

ORIGINALITY IN CONTEXT*

Introduction

There is no universally applicable view of authorship, originality and creativity. Postmodernists argue that no single work manifests creativity and innovation deriving from a unitary source. Drawing on this view, legal scholars have criticized copyright law as a whole for its implicit reliance on the Romantic view of authorship.¹ If true artistic creativity is, in essence, a fiction, then no reason exists for privileging authors above other producers when it comes to maintaining the integrity of their works.² Moreover, literary theorists document that the concept of “authorship” as we understand that term today is a relatively recent phenomenon that began to take shape in the eighteenth century.³ English professor Martha Woodmansee reminds us that how we see the concept of “authorship” today was not inevitable given that the heritage of the

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¹ See, e.g., Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29 (Martha Woodmansee & Peter Jaszi eds., 1994).

² See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’*, 17 *EIGHTEENTH-CENTURY STUD.* 425, 441 (1984) (observing that when a book is viewed a truth-conveying vehicle, there is no reason to privilege any of the numerous craftsmen involved in its production). A similar view was exemplified in China during the Cultural Revolution in the 1960’s, during which time the Communist government instituted radical policies undermining property rights and material incentives. The prevailing view was that “if a steel worker need not put his name on an ingot he had produced, why should a writer enjoy the privilege of putting his name on the article he produced?” David B. Dreyfus, *Confucianism and Compact Discs: Alternative Dispute Resolution and Its Role in the Protection of United States Intellectual Property Rights in China*, 13 *OHIO ST. J. ON DISP. RESOL.* 947 (1998). As a result of this position, all works of creativity were blocked and unprotected. See Shin-yi-Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *ASIAN-PAC. L. & POL’Y J.* 13, 17 n.88 (2000).

³ ROLAND BARTHES, *THE DEATH OF THE AUTHOR*, in *IMAGE, MUSIC, TEXT* (Stephen Heath trans., 1977); MICHEL FOUCAULT, *WHAT IS AN AUTHOR?* IN *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 141 (Josue V. Harari ed., 1979). See also Woodmansee, *supra* note 2.

Renaissance was to view authors as either “craftsmen” who mastered what was put before them for the enjoyment of the “cultivated audience of the court,” or alternatively as “inspired” by external forces.⁴ The idea that an author is personally responsible for his work was inconsistent with both of these conceptions but emerged later, in part as a result of the influence by a class of professional writers in the eighteenth-century who sought to justify legal protection for their efforts.⁵ Thus, perhaps the authorship construct in which we indulge today was “neither natural nor inevitable.”⁶ Without doubt, however, this construct is the one that has prevailed and thus it cannot be readily removed from the discourse.

Moreover, the postmodern view ignores the reality that when an author borrows from the cultural fabric in crafting her work, it is still the unique combination of past efforts and the author’s original contributions that invests the author’s work with its unique and inviolate stamp. As Fred Yen has observed: “Authorship is therefore not the creation of works which spring like Athena from the head of Zeus, but the conscious and unconscious intake, digestion, and transformation of input gained from the author’s experience within a broader society.”⁷ By questioning the ability of authors to draw upon personal originality as their creative inspiration, the postmodern perspective arguably does not sufficiently account for the inspirational dimension of authorship. Although authors freely borrow from the landscape of existing cultural production, a work of

⁴ Woodmansee, *supra* note 2, at 425-26. See also Martha Woodmansee, *The Fifth Annual Frankel Lecture: Commentary: Response to David Nimmer*, 38 HOUS. L. REV. 231 (2001) (criticizing the “authorship construct”).

⁵ *Id.* See also Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in THE CONSTRUCTION OF AUTHORSHIP, *supra* note 1, at 31 (discussing the influences documented by other scholars with respect to the current construction of “authorship”).

⁶ See Jaszi, *supra* note 1 at 29 (discussing the work of Michel Foucault).

⁷ Alfred Yen, *The Interdisciplinary Future of Copyright Theory*, in THE CONSTRUCTION OF AUTHORSHIP, *supra* note 1, at 166.

creative authorship nonetheless manifests the author's individual process of creativity and artistic autonomy. Indeed, the very act of authorship entails an infusion of the creator's mind, heart and soul into her work. This inspirational or "non-economic" impetus to create provides the theoretical predicate for moral rights protection such as the right of an author to receive attribution and to maintain some control over her work's public presentation.⁸

In order to address adequately authorship concerns with respect to works whose creation is rooted, either wholly or partially, in the inspirational realm, the focus must be on the author's relationship to her work and her sense of personal satisfaction or fulfillment resulting from the act of creativity itself. Under this framework, the external work of authorship is seen as the embodiment of the author's internal creative processes. Moral rights protections such as attribution and integrity rights reaffirm the author's work as a reflection of its creator and a testament to the author's autonomy and dignity. As a behavioral category, dignity can find realization only in the external embodiments that are seen as commodifications of the author's inner personality.⁹ According to this view, authorship dignity cannot be assessed absent the author's externalized message, but in turn the message of the author's work cannot be understood without reference to the author's intrinsic motivations.¹⁰ Thus, safeguarding an author's right to select an attribution of choice is vital because attribution is a central component of authorship dignity. Similarly, assaults upon a work's integrity damage authorship dignity because a

⁸ See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006) [hereinafter *Inspiration and Innovation*] for a more complete treatment of the importance of non-economic motivations for creativity.

⁹ See generally Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964); Kwall, *Inspiration and Innovation*, at 1973.

¹⁰ Kwall, *Inspiration and Innovation*, at 1974.

work that has been modified against the author's will no longer represents her original internal creative processes.

The purpose of this Essay is not to make the case for moral rights protection. Instead, it asks whether moral rights should be accorded to limited works of authorship. Even those who argue that moral rights protections in the United States are justified might still question whether they should be applicable to all types of "authored" works. International instruments that attempt to situate Intellectual Property rights within the discourse of human rights do not necessarily require a work to be copyrightable in order to receive moral rights protection.¹¹ Still, in most if not all countries, moral rights protections attach to works that are subject to copyright protection. If we assume that copyright law, at least in the United States, sets a particular floor for the concept of originality, it would not make sense to discuss moral rights in conjunction with works that do not possess at least this minimal level of originality. On the other hand, just because a work is sufficiently original to obtain copyright protection does not mean that it automatically should receive the additional safeguards of moral rights.

Sound reasons may support confining the application of moral rights to a smaller category of works than are covered by copyright law. For example, the conventional justifications for applying moral rights only to works we label "fine art" rather than to the products of all artisans embrace the view that such works are unique, entail substantial skill and effort, and are "generally acquired principally for their expressive or decorative

¹¹ See, e.g., The International Covenant on Economic, Social and Cultural Rights, arts. 15(1)(c) & 15(1)(b), S. Exec. Doc. D,95-2, at 13 (1997), 993 U.N.T.W. 3, 5 (entered into force Jan. 3, 1976) (recognizing the right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"). For a full discussion of this Covenant and its implications, see Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U. C. DAVIS L. REV. (forthcoming 2007).

character, and not for functional or utilitarian uses.”¹² Such works, therefore, are perhaps less likely to need modifications that may ultimately conflict with the creator’s artistic vision in order to serve their intended functions.¹³ Even in France, regarded as the birthplace of moral rights, limitations exist regarding the enforcement of moral rights depending on the nature of the work: “obviously, a [French] court is going to be less scrupulous about an editor’s polishing up a set of instructions for use of a home appliance than his reworking the text of a poem.”¹⁴

The issues addressed in this Essay are whether, as a normative matter, moral rights should be applicable to fewer types of works than currently are eligible for copyright protection, and if so, how the law can make viable distinctions. The concept of originality in the copyright context furnishes a useful model for tackling the appropriate application of originality in the context of moral rights. Therefore, this Essay begins with a discussion of copyright originality.

