NEW YORK UNIVERSITY

JOURNAL OF INTELLECTUAL PROPERTY AND ENTERTAINMENT LAW

VOLUME 6 SPRING 2017 NUMBER 2

THROUGH THE LOOKING GLASS: PHOTOGRAPHY AND THE IDEA/EXPRESSION DICHOTOMY

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Copyright law has always expressed an idea/expression dichotomy, where copyright protection extends not to an idea of a work but only to work's expression of that idea. Alas, this distinction walks a fine line with regard to non-textual and visual works. In particular, courts are prone to inconsistent outcomes and a violation of the fundamental precepts of copyright law because courts often succumb to shortcomings in grasping aesthetic theories of originality, realism, and ideas idiosyncratic to visual works. However, this dilemma may be solved within the existing framework of copyright law. This note argues that the solution should start by focusing less on visual works' subject matter, but rather elements of the work, such as the originality and realism of the expression that clarify the author's creativity. Moreover, the concept of an "idea" should be defined broadly as the residual locus of uncopyrightable elements in a work, rather than a cohesive concept that attempts to definitively pin down the "idea" behind that individual work. Taking this two-pronged solution would thus both recognize visual and photographic work's unique niche within copyright as well as align these forms of art with copyright's law's ultimate objective of authorship protection.

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INTRODUCTION

The law has an uncomfortable relationship with visual images. In part, this is simply a matter of familiarity: lawyers and judges are generally trained to read and write much more thoroughly than to see or hear, and tend to feel much more at ease analyzing textual than non-textual works.[1] However, the divide in law between the textual and the visual seems to run deeper than that. According to the standard account, the former is the vehicle through which reason, the paramount legal virtue, finds expression, while the latter is associated instead with irrationality

[1] See, e.g., Martin v. City of Indianapolis, 192 F.3d 608, 610 (7th Cir. 1999) (opening an opinion centered on the destruction of a sculpture by stating that "We are not art critics, do not pretend to be and do not need to be to decide this case.")

and emotion.[2] Although this is, of course, a gross oversimplification, difficulties regularly arise when courts and scholars attempt to venture outside of the realm of texts. The field of copyright is no exception. One of copyright's most fundamental concepts—the idea/expression dichotomy, which encapsulates the notion that copyright protection does not extend to the idea of a work, only to its expression of that idea—has proven most difficult to apply to non-textual works.

This note will focus on the especially problematic treatment of photography to highlight fundamental problems with copyright law's conception of "ideas" and expression in general, and with their application to visual works in particular. Part I will lay out the relevant analytical frameworks, beginning with the dominant method for analyzing copyrightability: the substantial similarity test.[3] It will then provide an overview of the elements of works categorically excluded from copyright protection, and the reasons for doing so, followed by an explanation of aesthetic theories of originality and realism and the important ways in which these diverge from courts' analysis of images. Part II will explore two of the most important shortcomings in courts' analyses of visual images, namely a poor grasp of aesthetic theory and the failure to articulate a viable theory of ideas applicable to visual works. It will show how these deficiencies have led to the misapplication of the frameworks described in Section I with respect to photographic works, yielding analyses and outcomes that are both inconsistent and in violation of fundamental precepts of copyright law. Part III will argue that improvements to each of these problems can be found within the current framework of copyright law. Firstly, we should locate the originality of photographs and other "realistic" images in their expression, rather than their subject matter, bringing analysis of these works in line with that of other images and lending greater clarity to the question of how to

[2] For a discussion of the internalization of this division not only in in legal thinking, but in western culture in general, see Costas Douzinas & Lynda Nead, LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW, 1, 6-9 (Costas Douzinas & Lynda Nead eds., 1999) (tracing it back to Plato, who distinguished art and poetry from philosophy and reason); in the context of First Amendment law, see Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205, 210 (2000) ("[T]he First Amendment offers greater protection to speech that is verbal rather than visual. The preference for text over image surfaces in a variety of places in First Amendment thinking. It is, however, a peculiar preference: it is often assumed and rarely explained. I know of no scholarship that addresses it directly.") (footnotes omitted). For an example from case law of images as irrational, see W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (describing images as "shortcuts from mind to the mind").

[3] I acknowledge that the substantial similarity test, strictly speaking, is concerned with infringement rather than copyrightability as such. However, as will be discussed below, the first step of this test requires identifying the copyrightable aspects of the first work, and it is in this context that the great majority of courts' discussions of copyrightability arise.

assess the creativity of photography. Secondly, we should recognize "idea" as a copyright term of art designating a residual category of uncopyrightable elements, rather than a cohesive concept. The attempt affirmatively to identify the "idea" behind an individual work is therefore misguided, and should be supplanted by the application of other copyright principles. Doing so will help prevent the blurring of the line between protectable and unprotectable expression described in Section II.

I
ANALYTICAL FRAMEWORKS

A. What Are We Looking For? How Courts Determine Copyrightability

While there are a number of requirements in order for a work to obtain copyright protection, the crux of the issue may be (and often is) boiled down to the famous statement from Justice Holmes's opinion in *Bleistein v. Donaldson Lithographing Co.*:[4] "Personality always contains something unique. […] [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."[5] And although further limitations have since been placed on the copyrightability of works—most notably a creativity threshold[6] and additions to the list of elements that are per se ineligible for protection[7]—the continued relevance of this formulation is attested by the frequency with which it is cited. As is often the case, the seemingly simple task of separating an individual's copyrightable contributions from the elements of her work that enter or remain in the public domain is fraught with complication. As a result, a vast quantity of copyright litigation turns on attempts to parse works and sort their elements into these two categories.

The primary mechanism through which courts analyze works for the extent of their copyright protection is the so-called "substantial similarity" test, which compares an allegedly infringing work with the original for similarity sufficiently

[4] 188 U.S. 239 (1903).

[5] *Id.* at 250.

[6] *See infra* Part I.B.2.

[7] The current Act lists the following works or elements of works as categorically ineligible for copyright protection: ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. 17 U.S.C. §102(b)(1994).

substantial to warrant a finding of copyright infringement.[8] The test takes two main forms, though these overlap significantly with each other.

The "ordinary observer test," pioneered by the Second Circuit,[9] first dissects the constituent elements of the relevant works to determine if there is sufficient similarity between the two to infer copying in fact.[10] For this step, parties may introduce expert testimony to aid the trier of fact.[11] Once copying has been established, the second step of the inquiry turns to whether the appropriation was unlawful. The answer to this question relies not on expert testimony or dissection, which are deemed irrelevant, but on the response of the "ordinary observer" to the respective works.[12]

The second prominent substantial similarity test was developed in the Ninth Circuit, and similarly employs a two-part analysis. In the "extrinsic" part, courts analyze objective elements of the works, such as materials and subject matter.[13] This inquiry looks for similarity of both ideas and expression, and like the first step of the ordinary observer test, may rely on expert testimony.[14] In the second step, termed "intrinsic," the question is turned over to the jury to determine whether, taking into account the work's "total concept and feel,"[15] improper infringement has occurred.[16]

In both cases, courts begin with what might be termed a deconstructionist analysis, in which they examine the individual elements of the respective works for objective similarities. It is at this stage that courts using either test generally

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[8] Although infringement is technically a distinct inquiry from copyrightability, the nature of litigation means that the latter question only tends to arise in the context of a question of infringement.

[9] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (describing the test as a response to the "ordinary lay hearer").

[10] *Id.* at 468.

[11] *Id.*

[12] *Id.*

[13] Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990). The case from which this test derives characterized the two parts as inquiries into, respectively, similarity of ideas and of expression, Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977), but later cases have abandoned this framework in favor of simply applying an objective, followed by a subjective, analysis. *See* Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y 719, 723 (2010).

[14] *Krofft*, 562 F.2d at 1164.

[15] Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970).

[16] *Krofft*, 562 F.2d at 1164.

identify and distinguish the protectable and unprotectable elements of the work.[17] Courts then proceed to assess the works based on subjective reactions to the work as a whole to determine whether infringement has occurred.[18]

B. The Idea-Expression Dichotomy: Rationales and Application

The distinction between a work's protectable and unprotectable aspects is typically referred to as the "idea-expression dichotomy,"[19] but, as noted above, ideas are only one of several categories that the Copyright Act excludes from protection.[20] The terminology thus tends to elide the various rationales that underlie the decision not to afford protection to certain elements; the distinction between a work's factual and expressive content, for example, is often discussed as an example of the idea-expression dichotomy,[21] despite relying on different principles. Since both the idea-expression and the fact-expression dichotomies come into play in courts' analyses of visual images, it will be useful to review the reasons for excluding ideas and facts from the ambit of copyright.

