [X1] with some great colleagues like [Y2]. Of course, I will really miss my old company, [X3], and all the great people I worked with there, especially [Z2, Z3, and Z4]." Someone could argue that the inclusion of particular names in the LinkedIn announcement is evidence of some creativity. As mentioned earlier, a Ninth Circuit opinion found "some minimal creative

204. Truman Capote, *The Art of Fiction No. 17*, PARIS REV. (1967), https://www.theparisreview.org/interviews/4867/the-art-of-fiction-no-17-truman-capote.

205. *See* Joseph Lelyveld, *Jack Kerouac, Novelist, Dead; Father of the Beat Generation*, N.Y. TIMES, Oct. 22, 1969, at 47 ("Truman Capote called Mr. Kerouac's method of composition typing, not writing.").

206. *See* Illustration of an 1890 Kodak Camera Advertisement from a Magazine, *in* EASTMAN COMPANY, OUTING 15 (1890).

207. Osman Ahmed, *Peter Lindbergh and The Birth of The Supermodel*, BRIT. VOGUE (Sept. 7, 2019), https://www.vogue.co.uk/arts-and-lifestyle/article/peter-lindbergh-and-the-birth-of-the-supermodel ("The crime is that photographers are pushed to shoot with a cable attached to the camera and there is a screen in the middle of the studio and everyone is looking at it. The relationship with the models is killed. The editors will say, 'Peter you got it, it's great!' or 'Move the hand to the left a little' and that's nothing to do with photography. Photography becomes a button and that is so normal now. It's the end of everything and all the photographers will slowly disappear. In 10 years, there will be no photographers left any more.").

effort" in a lawyer's prosaic email message that included "particular evidence to cite when asking whether his fellow listserv members thought it constituted churning or overbilling."[208] But, as shown earlier, the inclusion of merely relevant information is pure discretion rather than creativity. In other words, there is nothing creative in these LinkedIn messages, not only because the template follows a trite social-media formula, but because the content is always purely informational.

Courts have noted the distinction between informational and creative. "CONSUMER REPORTS is primarily informational rather than creative,"[209] noted one opinion, and another reasoned that "there is no 'creative spark' involved in a purely descriptive picture of a product."[210] Indeed, some copyright opinions have withheld copyright protection from content that is purely informational—e.g., a map,[211] a contract template,[212] and a 3D model of a car.[213] In other instances, however, courts miss this distinction, or find creativity in spite of it. An Eleventh Circuit opinion found creativity in the decision to take photos before and after a dental procedure in order to show its effectiveness: "Dr. Pohl selected the timing and subject matter of the photographs—that is, he took the pictures before and after he completed his cosmetic dentistry procedure on Belinda."[214] Not only was timing a necessary step in any before-and-after photographs, which means that Dr. Pohl was simply applying a familiar formula, but the photos themselves were entirely informational.

Indeed, copyright's failure to distinguish informational from creative content is particularly evident in connection with photographic imagery, a medium that's implicated in a range of critical cultural and commercial practices—from our use and reuse of social media to AI companies' ability to leverage visual culture for training purposes. As we saw earlier, courts routinely—and mistakenly—argue that photographic imagery is nearly always creative. Copyright opinions have found creativity in banal snapshots,[215]

208. *Stern*, 978 F. Supp. 2d at 1043.

209. Consumers Union of U.S., Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983).

210. Custom Dynamics, LLC v. Radiantz LED Lighting, Inc., 535 F. Supp. 2d 542, 549 (E.D.N.C. 2008).

211. Darden v. Peters, 488 F.3d 277, 288 (4th Cir. 2007).

212. Donald v. Zack Meyer's T.V. Sales & Serv., 426 F.2d 1027, 1030 (5th Cir. 1970) (holding that a legal template was not sufficiently original: "In the case before us we search in vain for the requisite originality in plaintiff's 'Agreement.'").

213. Meshwerks, Inc. v. Toyota Motor Sales U.S.A., 528 F.3d 1258, 1269 (10th Cir. 2008).

214. Pohl v. MH Sub I LLC, 770 Fed. Appx. 482, 489 (11th Cir. 2019).

215. Weinberg v. Dirty World, LLC, No. CV 16-9179-GW(PJWX), 2017 WL 5665023, at *13 (C.D. Cal. July 7, 2017).

routine product photos,[216] and highly formulaic high-school photos.[217] And, generally, courts have consistently found creativity on the thinnest of analytical premises. When the appropriation artist Richard Prince was sued for infringement for using photos he found on Instagram, for instance, the Southern District of New York concluded that two of the images "are undeniably creative works."[218] The court supported that conclusion merely by pointing to the presence of "composition, coloration, and editing,"[219] without any substantive analysis of those factors. Courts have gone so far as to say that "much, perhaps almost all, photography is sufficiently original to be subject to copyright."[220] Since the majority of photographs are not actually creative, the presumption that most photographic images warrant copyright protection means the regime inappropriately captures large swaths of our visual culture.

How would the informational boundary apply to photographs? Generally, copyright cases distinguish between factual and creative works, and find a lower level of copyright protection for the former. Since all photos are factual in the sense that they record something that exists, however, the factual/creative distinction is largely meaningless as a method for categorizing photographic content. This is particularly true with documentary images, where the photographer has no control of what's in front of the camera. In this sense, documentary photos are always informational. But many do exhibit creativity, a fact that courts have recognized.[221] As another court put it, "photographs of natural objects may be original."[222] The creativity in these

216. Prepared Food Photos, Inc. v. Chicken Joes, LLC, No. 23CV3895 (JGLC) (JW), 2024 WL 384997, at *2 (S.D.N.Y. Jan. 12, 2024).

217. Dlugolecki v. Poppel, No. CV 18-3905-GW(GJSx), 2019 U.S. Dist. LEXIS 149404, at *4 (C.D. Cal. Aug. 22, 2019).

218. Graham v. Prince, No. 15-CV-10160 (SHS), 2023 WL 3383029, at *15 (S.D.N.Y. May 11, 2023).

219. *Id.*

220. Bridgeman Art Libr., Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998); *see also* E. Am. Trio Prods. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 417 (S.D.N.Y. 2000) ("There is a very broad scope for copyright in photographs, encompassing almost any photograph that reflects more than 'slavish copying.'"); Dermansky v. Hayride Media, LLC, No. 22-3491, 2023 WL 6160864, at *13 (E.D. La. Sept. 21, 2023) ("As a general rule, courts consider photographs to be creative, artistic expressions of their author deserving 'thick copyright protection.'").

221. *Bridgeman*, 25 F. Supp. 2d at 427 ("Certainly anyone who has seen any of the great pieces of photography—for example, Alfred Eisenstadt's classic image of a thrilled sailor exuberantly kissing a woman in Times Square on V-J Day, the stirring photograph of U.S. Marines raising the American flag atop Mount Surabachi on Iwo Jima, Ansel Adams' work and the portraits of Yousuf Karsh—must acknowledge that photographic images of actual people, places and events may be as creative and deserving of protection as purely fanciful creations.").