Originality under Copyright Law

The 1909 Copyright Act provided that “[t]he works for which copyright may be secured . . . shall include all the writings of an author.”¹⁵ By stipulating that copyright protection applies to “works” and includes “all the writings of an author,” the statute neither confined copyright protection to “writings” nor included any limit on the types of

¹² Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 103 (1997).

¹³ *Id.* at 103-04 (questioning the conventional rationales for moral rights and positing that much of what drives the adoption of moral rights derives from “important reputational externalities” that attach to works we label “art”).

¹⁴ 1-FRA International Copyright Law and Practice § 7[2][a]. This idea also accounts for the special rules governing moral rights in connection with computer programs. For example, an author is precluded from preventing any “adaptation of a computer program” that complies with rights transferred and from “exercising his right to retract or correct.” *See Id.*

¹⁵ *See* H.R. REP. NO. 60-2222 (1909). Although the Copyright Clause uses the term “writings,” the intent of the Framers in this regard is far from clear. *See* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 61-62 (2003) [hereinafter *Anatomy of a Congressional Power*].

works eligible for protection.¹⁶ The 1976 Act circumvented these problems by stipulating that copyright protection instead extends to “original works of authorship.”¹⁷

In 1991, the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹⁸ declared originality to be a constitutional requirement in a case denying copyright protection to the plaintiff telephone company’s white page listings. In elaborating upon the standard for originality, the Court held that it requires “only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”¹⁹ *Feist* thus defines originality as requiring two elements: first, independent selection, and second, at least minimal creativity, and thereby merges the concept of originality with that of creative authorship.²⁰ In *Feist*, there were no allegations that the plaintiff copied its listings from any other work, and thus the focus of the Court’s opinion is on whether the plaintiff’s listings possessed the requisite degree of creative authorship. Prior to *Feist*, however, some courts and commentators drew a distinction between originality and creativity, positing that originality refers to whether the creator made an independent contribution whereas creativity is a more subjective concept that is concerned with the nature of that contribution.²¹ Other courts viewed the subjective element of originality as a requirement

¹⁶ See Walterscheid, *Anatomy of a Congressional Power*, *supra* note 15, at 65-66.

¹⁷ 17 U.S.C. § 102(a) (2000). The legislative history for the 1976 Act notes that by omitting a definition of originality, the statute intended to “incorporate without change the standard of originality established by the courts” under the 1909 Act. S. REP. NO. 94-473, at 50 (1975).

¹⁸ 499 U.S. 340 (1991).

¹⁹ *Id.* at 345.

²⁰ *Id.* In his contribution to this symposium, Keith Aoki observes that *Feist* is probably is the most influential intellectual property opinion written by Justice O’Connor. Keith Aoki, *Balancing Act: Reflections on Justice O’Connor’s Intellectual Property Jurisprudence*, __ HOUSTON L. REV.__(2007).

²¹ See, e.g., *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870, 1871-72 (S.D.N.Y. 1988) (quoting M. Nimmer, NIMMER ON COPYRIGHT, § 2.08[B][3] at 2-85, -86 (1979 ed.).

that the author contribute more than a “‘merely trivial’ variation.”²² Still, *Feist’s* adoption of a subjective, even if very minimal, “creativity” requirement for copyright has been severely criticized on the ground that it is at odds with the legislative history of the 1976 Act, and furnishes an ambiguous and inappropriately high standard for protection.²³ Regardless of whether creativity is viewed separately from originality, or as an element of originality, copyright law is clear that a copyrightable work must manifest a contribution that is both independent and creative.

As discussed, the necessary degree of creativity is minimal according to *Feist*. Distinguishing originality from novelty, the court emphasized that “the requisite level of creativity is extremely low; even a slight amount will suffice,” and “the vast majority of works make the grade quite easily.”²⁴ Thus, factual compilations may possess the requisite originality in light of the author’s selection and arrangement of the otherwise unprotectable material.²⁵ The Court does caution, however, that “there remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.”²⁶

In the United States, copyright’s standard of originality arguably fulfills the goals of the Copyright Clause with respect to works whose incentive for creation depends completely, or even primarily, upon an economic motivation. There are, quite simply,

²² *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (quoting *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)); *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914).

²³ See Russ VerSteege, *Originality and Creativity in Copyright Law*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH*, vol. 1, at 1, 20 (Praeger, 2007) (recommending a definition for “creativity” as a “material or distinguishable variation”). For a pre-*Feist* critique of originality as a “legal fiction” that is “inherently unascertainable,” see Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 969, 1004-07 (1990).

²⁴ *Feist*, 499 U.S. at 345. The standard for originality articulated in *Feist* is vulnerable to being challenged on the ground that it fails the objectives of the Copyright Clause by including works that will not necessarily promote progress. See Walterscheid, *Anatomy of a Congressional Power*, *supra* note 15, at 71 (advocating a standard of novelty and observing “how granting an exclusive right in a writing that is not novel in any way promotes the progress of science is simply not apparent”).

²⁵ *Feist*, 499 U.S. at 348.

²⁶ *Id.* at 359.

copyrightable works with fairly low degrees of originality such as arrangements of databases or specific computer programs that would not be created at all if their authors did not have the guarantee of some economic reward. *Feist* recognizes this difficulty by setting a low standard for originality, and suggesting that the level of originality in a particular work will determine the scope of copyright protection such work receives.²⁷ Works containing large amounts of unprotected expression will have more than copyright protection than works containing greater amounts of truly expressive material. For example, *Feist* instructs us that “[C]opyright in a factual compilation is thin. . . . [A] subsequent compiler remains free to use the facts . . . to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”²⁸ Courts have further massaged the concept of originality under copyright law by invoking a more stringent test for infringement when the work at issue has a narrow range of protectable and unauthorized expression. Thus, in assessing the degree of protection afforded an artist’s glass-in-glass jellyfish sculptures, the Ninth Circuit held that only the artist’s original contributions such as the distinctive curls of particular tendrils and the arrangement of certain hues are capable of sustaining a “thin” copyright.²⁹ Moreover, the artist’s “thin” copyright affords protection only against copying resulting in a “virtually identical” work as opposed to one that is “substantially similar.”³⁰

²⁷ *Id.* at 345-47.

²⁸ *Id.* at 349.

²⁹ *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).

³⁰ *See also Dyer v. Napier*, *supra* notes 47-50; *Trek Leasing, Inc. v. United States*, 75 U.S.P.Q.2d 1449 (Fed. Cir. 2005) (test for infringement of copyright in a post office building constructed in particular architectural style requires “supersubstantial similarity” since plaintiff’s copyright is “thin”); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, *cert. denied*, 513 U.S. 1184 (1995) (invoking the “virtual identity” test rather than the more lenient “substantial similarity” test for infringement).

Photography presents a particularly interesting study of the application of originality and creativity given that this medium straddles “the boundaries between technology and artistic expression.”³¹ Although photography was included in the copyright statute as protectable subject matter as early as 1865,³² the Supreme Court did not have occasion to consider the scope of protection in photographs until 1884. In *Burrow-Giles Lithographic Co. v. Sarony*, the Court looked to the findings of fact with respect to the photograph in question and concluded that copyright protection was warranted due to it being a “useful, new, harmonious, characteristic, and graceful picture,” which the plaintiff created with “his own original mental conception.”³³ The Court gave the following examples of the plaintiff’s original conception: the subject’s pose and arrangement, the selection and arrangement of the costume, draperies and other accessories used in the photograph, and the arrangement and disposition of the lighting, which resulted in the “desired expression.”³⁴ Based on these findings, which focused on the photographer’s staging of the process as the justification for originality, the Court held that the photograph was an original work of art, the product of the plaintiff author’s intellectual invention.³⁵

Christine Farley explains the Court’s decision in terms of both the artistic view of photography prevalent at that time, and the need for preserving the notion that post-shutter activities are free of artistic choice, and thus remain author-free and objective.³⁶

³¹ Jennifer Olsson, *Rights in Fine Art Photography: Through a Lens Darkly*, 70 TEX. L. REV. 1489, 1490 (1992).