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[17] *See, e.g.*, Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 449 (S.D.N.Y. 2006); Cavalier v. Random House, Inc., 297 F.3d 815, 822-23 (9th Cir. 2002); Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

[18] The two steps correspond roughly to determinations of what Nimmer terms "fragmented literal similarity" (where elements are taken verbatim from another work, without necessarily being combined in a way that resembles the original) and "comprehensive nonliteral similarity" (in which nothing is copied exactly, but the essence of the work is appropriated). 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03 [A][1] (2007).

[19] I use the term "idea-expression dichotomy" here for the sake of convenience to refer to the distinctions that courts draw both between ideas and their expression, and between facts and their expression. This is due to the tendency that courts have to treat these two doctrines as one. *See infra* Part I.B.3.

[20] 17 U.S.C. §102(b)(1994).

[21] *E.g.* Harper & Row, Publishers., Inc. v. Nation Enters., 471 U.S. 539, 555 (1985) ("[C]opyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.") (quotation marks omitted); *cf.* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co, 499 U.S. 340, 350 (1991) ("This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship."). *See further* Alan L. Durham, *Speaking of the World: Fact, Opinion and the Originality Standard of Copyright*, 33 ARIZ. ST. L. J. 791, 801 (noting the tendency of courts to treat the idea-expression and fact-expression dichotomies as the same).

1. Encouraging Authorship[22]

If the notion that ideas are unprotectable lies at the heart of the idea-expression dichotomy, it is because of the core rationale for American copyright protection, namely the promotion of progress,[23] which is generally assumed to be best accomplished through the proliferation of works of authorship.[24] Giving an individual copyright ownership of an idea, in the sense of the overarching concept behind a work,[25] would allow her to control or prevent the production of a wide range of other original works on the same subject, unduly hindering later authors.[26] This desire to keep the copyright monopoly from sweeping too broadly, thereby defeating its own purpose, comes up repeatedly in laws and doctrines designed to deny protection to the fundamental building blocks of works—in addition to the Copyright Act removing from its ambit concepts and principles,[27] similar reasoning lies behind the prohibition on copyrighting words or short phrases[28] and scènes à faire.[29] Indeed, the need to ensure that these unprotectable elements remain in the public domain is so strong that any protectable expression that cannot

[22] The related concern for encouraging technical and scientific innovation (manifested, for example, in the unprotectability of procedures, processes, systems, or methods of operation) does not apply to courts' analysis of visual images, and therefore will not be discussed here.

[23] U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Tımes to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

[24] See, e.g., 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 2.2.1, at 63-64 (1989) ("The aim of copyright law is to direct investment toward the production of abundant information."). For a more thoroughly theorized exploration of this assumption, see Jeanne C. Fromer, *An Information Theory of Copyright*, 61 EMORY L. J. 71 (2014).

[25] For analysis of copyright's definition of an "idea," see *infra* Part III.B.

[26] NIMMER, *supra* note 18 at §13.03[A] ("To grant property status to a mere idea would permit withdrawing the idea from the stock of materials open to other authors, thereby narrowing the field of thought open for development and exploitation."). *See also* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997); Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 1023 (1990). Some scholars have suggested that the uncopyrightability of ideas derives instead from the fact that the level of generality with which these are defined precludes their possessing the originality required for copyright protection. *E.g.*, Michael Steven Green, *Copyrighting Facts*, 78 IND. L. J. 919, 941 (2003) ("[A]bstract material tends to be uncreative..."). I believe that this suggestion confuses correlation with causation. While it is undoubtedly true that an abstractly formulated idea is less likely to be original than an intricately described one, it is surely not impossible. The idea of wrapping a building in fabric, for example, is an extremely simple one, but few would characterize Christo Javacheff's work as unoriginal.

[27] 17 U.S.C. §102(b)(1994).

[28] 37 C.F.R. §202.1(a) (2004).

[29] For discussion of the scènes à faire doctrine, see *infra* note 52

be separated from them loses its protection.[30] The canonical expression of the idea-expression dichotomy comes from *Nichols v. Universal Pictures Corp.*,[31] a case involving two plays about romance between a Jewish and an Irish individual, and the ensuing conflict between their families. In his opinion denying the plaintiff's claim of copyright infringement, Judge Hand remarked:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.[32]

The difficulty of deciding where to draw the line between uncopyrightable abstraction and protectable expression (and indeed the impossibility of formulating a rule to provide greater predictability in doing so) has been remarked upon repeatedly since the first iteration of the so-called "abstraction test."[33]

As a result of its admittedly and necessarily ad hoc nature, some scholars have suggested doing away altogether with the analytical separation of ideas and expression.[34] However, following on a 1970 Nimmer article,[35] courts have continued to apply it under the rationale of encouraging speech, often citing the idea-expression dichotomy as one of the two primary limitations on copyright (the other being the fair use doctrine) that render its constraints on speech compatible

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[30] For discussion of the merger doctrine, see *infra* Part I.C.

[31] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[32] *Id.* at 121.

[33] *Id.* ("Nobody has ever been able to fix that boundary, and nobody ever can."). The term "abstraction test" is used here as a matter of convention; for criticism of Judge Hand's statement being characterized as a "test," see, for example, Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990) ("Sometimes called the 'abstractions test,' Hand's insight is not a 'test' at all. It is a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality. It does little to help resolve a given case. . .").

[34] *E.g.*, Robert Yale Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735 (1967).

[35] Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186-1204 (1970).

with the First Amendment.[36] It is debatable whether this protection remains adequate to vindicate free speech rights. Just as the idea-expression dichotomy and fair use doctrine were necessary to accommodate copyright and First Amendment rights that had both expanded significantly since their inception, so, some scholars have argued, has the continued expansion of these rights since Nimmer's article necessitated further protection of speech.[37] Nevertheless, the idea-expression dichotomy continues to be treated as a constitutionally necessary constraint on the copyright monopoly, and therefore retains a central place in copyright jurisprudence.

2. The Originality Requirement

Nearly as central to American copyright jurisprudence as is encouraging copious production of works of authorship is the requirement that these works be original (that is, independently created and displaying some degree of creativity),[38] termed by *Feist* the *sine qua non* of copyright.[39] This demand is derived from the Copyright Clause's specification that it protects works of *authorship*,[40] which was determined early on to mean works that contained some modicum of originality,[41] however small.[42] A line of twentieth century cases held that mere labor on the part of the creator was sufficient to assure copyright protection for his work, but this so-called "sweat of the brow" reasoning was emphatically rejected in *Feist*.[43] As applied to the "idea-expression" dichotomy, this accounts for the Copyright Act

[36] That is, the constraint on authors that would result from the ability to copyright ideas would unconstitutionally limit speech. Golan v. Holder, 609 F.3d 1076, 1091 n.9 (10th Cir. 2010); Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003). *Cf.* Harper & Row, Publishers., Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).

[37] *E.g.*, Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

[38] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co, 499 U.S. 340, 350 (1991) ("This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship.").

[39] *Id.* at 345.

[40] U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

[41] *E.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58-60 (1884); Trade-Mark Cases, 100 U.S. 82, 94 (1879).

[42] The now-canonical formulation regarding the required degree of originality comes from *Feist*, 499 U.S. at 358-59 ("Originality requires only that the author make the selection or arrangement independently (*i.e.*, without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.").

[43] *Id.* at 352-56.

refusing protection for discoveries[44] and the related well-established tenet that facts are similarly uncopyrightable,[45]since neither is original to the discoverer, he can claim no ownership over it.[46] Only the author's expression of those facts, insofar as it is creative, may claim copyright protection.[47]

3. Baker-Selden *and the Application of the Idea-Expression Dichotomy*

The application of the idea-expression dichotomy in American law is generally traced to *Baker v. Selden*,[48] in which the Supreme Court ruled that a bookkeeping system represented an idea that could not be copyrighted; only the author's individual description of that system could merit protection.[49] The Court added to this the corollary principle that became known as the merger doctrine, namely, that when an idea is capable of only one or a limited number of expressions, and unprotectable ideas and protectable expressions "merge" to such an extent that they are neither physically nor conceptually separable, the entirety becomes uncopyrightable.[50] In *Baker*, the charts through which the bookkeeping system was implemented were deemed uncopyrightable, since they represented the system's only possible expression, so granting a copyright to the charts would result in allowing the system itself to be copyrighted through the back door.[51] Throughout the late nineteenth and twentieth centuries, the scope of the idea-expression dichotomy, and its application via the merger doctrine, expanded to apply to everything from jewelry,[52] to computer programs,[53] to (increasingly) the visual arts.[54]

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[44] 17 U.S.C. §102(b)(1994).