222. Home Legend, LLC v. Mannington Mills, Inc., 784 F.3d 1404, 1410 (11th Cir. 2015).

images lies in their framing, aesthetic qualities, and narrative content—an unusual or revealing juxtaposition of elements, for example. In other words, it's the photographer's perspective that can make a documentary image creative, or what Judge Kaplan referred to as "originality in the rendition."[223]

Sometimes, however, what the photographer brings to the image is merely technical. A mug shot and passport photos are paradigm examples of an image produced in strict compliance with preexisting dictates that, by definition, not only don't require creativity, but actively prohibit it. All the key parameters are determined ex ante, and the photographer merely applies a formula to generate a preconceived outcome—a process which might require some skill, but a process that not only doesn't require the photographer's subjective mediation, but purposely excludes it. Fundamentally, a mug shot is no different than a ticker delivering raw data, an ultrasound, an x-ray, or the informational LinkedIn post shown above; to put it in copyright parlance, it's pure fact.[224]

The formulae listed above would nevertheless provide courts with a doctrinal basis for finding creativity:

- *Choices and Discretion*. Photographs in the very least requires the decisions to take a photo and to photograph particular subject matter, so discretion is present even in a mug shot. Taking a mug shot certainly requires "posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression."[225] Check.
- *Genre-Based Presumption*. It's a photograph. Photographs are virtually always creative. Check.
- *Uniqueness*. No two mugshots are exactly the same. Check.
- *Skill*. Taking a photo requires knowledge of camera equipment and lighting. Check.
- *Mental conception*. The idea is to take a photograph that aligns with mug shot standards. Check.

223. Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005) ("I will refer to this type of originality as originality in the rendition because, to the extent a photograph is original in this way, copyright protects not *what* is depicted, but rather *how* it is depicted.").

224. Int'l News Serv. v. Associated Press, 248 U.S. 215, 234 (1918) ("[T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.").

225. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).

A court confronting the question of whether a mug shot is creative might say the photograph deserves only thin protection because of the limited choices implicated or because of its factual nature. This approach seems like a notable concession, but it's still fundamentally a misfire. A mug shot is one of the most routine types of photographs taken—so much so, in fact, that Idaho lists recommended approaches,[226] which include the ideal paint on the background wall and lighting suggestions (four-bulb, four-foot long, fluorescent lighting fixtures; the Idaho directions also make it clear that automatic settings are fine, and the camera can do a good amount of the work). In each instance, the photographer's entire objective is to conform the image—and the person in the image—to a preexisting standard developed by someone other than the photographer. All choices necessary to take a mug shot are entirely operational choices, and they all produce a routine and highly predictable outcome. Nor is the mental conception behind the mug shots creative—the whole point is to follow formulae rather than departing from it. In short, calling a mug shot creative is about as accurate as calling a parking ticket a painting.

It's easy enough to think of other photographic examples. Generic portraits—like high-school yearbook photos—are no more creative than mug shots. In 2017, after the big news from England, ABC's "Good Morning America" ran a high-school photo of Meghan Markle, and, at the end of the day, "Nightline" did the same.[227] ABC ran the photo along with some others a few days later and included them in a one-hour special.[228] The photos' formulaic nature notwithstanding, the Central District of California was "willing to accept the view that there is some measure of creativity in the photos."[229] Product photos typically apply preexisting formulae, too. Here is an image at issue in *Prepared Food Photos, Inc. v. Chicken Joes*:[230]

226. Idaho State Police, *Mug Shot Implementation Guide*, ISP.IDAHO.GOV (Apr. 25, 2013), https://isp.idaho.gov/wp-content/uploads/BCI/CrimHistory/Palm//Mug-Shot-Implementation-Guide.pdf.

227. Dlugolecki v. Poppel, No. CV 18-3905-GW(GJSx), 2019 U.S. Dist. LEXIS 149404, at *4 (C.D. Cal. Aug. 22, 2019).

228. *Id.*

229. *Id.* at *28.

230. Prepared Food Photos, Inc. v. Chicken Joes, LLC, No. 23CV3895 (JGLC) (JW), 2024 WL 384997, at *1 (S.D.N.Y. Jan. 12, 2024).

Figure 5: Exhibit from *Prepared Food Photos, Inc. v. Chicken Joes*

There are many technical choices—from camera angle to lighting—but, as with a mug shot, these are routine operational choices that, rather than being creative decisions, simply reflect industry standards necessitated by the genre of photograph. The aesthetics, if we can call them that, are also very predictable. The expression is highly factual, and the work's meaning is literal. The cultural coding itself is very clichéd—the checkboard pattern is a standard restaurant accessory. In short, if we ask even a handful of questions that go beyond genre-based presumptions and the application of choices, it's hard to say that this is photo is actually creative.

There are examples of noncreative photos taken outside the studio setting, too. Movie buffs sometimes travel to places where production took place, for example, locate the precise spot where a scene was shot, and recreate the framing. Sometimes, and usually in jest, they put themselves in the place of an actor; often, it's just a photograph of the location without any people in it. The content of these photos is dictated virtually entirely by external standards and technical requirements—i.e., the goal of replicating existing framing in order to highlight geography. The resulting photograph is a purely informational "I was there" image.

Parallel video examples have appeared in case law. One involved videos of a city council meeting: "The City Council Videos are straightforward recordings of public proceedings . . . . Given the barely creative nature of the City Council Videos, and their informational purpose, they enjoy very narrow copyright protection."[231] A similarly uncreative video is at the center of a dispute involving the "Tiger King" Netflix series: "Mr. Sepi shot the video by placing the camera on a tripod and leaving it running."[232] Just as the Central District of California thought the meeting video was "barely creative," the trial court in the "Tiger King" dispute acknowledged that the "video is not a work of fiction or artistry,"[233] but nevertheless reasoned that it exhibited "some elements of originality with respect to angle, lighting, and framing."[234] Because of doctrinal underpinnings, neither court could recognize what would be plain to any nonlawyer: Neither video is creative in a meaningful sense.

The purely informational tier includes shopping lists, mug shots, passport photos, security footage, financial information, legal agreements, *inter alia*. If a work is entirely informational, it's simply not creative, and, for copyrightability purposes, ought to be excluded.

2. Subjective Expression

Another form of expression that copyright too easily treats as creative is subjective expression. A recent Fourth Circuit opinion advanced the idea that a photograph is creative if it doesn't look like the actual object that was photographed: "The resulting Photo is a stylized image, with vivid colors and a bird's-eye view. Notably, the vehicle traffic appears as streaks of light. The Photo's subject may be a real-world location, but that location does not, in reality, appear as shown."[235] While this isn't incontrovertible evidence of

231. City of Inglewood v. Teixeira, No. CV-15-01815-MWF (MRWx), 2015 WL 5025839, at *25–26 (C.D. Cal. Aug. 20, 2015).

232. *Whyte I*, 97 F.4th 699, 707 (10th Cir. 2024).

233. *Whyte II*, 601 F. Supp. 3d 1117, 1137 (W.D. Okla. 2022).

234. *Id.*

235. Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 267 (4th Cir. 2019).