³² Copyright Act of 1865, ch. 126, 13 Stat. 540 (extending protection to “photographs and the negatives thereof”).

³³ 111 U.S. 53, 60 (1884).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 437 (2004) [hereinafter “*Lingering Effects*”].

Due to photography's inherent mechanical nature, at the time of *Burrow-Giles*, "very few photographers, and even fewer artists, considered photography to be within the realms of art."³⁷ The "artistry" of photography at this time understood "arranging" or "picture-making" as the primary component of the art.³⁸ Moreover, there was a prevailing view that the image produced by photography was free of human intervention and therefore well-suited as objective evidence in legal disputes.³⁹ A focus on the photographer's input as consisting of pre-shutter activity facilitated this conception.⁴⁰

Significantly, the holding in *Burrow-Giles* was extraordinarily narrow, extending only to the particular photograph before the Court,⁴¹ and thus reserved the more difficult question of the copyrightability of "ordinary," as opposed to highly "artistic" photographs.⁴² The Court's limited holding rendered later courts without adequate guidance⁴³ and even today, determining originality in the context of photographs raises complicated questions. For example, sometimes a photograph is not the result of deliberate artistic decisions being made by the photographer. There have been documented instances of photographers shooting in a deliberately haphazard manner, without any creative choices being exercised with respect to the work.⁴⁴ Contemporary

³⁷ *Id.* at 419.

³⁸ *Id.* at 417, 428.

³⁹ *Cf.* Jaszi, *supra* note 1, at 33 n.17 (noting that "[p]hotography had perplexed nineteenth-century lawyers who saw the machine, rather than human agency, as the source of the photographic image.")

⁴⁰ *See* Farley, *Lingering Effects*, *supra* note 36, at 389-91.

⁴¹ *See* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884).

⁴² *See* Farley, *Lingering Effects*, *supra* note 36, at 430.

⁴³ *Id.* at 438. *Cf.* *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932 (S.D.N.Y. 1921) (noting that "no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike").

⁴⁴ Olsson, *supra* note 31, at 1497 (discussing the later work of Garry Winogrand).

methods of photography such as surveillance cameras and satellite images take this problem to a new level.⁴⁵

Moreover, the theoretical premise of *Burrow-Giles* is consistent with the idea, invoked even in modern cases, that unless a photograph is actively staged, it is lacking in originality on the ground that it simply duplicates that which exists in nature.⁴⁶ When the subject matter in question is, in fact, that of nature itself, this issue is especially relevant. In *Dyer v. Napier*, a federal district court observed that “it is well-settled that when a live creature commonly appearing in nature is reproduced, the only elements protected by copyright are those original aspects which are not required in the depiction of the creature as expressed in nature.”⁴⁷ Thus, in that case the court held that the photographer of a “mother mountain lion perched on a rock with a kitten in her mouth”⁴⁸ enjoyed a “thin” layer of copyright protection with respect to his original elements such as the choice of location, background, lighting, shading, timing, angle, and framing.⁴⁹ Nevertheless, the court granted summary judgment for the defendant who had created a bronze sculpture of a mother mountain lion in the same pose as the plaintiff’s. According to the court, any similarity between the two works was the result of non-protectable elements of the plaintiff’s copyrighted photograph.⁵⁰

⁴⁵ Farley, *Lingering Effects*, *supra* note 36, at 388.

⁴⁶ *Id.* at 432.

⁴⁷ 2006 WL 2730747, at *11 (D. Ariz. 2006).

⁴⁸ *Id.* at *8.

⁴⁹ *Id.* at *9.

⁵⁰ *Id.* at *1. According to the evidence in the case, the plaintiff hired animal trainers to assist him in manipulating the animals so they would present themselves in the captured pose. Specifically, the trainers placed a baby mountain lion on the end of a boulder near a drop-off, and when the mother was released, she instinctively walked over to the boulder and used her mouth to retrieve her kitten. To produce the photograph in question, this procedure was repeated more than twelve times. *Id.* at *2. *See also* Satava v. Lowry, 323 F.3d 805 (9th Cir. 2003), *supra* note 29 and accompanying text. In *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903), Judge Holmes observed: “Others are free to copy the original. They are not free to copy the copy. . . . The copy is the personal reaction of an individual upon nature. Personality always contains something unique.”

The artistry of photography can inhere not only in the pre-shutter staging process, but also in both the creative choices associated with the timing of the click of the shutter and in post-shutter activity. With regard to timing, creative choices include “the precise timing to click the shutter, the angle of the shot, the frame, the focus, the distance from the subject, [and] the centering of the subject.”⁵¹ As for post-shutter activity, actions such as retouching, cropping, framing, redeveloping and coloring seem obvious exercises of creative decision-making.⁵² Moreover, digital technology has multiplied the opportunities for post-shutter creativity. For example, the well-known photographs of Depression-era, southern tenant-farmers taken by Walker Evans have now been digitally reproduced by two of his former colleagues.⁵³ Evans worked on assignment for the Farm Security Administration, and so his photographs are public property in the Library of Congress and capable of being reproduced by anyone.⁵⁴ The new prints “modulate and unify the midranges of gray” in the original pictures “to soften the contrasts and give a warmer ambience to photographs.” The resulting prints are “seductive and luxurious,” qualities that stand in sharp contrast to both the subjects themselves and to Evans’s original “gelatin silver prints.”⁵⁵

Thus, despite the challenges presented by photography to the application of the originality requirement,⁵⁶ the medium’s potential to express substantial degrees of

⁵¹ Farley, *Lingering Effects*, *supra* note 36, at 434. *See also* Pagano v. Charles Beseler Co., 234 F. 963 (S.D.N.Y. 1916) (affirming the photographer’s timing as a creative choice); Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968) (recognizing the selection of the camera, film and lens as artistic choices and noting also the photographer’s selection of the timing).

⁵² *See* Farley, *Lingering Effects*, *supra* note 36, at 390, 435.

⁵³ Michael Kimmelman, *Walker Evans. Or Is It?*, N.Y. TIMES, Weekend Arts, Aug. 25, 2006, at B25.

⁵⁴ *See* 17 U.S.C. § 105 (disallowing copyright protection for any work of the government of the United States).

⁵⁵ *Id.* at B25, B30.

⁵⁶ Interestingly, the Berne Convention differentiates the term of protection for photographic works and works of applied art by stating that the individual members should make this determination, although

individual creativity is clear. A compelling example of this point is furnished by the unique role photography plays in art therapy. As a medium which does not require knowledge of drawing, painting, or sculpting, photography has lowered the barriers to entry. In midtown Manhattan, for example, the International Center of Photography encourages poor, urban, teenage girls with few other positive outlets for their energies to develop their self awareness and gain control over their lives through digital photography.⁵⁷ In contrast, other genres of works that may challenge copyright's originality requirement in certain instances lack photography's potential to express substantial creativity. Yet, all copyrightable works, such as compilations of non-copyrightable material, now receive protection for the life of the author plus seventy years.⁵⁸ The reality of a relatively low standard of originality qualifying works for copyright protection, combined with an expanding duration of protection, has given rise to the current concern that copyright law is far too bloated.⁵⁹

This concern with expanding copyright protection impacts the dialogue on moral rights. Yet, many fail to appreciate that moral rights and copyright are clearly distinguishable. Moral rights are aimed at preserving an author's artistic autonomy and dignity; copyrights afford economic protection and are steeped in a utilitarian framework. Moreover, although many scholars share concerns regarding an increasingly expansive copyright law on the ground that copyright law inappropriately allocates speech

protection should last at least twenty-five years from the "making of such a work." Berne Convention for the Protection of Literary and Artistic Works of 1971, art. 7(4).