[45] 37 C.F.R. §202.1(a) (2004).

[46] *E.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co, 499 U.S. 340, 347-48 (1991); Harper & Row, Publishers., Inc. v. Nation Enters., 471 U.S. 539, 556 (1985); Durham, *supra* note 21, at 802 ("The fact/expression dichotomy is closely tied to the concept of 'originality.'"). For an argument that looks to ground the (lack of) copyright protection for facts not in their lack of originality, but in a weighting of transaction costs, see Green, *supra* note 26, at 951-57. However, this theory has not received support in the case law.

[47] *Harper & Row*, 471 U.S. at 557-58.

[48] 101 U.S. 99 (1879).

[49] *Id.* at 103. §102(b) of the Copyright Act ostensibly represents the codification of this case, though the statute adds a number of categories to those discussed in *Baker*.

[50] NIMMER, *supra* note 18, at §13.03[B][3][a].

[51] 101 U.S. at 104.

[52] Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (finding that, because only a very limited number of expressions was possible of a pin in the shape of a bee, the idea and expression merged, rendering the design uncopyrightable).

Baker likewise set the stage for the lack of differentiation between the idea-expression and fact-expression dichotomies: because its discussion was concerned primarily with identifying the respective spheres of patent and copyright, it lumped together inventions (such as the system in question) that are too broad to be afforded copyright protection, with discoveries, which lack the requisite originality.[55] The result has been a blurring of lines, with the two dichotomies, if they are distinguished, often simply assumed to rely on the same rationale – a tendency succinctly encapsulated in the statement from *Harper & Row* that "no author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."[56]

C. Aesthetic Theory and Originality

Given the centrality of the originality requirement to a work's copyrightability, and the denial of protection (via the merger doctrine) to any work representing the inevitable expression of an idea or fact, a number of scholars have begun to call attention to the facile manner in which the concept of originality has been applied to courts' analyses of visual images.[57] For example, in one case, the court deemed a series of drawings of birds to deserve very little copyright protection due to the images' realism: they simply reproduced a fact (the appearance of the birds) with minimal creative input from the artist, and so did not merit protection against anything other than identical copying.[58] However, as Rebecca Tushnet pointed out, these drawings, far from being mechanical reproductions of an objective fact, represented highly stylized works that were based not on nature, but on scenes constructed according to a decidedly unnatural idiom.[59] Her extensive discussion shows, through examples from a wide range of

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[53] Comput. Assocs. v. Altai, 782 F.2d 693, 707-08 (2d Cir. 1992).

[54] For in-depth discussion of the application of the idea-expression dichotomy to the visual arts, see *infra* Part II.A.2. This period also saw the development of the closely-related doctrine of scènes à faire, which holds that elements fundamental to the expression of a particular idea may not be copyrighted, since this too would lead to an indirect means of copyrighting the idea. The rationales for scènes à faire, however, are mixed, since as a practical matter any element necessary to the expression of an idea is also unlikely to be original.

[55] 101 U.S. at 102-03.

[56] 471 U.S. at 547.

[57] *E.g.*, Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012); Christina O. Spiesel et al., *Law in the Age of Images: The Challenge of Visual Literacy*, *in* CONTEMPORARY ISSUES IN THE SEMIOTICS OF LAW 231, 237 (Anne Wagner et al. eds., 2005).

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

[59] Tushnet, *supra* note 57, at 727-29.

disciplines, how even a concept as seemingly uncomplicated as "realism" turns out to be a highly culturally-specific construct,[60] a fact to which courts have tended to be blind.[61] Similarly, photographs do not so much reproduce reality as they do interpret it. Insofar as all of the elements of a picture are in focus, for example, a photograph creates an image that no eye could see.[62] Choice of color palette may appear to increase realism even when its hues do not correspond to the viewer's experience.[63] Other decisions such as length of exposure, contrast, or the use of filters ensure that two photographs of the same subject, taken at the same place and time, may look completely different from one another. The photographs below, for example, both capture the same subject at the same time. However, the use of a long exposure in the first results in the water taking on a smooth, serene appearance, in contrast with the sharply-defined choppy waves captured by the shorter exposure in the second.

[60] *Id*. at 728 (noting, for example, at least six distinct "realisms" that developed over the course of the twentieth century, or the many ways in which scientific photographs—specifically aimed at a faithful, mechanical reproduction of reality—require the photographer to make a significant number of aesthetic choices); *cf.* Joel Snyder, *Picturing Vision*, 6 Critical Inquiry 499, 500 (1980) (noting "the facile use by many art historians and critics of the visual arts of such weighty but indeterminate expressions as 'reality' or 'visual reality...'"). *See generally* Roman Jakobson, *On Realism in Art*, *in* Language in Literature 19, 21 (Krystyna Pomoroska & Stephen Rudy eds.,1987) ("The methods of projecting three-dimensional space onto a flat surface are established by convention; the use of color, the abstracting, the simplification, of the object depicted, and the choice of reproducible features are all based on convention. It is necessary to learn the conventional language of painting in order to 'see' a picture, just as it is impossible to understand what is said without knowing the language. This conventional, traditional aspect of painting to a great extent conditions the very act of our visual perception.").

[61] For other examples of courts according only thin copyright to "realistic" styles, see, e.g., Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003); Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 36 (1st Cir. 2001) (finding that realistic representations of fruit merge with their subject matter); Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 607 (1st Cir. 1988) (giving protection only against virtually identical copying to a realistic statue of a deer); First Am. Artificial Flowers, Inc. v. Joseph Markovits, Inc., 342 F.Supp. 178, 186 (S.D.N.Y. 1972). *But see* Kamar Int'l, Inc. v. Russ Berrie & Co., 657 F2d 1059, 1061 (9th Cir. 1981) (rejecting the notion that realistic depictions of live animals are not copyrightable).

[62] Snyder, *supra* note 60, at 501-02.

[63] *Id*. at 505.

Figure 1: Drew Zweller, *Camera Function Part 1*, DREW ZWELLER DIGITAL MEDIA (May 5, 2016), *available at* http://drewzweller.weebly.com/blog/camera-function-part-1.

This observation has important implications for how the concept of originality should be analyzed, and how the merger doctrine should be applied. With respect to the former, if a "realistic" style represents an aesthetic choice like any other, then denial or limitation of copyright protection on that ground seems particularly misguided. As for the merger doctrine, the above examples show how courts often overestimate the "inevitability" of the expression of a particular fact or idea, and therefore may apply the merger doctrine in cases to which it is inappropriate.[64]

These problems are related to the so-called "transparency" of realistic images, which courts deem to embody their subject in an unmediated manner (as distinct from, for example, verbal descriptions, in which the subject is accepted as being filtered through the author's voice).[65] In this view, the images, particularly

[64] It should be noted that this observation is not limited to situations in which the merger doctrine is explicitly invoked and copyright denied; it can also lead courts to according such a thin copyright that the effect is nearly the same as refusing protection. Thus, for example, the Third Circuit could truthfully claim that "this Court has never found an instance in which a completely aesthetic expression merged into an idea." Kay Berry, Inc. v. Taylor Gifts, 421 F.3d 199, 209 (3d Cir. 2005). But in *Franklin Mint*, 575 F.2d at 65, the copyright on the paintings of birds was so thin, it extends only to a precise reproduction of them.