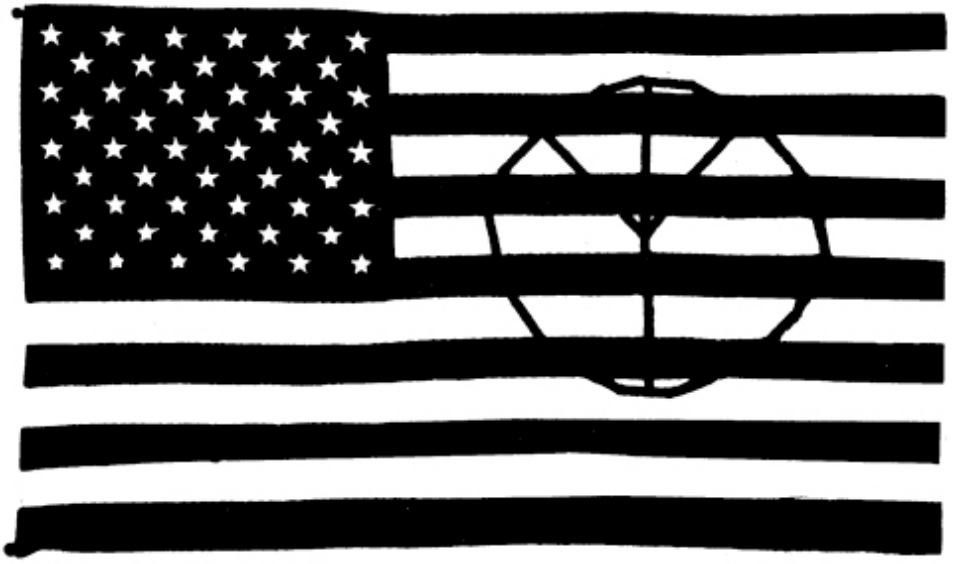
creativity, the manipulation of the image so that it is more than a mere recording reveals the photographer's subjectivity. Unlike a mug shot or security footage that indiscriminately records everything, taking a documentary photograph requires the photographer to choose which elements in the viewfinder's line of vision to include, and how to include them. A deliberately long exposure applied to alter the outcome is clearly a subjective choice that is reflected in the image itself. There is, in short, a greater degree of choice and editorial control than there is with a mugshot, which is tightly configured in advance. From this perspective, what I show in my photograph isn't just what's there, but my subjective take on it. Even if I don't control the content, I control the presentation, and the photo rises to "its maker's subjective description of his/her experience, in silver particles on paper."[236] In other words, unlike a purely informational image, which is by design a cookie cutter photo, subjective expression reflects the speaker's point of view.

Subjectivity isn't tantamount to creativity, though. The idea that merely subjective expression is creative is buoyed by the suggestion that mental conception indicates creativity. An early twentieth-century case determined that "if a photograph be not only a light-written picture of some object, but also an expression of an idea, or thought, or conception of the one who takes it, it is a writing within the Constitutional sense."[237] A later case reasoned that "[e]lements of originality include all elements that involve the author's subjective judgments."[238] The argument goes too far: Unless the idea itself is creative, a photograph isn't creative by virtue of expressing an idea any more than a shopping list or a statement of opinion is creative by virtue of conveying someone's preferences. In 2000, the First Circuit reasoned that "the photographs were not artistic representations designed primarily to express Núñez's ideas, emotions, or feelings, but instead a publicity attempt to highlight Giraud's abilities as a potential model."[239] This approach also mistakenly equates "artistic representation" with subjectivity: We all have ideas, emotions, or feelings; none is inherently creative. In other words, subjectivity is not the same thing as creativity; it's part of it, but it's not the whole thing. If we were to adopt the principle that subjectivity equals creativity, then all subjective expression would be creative expression, and ordering coffee, leaving a voicemail, making a photocopy, and singing in the shower would all be creative. The standard's utility as a determinant of actual creativity would quickly collapse.

236. A.D. Coleman, *Art Critics: Our Weakest Link*, N.Y. TIMES, Oct. 6, 1974, at 190.
237. Am. Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262, 265 (D.N.J. 1905).
238. Latimer v. Roaring Toyz, Inc., 550 F. Supp. 2d 1345, 1355 (M.D. Fla. 2008).
239. Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 23 (1st Cir. 2000).

Let's use an image from a well-known First Amendment case as another example: the flag from *Spence v. Washington*.[240]

Figure 6: Flag from *Spence v. Washington*



Spence's sole purpose was to convey "a pointed expression of anguish . . . about the then-current domestic and foreign affairs of his government."[241] Adding the peace sign appears creative at first blush, but the merger of the peace symbol with the American flag was a commonplace method of expressing political disagreement at the time. Making the peace sign made from tape rather than, say, felt-top marker or black paint is a discretionary choice, but it's no different than choosing a font or a word in a sentence—at least because Spence didn't attach any meaning to the materials he used. In sum, this is potent subjective expression, but it's not creative. If we want to separate ordinary speech from creative speech, a superficial degree of discretion that is inherent in all communication simply can't rise to the level of copyrightability.

How do we differentiate Spence's flag from Jasper Johns'?[242] In this case, materials do matter. The fact Jasper Johns' flag is a painted flag rather than a fabric flag like every other (including Spence's) calls into question the

240. State v. Spence, 81 Wash. 2d 788, 789 (1973), *rev'd en banc*, Spence v. Washington, 418 U.S. 405 (1974).

241. Spence v. Washington, 418 U.S. 405, 410–11 (1974).

242. Jasper Johns, *Flag*, 1954–55, Painting, MUSEUM OF MODERN ART, https://www.moma.org/collection/works/78805 (last visited Mar. 13, 2025).

distinction between a represented object and the object itself. His choice of presentation effectively collapses object and represented object, which, in the context of art discourse and despite the fact that Johns has no discretion to deviate from the flag as a symbol, is a notable creative step. "In a brilliant insight that equated the skin of a painting with the skin of an object, Johns imposed controls on the opticality and unlimited space of Pollock and de Kooning."[243] Unlike Spence, moreover, Johns is participating in an art tradition and speaking directly to Abstract Expressionists. Spence, by comparison, was participating in a political tradition, and his flag was advocacy directed at his fellow citizens. Not only is the purpose of each different, but, more importantly, so is the respective discursive field: One belongs to the art world, and the other to political advocacy, and each sends a message solely to its target audience. They're both forms of subjective expression, but Johns' flag takes a creative leap that Spence never even attempts.

In short, courts can't stop at subjectivity when looking for actual creativity; they need to identify criteria that render subjective expression creative.

IV. COPYRIGHT CREATIVITY

If we exclude ordinary speech from copyright's reach, is everything that's leftover *ipso facto* creative? If we accept that copyright protects something less than actual creativity, then, as a methodology, excluding ordinary speech—rather than a finding creativity per se—might well be simpler. In that case, so long as the content isn't informational or subjective, it's arguably creative—at least for copyright purposes.

If we adopt actual creativity as a standard, though (or, in any case, something more than mere generation as the threshold), then we can't stop at identifying informational and subjective content, since speech that attempts but fails to be creative is not creative speech. An actual creativity standard would require additional criteria to ensure not only that the speech isn't ordinary speech, so that failed creativity isn't accidentally captured, which would lead to copyright's continued arrogation of noncreative speech.

Below, I outline some additional data points that courts could consider in order to determine whether a work is actually creative rather than merely independently created, informational, or subjective.

243. Richard S. Field, *Jasper Johns' Flags*, 7 THE PRINT COLLECTOR'S NEWSLETTER 69, 70 (July–Aug. 1976).

A. ADDITIONAL CRITERIA FOR A HEIGHTENED STANDARD

1. Meaning

It's a fundamental copyright precept that works "are not copyrightable except to the extent they are given unique—and therefore protectable—expression in an original creation."[244] As the Supreme Court put it in 1954: "They must be original, that is, the author's tangible expression of his ideas."[245] Given copyright's origins—i.e., as protection against unauthorized copying of books—the law naturally prioritizes expression over all else, since identical or similar expression is the clearest evidence of illicit copying. But expression is not the only test of creativity. What a work means rather than how it looks is the central element of many modern works of art, and therefore a key creativity criterion. It's what separates Johns' American flag from Spence's, as outlined above. Sherrie Levine's *After Edward Weston*[246] questions copyright and male authorship by rephotographing the original Edward Weston photograph, and it's precisely because her photo replicates the original that her work conveys its intended meaning. In order to expose an advertising philosophy, in turn, Richard Prince appropriated a Marlboro advertisement photograph (which itself seemed to lack an author).[247] If we look only at expression in either photograph, we'll see nothing more than a slavish copy; if we look at the level of meaning, we will see a creative recontextualization that offers a commentary about culturally critical topics. A fair use defense would ask whether the secondary work generates new meaning, and a creativity assessment can utilize the same criterion.