⁵⁷ Randy Kennedy, *Lessons in New Ways to See—Troubled Girls Learn An Art of Examination*, N.Y. TIMES, Arts Section, July 5, 2006, at B1.

⁵⁸ See 17 U.S.C. § 302(a). The statute provides different terms of protection for works made for hire (§ 302(c)) and joint works (§ 302(b)). See also *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding the constitutionality of Congress's retroactive extension of the duration of copyright protection).

⁵⁹ Cf. Pamela Samuelson, *Enriching Discourse on Public Domain*, 55 DUKE L. REV. 101, 106 (2006) (noting the increase in scholarly interest in the public domain is partially the result of the discourse concerning copyright term extension).

entitlements to politically savvy and influential speech organizations,⁶⁰ these concerns do not necessarily apply to moral rights protections. Specifically, individual creators, as opposed to large corporations, often will gain the benefits from such laws. In fact, Congress's decision to confine moral rights protection to the limited categories of visual art designated in the Visual Artists Rights Act ("VARA") resulted from its desire to avoid conflict with the industrial forces that expressed concern about their ability to maintain profits and power with more expansive moral rights coverage.⁶¹ VARA, the product of political lobbying, poor drafting, and a hasty and thoughtless legislative process,⁶² is in need of considerable attention in many respects. The remainder of this Essay addresses the issue of the appropriate degree of originality for moral rights protection in a broader context than VARA.

Originality in a Moral Rights Framework

Significantly, *Feist's* elevation of the originality requirement to a constitutional magnitude signifies the importance of Congress's role in determining the parameters of how the originality standard should be applied. As Bill Patry has observed: "The *Feist* Court did not strip Congress of its voice on all originality issues; instead, the Court only set a threshold standard. Congress is free to set a higher standard, or, in protecting particular types of works, to declare how the originality requirement must be satisfied."⁶³

⁶⁰ See Kwall, *Inspiration and Innovation*, *supra* note 8, at 1996; Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *Stanford L. Rev.* 1, 65 (2001). See also Jaszi, *supra* note 1, at 32-33 (noting that such "distributors have reaped most of the benefits of copyright's cultivation of Romantic 'authorship.'").

⁶¹ Kwall, *Inspiration and Innovation*, *supra* note 8, at 1997.

⁶² See Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 *MARQ. INTELL. PROP. L. REV.* 1, 4 (1997).

⁶³ See William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 *GEO. WASH. L. REV.* 359, 377 n.104 (1999). Interestingly, the standard for copyright originality varies within the European Community. See Herman Cohen Jehoram, *The EC Copyright Directives, Economics and Authors' Rights*, 25 *INT'L REV. INDUS. PROP. & COPYRIGHT L.* 821,

I have argued elsewhere that the enactment of moral rights is constitutional on the ground the language used by the Framers in crafting the Copyright Clause is consistent with the view that promoting progress was the primary goal and providing economic incentives via copyright law was seen as an illustrative rather than an exclusive means of achieving this objective.⁶⁴ In this section, I develop the argument that despite the minimal threshold for originality developed under copyright law, moral rights protection should only be accorded to works satisfying a heightened standard of originality, as manifested by substantial rather than “a modicum” of creativity.⁶⁵

The current low standard for creativity, while familiar and arguably comfortable for determining whether a particular work deserves the economic protections of copyright law, should not be imported unthinkingly as the standard for a work’s eligibility for moral rights protections. For works whose creation is rooted in the inspirational realm of authorship, economic incentive is not the only relevant factor.⁶⁶ As discussed earlier, the importance of an author’s artistic autonomy and dignity are critical in driving the intrinsic

829 (1994) (noting that historically, Germany’s standard was among the most stringent to the extent “courts require more than just personal expression”).

⁶⁴ See Kwall, *Inspiration and Innovation*, *supra* note 8, at 1983-91. In the early republic, the conventional understanding of promoting progress appeared to be equivalent to the utilitarian conception of dissemination of knowledge. This objective is best achieved through a legal framework that promotes the public’s interest in knowing the original source of a work and understanding it in the context of the author’s original meaning. See *id.* at 1985-87. Given that the Supreme Court has long deferred to Congress’ judgments regarding the specific implementation of copyright legislation, moral rights is within the scope of Congress’ legitimate actions pursuant to the Copyright Clause. Indeed, “the task of definition, of inclusion and exclusion, upon deliberation and compromise, is precisely the type of line drawing that is the function of the legislature.” Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 839 (2001).

⁶⁵ Feist, 499 U.S. at 363.

⁶⁶ As Elliot Silverstein of the Directors Guild of America testified before Congress in 1987 against film colorization, “[s]ome values are more important than material reward . . . some things are just not for sale.” Kwall, *Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 15 (2001). See also Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARD. ARTS & ENT. L.J. 569 (2000) (arguing that because the economic incentive model does not adequately explain the application of intellectual property laws to the serious fine arts, these laws primarily apply to mass-produced works that are distributed in volume).

dimension of creativity, which forms the theoretical predicate for moral rights protections.⁶⁷ Therefore, works should be required to manifest heightened originality manifesting “substantial” creativity in order to be protected through moral rights legislation.⁶⁸

The standard suggested here would require courts to become involved in determining whether a particular work manifests the requisite degree of originality to qualify for protection. At first blush, this may seem to be a controversial suggestion based on “‘the doctrine of avoidance’ of artistic determinations,”⁶⁹ which represents “one of the most stable and explicitly stated doctrines across art law.”⁷⁰ This position has a strong pedigree, dating at least as far back as Justice Holmes’ famous statement in *Bleistein v. Donaldson* that “[i]t 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.”⁷¹ This language has “become a refuge for judges who do not want to engage with aesthetic questions.”⁷²

A distinction can be drawn, however, between a work’s artistic merit and its artistic rank. That is to say, Judge Holmes’ discussion in *Bleistein* seems directed toward judicial assessment of a work’s artistic merit. In contrast, the concepts of heightened originality and substantial creativity also can be applied to assess a work’s artistic rank. If Congress were to enact expanded moral rights protection, it could provide some assistance in these matters by excluding certain categories of works from the scope of

⁶⁷ See *supra* notes 8, 13 and accompanying text.

⁶⁸ Cf. Paul Edward Geller, *Toward an Overriding Norm in Copyright: Sign Wealth*, REVUE INTERNATIONALE DU DROIT D’AUTERU (Jan. 1994)(proposing that authorship norms require “some personal imprint” as opposed to marketplace norms which require “at most minimal creativity”).

⁶⁹ Christine Haight Farley, *Judging Art*, 79 TULANE L. REV. 805, 815 (2005).

⁷⁰ *Id.*

⁷¹ 188 U.S. 239, 351 (1903).

⁷² Farley, *Judging Art*, *supra* note 67, at 818.

coverage. A straightforward way to accomplish this result legislatively is to allow moral rights protection only for works that either completely lack, or contain de minimis utilitarian or functional elements. As a practical matter, this standard would eliminate the possibility of moral rights being asserted in particular types of subject matter such as databases, building codes,⁷³ office memos,⁷⁴ cabinets,⁷⁵ or any other work characterized by a significant functional component. Such requirements for protection not only comport with the underlying theory of moral rights but also avoid potential criticisms that stronger moral rights will open the door to covering a multitude of “creative” enterprises with little significant artistic value.⁷⁶

By analogy, it is helpful to consider the extent to which VARA has provided guidance with respect to what constitutes “a work of visual art” covered under the statute. VARA explicitly excludes any “poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication” as well as merchandising, advertising or promotional material.⁷⁷

Leaving aside the statute’s problematic exclusion of highly original works other than

⁷³ See, e.g., *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc decision holding that building codes are copyrightable until they become enacted as law, after which they enter the public domain).