[65] *E.g.*, Dominic McIver Lopes, *The Aesthetics of Photographic Transparency*, 112 MIND 433, 440 (2003); Kendall L. Walton, *Transparent Pictures: On the Nature of Photographic*

photographs, as the ultimate example of realism, do not require interpretation, but simply "are" their subjects.[66] This notion is reflected in the case law, beginning with the fountainhead of American photography jurisprudence, *Burrow-Giles*. In that case, the defendant copied a photograph that the plaintiff had taken of Oscar Wilde, arguing that a photograph, as a mechanical reproduction of reality, did not contain the level of originality required for copyright protection. In a move that remains characteristic of photography opinions, the Court did not seem to contest the defendant's characterization of photography. Instead, it listed a number of elements that might demonstrate originality, it concentrated overwhelmingly on the selection and arrangement of the subject matter,[67] and not the fundamental relationship between the photograph as medium and its subject matter.[68] The continued influence of this mode of analysis can be seen in the focus on elements such as arrangement[69] and perspective/camera angle[70] as the relevant factors in determining a photograph's originality.

II
VISUAL WORKS AND THE PROBLEMS OF COPYRIGHT LAW

The strands of doctrinal confusion discussed above—between ideas and facts, between copyright rationales, and between works and their subject matter—

Realism, 11 CRITICAL INQUIRY 246, 246 (1984). For discussion and criticism of this characterization, see, *e.g.*, Tushnet, *supra* note 57 at 688-95.

[66] *See* Justin Hughes, *The Photographer's Copyright – Photograph as Art, Photograph as Database*, 25 HARV. J. LAW & TECH. 339, 345 (2012); Tushnet, *supra* note 57, at 700-01 (noting the decision in *Harris v. Scott*, 550 U.S. 372, 372 (2007), which treated video footage of a car chase as giving them direct access to reality); *cf.* Walton, *supra* note 65, at 252 ("[W]e *see*, quite literally, our dead relatives themselves when we look at photographs of them.").

[67] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) ("[Sarony] gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression. . .").

[68] *E.g.*, Hughes, *supra* note 66 at 356 ("Burrow-Giles maintains an extremely mechanical view of photography."); Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 428 (2004) ("[T]he Court located authorship not in the act of capturing the image or in the post-photograph manipulation that many art photographers were doing, but in the preparation.").

[69] *E.g.*, Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2006); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).

[70] *E.g.*, *Mannion*, 377 F. Supp. 2d at 452; *Rogers*, 960 F.2d at 307; Kisch v. Ammirati & Puris Inc., 657 F. Supp. 380, 384 (S.D.N.Y. 1987).

converge in courts' analyses of visual works, and photographs in particular. This section will show how the substantial similarity test has been applied to visual works in such a way as to collapse the idea-expression dichotomy, leading courts to take one of two diametrically opposite, but equally questionable, approaches. Some courts, relying on a simplistic understanding of visual representation, have denied protection to arguably original expression by assimilating the expression into its underlying "idea" through the merger doctrine. Others, conversely, have used a misunderstanding of copyright's "ideas" doctrine to ascribe to uncopyrightable elements the quality of protectable expression, thereby extending copyright protection beyond its proper bounds. The result is a body of case law that is doctrinally unsound, and contributes to the inconsistency (and therefore unpredictability) of copyright decisions.

This section will further argue that many of these problems are not, as is generally assumed, merely the result of applying doctrine appropriate to textual analysis to a fundamentally different category of works. Rather, they expose weaknesses in core copyright concepts in a way that pertains equally to textual works, demonstrating the necessity of revising these doctrines.

A. Applying the Substantial Similarity Test

Copyright's analysis of visual works is built on a tension that derives from the law's fundamental uncertainty regarding the nature of images and how they ought to be analyzed. On the one hand, an image, like any other work, by definition consists of it various elements, some of which may not be copyrightable. But there is also a sense in which images, unlike other mediums, strike their audience all at once, protectable and unprotectable parts alike.[71] Insofar as this overall impression represents an integral part of an image's appeal, it too must be taken into account in analyzing the work's copyrightable expression.

[71] This is reflected in the frequent reference in opinions to the immediate impression that the images in question create on a viewer. *E.g.*, TY, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1169 (7th Cir. 1997) ("A glance at the first picture shows a striking similarity between the two. . ."); Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y 1987) (noting a striking similarity between two illustrations "even at first glance," but ascribing this initial impression to unprotectable elements such as the bird's-eye view of Manhattan or the band of blue to represent the sky); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (noting that "the remarkable similarity . . . is apparent even to a casual observer," and supporting this statement with reference to a number of unprotectable elements shared by the two works).

The tension between the particular details of the work, and the overall impression that these elements, taken together as a whole, create—somehow different from the elements individually—is reflected in the two steps of both the Second and Ninth Circuits' substantial similarity tests.[72] In the deconstructionist first step, courts employ an approach whose application to images predates either test, and can be traced back to the first American photography copyright case. In *Burrow-Giles*, the court enumerated the individual elements of the photograph that it deemed to be original to the author, and therefore merit protection.[73] A century later, the Southern District of New York applied a similar method in *Steinberg v. Columbia Pictures*, in which a movie poster was alleged to have impermissibly copied an illustration from The New Yorker.[74] Noting the similarity in everything from the depiction of intersecting two-way streets and water towers, to the facades and other details of the buildings, the court held that the poster constituted an infringing image.[75] Another Southern District case two decades after *Steinberg* reinforced the continued importance of the deconstructionist mode of analysis, applying it once again to photography. *Mannion v. Coors* involved two photographs of a man in a white t-shirt wearing jewelry, set against a blue sky. En route to determining that the second photograph had infringed the first, the court went item by item through the stylistic and compositional similarities of two photographs, noting choices such as angle, lighting, and selection and arrangement of jewelry on the subject.[76]

In the second step of both substantial similarity tests, courts compare the works as a whole, an exercise which is supposed to be mindful of, but not limit itself to, the copyrightable elements identified in step one.[77] This holistic consideration has sometimes been analogized to the so-called "compilation copyright,"[78] explained most famously in *Feist*, whereby even a work composed entirely of uncopyrightable elements may be eligible for copyright protection of

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[72] *See supra* Part I.A.

[73] 111 U.S. at 60.

[74] 663 F. Supp. at 708.

[75] *Id.* at 712-13.

[76] Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 462-63 (S.D.N.Y. 2006).

[77] *Cf. Mannion*, 377 F. Supp. 2d at 462 ("Key elements . . . may not be copyrightable in and of themselves, but their existence and arrangement in this photograph indisputably contribute to its originality.").

[78] *E.g.*, Boisson v. Banian, Ltd., 273 F.3d 262, 271, 272 (2d Cir. 2001); Matthews v. Freedman, 157 F.3d 25, 28 (1st Cir. 1998).

the whole if these elements are arranged in a sufficiently original manner.[79] As applied to images, this may involve comparing the cumulative effect created by elements such as compositional layout,[80] artistic style,[81] typeface,[82] and even the sentiments conveyed by the respective works.[83]

The exact nature of the logical leap between dissection of the work into protectable and unprotectable elements, and consideration of its "look and feel" has never been fully explained,[84] and numerous scholars have noted the problems that it raises. Most notably, the dual requirements of taking into account the protectability of the original work's elements, but not limiting the comparison to these, are at best in tension with each other, and at worst constitute mutually contradictory demands.[85] Moreover, in wrestling with the paradox of a copyrightable whole composed entirely of unprotectable parts, courts have sometimes read this copyrightability back into the elements themselves, leading to suggestions that an author may control copying of aspects such as artistic style.[86] At the center of this interplay and confusion between the specific and the general, the protectable and the unprotectable, is the definition of an "idea."

1. Defining Ideas

The copyright concept of an idea, as distinct from its expression by an author, appears in two guises. First, the term may be used to describe what I will term "micro ideas" – individual components of a work that are too general to

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[79] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co, 499 U.S. 340, 350 (1991) ("Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts...").

[80] *E.g.*, Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y 1987); *Boisson*, 273 F.3d at 269-70.

[81] *E.g.*, *Steinberg*; 663 F. Supp. at 712; Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970).

[82] *E.g.*, *Steinberg*, 663 F. Supp. at 712; *Roth Greeting Cards*, 429 F.2d at 1110; *cf. Boisson*, 273 F.3d at 271 ("[W]e hesitate to say that letter shapes are unprotectible in this context...").

[83] *Roth Greeting Cards*, 429 F.2d at 1110.

[84] Tushnet, *supra* note 57, at 718 ("There is a sort of magic by which unprotectable parts together become protected."); *cf.* Pamela Samuelson, *Essay: A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U.L. REV. 1821, 1830-34 (2013).