There are a lot of other examples of works whose meaning—rather than only expression—reveals creativity. Ulysses' stream-of-consciousness approach, and not only the actual text, makes the book significant,[248] for example, and, in nonfiction works, creativity derives from the insight, theories,

244. Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986).

245. Mazer v. Stein, 347 U.S. 201, 214 (1954).

246. Sherrie Levine, *After Edward Weston*, 1981, Photograph, FOTOMUSEUM WINTERTHUR, https://www.fotomuseum.ch/en/collection-post/after-edward-weston/ (last visited Mar. 13, 2025).

247. Richard Prince, *Untitled (cowboy)*, 1989, Photograph, GUGGENHEIM MUSEUM, https://www.guggenheim.org/teaching-materials/richard-prince-spiritual-america/cowboys (last visited Mar. 13, 2025) ("They were about wishful thinking, public pictures that happen to appear in the advertising sections of mass-market magazines, pictures not associated with an author.").

248. For more on this narrative methodology, see Erwin R. Steinberg, *Introducing the Stream-of-Consciousness Technique in Ulysses*, 2 STYLE 49 (Winter 1968).

and interpretations rather than the aggregation of facts.[249] The value of this Article, such as it is, is in the arguments it makes, not the cases it cites, or in its prose. In fiction, too, creativity can be in the particularly trenchant nature of the work. As John Updike wrote, "Salinger's work dawned as something of a revelation."[250]

Meaning can also elevate ostensibly banal imagery to creativity. Tim Davis's photos of reflections of fast food restaurant signage in residential windows may seem superficially uninteresting, but their creativity is evident once we consider their collective meaning, namely, the pervasive presence of commercialism in our lives.[251] At the outset, I argued that the Tiger King footage is banal and no more creative than security footage, but that aesthetic and narrative content can be creative if couched in creative meaning. Consider, for example, Tatu Gustafsson's weather-camera portraits, which challenge traditional notions of portraiture.[252] Hans Eijkelboom's photos,[253] in turn, have a very informational aesthetic—he takes photos of people wearing the same outfits around the world—but they are part of an ongoing act that creatively reveals global behavioral patterns and fashion trends.

Looking at meaning also allows courts to consider a work in its historical context, and, rather than examining it in isolation, ask whether a work actively speaks to particular art practices and thus shows a deliberate engagement with a relevant discursive field, which may provide evidence of intentional creative effort. For example, photographers Chris McCaw and Stephen Pippin built their own cameras to convey meaning.[254] By letting the camera burn the negatives, McCaw challenged the argument that photography merely represents reality.[255] Pippin converted washing machines in a New Jersey laundromat as a way of referencing Eadward Muybridge's early animal

249. *See, e.g.*, Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir. 1980) (addressing an author's theory about who might have destroyed the Hindenburg).

250. John Updike, *Anxious Days for the Glass Family*, N.Y. TIMES (Sept. 17, 1961), https://archive.nytimes.com/www.nytimes.com/books/98/09/13/specials/salinger-franny01.html.

251. Tim Davis, *McDonald's 2*, 2002 (C-Print), ARTNET, https://www.artnet.com/artists/tim-davis/mc-donalds-2-ajUitmiXG8CFMQt23hrdRQ2 (last visited Mar. 13, 2025).

252. Sofie Tapia, *Photographer Takes Weather Camera Self-Portraits and They Might Make You Feel Uneasy*, BOREDPANDA (Apr. 9, 2019), https://www.boredpanda.com/weather-camera-self-portraits-tatu-gustafsson/.

253. Hans Eijkelboom, DOCUMENTA14, https://www.documenta14.de/en/artists/13568/hans-eijkelboom (last visited Mar. 13, 2025).

254. *See infra* notes 255–256.

255. McCaw's *Sunburn* works used a custom camera that focused sunrays with sufficient intensity to burn the negatives in order to challenge the idea that photographs merely depict reality. *See, e.g.*, Chris McCaw, *Marking Time*, 2024, MARSHALL GALLERY, https://marshallgallery.art/exhibitions/47-chris-mccaw-marking-time/ (last visited Mar. 13, 2025).

locomotion photos.[256] Through unusual angling, Alexander Rodchenko's photographs challenged traditional viewpoints,[257] and Jasper Johns, as noted earlier, challenged the idea of representation, while Duchamp, in the guise of R. Mutt, famously challenged the distinction between art and ordinary objects.[258] Maybe nothing drives home the importance of meaning more effectively, though, than the fact that multiple works of art—from Andy Warhol's *Invisible Sculpture* to Salvatore Garau's *Io Sono*—exist only as concepts.[259]

Meaning also provides a basis for finding aleatory content creative. In the mid-nineteenth century, an Ohio district court reasoned that "[a] few lines or many thrown together without an object, and without the expression of a distinct idea, could not be called a book within the statute."[260] But meaning explains the creativity in aleatory music from Charles Ives to John Case, as well as a random poem generated according to the Dadaist recipe:

> To Make a Poem
>
> Take a newspaper
>
> Take a pair of scissors
>
> Choose from the paper an article as long as you are planning to make your poem
>
> Cut the article out
>
> Next carefully cut out each of the words that make up the article and put them in a bag
>
> Shake gently
>
> Next take each clipping out one after another in the order in which they left the bag

256. Pippin's Laundromat/Locomotion series references Eadward Muybridge's early works on animal locomotion. *See, e.g.*, PIPPIN, *supra* note 91; *see also* Stephen Pippin, *Laundromat Locomotion (Walking in Suit)*, 1997, TATE, https://www.tate.org.uk/art/artworks/pippin-laundromat-locomotion-walking-in-suit-p78485.

257. *Aleksandr Rodchenko*, MOMA, https://www.moma.org/artists/4975 (last visited Mar. 13, 2025).

258. *Marcel Duchamp and the Fountain Scandal*, PHIL. MUSEUM OF ART (Mar. 27, 2017), https://press.philamuseum.org/marcel-duchamp-and-the-fountain-scandal/.

259. Andy Warhol, *Invisible Sculpture* (conceptual art 1985); Salvatore Garau, *Io Sono* (conceptual art 2021). The last two lack expression altogether, and are therefore not copyrightable, but because they nevertheless exist, they are excellent examples of the importance of meaning rather than only expression in determining whether something is creative.

260. Scoville v. Toland, 21 F. Cas. 863, 864 (C.C.D. Ohio 1848).

> Copy conscientiously
>
> The poem will look like you
>
> And there you are—an infinitely original author endowed with a charming sensibility though beyond the understanding of the vulgar.[261]

Tristan Tzara, the author, had an objective in mind when promulgating this approach, which was to challenge orthodoxy in many of its forms. The meaning behind the methodology provides a creative basis for a poem generated according to Tzara's rules (though an argument could be made that only the first poem generated according to these rules is creative, and the rest are uncreative regurgitation).