⁷⁴ See Lee, *supra* note xxx, at 839.

⁷⁵ *Id.*

⁷⁶ See Sarah Kutner & Holly Rich, *Dirty Dancing: Attributing the Moral Right of Attribution to American Copyright Law: The Work for Hire Doctrine and the Usurping of the Ultimate Grand Dame and Founder of Modern Dance, Martha Graham*, 22 HOFSTRA LAB. & EMP. L.J. 325, 349 (2004) (urging that VARA be expanded to cover performing arts and noting that the creativity of choreography is particularly “the most misunderstood and underestimated” due to its seemingly effortless and undisciplined physical appeal); Cf. David Nimmer, *Copyright in the Dead Sea Scrolls*, 38 HOUSTON L. REV. 1, 184 (2001) (noting how works of “low authorship . . . flood the theoretical portholes for federal copyright protection” despite the small degree of attention they attract in practice since few people attempt to copyright such works); *Open Source Yoga Unity v. Choudhury*, No. C 03-3182 PJH (N.D.Cal. 2005) (observing that if the selection and arrangement of the yoga sequence at issue is entitled to copyright protection, the resulting protection would be considered “thin”).

⁷⁷ 17 U.S.C. §101 (definition of “work of visual art”).

visual art, the list of statutory exclusions suggests that the statute intends to exclude more functional types of visual art.⁷⁸ This intention is reinforced by the statute's provision that with respect to the right to protect against the destruction of a covered work, the work must meet the additional requirement of possessing "recognized stature."⁷⁹ Although the statute fails to define "recognized stature," one court has interpreted this requirement as "a gate-keeping mechanism" affording protection only to art work "that art experts, the art community, or society in general views as possessing stature."⁸⁰

Indeed, in enumerating those works of visual art covered by VARA, the statute establishes some basic parameters with respect to the requisite originality, creativity and aesthetics of the eligible works. Thus, the statute covers only paintings, drawings, prints or sculptures, existing in single copies or in limited editions of two hundred copies or fewer that are signed and consecutively numbered by the author.⁸¹ Photographic images also are covered but only those produced for "exhibition purposes," signed by the author, and existing in a single copy or a limited edition of two hundred or fewer copies.⁸² The legislative history contains the testimony of Professor Jane Ginsburg recognizing there is a unique value inherent in the original or limited edition of a copy of a work of art

⁷⁸ See 17 U.S.C. § 101 (definition of a "work of visual art").

⁷⁹ 17 U.S.C. § 106A(a)(3)(B).

⁸⁰ *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *rev'd*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996). One commentator has observed, however, that the "recognized stature" standard is controversial to the extent it requires courts "to make distinctions based on aesthetic considerations." Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1965 (2000).

⁸¹ 17 U.S.C. § 101 (definition of a "work of visual art"). In the case of multiple cast, carved, or fabricated sculptures, the statute covers 200 or fewer that as long as they are "consecutively numbered by the author and bear the signature or other identifying mark of the author." *Id.*

⁸² *Id.*

because these objects embody “the artist’s ‘personality’ far more closely than subsequent mass produced images.”⁸³

Predictably, courts have denied moral rights protection in cases involving mass produced posters⁸⁴ and original drawings used as the basis for the design of a trophy.⁸⁵ In another case, the question was whether a public sculpture park with a nautical theme should be considered a work of visual art within the meaning of VARA. The district court declined to consider the plaintiff’s contributions to the park as an integrated piece of “sculpture” covered by VARA, based on the judiciary’s tendency to construe the definitions in VARA narrowly and the fact that a park does not fit the traditional definition of a sculpture.⁸⁶ The First Circuit affirmed the judgment against the artist, but predicated its holding on the view that VARA does not protect site specific art.⁸⁷ On the other hand, a district court held that an intermediate clay model of the head of Queen Catherine qualified as a work of visual art because the ultimate goal of the project was to produce a bronze statute of the Queen, and therefore intermediate models qualified for protection.⁸⁸ As these cases show, the scope of VARA’s coverage is narrowly crafted and interpreted so as to assure, to the extent possible, that protected works manifest a high degree of artistic originality and creativity.

VARA’s intent in this regard is clearly evident in its treatment of photography.

Recall that in order to be protected under VARA, a photograph must be made “for

⁸³ Visual Artists Rights Act of 1990, H.R. Rep. No. 101-514, at 6922 (1990) (testimony of Professor Jane Ginsburg).

⁸⁴ *Silberman v. Innovation Luggage, Inc.*, 67 U.S.P.Q.2d 1489 (S.D.N.Y. 2003).

⁸⁵ *Nat’l Ass’n for Stock Car Auto Racing, Inc. (NASCAR) v. Scharle*, 2006 WL 1697101 (3d Cir. 2006).

⁸⁶ *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89 (D. Mass. 2003). The district court left open the question whether a park could ever be a “work of visual art” as defined by VARA, holding instead this particular park did not qualify.

⁸⁷ 459 F.3d 128 (1st Cir. 2006).

⁸⁸ *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

exhibition purposes only.”⁸⁹ In *Lilley v. Stout*,⁹⁰ a district court considered the applicability of VARA in a controversy arising from the collaboration of photographer Lilley and his one-time girlfriend, Stout. Lilley sued Stout under VARA as a result of Stout’s incorporation of Lilley’s photographs, without attribution, in *Red Room at Five*, a work consisting of the photographs placed in a binder with a red cover and illustration.⁹¹ In her defense, Stout argued that the photographs were not produced for “exhibition purposes only” because they were taken as studies for potential paintings. The court sided with Stout, denying Lilley his right of attribution, based on its view that in taking the photographs, the plaintiff’s purpose was to assist Stout with her project rather than to exhibit the works.⁹²

Apart from VARA, copyright determinations are more complex with respect to fine art photography.⁹³ Nevertheless, there is no doubt that photography as a category should be accorded moral rights protection under a standard requiring heightened originality with substantial creativity. Moreover, as the digitization of the Evans prints shows,⁹⁴ now more than ever, photographs are potentially subject to unauthorized modifications that may be out of keeping with the original message of the author’s work. The Evans prints were digitized by two individuals who brought “the authority of first-hand experience with Evans and an obvious devotion to him.”⁹⁵ Yet, even here, the author of a newspaper article discussing an exhibit of the digitized prints was critical of the resulting prints, and observed that someone looking at one of these new Evans prints

⁸⁹ See *supra* notes 80 and accompanying text. See also Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 840 (1992) (questioning this standard).

⁹⁰ 384 F. Supp. 2d 83 (D.D.C. 2005).

⁹¹ *Id.* at 85.

⁹² *Id.* at 87.

⁹³ See Olsson, *supra* note 31, at 1489-90. See also *supra* XXX.

⁹⁴ See *supra* XXX

⁹⁵ Kimmelman, *supra* note 53, at B30.