[85] NIMMER, *supra* note 18, at §13.03[A][1][c] ("[T]he touchstone of 'total concept and feel' threatens to subvert the very essence of copyright, namely the protection of original *expression*."); Tushnet, *supra* note 57, at 719.

[86] *E.g.*, *Steinberg*; 663 F. Supp. at 712; *Roth Greeting Cards*, 429 F.2d at 1110.

receive copyright protection, such as a stock character in a play.[87] More importantly, though, courts will inquire as to a work's "macro idea," or the "idea" of the work as a whole. This form of "idea" is based on the famous abstraction test laid out in *Nichols*, which states that a work may be described in increasingly broad terms, until at some point what is being described is no more than the "idea" of the work, which may not be copyrighted.[88] In other words, the idea of a work is, as *Mannion* noted in the context of photographs, simply a description of that work in general terms.[89] This definition is problematic for a number of reasons, beginning with the ways in which it interacts with other aspects of courts' analyses of images.

2. Expression as Idea: Substantial Similarity and the Merger Doctrine

As outlined above,[90] the first step in the substantial similarity test for visual works involves a close analysis of the various elements of the original work to determine which are copyrightable, a process that encourages (or even necessitates) a highly deconstructionist approach to the analysis of visual images. Combined with the tendency to define the work's "idea" as a combination of its various elements, this has resulted in courts defining ideas with increasing specificity. Thus, in several cases, we find the court slipping imperceptibly between a detailed analysis of a work's elements and a definition of the work's idea that simply amalgamates those elements.[91] This slippage, in turn, helps to

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[87] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[88] *Nichols*, 45 F.2d at 121 ("Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.").

[89] Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 460 (S.D.N.Y. 2006) ("Other copyright cases that have referred to the 'idea' of a photograph also used 'idea' to mean a general description of the subject or subject matter.") (citing SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 314 (S.D.N.Y. 2000); Andersson v. Sony Corp., 1997 WL 226310, at *3 (S.D.N.Y. May 2, 1997); Gentieu v. Tony Stone Images/Chicago, Inc., 255 F. Supp. 2d 838, 849 (N.D. Ill. 2003)).

[90] *See supra* Parts I.A; II.A.

[91] Perhaps the most succinct encapsulation of this tendency comes from *Kaplan v. Stock Market Photo Agency, Inc.*, which shifts back and forth within a single sentence between referring to the same elements as subject matter and idea. 133 F. Supp. 2d 317, 323 (S.D.N.Y. 2001) ("The subject matter of both photographs is a businessperson contemplating a leap from a

explain the increasing application of the merger doctrine to visual works, since the more specific an idea's description, the more "inevitable" the expression of that idea becomes.[92] To take as an example arguably the most influential work of art of the twentieth century, the idea behind Marcel Duchamp's *Fountain* could be described as "a challenge to the definition of art through the elevation of a mundane object to the status of artwork," and most would agree that this concept is capable of a wide range of expressions. However, if a court, after analyzing the work, found that the idea behind Duchamp's fountain was "laying a urinal on its back, inscribing 'R. Mutt 1917' on its lower left-hand side, and calling it a fountain," it might well be said that the idea is capable of only a limited number of expressions,[93] and that the two therefore merge. If this hypothetical seems exaggerated, it is not significantly different from courts' practice of defining works' ideas by reference to their numerous constituent elements, which were merely listed and analyzed.[94] Indeed, it is instructive to contrast the difference in the level of detail recent cases have deemed to be encompassed by the work's "idea" with the extremely broad description applied to the plaintiff's work in the seminal *Nichols* case ("a comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters. . .").[95] Viewed in this light, the increasing willingness to find that expression merges with idea is unsurprising.

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tall building onto the city street below. As the photograph's central idea, rather than Kaplan's expression of the idea, this subject matter is unprotectable in and of itself."); *see also, e.g., Roth Greeting Cards*, 429 F.2d at 1110-11.

[92] *Cf.* Jarrod M. Mohler, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. CIN. L. REV. 971, 991 (2000) ("The court broke down the works into such minute segments that it could not have possibly found originality..."); Jane C. Ginsburg, *Four Reasons and a Paradox: The Manifest Superiority of Copyright over Sui Generis Protection of Computer Software*, 94 COLUM. L. REV. 2559, 2561 (1994) ("There is a danger, but not only with respect to computer programs, that courts, in seeking to distinguish the public domain 'idea' from the protected 'expression,' will so 'dissect' the work as to classify all its elements as unprotectable."). The phenomenon was alluded to in *Krofft*, though without acknowledgement of the corresponding problems that arise from it. 562 F.2d at 1168 n. 10. ("If, in describing how a work is expressed, the description differs little from a simple description of what the work is, then ideas and expression coincide.").

[93] The range of which might, incidentally, be thought to be conveyed by the various urinal shapes that Duchamp employed for the several iterations of that sculpture.

[94] *See, e.g.*, Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003) (describing the idea of the sculpture in question as "lifelike glass-in-glass sculptures of single jellyfish with vertical tentacles."); *Matthews*, 157 F.3d at 27 (finding that the idea for a t-shirt's design was a phrase indicating that the t-shirt's purchase represents someone's love of the donee, combined with the use of childish lettering and emblems reminiscent of a location).

[95] Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).

The problem is not novel, and indeed the impossibility of pinpointing where to draw the line between idea and expression has been noted ever since the abstractions test was first introduced.[96] However, courts have often taken this difficulty as a license to declare the correct standard by fiat, so that even when opinions recognize the potential for the concept to be described at different levels of generality, they often give little reason for choosing to apply one over the other.[97]

3. Idea as Expression: The Transparency of Images

The approach outlined above describing works' ideas has resulted in a particular paradox in the case of photographs and other "realistic" visual images. As noted, courts have tended to view such works as transparent reproductions of their "factual" subject matter,[98] according them the thinner copyright that applies to fact-based (and therefore, implicitly, less original) works.[99] Such a position creates difficulties, since photographs are generally considered copyrightable,[100] even though merely reproductive works lack the creativity necessary for copyright protection.[101] The requisite originality must therefore be sought not in the photographic medium, but in the photograph's subject – that is, its "idea." The

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[96] *Id.* at 121 ("[T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.").

[97] *See, e.g.*, Kaplan v. Stock Market Photo Agency, Inc., 133 F. Supp. 2d 317, 324 (S.D.N.Y. 2001) (stating without any further explanation that "the concept of Kaplan's photograph 'may' be expressed more generally […] however, this idea is clearly not the most accurate characterization of the concept embraced by the photographs at issue in this case.").

[98] *Cf.* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884) (acknowledging, without deciding, that the characterization of a photograph as mere reproduction of its subject matter "may be true in regard to the ordinary production of a photograph, and that in such case a copyright is no protection.").

[99] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co, 499 U.S. 340, 350 (1991). ("This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works."). For courts' dim view of the originality represented by photographs, see, *e.g.*, Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y 1987) ("[E]ven a photograph may be copyrighted.").

[100] Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOKLYN L. REV. 1487, 1489 (2011) (footnote omitted). ("[P]hotographs—especially those of human subjects—have long been deemed, on the highest authority, a worthy subject for copyright protection.").

[101] Meshrwerks v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1264 (10th Cir. 2008).

law's answer to this problem has been to adopt a "pictorialist" approach to analyzing photographs,[102] in which courts focus especially on the author's hand in creating the scene depicted, and the originality involved in this creation.[103]

It is here that the failure to distinguish between ideas and facts becomes important. By locating the originality of photographs in their ideas, and then declaring these copyrightable, these decisions are implicitly based on the assumption that what prevents ideas from receiving copyright protection is their lack of originality. Thus, in *Burrow-Giles*, the Court found that the photograph displayed the requisite originality, but did so largely on the basis of factors (composition, subject's pose, etc.) that describe *what* is depicted, not *how* it is depicted,[104] and that therefore belong quintessentially to the realm of ideas. This line of analysis was taken to its logical extreme in *Mannion*, in which the court came to the conclusion that in the case of photographs, the distinction between idea and expression collapses, but that both may be protected due to their originality.[105] As a result, the photographer in that case was able to copyright not only his photograph, but the scene itself, and prevent others from recreating and photographing a similar scene.[106]

The trouble with this reasoning is that, as discussed above, the originality of an idea has no bearing on its copyrightability. The resulting problem of courts' granting protection to ideas is the reverse of the over-application of the merger doctrine: both problems spring from the difficulty that courts have in applying the notion of an "idea" to a visual work, but pull in different directions. Whereas the merger doctrine defines ideas so specifically that they subsume the work's expressive elements, the *Mannion*-style analysis treats them so much like expression that they end up being regarded as such. The former restricts copyright by removing protection even from seemingly original expression, while the latter greatly expands copyright by removing ideas from the public domain, thereby effecting the overbroad sweep of copyright that copyright law sought to prevent by denying protection to ideas.