In the 1940s, in connection with the Museum of Modern Art's exhibition of American snapshots, the museum's director of the newly established department of photography wrote that "it doesn't occur to the average snapshooter to look beyond reality."[262] The photographer Lisette Model, in turn, distinguished snapshots from other types of images based on the method of production: "of all photographic images it comes closest to truth . . . . A snapshot is not a performance. It has no pretence or ambition. It is something that happens to the taker rather than his performing it. Innocence is the quintessence of the snapshot."[263] Creative photography, in other words, looks beyond the literal content of the photo to generate meaning that goes beyond the subject matter itself. To look at photos without asking what they mean, over and beyond what they literally depict, is to miss the depth of a lake by refusing to look beneath its surface. A robust method for detecting creativity requires looking beyond expression, which is the outermost layer of a given work.

To drive the point home another way, consider this imaginary missive from Vincent van Gogh in Woody Allen's *If the Impressionists Had Been Dentists*:

> Dear Theo
>
> I took some dental X-rays this week that I thought were good. Degas saw them and was critical. He said the composition was bad. All the

261. TRISTAN TZARA, SEVEN DADA MANIFESTOS AND LAMPISTERIES (Barbara Wright trans., Riverrun Press 1977) (1920).

262. MUSEUM OF MODERN ART, THE AMERICAN SNAPSHOT: AN EXHIBITION OF THE FOLK ART OF THE CAMERA, MARCH 1 TO APRIL 30, 1944, at 4 (1994), https://assets.moma.org/documents/moma_catalogue_2316_300294211.pdf.

263. MARY WARNER MARIEN, PHOTOGRAPHY: A CULTURAL HISTORY 170 (Harry N. Abrams, Inc. 2002).

> cavities were bunched in the lower left corner. I explained to him that that's how Mrs Stotkin's mouth looks, but he wouldn't listen.[264]

In American courtrooms that look at expression and ignore meaning, the X-ray in Woody Allen's *If the Impressionists Had Been Dentists* will stubbornly always be an X-ray. Through meaning, however, Gary Schneider turned an X-ray into a work of art.[265]

2. Genre-Specific Standards

Creativity analysis might also be simpler and more effective if courts devise criteria that are specific to the genre of the work in question. Copyright typically conflates disparate creative practices by folding them into catch-all categories.[266] The Supreme Court in 1879 noted that "the word *writings* may be liberally construed,"[267] and, less than a decade later, wrote that "[t]he statute, however, has been so liberally construed as to make it embrace within the term 'book,' every-character of publication; whether a volume, pamphlet, newspaper article, calendar, or catalogue."[268] When the copyrightability of all photographs was at issue, courts decided that photographs are writings,[269] and when the copyrightability of film was at issue, courts decided films are just a form of photographs,[270] and thus a writing, too. In 1991, the Second Circuit reasoned that "[a]mong those forms of 'writings' now recognized as entitled

264. WOODY ALLEN, WITHOUT FEATHERS 189 (Sphere 1978).

265. *See* Gary Schneider, *genetic self-portrait*, 1997, THE WAREHOUSE GALLERY AT SYRACUSE UNIVERSITY, https://museum.syr.edu/wp-content/uploads/2015/06/Gallery_guide.pdf.

266. *See* 17 U.S.C. § 102 ("Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.").

267. *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879).

268. Brightley v. Littleton, 37 F. 103, 104 (E.D. Pa. 1888).

269. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) ("[N]o one would now claim that the word writing in this clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist, as photography as an art was then unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted.").

270. Edison v. Lubin, 122 F. 240, 242 (3d Cir. 1903) (holding that film, while not the same as a still image, is "none the less a photograph—a picture produced by photographic process").

to copyright protection are fabric designs."[271] Similarly in 2016, the Ninth Circuit reasoned that "the term 'original work of authorship' may, as it has, evolve and encompass new forms of expression that, like choreography, are not easily reduced to neat definitions."[272]

At least in some instances, the law is sensitive to creativity's genre specificity. For example, Congress recognized that "creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectible whole,"[273] and courts apply different standards to different types of work: The argument that "great skill and originality is [*sic*] called for when one seeks to produce a scale reduction of a great work with exactitude"[274] simply wouldn't apply to a photograph. Generally, copyright's organizing approach—i.e., the practice of packing different types of content into the same large moving box—has an unintended flattening effect that suggests the same standards should apply to vastly different types of creative works: "Expression in cartography is not so different from other artistic forms seeking to touch upon external realities that unique rules are needed to judge whether the authorship is original."[275]

A one-size-fits-all approach misses key differences in the creative processes endemic to specific genres. In software development and in architecture, for instance, a common part of the creative process is figuring out how to find practical solutions that account for compatibility issues and topological limitations, respectively, which are not problems that come up in the context of music and poetry (though they might in the context of photography). Taking photos, in turn, is very different from making films, and creativity in sculpture is measured differently than creativity in humor. A history book is creative because of the insights it generates. A book may be written in a particularly inventive way (e.g., Ulysses), and a photo might exhibit aesthetic sensitivity (e.g., virtually any photo by Henri-Cartier Bresson). These

271. Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759, 763 (2d Cir. 1991).

272. Bikram's Yoga Coll. of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1043–44 (9th Cir. 2015). For an in-depth treatment of this topic, see generally Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. PITT. L. REV. 17 (2016).

273. H.R. Rep. No. 101-735, 101st Cong., 2nd Sess. (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6935, 6949; *see also* Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J. L. & ARTS 477, 491 (1990) ("In the Architectural Works Copyright Act of 1990, Congress granted protection to the building, subject to a standard of copyrightability more generous than that accorded pictorial, graphic or sculptural works.").

274. Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959).

275. United States v. Hamilton, 583 F.2d 448, 451 (9th Cir. 1978).

are the unique elements that courts need to look for in connection with specific genres.

Even within a particular medium there is a range of approaches: A Jackson Pollock painting required a process that was very different from a Chuck Close work:

> I always know that a finished print is going to look a lot like the photograph I work from. An art historian once said that the difference between my work and, say, Jackson Pollock's was that Pollock didn't know what his next painting was going to look like, but he knew what he was going to do in the studio that day. I know what my painting is going to look like, but I don't know what I am going to do in the studio. My art is an invention of means rather than invention of interesting shapes and interesting colors.[276]

Indeed, finding a new approach is often what distinguishes one work from another.

More fundamentally, what courts may deem creative in one context—e.g., finding a discretionary basis for the aggregation of information—might have no meaningful relevance to an expressive work. *MacLean*—the used car value predictions case mentioned earlier—is a good reminder of why creativity standards don't work across genres. The Second Circuit, as mentioned, thought that "[t]he fact that an arrangement of data responds *logically* to the needs of the market for which the compilation was prepared does not negate originality. To the contrary, the use of logic to solve the problems of how best to present the information being compiled is independent creation."[277] Even if one agrees that logic provides a sufficient basis for finding creativity, it simply doesn't transfer over as a standard to fiction writing—the realm of fantasy, imagination, and sometimes Jabberwocky.[278]

In short, the creative process present in each category of work, and sometimes in each work, is *sui generis*. Even if for convenience we want to fit

276. *See* LAMBLA, *supra* note 147.