“is likely to assume it is by Evans, which it is of course only up to a point.”⁹⁶ Judges will need to draw lines, however, in determining how this standard should apply to particular photographs in question. As discussed, historically courts have had to make these same types of determinations with respect to whether photographs manifest the requisite originality for copyright protection.⁹⁷

Other types of works will also raise these same line-drawing issues with respect to an originality standard requiring substantial creativity. For example, music scholars have argued that popular music is far less original and creative than the classical genre because its market orientation necessitates little variation between songs. In this regard, Professor Simon Frith explains that popular music is “music produced commercially, for profit, as a matter of enterprise not art.”⁹⁸ Classical music, in contrast, is far more artistically driven and thus displays much greater diversity in composition. As music critic Tim Smith has observed: “[T]he great composers didn’t follow the rules, but made the rules follow them.”⁹⁹

⁹⁶ *Id.*

⁹⁷ *See supra* XXX. *Cf.* *Marco v. Accent Publ’g Co.* 969 F.2d 1547 (3d Cir. 1992) (engaging in a similar ad hoc evaluation of a photograph’s creativity in the context of a work for hire determination).

⁹⁸ Simon Frith, *Pop Music*, in *THE CAMBRIDGE COMPANION TO POP AND ROCK MUSIC*, 93, 94-95 (Simon Frith et al. eds., 2001). *Cf.* *Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984) (noting that “in a field such as that of popular music in which all songs are relatively short and tend to build on or repeat a basic theme,” the inference of copying must be established by testimony regarding the relative complexity of the compositions at issue).

⁹⁹ TIM SMITH, *THE NPR CURIOUS LISTENER’S GUIDE TO CLASSICAL MUSIC*, 2-3 (2002). Smith explains: “Typically, the pop music composer is finished after creating a tune with chords (harmony) underneath it. By contrast, the classical composer’s task is far from over with the writing of a melody or a chord or a rhythmic pattern; that’s only the beginning. The classical composer is interested in developing the full potential of the melodic and harmonic ideas.” *Id.* at 3. *But see* Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN — IDENTIFYING THE COMMONS IN INFORMATION LAW* (Lucie Guibault and P. Bernt Hugenholtz, eds., Kluwer Law International, 2006) at 143 (noting that musicologists have documented borrowings and reworkings among classical composers). An interesting comparison is presented in *Montgomery v. Montgomery*, 60 S.W.3d 524 (Ky. 2001). The court there was faced with the question whether music videos should be considered commercial for purposes of a right of publicity claim. The majority observed that music videos display the same artistic and creative elements as motion pictures whereas the dissent claimed that music videos are merely profit driven and lacked artistic quality.

The foregoing discussion supports the idea that although certain functional types of works should be excluded *per se* from moral rights protection,¹⁰⁰ other works such as art, literature, and music presumptively should qualify if a sufficient showing of originality can be made with respect to the particular work at issue. For many works, the requisite level of originality likely will not be an issue. For works at the margins, however, courts will have to decide whether a heightened originality standard with substantial creativity has been met. Any originality determination thus will necessitate at least some judicial evaluation of the artistic rank of a given work. Realistically, if a heightened standard of originality with substantial creativity were to be embraced in moral rights legislation, the judicial line-drawing that would result will not be much different from that which currently takes place in applying the *Feist* standard for copyright originality. In *Burrow-Giles*,¹⁰¹ the Supreme Court recognized that because copyright law lacks the patent system's safeguard of a prior examination by an authoritative tribunal, it is more important in a copyright case for the author to prove "the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author."¹⁰² So from an early point in time, courts were sensitive to the importance of how to prove originality in copyright law.¹⁰³ In discussing the legal determination of piracy, an issue related to the concept of originality, David Lange has stated that courts need to determine whether they are dealing with "appropriation unmotivated by any creative exercise."¹⁰⁴ In advising how to do this, he

¹⁰⁰ See *supra* notes 32-34.

¹⁰¹ 111 U.S. 53 (1884).

¹⁰² *Id.* at 59-60.

¹⁰³ But see Litman, *The Public Domain*, *supra* note 23, at 1004-05 (arguing that despite its "esteem" in copyright jurisprudence, "originality" is irrelevant to the actual resolution of the cases).

¹⁰⁴ David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 481 (2003).

writes: “There is no escaping: we must decide,” a decision that, in his view, “ought to be grounded in fact-finding affected by law.”¹⁰⁵ That same reasoning applies to the determination of heightened originality with substantial creativity for purposes of applying moral rights protections.

Under copyright law, there is precedent in the Second, Seventh, and Ninth Circuits for applying a heightened standard of originality when derivative works, defined in the statute as original works of authorship that are “based upon one more preexisting works,” are at issue.¹⁰⁶ The Second Circuit has held that with respect to reproductions of artistic works, a higher degree of skill, “true artistic skill,” may be required to make a reproduction copyrightable.¹⁰⁷ Although courts following this approach might be somewhat inclined to evaluate the artistic merits of a given work, the case law in the Seventh Circuit clarifies that the purpose of this heightened standard of originality for derivative works is to assure that a sufficiently pronounced difference exists between the underlying and derivative works so that subsequent artists are not faced with copyright problems if they depict the underlying work.¹⁰⁸ In other words, courts need to determine

¹⁰⁵ *Id.*

¹⁰⁶ See 17 U.S.C. § 101 (definition of a “derivative work”). See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc); *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980); *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983); *Entm’t Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211 (9th Cir. 1997). At least one commentator has suggested that this view represents a marked departure from traditional copyright doctrine. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’*, 1991 DUKE L.J. 455, 461.

¹⁰⁷ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc). In calling for “at least some substantial variation,” and “not merely a trivial variation,” *Batlin* is seemingly inconsistent with *Bell*’s “merely trivial” standard. See *supra* note xxxx. On the other hand, *Bell* also uses the phrase “distinguishable variation.” See *Bell*, 191 F.2d at 102.

¹⁰⁸ See *Gracen*, 698 F.2d at 305 (saying that a “derivative work must be substantially different from the underlying work to be copyrightable”). More recent cases in the Seventh Circuit suggest somewhat of a retraction from *Gracen*’s heightened originality standard, although that standard is not explicitly overruled. See, e.g., *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1192 (7th Cir. 1987) observing that derivative works are copyrightable if they have “some incremental originality” and the copyright “is limited to that increment” (emphasis supplied). Cf. *Gaiman v. McFarlane*, 360 F.3d 644, 658 (7th Cir. 2004) (“There has to be some original expression contributed by anyone who claims to be a co-author”).

originality under copyright law to insure adequate differentiation among multiple works created subsequent to the original work. Although this determination may seem more objective in theory than one involving subjective creativity, in practice subjectivity will be a factor when courts are faced with the paramount question of whether a given work is sufficiently distinguishable from the work upon which it is based. Thus, the case law reveals an inclination and ability to endorse different levels of originality where appropriate.

In elucidating different levels of originality, *Burrow-Giles* is an important precedent not only because the Court elevated art photography above ordinary photography, but also because the Court elected to mark this distinction by focusing on the artistic process as narrated by the artist in addition to the final product.¹⁰⁹ According to the Court, although authorship is evident in the photograph itself, the narrative supplied by the photographer was vital in assisting the Court's perception. The photographer's narrative emphasized that his actions were taken in furtherance of pre-shutter, "picture-making" activity.¹¹⁰

This emphasis on the author's decision-making during the artistic process has a parallel in the case law concerning whether subject matter constitutes copyrightable applied art or non-copyrightable industrial design. According to the 1976 Act, copyright protection does not extend to "useful articles" that have "an intrinsic utilitarian function."¹¹¹ The legislative history accompanying the definition of a "useful article"

¹⁰⁹ Farley, *Lingering Effects*, *supra* note 36, at 431-32.

¹¹⁰ *Id.* at 426. Sarony's narrative with respect to his creative choices was intended not only to inform the Court but also to distinguish his work from that of the numerous non-art photographer portraitists. *Id.* at 429.