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[102] For discussion of the term "pictorialism" as applied to photographs, see Farley, *supra* note 68, at 421; Teresa M. Bruce, *In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography*, 115 W. VA. L. REV. 93, 95-96 (2012).

[103] *E.g.*, Farley *supra* note 68, at 425-29; Hughes, *supra* note 66, at 389-96. *Cf.* Subotnik, *supra* note 100, at 1517-23 (discussing courts' use of a "proxy of narrative" – that is, the author's narrative of her creative process as a substitute for finding originality in the image itself).

[104] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).

[105] Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 454-61 (S.D.N.Y. 2006).

[106] *Id.*

The problem of copyrighting ideas is not limited to courts granting protection to "macro ideas." One effect of the "look and feel" test finding copyrightability in collections of otherwise unprotectable elements has been for courts to sometimes read the copyrightability of the whole back into the individual elements. In *Steinberg*, for example, the court, in determining the copyright of the original illustration, implied that the plaintiff's artistic style was copyrightable, committing the same error of protecting an idea based on its originality.[107] *Roth*, finding that the plaintiff's cards were copyrightable, indicated that elements such as arrangement of words and characters' emotions were protectable.[108] As with "macro ideas," such reasoning fails to recognize that, whatever the originality of the elements in question (relatively high in *Steinberg*, extremely low in *Roth*), it should not overcome their unprotectability, which is based on different grounds.

B. Beyond images

Copyright originally developed as a system of protection for written works. This fact is regularly invoked by both courts and scholars to explain the difficulty encountered in applying copyright principles to non-textual works:[109] it is almost a truism that textual and non-textual works differ in certain fundamental respects,[110] so it is inevitable that doctrines and modes of analysis that were tailored to the former will sometimes be a poor fit for the latter.[111] For example, both scholars and courts have regularly held up the ability to define ideas and distinguish them from

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[107] Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y 1987) ("[O]ne can see the striking stylistic relationship between the posters, and since style is one ingredient of 'expression,' this relationship is significant.").

[108] Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970).

[109] *E.g.*, Tushnet, *supra* note 57, at 684 ("Copyright is literal. It starts with the written word as its model, then tries to fit everything else into the literary mode."); Michael Murray, *Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 792-95 (2006); *Mannion*, 377 F. Supp. 2d at 458; Warner Bros. v. Am. Broad. Co., Inc., 720 F.2d 231, 241 (2d Cir. 1983) (describing the tension between two doctrines "result[ing] from their formulation in the context of literary works and their subsequent application to graphic and three-dimensional works.").

[110] In general on the differences between images and words, see especially Christina Spiesel, *Reflections on Reading: Words and Pictures and Law*, in LAW, MIND AND BRAIN, 391 (Michael Freeman & Oliver R. Goodenough eds., 2009).

[111] *See Warner Bros.*, 720 F.2d at 241.

their expression as an analysis to which texts are much more amenable than other forms of expression.[112]

Given the broad consensus about the distinctiveness of textual works, it is surprising to note the disagreement about exactly what features distinguish texts from visual works.[113] Beyond the widely-noted observation that books have a built-in order in which they are read,[114] some have argued that text is a more inherently restrictive medium than visual artwork, and therefore more prone to merging ideas and expression.[115] Others have claimed that it is visual artists who are more constrained by their medium.[116] Some have seen the divide as being primarily between words, which owe their appeal to rationality, and other mediums that are less rooted in reason.[117]

Part of the explanation for the lack of consensus may be that the supposedly fundamental gap between textual and visual works is less of a chasm than is often assumed.[118] Take the example of courts finding that certain visual representations merge ideas and expression, and are therefore uncopyrightable. As noted in Part I.C, this logic relies on a naive belief in the inevitability of certain forms of

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[112] *E.g.*, *Mannion*, 377 F. Supp. 2d at 458; Murray, *supra* note 109, at 791.

[113] *Cf.* Tushnet, *supra* note 57, at 703-04 ("Images are different, courts agree. They just can't agree what that difference is. . .").

[114] Even this seemingly obvious point is both less universally true than it might first seem (reference works, for example are read in whatever order the user wishes) and not unique to textual works (movies and music are two other prominent examples of categories of works that dictate the order in which they are consumed). However, it is true that this is a notable difference between textual and visual works. *See* Christina Spiesel, *More Than a Thousand Words in Response to Rebecca Tushnet*, 125 HARV. L. REV. F. 40, 41 (Feb. 22, 2012) ("Pictures are different from words. They are perceptually immediate, they can be vivid, and under some circumstances they can be confused with reality itself. […] [T]heir elements are displayed in space; we read the relationships between the parts within a framing edge as they are visually bound together and related through many possible qualities (not grammatical order).").

[115] *E.g.*, Murray, *supra* note 109, at 851-53.

[116] *E.g.*, Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 306 (1988) ("Because it is a rare fact or idea that cannot be expressed verbally in more than a few ways, the merger doctrine may be more applicable to nonverbal works such as pictures, in which the content and expression may be inextricably intertwined.") (footnotes omitted).

[117] *E.g.*, NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT xi (2009).

[118] For a reflection on the similarities between textual and visual works in the copyright context, see Zahr Kassim Said, *Only Part of the Picture: A Response to Professor Tushnet's* Worth A Thousand Words, 16 STAN. TECH. L. REV. 349 (2013) (focusing on the necessity in both cases of applying a sophisticated interpretative approach to expressive works).

expressions. However, those who rightly argue that these cases demonstrate a lack of imagination regarding the range of possibilities for visual expression often fail to recognize a related temptation to assume that, insofar as writers are bound by the vocabulary and structure of language, the written expression of some ideas will be "inevitable."[119] As Christina Spiesel has pointed out, while treating written expression as a relatively straightforward area of copyright law provides a "convenient foil" against which to compare the problematic treatment of pictures, it can have the effect of understating the flexibility and fluidity of language.[120] The meaning of a word may change depending on its context, or an author may convey her meaning through metaphor or other indirect language, or borrow words from different languages, or even invent entirely new words.

As with images, the distortion created by treating textual works as the settled core of copyright law similarly disguises fundamental problems with the definition of "ideas" in copyright law. Although both scholars and courts have long recognized the difficulty of applying the concept to visual works, this difficulty is usually contrasted with the suitability of the doctrine to the analysis of textual works.[121] In that context, "idea" is generally treated as synonymous with "plot,"[122] undoubtedly due at least in part to the enduring influence of Justice Hand's opinion in *Nichols*, which equated the two concepts in the context of a play.[123] But many textual works do not have a plot, and, like visual works, resist easy application of the idea-expression dichotomy. Poetry is perhaps the best example of a literary genre in which identifying the "idea" behind a work will frequently be difficult or impossible.[124] Yet we could equally imagine the challenge of mapping the idea-expression framework onto unconventional literary works. How would a court go about deciding what "idea" lies behind *Finnegan's Wake*? Or, for that matter, even as ubiquitous a work as the Bible? In the case of the poem or the Joycean novel, the overlap with the problems of visual image copyright is succinctly illustrated by the nearly perfect applicability to them of a judge's statement regarding a picture:

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[119] *See, e.g.*, Murray, *supra* note 109, at 850-51 ("[I]f you want to express the idea of darkness, you have to use the word 'dark' or one of a limited number of synonyms of that word.").

[120] Spiesel, *supra* note 114, at 44.

[121] *E.g.*, Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 458 (S.D.N.Y. 2006); Murray, *supra* note 109, at 850-52.

[122] *Cf.* Warner Bros. v. Am. Broad. Co., Inc., 720 F.2d 231, 240 (2d Cir. 1983) (noting the difficulty of applying the notion of an "idea" to a concept other than plot).

[123] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (1930).