277. CCC Info. Servs. v. MacLean Hunter Mkt. Reps., Inc., 44 F.3d 61, 67 (2d Cir. 1994).

278. The Supreme Court listed "fancy or imagination" as one of the factors that distinguished copyright from trademarks in *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879). In 1985, the Court distinguished works of fact from works of fantasy in Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."). And, in 1995, the Supreme Court referenced Jabberwocky in Hurley v. Irish-American Gay, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' *cf.* Spence v. Washington, 418 U.S. 405, 411 (1974) (*per curiam*), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.").

disparate genres in the same categories to determine the binary question of eligibility for copyright protection, we can't treat them as fungible when we want to assess a work's quantum of creativity, which is a more nuanced question. Conflating different types of content under a single creativity rubric misses critical differences, which is particularly problematic in light of the fact that artworks often utilize novel processes to make their respective points. A Third Circuit opinion lamented this convergence in the late 1970s: "Troublesome, too, is the fact that the same general principles are applied in claims involving plays, novels, sculpture, maps, directories of information, musical compositions, as well as artistic paintings."[279] The endemic aspects of each work need to be considered, so that misapplied standards don't generate false positives or false negatives. As a Sixth Circuit opinion noted, "careful attention must be paid to the nature of the creative expression."[280]

Rather than transposing formulae from one type of content to another—e.g., finding creativity in expressive works on the same basis as creativity in a collection of facts[281]—courts can look for creativity that matches the type of content in question:

- Organizational, which would apply solely to collections/data aggregations, and require a clear and nontrivial organizing principle.
- Technical, which would apply to software, architecture, and, sometimes, photography, and capture solutions to practical problems (as distinguished from routine operational choices).
- Expressive, which would apply to text, images, and architecture, and require elements of creativity in presentation (e.g., creative text or framing).
- Conceptual, which would apply to all works, and operate at the level of meaning: interpretative theories in a book, insights in a photograph, organizing principle for a directory.
- Aesthetic, which would apply to visual works, and require evidence of aesthetic considerations.

279. Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 65 (3d Cir. 1978).

280. Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Grp., 463 F.3d 478, 483 (6th Cir. 2006).

281. *Harper & Row*, 471 U.S. at 547 ("Creation of a nonfiction work, even a compilation of pure fact, entails originality.").

Some works could leverage multiple types of creativity; photography is a good example of a medium that would overlap expressive, aesthetic, conceptual, and technical creativity.

3. Banality Again

Even if novelty isn't permissible as a copyright requirement, its converse—i.e., banality—is a factor to consider. The application of banality as a criterion would further diminish the probability of copyright arrogating noncreative content.

The biggest obstacle to this approach is copyright's ostensible content neutrality. In 1903, Justice Holmes issued his well-known admonishment against judges assessing the value of art,[282] and, over a century later, the warning persistently lurks in copyright's shadows. When reversing the trial court's opinion in *Situation Mgmt. Sys. v. ASP Consulting Grp.* (the "aggressively vapid" case mentioned above), the First Circuit reasoned that "the district court's originality analysis was obviously tainted by its own subjective assessment of the works' creative worth."[283] But this is red herring—courts routinely look at content. In fair use cases, the doctrine requires courts to determine the original work's nature. In infringement cases, courts deconstruct narrative structure to assess substantial similarity. *Scène à faire* requires courts to look at content in order to determine whether a particular component is a requirement in a particular narrative structure. In this sense, finding banality is no different than finding that a three-note music sequence is so routine that it doesn't merit copyright protection.[284]

Moreover, the First Circuit's suggestion that finding banality is the same thing as assessing creative worth confuses analytically distinct determinations. Assessing a work's creativity quotient is not the same thing as assessing its worth any more than asking whether a work is infringing is the same as asking whether it's good or bad. As pointed out by a New York opinion over a century ago, they are analytically separate steps: "Whether what was done makes a new, harmonious, and artistic picture is probably a conclusion of the pleader; but the allegation that the conception was original, and that visible form was given to that conception by selecting the position and place at the proper moment, is an allegation of fact."[285] As long as courts don't refuse to find creativity solely on the grounds that they don't like the content, they're not judging its value,

282. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

283. Situation Mgmt. Sys., Inc. v. ASP Consulting LLC, 560 F.3d 53, 60 (1st Cir. 2009).

284. *See* Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2003).

285. Pagano v. Chas. Beseler Co., 234 F. 963, 963–64 (S.D.N.Y. 1916).

but merely assessing its status. After *Feist*, courts are constitutionally obligated to do exactly that.

To mitigate judicial overreach, banality could be assessed with the help of experts, who can apply the standard on a genre-specific basis. What makes a photo banal, after all, is not the same as what makes a song or TV show banal—the latter has much more opportunity for actual creativity, which, in practice, would make a finding of banality much more difficult.

B. CREATIVE ACTS

There is another dimension that courts can explore when separating informational and subjective speech from creative speech, and that's asking whether the author who created the work in question engaged in a creative act in the first place. As Martin Heidegger put it, "the work arises out of and through the activity of the artist,"[286] or, in the more-granular phrasing of a California court, "[a]uthors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows."[287] In other words, all creative production begins with a creative act. The German artist Max Pechstein provided a particularly vivid description of the creative rapture he experienced when working:

> Work! Ecstasy! Smash your brains! . . . The crack of the brush, best of all as it stabs the canvas. Tubes of colour squeezed dry . . . . Paint! Dive into colors, roll around in tones! in the slush of chaos . . . . Crayon and pen pierce sharply into the brain, they stab into every corner, furiously they press into the whiteness.[288]

Here is a literary take on painting:

> Always (it was in her nature, or in her sex, she did not know which) before she exchanged the fluidity of life for the concentration of painting she had a few moments of nakedness when she seemed like an unborn soul, a soul left of body, hesitating on some windy pinnacle and exposed without protection to all the blasts of doubt. Why then did she do it?[289]

286. MARTIN HEIDEGGER, *The Origin of the Work of Art*, *in* OFF THE BEATEN TRACK 1 (Julian Young & Kenneth Haynes eds. & trans., Cambridge Univ. Press 2022) (1960).

287. De Havilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 849 (2018).

288. CHARLES HARRISON & PAUL WOOD, *Max Pechstein (1881–1955) 'Creative Credo'*, *in* ART IN THEORY 1900–1990: AN ANTHOLOGY OF CHANGING IDEAS 269 (1998).

289. VIRGINIA WOOLF, TO THE LIGHTHOUSE 110 (1927).

An occasional copyright opinion does mention a creative act,[290] but copyright law, by virtue of its nearly exclusive focus on content, has no working model for recognizing the significance and relevance of the creative process. When writing for the Tenth Circuit, Judge Gorsuch noted that "in assessing the originality of a work for which copyright protection is sought, we look only at the final product, not the process."[291] As we've already seen, though, the work-only assessment is not quite accurate. In the context of photography, for example, courts do look at the photographer's choices. The First Amendment has no trouble finding expressive acts: "neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded."[292] First Amendment protection extends to the process of collecting information intended for publication,[293] for example, as well as taking pictures[294] and tattoos.[295] If we can look for "conduct commonly associated with expression,"[296] we can also look for processes that reveal the

290. Lone Wolf McQuade Assocs. v. CBS Inc., 961 F. Supp. 587, 594 (S.D.N.Y. 1997) ("The plaintiff also contends that the character J.J. McQuade could also be considered a non-factual compilation of carefully selected character traits that constitutes a creative act protected by copyright.").

291. Meshwerks, Inc. v. Toyota Motor Sales U.S.A., 528 F.3d 1258, 1268 (10th Cir. 2008).

292. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061 (9th Cir. 2010).

293. Branzburg v. Hayes, 408 U.S. 665, 727 (1972) ("A corollary of the right to publish must be the right to gather news.").