¹¹¹ See 17 U.S.C. § 101 (2000 & Supp. 2002) (definition of a "useful article"). The 1976 Act was intended "to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design." H.R. REP. NO. 94-1476, at 55 (1976).

speaks of physical and conceptual separability as the appropriate litmus tests in determining whether a particular useful article constitutes copyrightable art.¹¹² Thus, courts have recognized that a work can obtain copyright protection when the artistic features are physically or conceptually separate from those that are utilitarian.¹¹³ Although the application of the physical separability test is rather clear in that it simply asks whether the ornamental nature of the object in question can be physically separated from the object,¹¹⁴ it is unlikely to be of much aid when the object under consideration is two-dimensional rather than three dimensional.¹¹⁵

The conceptual separability test is more complex than the physical separability test and courts have used a variety of approaches in determining whether the artistic components of a work are conceptually separate from the work's utilitarian function.¹¹⁶

¹¹² H.R. REP. NO. 94-1476, at 55 (1976).

¹¹³ See, e.g., *Pivot Point*, 372 F.3d at 926 (invoking conceptually separable test to uphold copyrightability for a fish mannequin); *Brandir*, 834 F.2d at 1142 (applying Denicola's conceptually separable test to reject copyright protection of a thick, interwoven wire initially constructed as artwork but later modified into a bicycle rack); *Norris Indus., Inc. v. Int'l Telephone and Telegraph Corp.*, 696 F.2d 918 (11th Cir. 1983) (holding wire wheel covers not copyrightable because they did not contain physically or conceptually separable works of art); *Animal Fair, Inc. v. Amfesco Indus., Inc.*, 620 F. Supp. 175, 186-88 (D. Minn. 1985) (holding bear-paw designs on slippers conceptually separable), *aff'd mem.*, 794 F.2d 687 (8th Cir. 1986); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 95 F.R.D. 95 (D. Del. 1982) (invoking conceptually separable test to support copyright in eyeglass display cases).

¹¹⁴ See *Pivot Point*, 372 F.3d at 917.

¹¹⁵ See *Pivot Point*, 372 F.3d at 922 (noted in Robert C. Denicola, *Applied Art & Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 744 (1983)). See also *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1392 (C.D. Cal. 1993) (holding artistic packaging physically separable from the utilitarian aspects of the perfume inside); *Ted Arnold, Ltd. v. Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966) (holding copyrightable a simulated antique telephone encasing a pencil sharpener based on physical separability test).

¹¹⁶ In addition to the test design process test adopted in *Brandir*, 834 F.2d at 1142, and discussed *infra* XXX in the text, other tests have been suggested by courts and commentators. One formulation determines conceptual separability from the standpoint of the ordinary reasonable observer by looking to look to whether "the article . . . stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function." See, e.g., *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 419-424 (2d Cir. 1985) (Judge Newman, dissenting), see *infra* note xxx and accompanying text. Other tests include whether the primary use of the work is artistic or utilitarian, and whether the work is marketable as art. See *Brandir*, 834 F.2d at 1144 (calling neither one of these tests "very satisfactory"). See *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 421 (5th Cir. 2005) (adopting "the likelihood-of-marketability standard for garment design only") (emphasis in original). In addition, Professor Goldstein has proposed a test positing that a particular "feature incorporated in the design of a useful article is

In *Brandir International, Inc. v. Cascade Pacific Lumber Co.*,¹¹⁷ the test adopted by the court looks to whether the design process reflects the creator’s artistic judgment, as exercised independently of functional considerations. *Brandir* affirmed the Copyright Register’s denial of copyright for a bicycle rack originating from a wire sculpture on the ground that it is a useful article and the artistic aspects of the work were not conceptually separable from its utilitarian function pursuant to the test invoked by the court. In evaluating whether the design of the bicycle rack should be protected as a “sculptural work,”¹¹⁸ or denied protection as a useful article, the court noted that the application of its “design process” test will require the parties to present evidence relating to the “design process and the nature of the work.”¹¹⁹ According to the majority, such a test would not be difficult to apply since “the work itself will continue to give ‘mute testimony’ of its origins.”¹²⁰

Although *Brandir* was a case about copyrightable subject matter rather than the originality requirement, the test it adopts for determining the copyrightability of applied art is relevant to determining how a heightened originality with substantial creativity requirement can be applied in the context of moral rights. The test in *Brandir* seeks to determine the author’s creative intent and relies upon the sequences of the author’s actions or decisions in the design process. The *Brandir* model thus relies on evidence

conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied would be equally useful without it.” PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW & PRACTICE, 109 (2001). Several courts have adopted the Goldstein test. *See, e.g.*, *Collezione Europa U.S.A., Inc. v. Hillsdale House, Ltd.*, 243 F. Supp. 2d 444 (M.D. N.C. 2003) (holding sculpted leaves of a furniture collection sufficiently separable to be copyrightable); *Celebration Int’l, Inc. v. Chosun Int’l, Inc.*, 234 F. Supp. 2d 905 (S.D. Ind. 2002) (upholding copyright protection of tiger costume with a plush head).

¹¹⁷ 834 F.2d 1142 (2d Cir. 1987).

¹¹⁸ 17 U.S.C. § 102(5).

¹¹⁹ *Brandir*, 834 F.2d at 1145.

¹²⁰ The dissent in *Brandir* objected to the majority’s test for conceptual separability in part on the ground that a work’s copyrightability should not depend “upon largely fortuitous circumstances concerning the creation of the design in issue.” *Id.* at 1151.

regarding the design process and the nature of the completed work. This same type of evidence also can facilitate a judicial determination of heightened originality requiring substantial creativity based on the creator's conscious artistic choices as manifested in the design process and the nature of the work itself. Such a test for the applicability of moral rights makes particular sense since, according to the theoretical predicate for moral rights, the external product of creativity embodies the author's artistic autonomy and dignity.

Thus, the case law involving the conflict between copyrightable art and non-protectable industrial design¹²¹ furnishes a helpful path for contemplating the operation of a standard for determining whether particular works in question manifest heightened originality with substantial creativity. Rather than making these determinations according to the judiciary's individual perceptions of an author's creativity, courts should take the author's own narrative of creativity into account. Thus, courts should ask

¹²¹ To further illustrate the operation of this bifurcation, garment designs can be compared with decorative quilts. Garment designs, even those which are quite elaborate, historically have been denied copyright protection on the ground that they are useful articles that are the product of a craft or trade, rather than art. *See* Galiano, 416 F.3d at 411. Courts have, however, held that patterns or other artistic elements featured on a fabric may be eligible for copyright protection if they can be identified separately from the useful purpose of the clothing. *See, e.g.,* Express LLC v. Fetish Group, Inc., 424 F. Supp. 2d 1211 (C.D. Cal. 2006) (upholding copyright protection for the arrangement, placement and look of lace trim on a tunic). In contrast to clothing for humans, clothing for a toy bear has been held copyrightable on the ground that it has no utilitarian function. *Boyds Collection, Ltd. v. Bearington Collection, Inc.*, 365 F. Supp. 2d 612 (M.D. Pa. 2005). Currently, however, federal legislation is pending that will afford a form of *sui generis*, or copyright-like, protection for the overall appearance of fashion designs that are not commonplace such as jeans, T-shirts, and A-line skirts.

In contrast, copyright protection has been recognized in quilt tops, the artistically decorated top cover of a quilt, as well as to the individual quilt blocks, which sewn together comprise the quilt top. *See* Brown v. McCormick, 23 F.2d 594 (D. Md. 1998) (upholding original elements in a quilt block depicting a black bird flying over a man and a woman holding hands); *Boisson v. Am. Country Quilts and Linens, Inc.*, 273 F.3d 262 (2d Cir. 2001) (upholding copyright protection to quilts consisting of square blocks containing the capital letters of the alphabet displayed in order). In her book *Who Owns Culture*, Susan Scafidi notes that in 1971, a New York museum mounted an exhibition of quilts from diverse communities and "was perhaps the first curatorial recognition of quilts as American women's artwork." SUSAN SCAFIDI, *WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW*, 27 (2005). In a similar vein, courts have held that artistic designs woven or imprinted onto rugs qualify for copyright protection. *See, e.g.,* Peel & Co. v. Rug Market, 238 F.3d 391, 395 (5th Cir. 2001).

whether, in light of the author's articulated narrative, his design choices reflect heightened originality with substantial creativity. Random actions by the artist that are not the result of artistic decision-making in furtherance of his message would militate against a work satisfying this test.