[124] I have borrowed the apt analogy to poetry from Rebecca Tushnet, *supra* note 57, at 715.

"An artist's idea, among other things, is to depict a particular subject in a particular way."[125]

None of this is to deny that important differences exist between textual and visual works. For one, judges are generally much more comfortable analyzing texts than they are other kinds of works,[126] a fact that is sometimes admitted in opinions.[127] Moreover, several scholars have written about the different ways in which we both consume and process texts as opposed to images.[128] It is, rather, to say that several problems that are most acutely illustrated in the courts' struggles to fit visual images into the copyright framework are not limited to such cases; they are symptomatic of broader instabilities and inconsistencies that underlie fundamental copyright doctrines. Here too, though, judges confronted with texts could learn from scholarship on the legal analysis of visual works: just as there has been a growing call cautioning against judicial overconfidence in interpreting even seemingly straightforward pictures,[129] so might it be salutary to remember the pitfalls that texts present, even (or, perhaps, especially) for those as familiar with them as lawyers.[130]

III
REFRAMING COPYRIGHT IN PHOTOGRAPHY (AND BEYOND)

In light of the myriad problems that have accompanied copyright law's attempt to accommodate visual works, it is unsurprising that suggestions have proliferated regarding ways to fix this area of law, some of them calling for a radical overhaul of entire areas of copyright doctrine.[131] While there is substantial merit to many of these, the aims of this section are more limited, namely to

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[125] *Mannion*, 377 F. Supp. 2d at 458.

[126] Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1172 (2007).

[127] *E.g.*, 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.").

[128] *E.g.*, FEIGENSON & SPIESEL, *supra* note 117, at 7-9; Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 1-2 (1998).

[129] *E.g.*, Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

[130] *Cf.* Tushnet, *supra* note 57, at 702 ("Those rules [of textual interpretation] might be, in fact, indeterminate and manipulable, but they feel predictable and rational.").

[131] *E.g.* Tushnet, *supra* note 57 (arguing that copyright in visual works should protect only against literal infringement); Amy Adler, *Why We Should Abolish Copyright Protection for Visual Art* (on file with the author) (suggesting the abolishment of copyright protection with respect to fine art).

propose improvements that work within the existing structure of copyright law to achieve greater coherence and consistency. I have argued many of the issues that have accompanied the analysis of realistic visual works stem from the combined effects of a poor understanding of aesthetic theory and a lack of a coherent theory of ideas. This part will therefore address each of these problems and suggest improvements in copyright's approach to them. The first section will argue for a rethinking of the basis of copyright in realistic visual works, resulting in a standard that is both more administrable than the current approach, and more consistent with the analysis of other visual works. The second section will address the problem of how ideas are thought of in copyright law, why the current conception has resulted in incoherent case law, and how it can be ameliorated.

A. Locating Originality in Photography and Realism

As discussed above,[132] the pictorialist lens through which courts have analyzed photographs has contributed to the dissolution of the idea/expression dichotomy and resulted in the extension of copyright protection to unprotectable elements. However, this is only one of the flaws with such an approach, which is also difficult to administer consistently, undermines core copyright purposes, and fails to account for an increasingly large proportion of photographic works. Courts should therefore cease to employ it and instead bring the analysis of photographs into line with the treatment of other visual images.

1. Administrability

The mode of analysis that courts have applied to photographs relies above all on the photographer's pre-shutter actions to determine originality, and therefore protected expression.[133] This approach at least maintains a veneer of coherence when applied to scenes that the author has played a significant part in constructing, such as those in question in *Burrow-Giles* and *Mannion*, but can become strained to the point of absurdity in the context of other types of photographs. Thus, for example, in assessing the copyrightability of Abraham Zapruder's film of the Kennedy assassination, the court emphasized the "creative" choices involved in the selection of camera, film, lens, location, and time.[134]

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[132] *See supra* Part II.A.3.

[133] *Id.*

[134] Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968); *cf.* Farley, *supra* note 68 at 449 (noting that frequently "the court cannot conceive of an author acting through a machine, but only in advance of it.").

Far from ensuring that the work in question represents a series of creative decisions by the photographer, the primary effect of such a line of inquiry is to incentivize authors to shape their testimony to the court's tastes, and punish those who are unwilling or unable to do so. A recent series of cases, in which courts based fair use on testimony of authorial intent, is instructive: without any significant change in working methods, artists have learned to adapt their description of the creative process to the courts' requirements,[135] suggesting testimony that is at best without value, and at worst unreliable.

2. Hindering Authorship: Pictorialism and the Goals of Copyright

The evidentiary problems inherent in relying on a narrative of creation bear on the fundamental question of copyright, namely identification of the expression original to the author. Since every work will contain elements that are not original to the author, by granting copyright to the creation of a scene courts risk granting ownership over aspects of a work for which the author is not responsible. The photograph at issue in *Burrow-Giles* illustrates the point well. Among the elements of the photograph that the Court describes as springing "entirely from [Sarony's] original mental conception" are Wilde's pose and costume.[136] But neither of these was original to Sarony in any significant way: the pose was one for which Wilde was already known,[137] as was his style of clothing. Nevertheless, under subsequent copyright jurisprudence that prevents later authors from recreating and photographing the same scene,[138] Sarony may well have been able to claim ownership over these elements and prevent others from photographing them.[139]

The dangers of granting such a monopoly over elements for which the author is not responsible are closely related to the dangers of according copyright protection to ideas: both risk unduly constraining the future creation of works,[140] and therefore hindering the proliferation of works that copyright law seeks to encourage.

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[135] Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 582-83 (2016).

[136] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54-55 (1884).

[137] Farley, s*upra* note 68 at 433.

[138] *E.g.*, Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 463 (S.D.N.Y. 2006); Gross v. Seligman, 212 F. 930, 931 (2d Cir. 1914).

[139] Note that this is only a hypothetical intended to illustrate problems with current copyright jurisprudence; the actual *Burrow-Giles* case involved a reprint of the original photograph rather than a recreation of it, and therefore did not consider the latter scenario.

[140] *See supra* Part II.A.3.

3. Aligning Photography Copyright with Other Visual Images

Copyright no longer protects only posed photographs like the Oscar Wilde portrait from *Burrow-Giles* or the Kevin Garnett photograph from *Mannion*, but extends to "[a]lmost any photograph."[141] However, as Christine Farley has pointed out, the logic for protecting photographs has remained essentially unchanged.[142] Instead, courts have strained to shoehorn works like documentary photographs[143] into the *Burrow-Giles* framework, focusing on pre-shutter scene-setting and attributing unlikely aesthetic considerations to the photographers.[144] Confronted with the disconnect between the case law's protection for photographs and its reasons for doing so, opinions have had to resort to a legal fiction. In light of the increasingly large proportion of photographs that conform much more closely to a documentary paradigm than a pictorialist one, it is untenable to continue applying a framework that fails to account for these.

I have argued that the need to analyze photographs through a pictorialist lens grew out of an untheorized acceptance of photography as a transparent medium, but that such a view ignores the creative choices involved in the rendering of a scene via a photograph.[145] However, if photography is a medium that interprets its subject in a manner akin to painting or the other visual arts, then there is no reason to accord it different treatment. The subject matter would therefore remain an element of the analysis of photographs, since substantial similarity requires at minimum that two works depict the same thing. However, Photographer A would not be able to prevent later authors from depicting the same scene—even if it was one that he had created—provided they did so in a manner that was not substantially similar.

A famous example from the world of painting may illustrate the point. When Pablo Picasso painted *Le déjeuner sur l'herbe (d'après Edouard Manet)*, he copied the scene from Manet's *Le Déjeuner sur l'herbe* but depicted it in such a different manner that it is inconceivable a court would find the works substantially similar.

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[141] *Mannion*, 377 F. Supp. 2d. at 450.

[142] Farley, *supra* note 68, at 438-51.

[143] I use the term "documentary photographs" to refer not to professional works in a documentary style, but to photographs whose primary value is evidentiary rather than aesthetic.

[144] Farley, *supra* note 68, at 447-48.

[145] *See supra* Part I.C.