294. *See* Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected."); *see also* Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1228 (10th Cir. 2021) ("[W]e recognized a significant volume of precedent from the Supreme Court and other circuit courts protecting the creation of information in order to protect its dissemination . . . . [Video]recording . . . is speech-creation, not mere conduct."); Fields v. City of Phila., 862 F.3d 353, 356 (3d Cir. 2017) ("[T]he First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."); W. Watersheds Project v. Michael, 869 F.3d 1189, 1196 (10th Cir. 2017) ("An individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter.").

295. *Anderson*, 621 F.3d at 1062 ("[T]he tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink. Thus, as with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection.").

296. Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 760 (1988).

putative author's intent to engage in an creative activity, if only as an added means of separating noncreative from creative content.

The easiest approach to detecting a creative act is locating it in an institutionalized process—people working in a marketing department, for example, or as part of a film production, or as part of a software development team. Mere participation in this kind of process doesn't mean that the outcome will ultimately be creative—"art by committee,"[297] to quote Natalie Merchant, can still yield lousy results—but all of it suggests that there is an effort to generate creative work, rather than, say, generate a shopping list.

Acts performed outside an institutional context, in turn, are sometimes visibly creative by virtue of being tethered to a creative cultural practice—i.e., the processes that have generally been recognizes as creative. Performance art, like the type in dispute in *Finley*,[298] and action painting, like Jackson Pollock,[299] are obvious examples. The creative intent there is clear (and, in the case of certain artworks, the intent is sometimes clearer than the work's meaning).

In some cases, identifying a creative act will require looking beyond established practices. It might be something highly unusual, like a photographer and writer collaborating across their respective works,[300] or, to reiterate an example mentioned earlier, Stephen Pippin converting twelve washing machines into cameras. By its very nature, some creativity will also occur outside of recognized spaces. As one court pointed out, creativity "is unpredictable. Much that is not obvious can be necessary to the creative process."[301]

Some solo creative acts are self-evident. If I write a book, my intent to engage in a creative act is easily reverse engineered. A photographer taking photos in a studio setting is clearly engaging in a creative act when, for example, she deliberately reneges on a promise to give children lollipops for

297. Stephen Deusner, *Natalie Merchant: "When I Talk to Friends Who Have Creative Lives and Children, We Commiserate About All the Time We Wasted in Our Youth"*, SALON (May 12, 2014), https://www.salon.com/2014/05/12/natalie_merchant_when_i_talk_to_friends_who_have_creative_lives_and_children_we_commiserate_about_all_the_time_we_wasted_in_our_youth/.

298. Finley v. Nat'l Endowment for the Arts, 100 F.3d 671, 674 (9th Cir. 1996).

299. *Jackson Pollock*, MOMA, https://www.moma.org/artists/4675-jackson-pollock (last visited Mar. 13, 2025).

300. The writer Paul Auster and the artist Sophie Calle incorporated aspect of each other's work into their own. *See, e.g.*, Stamatina Dimakopoulou, *Towards a Trope of Reciprocal Reading in the Post-Medium Condition: From Paul Auster's* Leviathan *to Sophie Calle's* Double Game *and Back Again*, 61 CRITIQUE: STUDIES IN CONTEMP. FICTION 79, 79–90 (2020); *see also* Ginger Danto, *"Leviathan"*, N.Y. TIMES (Sept. 20, 1992), https://www.nytimes.com/1992/09/20/books/leviathan.html.

301. Lyle v. Warner Bros. Television Prods., 38 Cal. 4th 264, 298 (2006).

the sole purpose of photographing their unhappy reactions.[302] Other solo acts, though, may be more difficult to identify as creative. Consider the lonely street photographer, who, like the First Amendment's "lonely pamphleteer,"[303] wanders the city streets scouring for images. In the words of Henri-Cartier Bresson (widely recognized as one of the greatest photographers in history), "[t]here are those who take photographs arranged beforehand and those who go out to discover the image and seize it."[304] These may seem harder to detect, but they're creative acts, too. David Hockney called photography a form of intense looking.[305] Describing the photographer Sebastiao Salgado's process, a *New York Times* article wrote that "[a]s practiced by Salgado in Kuwait, this means stalking the photo, getting close to the improvised choreography of men and equipment around each well."[306] A *New Yorker* article, in an clever twist of phrase, referred to an artful glimpse: "while Svenson's neighbors reportedly feel that their privacy was invaded by the artist's surveillance, his artful glimpses of urban life are too discreet to be voyeuristic."[307]

What these perspectives point to, despite shifts in terminology, is a specific practice. Alfred Stieglitz spent hours wandering through turn-of-the-century New York City before finally getting the *Winter on Fifth Avenue* photograph.[308] When I leave my house to take street photos, I do so with the intent of engaging in a creative act. If I travel to England to take photos of manors (rather than traveling there for vacation), I'm engaging in a creative act. Sophie Calle's work[309] is a paradigm example: Unbeknownst to him, Calle followed a stranger to Venice to photograph him over the course of his trip. Rather than taking a sightseeing trip, Calle engaged in an ongoing creative act—just as she did when she returned to Venice later to work as a chambermaid in a hotel,

302. Jordan G. Teicher, *Stunning Portraits of Crying Children That Brought the Photographer Hate Mail*, SLATE (Aug. 4, 2013), https://slate.com/culture/2013/08/jill-greenberg-end-times-crying-children-photos-became-a-headache-for-the-photographer-photos.html.

303. Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

304. HENRI CARTIER-BRESSON, THE MIND'S EYE 15 (1999).

305. Christopher Knight, *David Hockney's Photographs*, APERTURE (Winter 1982), https://archive.aperture.org/article/1982/4//david-hockneys-photographs.

306. Matthew L. Wald, *Sebastiao Salgado: The Eye of The Photojournalist*, N.Y. TIMES, June 9, 1991, at A28.

307. *Arne Svenson*, NEW YORKER (June 17, 2013), https://www.newyorker.com/goings-on-about-town/art/arne-svenson.

308. Alfred Stieglitz, *Winter on Fifth Avenue*, 1897 (photograph), *in* HARVARD ART MUSEUM, https://harvardartmuseums.org/collections/object/336791.

309. *See supra* note 300.

where she photographed strangers' belongings over the course of three weeks.[310]

In all these cases, there is clear intent to engage in an activity capable of generating content which historically has been seen as creative or can reasonably be seen as capable of yielding creative content. Intent is a pervasive measuring stick that resurfaces across the legal system. For example, burning a cross with the intent to intimidate may be regulated as a matter of First Amendment law.[311] Courts look for intent in copyright case law, too, when, for instance, determining a work's purpose: "[p]hotographs that are meant to be viewed by the public for informative and aesthetic purposes, such as Kelly's, are generally creative in nature."[312] The intent-based approach finds support outside legal theory, too. In discussing the difference between lyric and other types of medieval poetry, for example, one scholar noted that the "emphasis here is on the means to achieve successfully the primary purpose of creating a poetic work."[313] In other words, there is a creative act, as determined by a specific purpose and specific elements that distinguish it not just from other types of poetry, but from ordinary speech. The "author's *primary* aim is to create a poetic work."[314] The author is "offering a piece of creative work for esthetic evaluation by his readers,"[315] not simply to convey information. A *New York Times* article reviewing a photographer's work used intent to distinguish them from images that might otherwise be seen as exploitative: "How does the typical museum-goer distinguish Mr. Louie's pictures of unabashedly naked young women from the general run of pornographic imagery? Intention, for one thing."[316]

In sum, a creative act exists if an individual generates conditions designed to facilitate creative expression, or if an individual participates in such

310. The resulting photographs were published as *Suite Vénitienne* in 1980 and *The Hotel* in 1981. *See* Sophie Calle, *Suite Vénitienne* (photograph) (1980); Sophie Calle, *The Hotel* (photograph) (1981).