The advantage of such a test for heightened originality with substantial creativity is that it would free courts from having to ascertain unilaterally the nature and significance of a creator's message. Rather than the court determining whether a work's message embodies sufficient creativity, the court would determine whether, based upon the author's narrative, the design process reflects heightened originality with substantial creativity in furthering the author's articulated message. In terms of its operation, this test would be similar to the one invoked in *Brandir* in terms of its reliance on the design process in determining whether a particular work was so influenced by artistic design so as to qualify as copyrightable art. Thus, heightened originality requiring substantial creativity will be measured by the process itself, with the evidence being provided by the author.

In addition, some courts have augmented *Brandir's* focus on the design process with a consideration of whether "the artistic aspects of an article can be 'conceptualized as existing independently of their utilitarian function.'"¹²² This approach would be especially useful for judicial determinations of whether a particular work manifests heightened originality with substantial creativity for purposes of moral rights protection because it would additionally incorporate a consideration of the degree to which reasonable observers perceive the object as creative. Thus, an appropriate test for

¹²² See *Pivot Point*, 372 F.3d at 931 (quoting Judge Newman's dissent in *Carol Barnhart*, 773 F.2d at 418); *supra* note XXXX. See also *Stanislawski v Jordan*, 337 F. Supp. 2d 1103, 1112 (E.D. Wis. 2004) (adopting *Pivot Point* standard).

heightened originality with substantial creativity also should consider evidence bearing upon the perceptions of the reasonable beholder. Such evidence could include the extent to which the object has been used or displayed, custom and usage within the art world, expert opinion, and survey evidence including the object's marketability as art.¹²³ As noted by Judge Newman in his renowned dissent in *Carol Barnhart Inc. v. Economy Cover Corporation*, the "ordinary, reasonable observer" is a good standard for assessing such matters and in fact has been entrusted "to decide other conceptual issues in copyright law, such as whether an allegedly infringing work bears a substantial similarity to a copyrighted work."¹²⁴ In approaching the issue of heightened originality with substantial creativity from this standpoint, perhaps some "courts will inevitably be drawn into some minimal inquiry as to the nature of art," but realistically "some threshold assessment of art" cannot be avoided in these inquiries.¹²⁵

Another advantage of this test is that it comports with the reality that certain works may not manifest heightened originality with substantial creativity according to a reasonable observer even if they possess specific messages intended by the author. Appropriation art is one such example in that it borrows from common images in the media and advertising and places them in new contexts, with the objective of attempting to change society's thinking about these images.¹²⁶ The creativity inherent in this practice stems from "the selection of the texts and their recontextualization."¹²⁷ Thus, in the 1980's, postmodern artist Sherrie Levine created a series of photographs in which she

¹²³ See *Carol Barnhart*, 773 F.2d at 423 (Newman, dissenting); *Poe v. Missing Persons*, 745 F.2d 1238, 1243 (9th Cir. 1984) (identifying evidence pertinent to the district court's determination of whether a soft sculpture was a utilitarian article of clothing or a work of art).

¹²⁴ *Carol Barnhart*, 773 F.2d at 422 (2d Cir. 1985) (Newman, dissenting).

¹²⁵ *Id.*

¹²⁶ Farley, *Judging Art*, *supra* note 67, at 837.

¹²⁷ *Id.*

intentionally re-photographed famous photographs in order to comment on the concept of originality.¹²⁸ Another appropriation artist, Jeff Koons, has produced work involved in several reported decisions. Recently in *Blanch v. Koons*,¹²⁹ the Second Circuit held that Koons's use of a part of a copyrighted photograph of a pair of women's legs in a collage painting was a fair use. The painting by Koons in that case consisted of four pairs of women's feet and lower legs dangling over images of sweets with Niagara Falls and a grassy field in the background.¹³⁰ One of the pair of legs featured in Koons's painting was from the plaintiff's work. A particularly interesting facet of this case is the court's reliance on the message of the work as articulated by Koons himself. The court concluded that Koons not only possessed a genuine creative rationale for borrowing the plaintiff's work, but also that his work possessed a sufficient transformative value such that it altered the borrowed work "with new expression, meaning, or message."¹³¹ The opinion emphasized Koons's message of this particular work with the following observation: "By juxtaposing women's legs against a backdrop of food and landscape . . . he intended to 'comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular messages.'"¹³²

Although Koons's work in *Blanch v. Koons* might have satisfied both components of the proposed test, other works of appropriation art might possess a particular message but still fail to satisfy ordinary reasonable observers that heightened originality requiring substantial creativity is present. The benefit of the proposed test is that it incorporates a

¹²⁸ See Farley, *Lingering Effects*, *supra* note 36, at 451 n.252 (citing Constance Lewallen, Sherry Levine, J. CONTEMPORARY ART, available at <http://www.jca-online.com/sleine.html>).

¹²⁹ 467 F.3d 244 (2d Cir. 2006).

¹³⁰ *Id.* at 247.

¹³¹ *Id.* at 253 (quoting *Campell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

¹³² *Id.* at 247 (quoting *Koons Aff.* dated June 10, 2005). Koons further stated: "By re-contextualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media."

dual standard that, taken together, is a useful measure of a work's originality for purposes of determining whether it should be entitled to moral rights protection. Such a standard for heightened originality with substantial creativity is preferable to one that requires the trier of fact to discern independently the creator's message. Thus, reliance on the author's narrative with respect to the design process and on evidence concerning the perceptions of ordinary reasonable observers is a viable way for courts to assess whether a work possesses the requisite originality to be within the scope of moral rights protection.¹³³

¹³³ Cf. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1622-65 (2004) (suggesting that in applying the fair use doctrine and other aspects of copyright law, courts should take established patterns of social and authorial norms into account, especially those delineated and legitimized by tradition in various fields and institutions).

Conclusion

The United States is a long way from the enactment of a statute that treats moral rights thoughtfully and comprehensively, and thus it continues down a path that is out of step with global norms.¹³⁴ Moreover, the Internet environment makes our deficiency particularly problematic because violations of textual integrity can occur with unprecedented ease and the results can be disseminated to countless recipients with the mere press of a key. Given this situation, it is important to contemplate what an adequate moral rights structure for the United States would entail. This Essay focuses on the appropriate degree of originality a work must display in order to be eligible for moral rights protection, an issue which represents just one piece in the overall moral rights puzzle.

I argue that moral rights protections should be afforded to a more narrow range of works than are currently covered by copyright law. Specifically, whereas copyright law applies to works with a minimal degree of creativity, only works with heightened originality as manifested by substantial creativity should be eligible for moral rights protections. Categories of works that are largely functional should be excluded from protection. In addition, for **works of authorship** that are eligible for moral rights protection, judges still will need to make determinations on a case by case basis as to whether a given work meets the requisite standards for protection. To facilitate this inquiry, courts can invoke tests that draw from the originality and subject matter litigation under copyright law. These tests minimize the court's independent assessment of creativity and instead focus on the author's narrative in explicating his artistic choices,

¹³⁴ **Insert a cite to Justin's Utah piece on Dastar**

and on the perceptions of reasonable observers. The proposed standard recognizes that although both moral rights and copyrights are concerned with works of authorship, significant differences in their underlying philosophies should render their specific applications clearly distinct even if somewhat parallel.