That Manet had created the scene from his imagination would be of no importance. In an analogous manner, we can imagine a photograph of Oscar Wilde in the same pose, wearing the same clothes, from the same angle as Sarony's photograph, but that looks nothing like it – the background could be in focus, and Wilde himself little more than an unidentifiable fuzzy shape; or a long exposure could cause the picture to depict several blurred outlines of Wilde. How much of difference from the original would be required remains open to question, and would be for a jury to determine.[146] But importantly, it would accomplish the same end as a pictorialist approach by protecting original expression, while leaving room for the age-old practice of artists providing new takes on existing works. Moreover, it would better account for the vast majority of photographs that do not depict elaborately staged scenes, and free the courts from attempting to manipulate an inapplicable framework.

This leaves the problem of how to deal with works such as documentary footage that are produced with little if any aesthetic consideration. Here too, though, the distinction between replication and recreation of photographs may be of help: insofar as such works should be protected—a proposition concerning which this note is agnostic, but that describes the current approach of the law—one possibility would be to adopt a presumption of copyrightability for photographs, which would protect against exact copying of pictures, but not against their recreation. This would allow those who had captured something truly unique such as the Kennedy assassination to capitalize on their work, without entailing the problems associated with overbreadth of protection.

B. Reimagining Ideas

So far this section has discussed solutions to problems limited (or at least, especially relevant) to visual works. However, the broader theme underlying this note—the problematic separation of ideas from expression—is one that I have argued is thrown into sharpest relief in analyses of visual images, but certainly is not limited to such works. At the heart of the confusion as to what constitutes an idea is a widespread failure to acknowledge the fundamental difference between the colloquial definition of "ideas," and "ideas" as they are understood for the purposes of copyright law.

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[146] It is possible, for example, that the result of *Mannion* would be the same under this analytic framework, since elements such as shading and focus may have simply reinforced the substantial similarity between the works.

The ordinary meaning of the word "idea" has a germinal connotation as the first step of an endeavor, which may manifest itself in a number of ways, including creative expression. Courts frequently use the term in this way, alluding to a causal and logical chain that originates with the author's idea, and yields the end result of the work that is the object of analysis.[147] A number of difficulties attend the practical application of this concept, beginning with the question of whether it is relevant, even theoretically, to many works of authorship. As a number of scholars have pointed out,[148] creators often are not driven by a single idea that they proceed to execute. Rather, works may represent the combination of several ideas, none of which predominates over the others. Alternatively, authors may simply create gratuitously without any conscious or articulable motivation. To seek a single idea behind a work as the centerpiece of copyright analysis therefore risks in many cases being an illogical quest.

Perhaps more importantly for the purposes of copyright analysis, however, is the fact that this definition does not align with the "idea" analysis that courts employ, in which the "macro idea" of the work is simply a description of the work at a level too broad to receive protection.[149] Essentially, the "idea" that courts arrive at through the *Nichols* abstraction test consists of what is left once the work's protectable elements have been filtered out. However, no reason is given for thinking that the result of such an analytical process will be a reasonable proxy for the work's "idea" in the colloquial sense, even though the two are frequently treated interchangeably. Certainly, in some cases the definitions will coincide, and the failure of courts to distinguish between them may reflect the fact that the case that introduced the abstractions test involved two such works: the general plots of

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[147] *See, e.g.*, Kaplan v. Stock Market Photo Agency, Inc., 133 F. Supp. 2d 317, 323 (S.D.N.Y. 2001) (describing the photograph's idea as the attempt to convey a state of mind); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (describing greeting cards as protectable due to their "embodiment of humor, praise, regret or some other message in a pictorial and literary arrangement.").

[148] *E.g.* Adler, *supra* note 135, at 584-87.

[149] Judge Kaplan made this very point in *Mannion*, 377 F. Supp. 2d at 460, while discussing a previous case ("'a couple with eight small puppies seated on a bench' [identified in Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992) as the idea of the plaintiff's work] is not necessarily the idea of *Puppies*, which just as easily could be 'people with dogs on their laps,' 'the bliss of owning puppies,' or even a sheepishly ironic thought such as 'Ha ha! This might look cute now, but boy are these puppies going to be a lot of work!' Rather, 'a couple with eight small puppies seated on a bench' is nothing more or less than . . . a description of the subject at a level of generality sufficient to avoid implicating copyright protection for an original photograph.").

the plays at issue in *Nichols* were ideas both in the copyright sense of elements too general to merit protection, and in the general usage sense of initial conceptions from which the works sprung.[150] However, in other works the two definitions of "idea" will diverge widely. The plot of the Samuel Beckett play *Waiting for Godot*, for example, may be broadly described as two men waiting for an individual who never shows up, but this hardly captures the "idea" that Beckett was looking to convey and that prompted him to write the work.

A similar observation may be made of visual images, some of which seek merely, or at least primarily, to depict their subjects, and whose "ideas" in the colloquial sense may therefore correspond roughly to a general description of them.[151] Conversely, few would describe the idea of Edvard Munch's *The Scream* as "an individual with his mouth open," or even "an individual screaming," although both of these provide a broad description of the work.

The common definition of a work's "idea," then, is different from that yielded by the analysis of copyright cases, though courts treat them as equivalent. Once we understand this, we can begin to make sense of courts' struggle to pin down the "ideas" behind works: since the "idea" of a work as determined through the abstraction analysis corresponds simply to whatever aspects cannot be copyrighted, it is fundamentally a residual category, defined by what it is not. As a result, it has no necessary internal coherence, and is therefore not amenable to being unified under the label of the work's overarching "idea." Attempting to locate and define such a singular idea thus risks being an impossible task.

If locating a work's overall "idea" is a difficult or impossible task, it begs the question of whether there are any benefits to the exercise. The primary role in copyright analysis of identifying and describing a work's idea is to determine whether the doctrines of merger or scènes à faire apply. I have argued in Part I.C that the notion of inevitability of expression is generally greatly overstated, and may even be inapplicable, in the case of non-utilitarian visual works. As a result, the merger doctrine for such works is of questionable value even aside from the problem of identifying their "ideas."[152] The application of scènes à faire to visual works is similarly of limited usefulness. To the extent that elements encompassed

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[150] That is, they were plot-driven works whose primary purpose seems to have been to convey stories.

[151] Works with a documentary purpose, such as a court sketch, would fall into this category.

[152] *See, e.g.*, Murray, *supra* note 109 (arguing that merger and scènes à faire doctrines are inapplicable to visual works, due to the infinite number of ways to convey something visually). I differ from him primarily in that I do not believe merger or scènes à fair to be any better applicable to textual works.

by this doctrine are necessary to convey an idea, they are likely to be too unoriginal or unspecific to meet the requirements of copyright anyway. For example, a character with a hook for a hand would not be protectable regardless of whether the hook were considered a scène à faire with respect to pirates, since it is neither original nor sufficiently detailed to rise to the level of copyrightability.

The identification of "macro ideas" is therefore difficult or impossible, is of little value for copyrightability analyses, and leads to inconsistent results of the kind described in Part II.B. As a result, courts should cease the attempt. This would not eliminate the idea/expression dichotomy from copyright law, but simply reframe how we identify it: rather than attempting affirmatively to identify ideas, courts would identify all of the aspects of a work that are protectable, without worrying how to characterize those that are not. As I have argued in this section, this is essentially what courts already do through the abstractions test, with the identification of macro ideas simply adding a layer of confusion to the analysis.[153]

The adjustment that I propose here would by no means solve all of the problems inherent in attempting to distinguish between protectable and unprotectable expression. Most notably, it does nothing to aid the line-drawing problem that Justice Hand famously identified in *Nichols.*[154] However, by eliminating the inquiry into a work's overarching idea, courts can cut out one perennial source of confusion, and the effects that flow from it. In doing so, they can refocus the copyrightability analysis on its proper object, namely the tangible elements of the works in question.

CONCLUSION

Among the recurring challenges of copyright law is the adaptation of existing law to technological developments that allow new means of creating, storing, or displaying works of authorship. While photography has posed enduring problems since its invention, the tools of existing copyright doctrine can be refined to significantly ameliorate some of the more pronounced areas of confusion. But these improvements require coming to grips with the unique characteristics of photographs, and a willingness to recognize and rectify the ways in which they have been largely ignored to this point in copyright jurisprudence.

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[153] *Cf. Mannion*, 377 F. Supp. 2d at 461 ("The idea/expression distinction in photography, and probably the other visual arts, thus achieves nothing beyond what other, clearer copyright principles already accomplish.").

[154] 45 F.2d at 121.