311. *See* Virginia v. Black, 538 U.S. 343, 352 (2003).

312. Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003).

313. John T. Shawcross, *The Poet as Orator: One Phase of His Judicial Pose*, *in* THE RHETORIC OF RENAISSANCE POETRY: FROM WYATT TO MILTON 34 (Thomas O. Sloan & Raymond B. Waddington eds., Univ. of Cal. Press 1974).

314. *Id.*

315. *Id.*

316. Philip Gefter, *ART; Working Girls, Without Exoticism*, N.Y. TIMES (Sept. 28, 2003), https://www.nytimes.com/2003/09/28/arts/art-working-girls-without-exoticism.html ("Mr. Louie writes in the accompanying catalog that, by returning to his ancestral home, he was aiming to reconcile both his Chinese and American identities. And, photographing in China, he noticed a different dynamic in his relationships to Asian women and American women. It was his intention to dispel the Western stereotypes and myths he had carried around about 'exotic' Asian women.").

conditions when they are created by someone else. These formulations nicely align with work-for-hire,[317] amanuensis,[318] and dominant author[319] lines of cases, all of which involve more than one person participating in a creative endeavor initiated and controlled by someone else. The creative act could be an act that's limited to a place and time (e.g., converting a junked car into an expressive piece),[320] or it could be an act that stretches over time and across many places (e.g., a documentary film and street photography projects). Identifying a creative act or its absence helps determine whether the putative author intends the content to be creative in the first place, which is an added criterion that courts can use when separating creative from noncreative content.

C. CO-EXISTENCE AND FAIR USE

Reasonable arguments can be made for leaving things roughly as they are. Rather than actual creativity, copyright can simply reward competence, or the skill and ability to generate certain types of non-copied content, thereby increasing cultural output, even if that output isn't always actually creative. After all, what's the harm? Moreover, as creators we should be able to do a lousy job of it, and if someone wants to pay us for those efforts anyway, all the better, at least economically. Some of what we do will be good at least some of the time, and maybe that's the best we—and copyright—can hope for. On this view, we can simply say that copyright protects cultural production rather than creativity per se. This approach aligns with the pre-*Feist* observation—advanced by a New York district court in 1929,[321] reiterated by the Second Circuit in 1951,[322] and embraced since then by various pre- and post-*Feist*

317. Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemp. Dance, Inc., 380 F.3d 624, 628 (2d Cir. 2004) ("This appeal raises several copyright and contract issues relating primarily to dances choreographed by the late Martha Graham, widely regarded as the founder of modern dance. The primary issue is whether the work-for-hire doctrine applies to works created by the principal employee of a corporation that was, in the Appellants' view, 'created to serve the creative endeavors of an artistic genius.'").

318. *See, e.g.*, Andrien v. S. Ocean Cnty. Chamber of Com., 927 F.2d 132, 135 (3d Cir. 1991); Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic, No. 97 CIV. 9248 (HB), 1999 WL 816163, at *6 (S.D.N.Y. Oct. 13, 1999).

319. *See, e.g.*, Erickson v. Trinity Theatre, Inc., No. 1:91-CV-1964, 1992 WL 12561924, at *11 (N.D. Ill. Mar. 6, 1992) ("A focus on whether the putative joint authors regarded themselves as joint authors is especially important in circumstances where one person is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another are joint authors.").

320. Kleinman v. City of San Marcos, 597 F.3d 323, 326 (5th Cir. 2010).

321. Hoague-Sprague Corp. v. Frank C. Meyer Co., 31 F.2d 583, 586 (E.D.N.Y. 1929).

322. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951).

courts across circuits[323]—that the "originality required in case of copyright means little more than a prohibition of actual copying."[324]

But that threshold effectively skips over a real creativity requirement. The most obvious reason for increasing the creativity standard—a shift which copyright can accommodate as a matter of legislation and doctrine—[325] is doctrinal integrity. By demanding actual creativity, rather than mere independent creation, copyright, to the extent copyright protection is a motive for any particular author in the first place, will stay in line with the imperative articulated in *Feist*. A higher standard also brings a First Amendment benefit. Increasing the creativity requirement means copyright will reach less content, thereby minimizing the doctrine's arrogation of cultural materials that could be used for downstream creative initiatives. Most importantly, a standard that's clearly higher than the one in use now will protect noncreative speech from being converted to private property—which I think is the biggest adverse side effect of copyright's current creativity criteria. Even if copyright doesn't want actual creativity, in other words, it's critical that uncreative speech is not captured by copyright's property net.

A workable middle-of-the-road approach would be for copyright to recognize both categories: creativity on the one hand, and cultural production on the other. Is someone being creative in the sense of generating something novel and creative—i.e., actually being creative—or is someone being creative in the sense of generating the type of content that is protected? This would be a highly legalized definition of creativity, first, and, second, to the extent mere creation would capture actual creativity, at least in some cases the distinction would be redundant as an organizing principle. But it could be relevant in the context of fair use. Just as courts distinguish between factual and creative works, courts—with the help of expert testimony and the application of the factors outlined above—could assess whether the work is generative or actually creative, and, when that content is being used downstream, provide a lower level of federal armor to the merely generative category. This would be

323. *See, e.g.*, Best Medium Publ'g Co. v. Nat'l Insider, Inc., 385 F.2d 384, 386 (7th Cir. 1967); M. M. Bus. Forms Corp. v. UARCO, Inc., 472 F.2d 1137, 1139 (6th Cir. 1973); Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 824 (11th Cir. 1982); M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 438 (4th Cir. 1986); Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988); Swirsky v. Carey, 376 F.3d 841, 851 (9th Cir. 2004); Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc., No. 1:04CV00977, 2007 WL 2712926, at *16 (M.D.N.C. Sep. 14, 2007); Morgan v. Hawthorne Homes, Inc., No. CIV.A. 04-1809, 2009 WL 1010476, at *25 (W.D. Pa. Apr. 14, 2009).

324. *Hoague-Sprague Corp.*, 31 F.2d at 586.

325. *See* MILLER, *supra* note 172, at 486 ("The statutory term 'original' is not expressly defined, and is thus open to upward adjustment in light of profoundly changed technological environments, consistent with the remainder of the Copyright Act's text and purpose.").

a practical rapprochement that would allow the doctrine to cleanly continue protecting sub-creative content while, at critical pressure points, recognizing that some works are not actually creative, and release them for further use.

Whichever standard courts choose, however, ordinary speech—i.e., content which is purely informational or subjective—ought to remain outside copyright's reach.

V. CONCLUSION

Rather than looking for originality to determine whether something is creative, copyright asks if something is creative to determine if it's original. Creativity, in turn, is essentially seen as any content that reflects *de minimis* discretion and is not copied. In effect, copyright law flips the nonlegal definition of originality upside down, and effectively reduces the concept of creativity to mere content generation. As a result, copyright's creativity requirement is a doctrinal misnomer. Rather than actual creativity, copyright requires creation of non-copied content. Copyright, in short, protects cultural production rather than creativity. The current creativity formulation also fails to shield uncreative content from copyright's reach. As a result, copyright arrogates large swaths of content that shouldn't be turned into private property. Courts could require a heightened standard when assessing creativity, so that noncreative content is excluded from copyright's reach. Even if copyright law doesn't heighten its creativity standard, however, in the very least judges can, in the context of fair use, determine whether something is actually creative or simply a form of cultural production, and make the latter more readily eligible for the fair use exception.